

A Comparative Evaluation of the Judicial Discretion to Refuse Specific Performance

by

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DECLARATION

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SUMMARY

This thesis examines the contractual remedy of specific performance in South African law. It looks closely and critically at the discretionary power of the courts to refuse to order specific performance. The focus is on the considerations relevant to the exercise of the judicial discretion.

First, it emphasises the tension between the right and the discretion. It is argued that it is problematical for our courts to refuse to order specific performance in the exercise of their discretion. The underlying difficulty is that the discretion of the court to refuse specific performance is fundamentally in conflict with the supposed right of the plaintiff to claim specific performance. The thesis investigates the tenability of this open-ended discretionary approach to the availability of specific performance as a remedy for breach of contract.

To this end, the thesis examines less complex, more streamlined approaches embodied in different international instruments. Comparison between different legal systems is also used in order to highlight particular problems in the South African approach, and to see whether a better solution may be borrowed from elsewhere.

An investigation of the availability of this remedy in other legal systems and international instruments reveals that the South African approach is incoherent and unduly complex.

In order to illustrate this point, the thesis examines four of the grounds on which our courts have refused to order specific performance. In the first two instances, namely, when damages provide adequate relief, and when it will be difficult for the court to oversee the execution of the order, we see that the courts gradually attach less or even no weight to these factors when deciding whether or not to order specific performance. In the third instance, namely, personal service contracts, the courts have at times been willing to grant specific performance, but have also refused it in respect of highly personal obligations, which is understandable insofar as the law wishes to avoid forced labour and sub-standard performances. The analysis of the fourth example, namely, undue hardship, demonstrates that the courts continue to take account of the interests

of defendants and third parties when deciding whether or not to order specific performance.

This study found that there are certain circumstances in which the courts invariably refuse to order specific performance and where the discretionary power that courts have to refuse specific performance is actually illusory. It is argued that our law relating to specific performance could be discredited if this reality is not reflected in legal doctrine. Given this prospect, possible solutions to the problem are evaluated, and an argument is made in favour of a simpler concrete approach that recognises more clearly-defined rules with regard to when specific performance should be refused in order to provide coherency and certainty in the law.

This study concludes that a limited right to be awarded specific performance may be preferable to a right which is subject to an open-ended discretion to refuse it, and that an exception-based approach could provide a basis for the simplification of our law governing specific performance of contracts.

OPSOMMING

Hierdie tesis ondersoek die benadering tot die kontraktuele remedie van spesifieke nakoming in die Suid-Afrikaanse reg. Die diskresionêre bevoegdheid van Howe om spesifieke nakoming te weier word van nader en krities aanskou. Die fokus is op die oorwegings wat 'n rol speel by die uitoefening van die diskresie.

Eerstens beklemtoon die tesis die spanning tussen die reg en die regterlike diskresie. Daar word aangevoer dat dit problematies is dat ons Howe 'n eis om spesifieke nakoming kan weier in die uitoefening van hul diskresie. Die onderliggende probleem is dat die hof se diskresie om spesifieke nakoming te weier, fundamenteel in stryd is met die sogenaamde reg van die eiser om spesifieke nakoming te eis. Die tesis ondersoek die houbaarheid van hierdie onbelemmerde diskresionêre benadering tot die beskikbaarheid van spesifieke nakoming as 'n remedie vir kontrakbreuk.

Vervolgens ondersoek die tesis die vereenvoudigde benaderings ten opsigte van spesifieke nakoming beliggaam in verskillende internasionale instrumente. Vergelyking tussen verskillende regstelsels word ook gebruik om spesifieke probleme in die Suid-Afrikaanse benadering uit te lig, en om vas te stel of daar 'n beter oplossing van elders geleent kan word.

'n Ondersoek van die aanwesigheid van hierdie remedie in ander regstelsels en internasionale instrumente onthul dat die Suid-Afrikaanse benadering onsamehangend en onnodig ingewikkeld is.

Om hierdie punt te illustreer, ondersoek die tesis vier gronde waarop die remedie tipies geweier word. In die eerste twee gevalle, naamlik, wanneer skadevergoeding genoegsame regshulp sal verleen en wanneer dit vir die hof moeilik sal wees om toesig te hou oor die uitvoering van die bevel, sien ons dat die Howe geleidelik minder of selfs geen gewig aan hierdie faktore heg wanneer hulle besluit om spesifieke nakoming toegestaan moet word nie. In die derde geval, naamlik, dienskontrakte, sien ons dat die Howe bereid is om in sekere gevalle spesifieke nakoming toe te staan, maar egter nie spesifieke nakoming ten opsigte van hoogs persoonlike verpligtinge gelas nie, wat

verstaanbaar is tot die mate wat ons reg dwangarbeid en swak prestasies wil vermy. Die analise van die vierde grond, naamlik, buitensporige benadering, toon dat die howe voortgaan om die belang van die verweerde en derde partye in ag te neem wanneer hulle besluit om spesifieke nakoming te beveel.

Die studie het bevind dat daar sekere omstandighede is waarin die howe nooit spesifieke nakoming toestaan nie en die diskresie eintlik afwesig is. Derhalwe word dit aangevoer dat die geldende reg wat betref spesifieke nakoming weerlê kan word indien hierdie werklikheid nie in die substantiewe reg weerspieël word nie. Gegewe die vooruitsig, word moontlike oplossings ondersoek, en 'n argument word gemaak ten gunste van 'n eenvoudiger konkrete benadering wat meer duidelik gedefinieerde reëls erken met betrekking tot wanneer spesifieke nakoming geweier moet word ten einde regsekerheid en eenvormigheid te bevorder.

Die gevolgtrekking is dat 'n beperkte aanspraak op spesifieke nakoming meer wenslik is as 'n reg op spesifieke nakoming wat onderhewig is aan die hof se oorheersende diskresie om dit te weier, en dat 'n uitsondering-gebaseerde benadering as 'n basis kan dien vir die vereenvoudiging van ons reg rakende spesifieke nakoming.

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LIST OF ABBREVIATIONS

Am J Comp L	American Journal of Comparative Law
AMJUR	American Jurisprudence
ASSAL	Annual Survey of South African Law
BGB	<i>Bürgerliches Gesetzbuch</i>
BW	<i>Burgerlijk Wetboek</i>
CILSA	The Comparative and International Law Journal of Southern Africa
CLJ	Cambridge Law Journal
Colum LR	Columbia Law Review
Edin LR	Edinburgh Law Review
Fordham LR	Fordham Law Review
Harv LR	Harvard Law Review
IECL	International Encyclopedia of Comparative Law
ILJ	Industrial Law Journal (Juta)
Ind LJ	Industrial Law Journal (Oxford)
J Legal Stud	Journal of Legal Studies
LAWSA	The Law of South Africa
LQR	Law Quarterly Review
Mich LR	Michigan Law Review
Minn LR	Minnesota Law Review
OJLS	Oxford Journal of Legal Studies
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
Tex LR	Texas Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tulane LR	Tulane Law Review
U Chi LR	University of Chicago Law Review
U Pitt LR	University of Pittsburgh Law Review
VUWLR	Victoria University of Wellington Law Review
Yale LJ	Yale Law Journal
ZPO	<i>Zivilprozessordnung</i>

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CHAPTER 1: INTRODUCTION

1 1 Problem identification

1 1 1 Introduction

A person who enters into a contract expects the other party to fulfil his obligations under that contract. That party may, however, decide not to perform as it is expected of him. The question then arises what forms of relief or redress the legal system will offer the aggrieved party.¹ There are various remedies available to an aggrieved party where there has been a breach of contract. In theory, specific performance² is the most appropriate remedy from the point of view of the creditor, who receives what he actually

¹ See generally R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 770-782; K Zweigert & H Kötz *Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 470 ff.

² The exact meaning of “specific performance” has been the subject of extensive discussion in contract literature, which cannot be consolidated here. While a variety of definitions of the term “specific performance” have been suggested, the term will be used here in its traditional sense, according to its Latin terminology, performance *in forma specifica*, to refer to the remedy available to compel a defaulting party by an order of court to perform a contract literally, i.e. to make the very performance he agreed to make in terms of the contract. And for ease of exposition, the term “contract” in this thesis will be used to mean a legally-concluded contract; the present study is therefore mainly concerned with limitations on the availability of the remedy where the contract is not in any way defective. See J W Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3089; J J du Plessis “Spesifieke nakoming: ‘n regshistoriese herwaardering” (1988) 51 *THRHR* 349; M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 12-13, 56; G Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 51 52; A D J van Rensburg, J G Lotz & T van Rijn (R D Sharrock) “Contract” in W A Joubert & J A Faris (eds) *LAWSA* 5(1) 2 ed (2010) para 495.

bargained for.³ This ideal, is however, counterbalanced by a number of factors. As Sir Guenter Treitel explained some time ago:⁴

“First, the enforced performance may be regarded as an undue interference with the personal freedom of the debtor. This is particularly true where performance can only be rendered by the debtor personally; but even where this is not the case enforced performance is often felt to be too strong a measure when the creditor could for most practical purposes be put into almost as good a position by an award of a sum of money. Enforced performance might, moreover, cause hardship to the debtor which would not be occasioned by an award of money, particularly where such an award would be subject to reduction under the mitigation rules. Secondly, enforced performance may be thought to impose strains on the machinery of the law enforcement which are too severe when balanced against the benefit derived by the creditor from enforced performance.”

For these and related reasons, legal systems generally limit the availability of specific performance as a remedy for breach. There are at least three approaches to the problem. The first is to accept the general principle that specific performance is available in principle, subject to certain exceptions, while the second is to adopt the

³ This statement requires some clarification, because an order for specific performance seldom brings about performance within the time specified in the contract. In this respect, such an order would be for less than exact and complete performance. For the loss involved in the delay or in other existing non-performance, damages will be awarded along with specific performance. Thus, to the extent that it does not bring about exact and complete performance, damages in conjunction with specific performance will be ordered. See *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 15 ed (1992) 213; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 333.

⁴ G H Treitel “Remedies for breach of contract” in *IECL VII* ch 16 (1976) 8. See also A Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 472-473.

point of departure that specific performance is an exceptional, discretionary remedy. A third hybrid approach combines elements of the other two.⁵

It is a basic principle of modern civil-law systems that the debtor is obliged to perform his contractual obligation and, in the case of a breach, the creditor has the right to enforce this duty. The creditor has the right to claim performance of the contract and to obtain a judgment ordering the debtor to fulfil it. Monetary damages are only regarded as a type of substitute specific performance.⁶

The position in the common law is quite different. Specific performance is regarded as an exceptional discretionary remedy in common-law jurisdictions.⁷ The concept that contractual obligations, as a rule can be specifically enforced, and that the election is with the plaintiff creditor to demand specific performance, is foreign to these systems. This point is implicit in the “unsettling”⁸ theory about liability in contract put forward by the American jurist, Oliver Wendell Holmes Jr, that every contractual obligation resolves itself into damages in case of non-performance by the debtor – as discussed below.⁹ The essence of the modern common law doctrine is thus that failure to perform / breach of contract will be compensated with the value of the expectancy that was created by

⁵ Treitel “Remedies for breach of contract” in *IACL* 8. See also A Cockrell “Breach of contract” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 325 ff; Zweigert & Kötz *Comparative Law* 484-485 A Cockrell “Breach of contract” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 326; S Eiselen “Specific performance and special damages” in H L MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 249 250 ff.

⁶ De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 209; Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 326; Zweigert & Kötz *Comparative Law* 479.

⁷ M Chen-Wishart *Contract Law* 4 ed (2012) 539.

⁸ According to Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 326.

⁹ See paras 3 2 & 6 3 below.

the promise of the other party (i.e. expectation damages); only when awarding damages is inadequate will it be in the discretion of the court to grant specific performance.¹⁰

The point of departure in South African contract law is that freely-concluded contracts must be honoured (*pacta sunt servanda*). This suggests that an order for specific performance should be regarded as the principal remedy for breach of contract.¹¹ As a general rule the creditor is entitled to enforce performance of the contract precisely as it was agreed between the parties in the contract.¹²

This principle was famously encapsulated as follows in *Farmers' Co-operative Society (Reg) v Berry*¹³ by Innes J:

¹⁰ This principle is firmly established in English law – see J Beatson *Anson's Law of Contract* 29 ed (2010) 575; E Peel *Treitel's Law of Contract* 13 ed (2011) 1099; H G Beale et al (eds) *Chitty on Contracts I: General Principles* 31 ed (2012) 1907, and in American law – see § 359(1) of the American Law Institute's *Restatement (Second) of Contracts* (Addendum A 383). See further J M Perillo (ed) *Corbin on Contracts 12: Restitution, Specific Performance and Election of Remedies* Interim ed (2002) § 1139.

¹¹ Even though there may be a theoretical preference for the remedy, a creditor is of course not obligated to utilise this remedy, and may rely on other contractual remedies instead. See D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 321; F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 873.

¹² See *Fick v Woolcott & Ohlsson's Cape Breweries* 1911 AD 214; *Woods v Walters* 1921 AD 304; *Hesselmann v Koerner* 1922 SWA 40; *Shill v Milner* 1937 AD 101; *Johannesburg Stock Exchange v Northern Transvaal (Messina) Copper Exploration Co* 1945 AD 529. Note that specific performance may be claimed as soon as performance of the debtor's obligation resulting from the contract is due, even if no breach has yet occurred. Unlike damages and termination, failure to perform is not a requirement for specific performance (*Joss v Western Barclays Bank Ltd* 1990 (1) SA 575 (T)). See also para 2 3 1 2 n 92 below.

¹³ 1912 AD 343.

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party a performance of his undertaking in terms of the contract.”¹⁴

The Appellate Division confirmed this position in the leading case of *Benson v SA Mutual Life Assurance Society*.¹⁵ However, even though the court described the right to specific performance as a cornerstone of our law relating to specific performance,¹⁶ in the same judgment the court noted that there is a discretion on the part of the court to refuse to order specific performance and leave the plaintiff to claim and prove his *id quod interest*.¹⁷

The approach that was adopted by South African courts represents a “fusion” of the Roman-Dutch notion that a party to a contract has a right to specific performance

¹⁴ 350. The existence of a right to specific performance was decided as long ago as 1882 in *Cohen v Shires, McHattie and King* (1882) 1 SAR 41, and subsequently reaffirmed in a number of cases – see eg *Thompson v Pullinger* (1894) 1 OR 298 301; *Woods v Walters* 1921 AD 303 309; *Shill v Milner* 1937 AD 301 109; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 433. See also para 2 2 3 below.

¹⁵ 1986 (1) SA 776 (A). This decision and its implications are discussed fully below (see paras 3 3 & 6 1 2).

¹⁶ 782I-J *per* Hefer JA.

¹⁷ 782D-G (referring to *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378 *per* De Villiers AJA). See more recently *Klimax Manufacturing Ltd v Van Rensburg* 2005 (4) SA 445 (O) para [10] *per* Hattingh J: “A plaintiff is always entitled to claim specific performance. Assuming he makes out a case, his claim will be granted, subject only to the Court’s discretion”; *Nkengana v Schnetler* [2011] 1 All SA 272 (SCA) para [12] *per* Griesel AJA: “It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party’s obligations in terms of the contract” and finally, *Botha v Rich NO* 2014 (4) SA 124 (CC) para [37] *per* Nkabinde J: “The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right ...” See also para 1 1 4 below.

thereof and the English equitable doctrine that this remedy is within the discretion of the court.¹⁸ As a result of the synthesis of these viewpoints, our courts accept that the right to specific performance is not absolute, but subject to a judicial discretion to refuse an order for specific performance,¹⁹ which entails the reversal of the content of the discretion under English law.²⁰ Courts should, however, always be cautious not to refuse enforcing contracts.²¹ To this extent therefore, the civilian approach has prevailed.

Under South African law “[t]here is thus an automatic right to claim, but no automatic right to receive specific performance”.²² It has furthermore been suggested that this discretion to refuse to order specific performance is warranted since “cases do arise where justice demands that a plaintiff be denied his right to performance”.²³

¹⁸ Eiselen “Specific performance and special damages” in H L MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 252.

¹⁹ This, according to Botha AJA is irrevocably entrenched in South African law (*Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 923).

²⁰ G F Lubbe & C M Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3 ed (1988) 542; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321.

²¹ See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para [94].

²² A Beck “The coming of age of specific performance” 1987 *CILSA* 190 195. See also G Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 95 102.

²³ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783D. See also D J Joubert *General Principles of the Law of Contract* (1987) 223-224; Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 256.

The modern law governing the availability of this remedy has quite correctly been described as being rather complicated and “precarious”.²⁴ This is a product of the mixed nature of the South African legal system.²⁵ South African courts have accepted a reverse discretion to refuse the remedy without recognising the exceptional nature of the remedy in English law, and have done so in spite of the fact that English law differs considerably from Roman-Dutch law (from which the right to specific performance was received).²⁶ In our law the general point of departure remains that specific performance is available “as of right”.²⁷ It is problematical for our courts to refuse to order specific performance in the exercise of their discretion,²⁸ because the denial of the order has a

²⁴ See generally Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 330. See also Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 252.

²⁵ Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 325: “Modern South African law regarding the availability of specific performance as a remedy for breach represents the outcome of an extremely nuanced process of historical development.” See also introductory paragraph of Beck’s 1987 *CILSA* article, commencing with: “The theoretical underpinnings of contract law as well as the complications caused by the accidents of history are probably demonstrated uniquely by the remedy of specific performance for breach of contract.” See also para 7 1 below.

²⁶ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785E; *Santos Professional Football Club (Pty) Ltd v Iglesund* 2003 (5) SA 73 (C) 82E-F.

²⁷ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 46. See also Lubbe & Murray *Contract* 542: “As Hefer JA points out in *Benson v SA Mutual Life Assurance Society*, in English law specific performance is an exceptional remedy available when damages appear to be inadequate. The theoretical starting point in South Africa (like other civil law jurisdictions) is quite different from the English and American one. In South Africa reasons must be found for not granting specific performance to the party that requests it, with the court exercising an equitable discretion to refuse the remedy.”

²⁸ See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 210-211; Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 328 ff.

substantive effect on the right of the creditor to specific performance of the contract, and does not operate at the remedial or procedural level only. As Lubbe correctly explains:

"The immediate connection between the creditor's right to the performance and the remedial claim to an order for enforcement, means that a refusal to grant a decree for specific performance goes beyond a mere *denegatio actionis* [or "refusal of the action"]. A decision rejecting the plaintiff's request for specific enforcement of his contract deprives the creditor not merely of 'the main advantage which the theoretically valid right is supposed to grant him',²⁹ but also of the very substance of the right, for, according to our courts, the substance of the right cannot be separated from the remedial manifestation thereof.³⁰ The notion that the exercise of the discretion takes effect merely at the remedial level is therefore untenable."³¹

²⁹ Citing D E Friedmann "Good faith and remedies for breach of contract" in J Beatson & D E Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 399 406, where Friedmann explores to what extent gaps created in English contract law by the lack of good faith doctrine are filled by the law of remedies.

³⁰ Citing *First National Bank of SA Ltd v Lynn* 1996 (2) SA 339 (A) 352C-D *per* Van den Heever JA; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) 411C-D *per* Nienaber JA, and *Headleigh Private Hospital t/a Rand Clinic v Soller & Manning* 2001 (4) SA 360 (W) 367F-G *per* Cameron J: "Legal procedures are the essential mechanism through which rights in our society are recognised and enforced. In a society whose conception of rights derives from a system of legal entitlements an integral part of which is the institutional mechanisms established for their enforcement, it seems to me to be unrealistic to divorce the underlying right from the entitlement to be compensated for its procedural exaction." See further Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 103.

³¹ "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 105, and on 107 the author continues as follows: "In the light of the foregoing, it can be contended that the practice of the courts provides the basis for a construction whereby, in respect of the so-called remedy of specific performance, judges

Furthermore, South African courts relied on English law to give content to this specific performance discretion and under the influence of the English approach that an order for specific performance is an *exceptional* remedy, our courts in practice have exercised their discretion in such a way that it appeared as if the remedy would not be granted if certain circumstances³² were present.³³ As a result,

“The Roman-Dutch right to specific performance, affirmed as part of modern South African law, was effectively negated by the courts’ subsequent endorsement of crystallized instances – borrowed from English law – in which specific performance should be refused.”³⁴

possess a discretionary power to derogate from the consequences of a contract on account of considerations of fairness and reasonableness. On this view a decision to refuse an order for specific performance amounts to a judicial re-evaluation of the plaintiff’s contention that there is in existence an obligation entitling him to performance by the debtor.” See also Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 328.

³² This thesis indicates that in practice, in the compared jurisdictions and international instruments, there are a number of similar recognised circumstances in which the remedy will not be granted. These circumstances or considerations form the subject matter of chapters 3 to 6.

³³ For instance (*Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378H-379A per De Villiers AJA): where it would be difficult for the court to supervise the execution of its order, where damages would adequately compensate the plaintiff, where the performance could readily be obtained elsewhere, or where specific performance would entail rendering personal services, or would cause unreasonable hardship to the defendant. See also *Thompson v Pullinger* (1894) 1 OR 298; Wessels *The Law of Contract in South Africa* § 3113 ff; Beck 1987 *CILSA* 197; Joubert *General Principles of the Law of Contract* 225-227; Lubbe & Murray *Contract* 542-543; De Wet & Van Wyk *Kontraktereg en Handelsreg* 210-211, and esp Van der Merwe et al *Contract: General Principles* 330. See also para 6 1 1 below.

³⁴ Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 329; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 784C.

However, the Appellate Division in *Benson*, emphasised that “any curtailment of the court’s discretion inevitably entails an erosion of the plaintiff’s right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the court’s discretion is to be exercised, which does not affect the plaintiff’s right in some way or another”.³⁵ Hefer JA also pointed out that in English law the approach regarding the availability of specific performance is fundamentally different: an order for specific performance being the exception rather than the rule. Hefer JA reaffirmed that every plaintiff has a right according to South African law to demand performance, and that there is “neither need nor reason” to continue to follow the English rules of equity as to when specific performance should be denied.³⁶ He maintained that although the right to specific performance is subject to a judicial discretion, this discretion cannot in any way be regulated by rigid rules which would restrict the court’s discretion and erode the right to specific performance.³⁷ When considering the nature and extent of this discretion, he went on to say:

“This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* [1951] (4) SA 331 (A) 335]). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy. (cf De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 189) ...”³⁸

³⁵ 783B-C.

³⁶ 785F.

³⁷ 782I-783C.

³⁸ 783C-F. See further Van der Merwe et al *Contract: General Principles* 330: “The court’s discretion to refuse specific performance is regarded as a judicial discretion which, although it should be as unfettered as possible, must be exercised in accordance with

After *Benson*, our courts³⁹ have gravitated towards a strict Roman-Dutch approach, constantly emphasising a plaintiff's right to specific performance.⁴⁰ As a result, South African courts frequently assert that they should resist the tendency to develop the abovementioned factors, deriving from English law, into rules governing the discretion, in order to avoid the limitation of a plaintiff's right to specific performance.⁴¹

The considerations set out above give rise to a number of questions about the scope of the right to specific performance, seeing that it is still not regarded as absolute, but subject to a judicial discretion to refuse it.⁴² How can one accept the claim that a plaintiff has a right to specific performance, if that right can be trumped by certain considerations within the overriding discretion of the court? The underlying difficulty is

public policy and in such a manner that it does not bring about an unjust result ..."; Du Bois (ed) *Wille's Principles of South African Law* 873: "Apart from these inherent restrictions no rules can be prescribed to regulate the exercise of the court's discretion."

³⁹ See eg *LMG Construction (City) Pty Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd* 1984 (3) SA 861 (W) 880-881.

⁴⁰ Lubbe "Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie" in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 58 ff; G Lubbe & J du Plessis "Law of contract" in C G van der Merwe & J E du Plessis (eds) *Introduction to the Law of South Africa* (2004) 243 262-263; Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 102 ff; Van der Merwe et al *Contract: General Principles* 330; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321; Lubbe & Murray *Contract* 545.

⁴¹ See eg *Raik v Raik* 1993 (2) SA 617 (W) 626; *Santos Professional Football Club (Pty) Ltd v Iglesund* 2003 (5) SA 73 (C) 84E-J; *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) paras [17]-[21]; *Vrystaat Cheetahs (Edms) Bpk v Mapoe* paras [101] ff, unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court *per* Van Zyl J (copy on file with author).

⁴² Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 126 (as quoted in para 7 1 below).

that the discretion to deny the plaintiff's right to specific performance still seems to undermine the right to specific performance.⁴³ It may then be argued that the right to specific performance is illusory.⁴⁴

It seems that even though the Appellate Division confirmed the position in our law, and *Benson* reaffirmed the primacy of the remedy in current law, there is still uncertainty surrounding the availability of this remedy, particularly with reference to the considerations relevant to the exercise of the courts' discretion to refuse an order for specific performance. Cockrell argues that the fundamental tension in this area of law (as outlined above)⁴⁵ was not properly addressed by the judgment,⁴⁶ and that "despite trying to re-establish the Roman-Dutch position, the court has simply perpetuated the internal incoherence in this area of the law, occasioned by the fusion of the remedy from two dissimilar systems of law".⁴⁷

⁴³ Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 330.

⁴⁴ 328: "The underlying difficulty was that the 'discretion' of the court to refuse specific performance was fundamentally at odds with the supposed 'right' of the promisee to claim specific performance."

⁴⁵ See also para 7 1 below.

⁴⁶ Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 328, 330.

⁴⁷ For supporting reference, see Eiselen "Specific performance and special damages" in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 252. See also Beck 1987 *CILSA* 190 and Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 110-111; A Smith "Specific implement" in K Reid & R Zimmermann (eds) *A History of Private Law in Scotland II: Obligations* (2000) 195 209: "Cockrell nevertheless criticizes the inconsistency of three propositions in the *Benson* judgement: the confirmation of the plaintiff's right to the remedy, the court's discretion untrammelled by rules, and the inability of the English exceptions (though still relevant factors) to limit the South African court's discretion. The discretion he maintains, undermines the right."

It is submitted that the precise nature and extent of the courts' discretion and the way in which it is to be exercised cannot be regarded as fully resolved. The availability of the remedy is regulated by an open norm which requires an evaluative consideration of the circumstances of the case with reference to considerations of fairness and the broader interests of the community.⁴⁸ Whether an order for specific performance will be refused is determined by the facts of each case.⁴⁹ The question arises, though, whether South African courts should follow a more concrete approach, and could possibly be guided by certain more clearly-defined rules with regard to when specific performance may be refused.

This study proposes to evaluate the different considerations that could be regarded as relevant to the exercise of the courts' discretion to refuse specific performance in order to determine whether such considerations should influence a court to exercise its discretion to refuse to order specific performance. This study will examine the way in which South African courts have dealt with some of these circumstances and also explore the desirability of a more concrete approach regarding the availability of this remedy.⁵⁰ These issues are dealt with in chapters 3 to 6 below.

The proposed study problem has been investigated by a number of local commentators,⁵¹ and is also the subject of continuous international debate, especially of

⁴⁸ See Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 99.

⁴⁹ See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783B per Hefer JA.

⁵⁰ With specific reference to the circumstances identified in *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378H-379A (see n 33 above). See also para 6 1 1 below.

⁵¹ See eg Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law*; Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives*.

a comparative⁵² and historical nature.⁵³ However, no recent in-depth South African study has investigated whether the products of these debates could benefit the development of our law. Before proceeding to problems relating to the specific considerations that influence the courts' discretion, it is useful for purposes of problem identification to deal briefly with this broader historical and comparative context.

1 1 2 Historical and comparative overview⁵⁴

The remedy of specific performance is a well-known example of divergence between the civil law and the common law.⁵⁵ It was mentioned earlier that the scope of the remedy is more limited in common-law jurisdictions: damages is regarded as the

⁵² See eg Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 303; Eiselen "Specific performance and special damages" in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 249. See also Smith "Specific implement" in Reid & Zimmermann (eds) *A History of Private Law in Scotland II* 195; Beck 1987 *CILSA* 190.

⁵³ See eg Du Plessis 1988 *THRHR* 349; J Oosterhuis *Specific Performance in German, French and Dutch Law in the Nineteenth Century: Specific Performance: German, French and Dutch Law in the Nineteenth Century: Remedies in an Age of Fundamental Rights and Industrialisation* (published) doctoral thesis Vrije University Amsterdam (2011).

⁵⁴ For extensive discussion, see ch 2 below. For a general comparative account of specific performance, see G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) ch 3 and Zweigert & Kötz *Comparative Law* 470-485. See further and more recently, V Mak *Performance-Oriented Remedies in European Sale of Goods Law* (2009) 77-113; M Hogg *Promises and Contract Law: Comparative Perspectives* (2011) 348 ff; E McKendrick & I Maxwell "Specific performance in international arbitration" 2013 *The Chinese Journal of Comparative Law* 195.

⁵⁵ Zimmermann *The Law of Obligations* 781; Zweigert & Kötz *Comparative Law* 484; D Haas, G Hesen & J Smits "Introduction" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 1 2; M Torsello "Remedies for breach of contract" in J M Smits (ed) *Elgar Encyclopedia of Comparative Law* 2 ed (2012) 754 762.

primary remedy and specific performance is seen as an exceptional remedy, which can only be awarded by a court in the exercise of its equitable discretion. Certain specific circumstances have been identified where an order for specific performance would not be granted.⁵⁶ These circumstances include: if damages would provide an adequate remedy, if performance consists of a personal service, if the order could cause undue hardship and if the contract requires constant supervision.⁵⁷

Traditionally, equity would only grant specific performance with respect to contracts involving movables where the goods were unique in character.⁵⁸ The reason was that the aggrieved party had an adequate remedy in damages in case of breach if he could acquire the goods elsewhere.⁵⁹ English law has been reluctant to recognise the specific enforceability of contracts for the sale of ordinary or “non-unique” personal property.⁶⁰ The courts in the United States have, however, extended the remedy to buyers of generic goods whose need for the actual supply was particularly urgent or who would not be able to obtain a satisfactory substitute.⁶¹ And there is a growing tendency to order specific performance on the basis of the appropriateness of the remedy, rather than on the inadequacy of damages.⁶² Though English courts are slower in accepting this view, there are indications that the English courts are moving away from the traditional rule that specific performance will not be ordered where damages is an

⁵⁶ See generally Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 456-457; R Stone *The Modern Law of Contract* 10 ed (2013) 501-505; H G Beale et al (eds) *Chitty on Contracts I: General Principles* 31 ed (2012) 1917-1933. See also Beck 1987 *CILSA* 190 193.

⁵⁷ For a more detailed list, see para 2 3 2 1 below.

⁵⁸ See further para 2 3 2 1 & 3 2 1 2 below.

⁵⁹ See further para 3 2 1 2 below.

⁶⁰ Treitel “Remedies for breach of contract” in *IECL VII/16* 18. See further paras 2 3 2 1 & 3 2 1 below.

⁶¹ This is illustrated by the wording of § 2-716(1) US Uniform Commercial Code (discussed in paras 2 3 2 2 & 3 2 1 2 below).

⁶² See para 3 2 1 2 below.

adequate remedy.⁶³ It is suggested that this development could be informative in the South African context. Such an investigation will be approached carefully, as recommended by Lubbe.⁶⁴

As mentioned above, the remedy of specific performance assumes an extensive field of application in civil-law jurisdictions and is available as of right. However, the majority of these jurisdictions recognise certain exceptions to this position.⁶⁵ These systems generally do not retain such an unrestrictive discretion to refuse performance. In his doctoral thesis, Oosterhuis focused on the question why exceptions exist to this general principle. This research could be informative as to one of the central questions this study seeks to answer, namely whether there should be defined exceptions in our law as well.⁶⁶ Oosterhuis points out that during the first decades of the nineteenth century German courts accepted certain exceptions to the general principle, because more cases occurred, due to the increase in trade and production of generic goods, in which damages would appear to be a more appropriate remedy. German states and territories underwent mass industrialisation during this period and the remedy of specific performance was considered to be inappropriate where a buyer needed timely delivery of goods, either for trading purposes or for their use in the industrial production process.

⁶³ See Beale et al (eds) *Chitty on Contracts* 1907 ff. For further discussion, see paras 2 3 2 1, 3 2 1 2 & 3 4 1 below.

⁶⁴ “Contractual derogation and the discretion to refuse an order for specific performance in South African law” in Smits et al (eds) *Specific Performance in Contract law: National and Other Perspectives* 110. Lubbe cautions against the “the development of a separate system of rules at the remedial level [that] would erode the right of a creditor to a performance contracted for according to the rules of substantive law”, and create “a conflict between substantive law and the equitable remedial regime and [so] introduce the division between law and Equity into our law”.

⁶⁵ B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 398-399.

⁶⁶ Besides those already recognised, i.e. impossibility of performance and the insolvency of the debtor (see paras 4 8 3, 6 5 2 & 7 2 2 below).

Such a buyer would rather choose to rescind the contract, immediately conclude another contract for the same goods and claim damages in the amount of the shortfall between the price agreed upon and the market price at the time of default.⁶⁷ The consideration of “appropriateness”, as applied in both civil law and common law jurisdictions, will be explored to determine whether it is suitable for adoption in the South African context.⁶⁸

The basic position in the civil law, that specific performance is considered to be the primary remedy for breach of contract, is reflected in a number of prominent jurisdictions such as Dutch law and German law.⁶⁹ The German Civil Code (*Bürgerliches Gesetzbuch* or BGB)⁷⁰ of 1900, which was partly revised in 2002, expressly provides the creditor with a substantive right to specific performance.⁷¹ Specific performance is also the primary remedy for breach under the Dutch Civil Code (*Burgerlijk Wetboek* or BW),⁷² even though no single provision in the Code explicitly grants the creditor a

⁶⁷ Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 239-241.

⁶⁸ See also n 106 para 1 1 3 1 below.

⁶⁹ At present, specific performance is also acknowledged in the civil-law jurisdictions of France and Belgium. See eg Haas, Hesen & Smits “Introduction” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 1 3; D Haas *De Grenzen Van Het Recht Op Nakoming* doctoral thesis Vrije University Amsterdam (2009) 19-24; U A Mattei, T Ruskola & A Gidi *Schlesinger's Comparative Law: Cases, Text, Materials* 7 ed (2009) 879 ff, and for more detailed discussion, H Beale et al *Cases, Materials and Text on Contract Law* (2010) 840 ff; M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014) 28 ff.

⁷⁰ Full text available online at <http://www.gesetze-im-internet.de/englisch_bgb/>.

⁷¹ D Haas “Searching for a basis of specific performance in the Dutch Civil Code” in J Hallebeek & H Dondorp (eds) *The Right to Specific Performance: The Historical Development* (2010) 167 172.

⁷² Full text available online at <<http://www.dutchcivillaw.com/civilcodegeneral.htm>>.

substantive right to specific performance.⁷³ These systems are close to the South African position, and could potentially be the most instructive in evaluating the South African approach.

In Germany, parties to a contract as a matter of course are entitled to demand performance of their respective obligations *in specie*.⁷⁴ The right to specific performance is contained in § 241 of the BGB. It states that the creditor is entitled, on the grounds of the creditor-debtor relationship, “to demand performance from the debtor”.⁷⁵ This provision clearly indicates that actual performance of an obligation may be demanded, and that a judgment ordering performance *in specie* may be issued by a court.⁷⁶ The creditor’s claim to the specific enforcement of the contract is regarded as an inherent and standard right flowing from the contract.⁷⁷ The primacy of this remedy is demonstrated by the fact that the creditor may only sue for damages where the specific enforcement of the contract is no longer possible.⁷⁸ The emphasis on the enforcement of the contract is also reflected in the fact that a creditor has to grant the debtor a period of grace or *Nachfrist* before he can rely on secondary remedies, such as rescission and/or damages.⁷⁹ It is only after the expiry of this period (without result) that the creditor is entitled to claim damages instead of performance.⁸⁰ In other words, a creditor

⁷³ Haas “Searching for a basis of specific performance in the Dutch Civil Code” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 167.

⁷⁴ R Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 43.

⁷⁵ Haas “Searching for a basis of specific performance in the Dutch Civil Code” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 169.

⁷⁶ Zweigert & Kötz *Comparative Law* 472.

⁷⁷ Markesinis et al *German Law of Contract* 399.

⁷⁸ Markesinis et al *German Law of Contract* 439-441. See also C Szladits “The concept of specific performance in civil law” (1955) 4 *Am J Comp L* 221.

⁷⁹ Markesinis et al *German Law of Contract* 400.

⁸⁰ § 281(1) BGB. See also para 2 3 1 1 below.

has to claim specific performance first, and only after the debtor's non-performance, is he entitled to claim damages.

One of the foundational principles of Dutch contract law is that parties to a contract are obliged to execute the obligations they have entered into. This principle, the binding force of contract, and its twin notion of freedom of contract, are not expressly included in the BW, but is implied in Article 6:248(1), which states that a contract has not only the judicial effects agreed to by the parties, but also those which according to the nature of the contract result from the law, usage or the requirements of reasonableness and equity.⁸¹

According to some commentators, the Dutch legislator probably did not include an explicit provision granting the creditor a substantive right to specific performance, because this right is regarded as an essential feature of the contract itself.⁸² Hartkamp, for example, expresses the view that “[t]he right to specific performance arises directly from the obligation; it does not result from breach of contract”.⁸³ The primary position of specific performance can thus be ascribed to the maxim of *pacta sunt servanda*. Its primacy is also reflected in the limited number of conditions the creditor has to satisfy to obtain an order for specific performance and the few defences the debtor can raise against such an action. Furthermore, Dutch law promotes specific performance claims by way of the legal requirement of a written notice, whereby the creditor must give the debtor a reasonable time to perform, before he can claim damages or rescind the contract.⁸⁴

⁸¹ A S Hartkamp et al *Contract Law in the Netherlands* 2 rev ed (2011) 34.

⁸² See further text to n 103 para 2 3 1 2 below.

⁸³ Haas “Searching for a basis of specific performance in the Dutch Civil Code” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 172.

⁸⁴ D Haas & C Jansen “Specific performance in Dutch law” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 11-14. Cf for German law: text to n 80 above & n 95 para 2 3 1 2 below.

Various international restatements of contract law also contain provisions explicitly granting the creditor a substantive right to specific performance. Article 46 of the UN Convention on Contracts for the International Sale of Goods (CISG),⁸⁵ Article 7.2.2 of the UNIDROIT Principles of International Commercial Contracts (PICC), Article 9:102 of the Principles of European Contract Law (PECL), Article III–3:302 of the Draft Common Frame of Reference (DCFR)⁸⁶ and Article 110 the Common European Sales Law (CESL),⁸⁷ all provide as a rule that the debtor should specifically perform his obligations in case of non-performance.⁸⁸ These provisions could provide valuable insights as to the manner in which the South African position can be improved. They also suggest that a better convergence of the common- and civil law approaches may be possible.

The CISG incorporated a largely unrestricted right to require performance,⁸⁹ mirroring the civilian approach, while retaining a reservation in Article 28 regarding the application of this remedy in order to facilitate common-law countries in the sense that a court which would not require specific performance under national law does not have to do so under the CISG.⁹⁰ This provision appears to address the concerns of both systems, but it becomes clear upon further inspection that there is a lack of coherence in the CISG's

⁸⁵ Art 46 (buyer's right) & Art 62 (seller's right). See also para 2 3 3 1 below.

⁸⁶ See also para 2 3 3 4 below.

⁸⁷ Art 110 (buyer's right) & Art 132 (seller's right). See also para 2 3 3 5 below.

⁸⁸ V Heutger & J Oosterhuis "Specific performance within the hierarchy of remedies in European contract law" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 147 152. See for further information para 2 3 3 below.

⁸⁹ As outlined in Arts 46 & 62 CISG.

⁹⁰ For more information, see para 2 3 3 1 below. See also M Wethmar-Lemmer "Specific performance as a remedy in international sales contracts" (2012) 4 *TSAR* 700 701; S Eiselen "A comparison of the remedies for breach of contract under the CISG and South African law" in J Basedow et al (eds) *Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht* (2001) also available online at <<http://www.cisg.law.pace.edu/cisg/biblio/eiselen2.html>>.

approach to the enforcement of performance. While the need for this provision is undeniable in the light of the divergent viewpoints on specific performance as a contractual remedy, it is said that it causes uncertainty with regard to the availability of specific performance.⁹¹ The approach adopted by the CISG raises similar concerns to those raised with regard to the position in the South African law, and the reaction to its provisions could therefore be instructive.

The PICC, the PECL, the DCFR and the CESL on the other hand are more in favour of specific performance as the primary remedy, and a creditor will most likely obtain an order for specific performance under these instruments.⁹² These instruments have all adopted the principle of specific performance, subject to exceptions when performance is impossible or disproportionately onerous by reason of legal or practical difficulties, when performance is of an exclusively personal character⁹³ or when performance can be easily obtained from another source.⁹⁴ This study proposes to undertake a comprehensive assessment of the approaches adopted in the CISG, the PICC, the PECL, the DCFR and the CESL, as these instruments contain a similar approach to that followed by South African courts, and could provide solutions that are suitable for adoption in South Africa.

⁹¹ For more information, see para 2 3 3 1 below. See also C M Venter *An Assessment of the South African Law Governing Breach of Contract* master's dissertation Stellenbosch University (2004) 69.

⁹² Heutger & Oosterhuis "Specific performance within the hierarchy of remedies in European contract law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 152.

⁹³ Excluding the CISG & CESL – see para 4 7 n 314 below.

⁹⁴ See para 2 3 3 2 (esp n 244) below.

1 1 3 Considerations relevant to the courts' discretion

The discretion that the South African courts exercise evidently derives from the English law of equity.⁹⁵ Rules deriving from the English approach were applied in South Africa without regard to the fundamentally different approach.⁹⁶ As indicated earlier, *Benson* affirmed that these rules cannot interfere with the discretion of a South African court to refuse specific performance.⁹⁷ Modern continental jurisdictions that endorse a right to specific performance do not usually retain the sort of unrestricted discretion to refuse performance, as contemplated by *Benson*.⁹⁸ According to Cockrell, South African courts presently have a “freewheeling discretion”⁹⁹ to refuse the remedy. One of the key problems that will be addressed is whether such a liberal approach regarding the availability of this remedy is sustainable. The attention will now turn to some of the typical factors that have been regarded as relevant in refusing specific performance. The purpose is to illustrate the difficulties associated with deciding what status to accord these factors (or grounds of justification) and to underline the problems which arose in our law due to the fact that the general (Roman-Dutch) principle of the aggrieved party's right to choose specific performance was qualified by the adoption of the (English) principle of the judicial discretion to refuse the remedy on certain grounds. These factors include the adequacy of damages as compensation (or the ready availability of a substitute performance), the rendering of personal services, the difficulty of supervising

⁹⁵ Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321. See also Beck 1987 *CILSA* 196 ff; Cockrell “Breach of contract” in Zimmermann & Visser *Southern Cross* 326-327.

⁹⁶ See para 3 3 below.

⁹⁷ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785F-G.

⁹⁸ Cockrell “Breach of contract” in Zimmermann & Visser *Southern Cross* 330.

⁹⁹ 330. Smith (“Specific implement” in Reid & Zimmermann (eds) *A History of Private Law in Scotland II* 209), describes it as being “untrammelled by rules”.

the execution of the order, and the situation where the order would cause undue hardship.¹⁰⁰

1 1 3 1 Adequacy of damages

Specific performance has been denied in situations where money would adequately compensate the plaintiff for his loss, for example, where the item could be easily repurchased on the open market.¹⁰¹ In *Thompson v Pullinger*,¹⁰² Kotzé CJ, after reviewing some of the Roman-Dutch authorities, came to the conclusion that “the right of a plaintiff to specific performance of a contract, where the defendant is in a position to do so, is beyond doubt”.¹⁰³ However, in the same judgment Kotzé CJ noted that specific performance should not be granted in the case of shares in companies which can daily be obtained on the market without difficulty.¹⁰⁴

However, the “adequacy of damages” rule was rejected in *Benson*.¹⁰⁵ It follows that the adequacy of monetary damages does not constitute an independent ground on which courts will refuse an order for specific performance. The possibility that this should be the case only in certain instances, for example, where performance would result in wastage or loss, will be investigated. The possible influence of equity becomes relevant in this regard. The question arises whether South African law should benefit from refusing an order for specific performance when it would cause severe loss that could be prevented by awarding damages instead. The so-called “appropriateness” of the remedy, as a factor by which courts can be guided, for example, where a buyer has no interest in the performance since the contract depended on the timely delivery of the

¹⁰⁰ These grounds of justification form the chapter headings of this thesis.

¹⁰¹ See generally P Gross “Specific performance of contracts in South Africa” (1934) 51 SALJ 347 357-358, and Beck 1987 CILSA 196.

¹⁰² (1894) 1 OR 298.

¹⁰³ 301.

¹⁰⁴ See dictum quoted in text to n 164 para 3 3 below.

¹⁰⁵ See further text to nn 170 ff para 3 3 below.

goods and he concluded another contract for the same goods and late delivery will result in wastage, is considered throughout the thesis.¹⁰⁶

1 1 3 2 Personal service contracts

A contract involving personal service,¹⁰⁷ for example, a contract of employment, has rarely been specifically enforced by South African courts.¹⁰⁸ The position is especially complicated in the case where an employer seeks an order for specific performance against his employee,¹⁰⁹ because the personal freedom of the employee is

¹⁰⁶ See esp paras 1 2, 3 2, 3 4 1, 5 2 below. For traces of “appropriateness” reasoning in South African case law, see *South African Harness Works v South African Publishers Ltd* 1915 CPD 43; *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W); *Morettino v Italian Design Experience CC* [2000] 4 All SA 158 (W); *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W). See also in this regard Van der Merwe et al *Contract: General Principles* 330: “The court’s discretion to refuse specific performance is regarded as a judicial discretion which, although it should be as unfettered as possible, must be exercised in accordance with public policy and in such a manner that it does not bring about an unjust result, for instance if the granting of an order for specific performance would result in wasting a performance.”

¹⁰⁷ A personal service contract can assume various forms; in the present thesis a distinction will be drawn between employment contracts and other service contracts. The latter category comprises non-employment contracts, such as agreements to perform a specific service that does not entail a continuous personal relationship. See further para 4 2 2 below.

¹⁰⁸ See para 4 2 1 below.

¹⁰⁹ In *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) it was held that, in principle, an employee is entitled to specific performance, although there may be factors which could influence a court to refuse such an order (see further para 4 2 1 1 below).

implicated.¹¹⁰ Our courts in the past would never specifically enforce an employment contract by ordering an employee to work for an employer because this would constitute forced labour.¹¹¹ Breaches of this kind were rather compensated by damages.

In the landmark decision of *Santos Professional Football Club (Pty) Ltd v Igesund*,¹¹² the court for the first time ordered specific performance of an obligation to work against an employee.¹¹³ The Full Bench thereby distanced itself from the view held by many South African commentators and case law that specific performance of an obligation to work should generally not be granted against an employee.¹¹⁴ There were however, special circumstances that swayed the court in favour of granting specific performance.¹¹⁵

This case also persuaded other South African courts to prohibit employees from working for other employers for the remainder of their contracts.¹¹⁶ Decisions like *Igesund* give rise to a number of difficulties. For example, the Full Bench failed to consider fully the court *a quo*'s argument that one of the “[c]ompelling reasons not to enforce specific performance on the part of an employee [was] a disapproval of forced labour”.¹¹⁷ It also

¹¹⁰ Van der Merwe et al *Contract: General Principles* 331: “It might even be regarded as forced labour.”

¹¹¹ See in particular *Troskie v Van der Walt* 1994 (3) SA 545 (O) discussed fully in para 4 2 1 2 below.

¹¹² 2003 (5) SA 73 (C).

¹¹³ The Full Bench decision and its implications are discussed fully in para 4 2 1 2 below.

¹¹⁴ See R H Christie & G B Bradfield *Christie's The Law Of Contract in South Africa* 6 ed (2011) 550; A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 680-681, and the valuable contribution by T Naudé “Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Igesund*” 2003 SALJ 269.

¹¹⁵ 2003 (5) SA 73 (C) 79; and see Van der Merwe et al *Contract: General Principles* 331-332.

¹¹⁶ See further paras 4 2 1 2 & 4 8 4 below.

¹¹⁷ *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 (5) SA 697 (C) 701C per Desai J.

did not attach much weight to the coach's argument that the move to a different club would enable him to relocate and reunite with his family. Instead it focused on the commercial reasons for his repudiation and the cynical nature of the breach.¹¹⁸ However, it has been argued that courts should refuse specific performance in such a case, on the basis that it would cause unfair hardship to the employee.¹¹⁹ It is submitted that these views require further consideration and analysis.¹²⁰ In this regard, the thesis develops themes raised by Naudé and Lubbe in particular.

1 1 3 3 Supervision of performance

In many instances, specific performance is denied where courts would be unduly burdened with the task of supervising the performance.¹²¹ South African courts have been reluctant to grant specific performance in respect of obligations arising from mandate and contracts for services, for example, where a builder has undertaken to build/alter/repair a house or where a lessor is bound to repair the leased property (i.e. *obligationes faciendi*).¹²²

The lessor's obligation to afford the lessee *commodus usus*¹²³ of the leased property during the full term of the lease is the classic example referred to in this context. Where a lessor's breach has taken the form of a failure to maintain the leased property in a proper condition, the courts have often refused to order the lessor to effect the necessary repairs, the reason being that courts would be unduly burdened with the task of supervising the performance. The refusal was often justified on the ground that a lessee is allowed to effect the necessary repairs himself (after an unsuccessful demand to the lessor), and then claim the expense from the lessor or deduct it from the rental.

¹¹⁸ See text to n 192 para 3 3 & text to n 99 para 4 2 1 2 below.

¹¹⁹ See for further discussion para 4 2 1 2 below.

¹²⁰ These and other themes are dealt with fully below in ch 4.

¹²¹ See generally para 5 1 below.

¹²² See paras 5 1 & 5 5 below.

¹²³ See n 13 para 5 1 below.

For the same reason, our courts have also been reluctant to specifically enforce building contracts.

However, and predictably, this view has attracted severe criticism.¹²⁴ The primary basis of the criticism is that, in most cases, it is not necessary for the court itself to supervise the work. If the lessor (or the builder by way of analogy) has been ordered to effect repairs and fails to do so, the lessee may once again approach the court for relief, and any court then has the power to deal with such a reluctant defendant. Also, lessees often do not have the skills or financial means to effect the repairs themselves.¹²⁵ These criticisms touch on more perplexing problems relating to the notion of contract (since we maintain that the contract binds the debtor to the promised performance) which this study proposes to explore.¹²⁶

1 1 3 4 Undue hardship

It is settled law that South African courts will refuse to order specific performance where it would cause undue hardship to the defaulting party or to third parties.¹²⁷ This principle was confirmed in the leading case of *Haynes v Kingwilliamstown Municipality*.¹²⁸ Here the court's discretion to refuse the remedy in cases of hardship was derived from the fact that the English courts of chancery refused the remedy where equitable notions prevailed.¹²⁹ In this case the hardship was mostly to third parties and as such the consideration was very much an equitable one.¹³⁰ De Villiers AJA emphasised the unbound nature of the court's discretion¹³¹ and pointed out that it is open to a judge ex

¹²⁴ See para 5 1 below.

¹²⁵ See especially in this regard the discussion of *Mpange v Sithole* 2007 (6) SA 578 (W) in para 5 5 below.

¹²⁶ This factor is dealt with in detail in ch 5 below. See esp text to n 25 para 5 1 below.

¹²⁷ Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321.

¹²⁸ 1951 (2) SA 371 (A). This decision is discussed fully in ch 6 below.

¹²⁹ See para 6 1 1 below.

¹³⁰ See para 6 1 1 below.

¹³¹ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378G.

aequo et bono to consider the effect of its order at the time of performance.¹³² Thus some time ago Beck observed that “[i]t is interesting to see that the basis for the exercise of the discretion is described as *ex aequo et bono*; this seems to be no different from the workings of a court in equity”.¹³³

It is immediately apparent that the court refrained from engaging in a process of substantive reasoning regarding the considerations relevant to the exercise of its discretion.¹³⁴ This has consistently been the view of our courts.¹³⁵ However, authors such as Lubbe and Cockrell, convincingly argue that considerations of fairness and legal policy are the same considerations that underlie and inform the substance of legal doctrine.¹³⁶ The implication is that the law regarding specific performance of contracts cannot be separated from the broader debate regarding the relevance of substantive considerations of fairness and reasonableness and other policy considerations. Again, it is submitted that these views require further reflection.¹³⁷ In this regard, the thesis develops themes raised by Lubbe and Cockrell in particular.

¹³² 381A.

¹³³ Beck 1987 *CILSA* 190 198.

¹³⁴ See Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 12; Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 57 ff; “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 98, 99, 111; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 784C-785E; and see text to nn 347-348 para 4 8 3 below.

¹³⁵ See para 4 8 3 (esp n 354) & para 7 1 (esp n 9) below.

¹³⁶ See Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 109; Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 333.

¹³⁷ See esp paras 4 8, 6 5 & para 7 1 below.

114 Execution of orders for specific performance and the possibility of claiming damages in lieu of performance

A judgment ordering a debtor to perform in accordance with the contract is not of much use to the creditor unless the legal system provides the means to make it effective. Accordingly we will briefly turn to the question how South African law enforces such a judgment.

In Roman-Dutch law an order for specific performance was enforceable by depriving the debtor of his liberty in the practice of civil imprisonment ("burgerlike gyseling").¹³⁸ Civil imprisonment of a debtor for failure to comply with a court order has, however, been abolished in South Africa by statute.¹³⁹ An order for specific performance is presently executed in accordance with the ordinary rules of procedure.¹⁴⁰ In modern court practice an order *ad pecuniam solvendam* (to pay a sum of money) will be enforced by attachment of the debtor's property and subsequent sale in execution.¹⁴¹ A debtor who refuses to comply with an order *ad factum praestandum* (to perform an act or refrain from performing an act) may be guilty of contempt of court.¹⁴² In certain cases the court may directly enforce the order by instructing a third party (usually an official) to make

¹³⁸ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 40-41.

¹³⁹ See s 1 of The Abolition of Civil Imprisonment Act 2 of 1977; and see Joubert *General Principles of the Law of Contract* 227; Van der Merwe et al *Contract: General Principles* 332.

¹⁴⁰ A C Cilliers et al *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa II* 5 ed (2009) 1022-1023; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 324.

¹⁴¹ De Wet & Van Wyk *Kontraktereg en Handelsreg* 214; Joubert *General Principles of the Law of Contract* 227; Cilliers et al *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa II* 1022, 1053 ff.

¹⁴² Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 331; Cilliers et al *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa II* 1023, 1097 ff.

performance to the creditor. For example, the sheriff might be instructed to seize movable property of the debtor and deliver it to the creditor; or the registrar of deeds might be instructed to sign the documents necessary to effect transfer of immovable property to the creditor; or where property is in the possession of a third party, such third party might be instructed to deliver it to the creditor.¹⁴³

The enforcement of an order for payment of a sum of money seems to be less problematic, except, of course, "if no assets can be found for attachment".¹⁴⁴ The enforcement of obligations to do or refrain from doing something, on the other hand seems to be more challenging. These obligations can be enforced,¹⁴⁵ but the effectiveness of the enforcement measures in practice in respect of these obligations is disputed. The process of enforcement of an obligation to perform might involve substantial expense and result in unsatisfactory outcomes and often direct enforcement (as described above) of such an order is not possible, for example, where a debtor must render a service.¹⁴⁶ Considerations such as the human free will and autonomy militate against direct enforcement of such obligations.¹⁴⁷ Therefore, indirect measures must be employed under such circumstances. In such cases compliance would depend on the threat of other measures, for example, the prospect of being held in contempt of court if the debtor fails to perform the act.¹⁴⁸

¹⁴³ Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 322; Cilliers et al *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa II* 1023.

¹⁴⁴ Van der Merwe et al *Contract: General Principles* 333.

¹⁴⁵ The most famous example of the enforcement of an *obligatio facienda* is probably *National Butchery Co v African Merchants Ltd* (1907) 21 EDC 57, discussed in para 4 2 2 below. See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 211, and para 7 2 1 (esp n 25) below.

¹⁴⁶ Van der Merwe et al *Contract: General Principles* 332.

¹⁴⁷ For further discussion, see ch 4 below.

¹⁴⁸ Van der Merwe et al *Contract: General Principles* 332.

In South Africa there is no reason to assert that the creditor must be content with damages in case of non-compliance with a court order to perform or refrain from performing an act. The wilful refusal to comply with a court order renders the debtor liable to criminal prosecution for contempt of court; a circumstance which indirectly prompts the debtor to perform.¹⁴⁹ As indicated, civil imprisonment as an indirect method of enforcement is no longer possible.¹⁵⁰ Another possible indirect enforcement measure is the imposition of a penalty sum. Although this measure has been applied by South African courts, it seems that it is not favoured in practice.¹⁵¹ The question that arises is how far the claim for specific performance as a matter of right is of practical value when it comes to the execution of such a judgment.

South African courts have often been confronted with the problem of whether a claim for payment as a surrogate for specific performance could perhaps be an adequate alternative to specific performance.¹⁵² As this topic is beyond the scope of the research question, it will not be treated as a whole, but the matter deserves some attention. De Wet and Van Wyk argue that performance does not have to be specific performance of the exact terms agreed upon by the parties, but can also take the form of payment of damages as a surrogate for performance. They argue that the party who is in breach should be permitted to pay the objective value of performance, instead of rendering the performance itself.¹⁵³ Thus, where the plaintiff elects to claim damages in lieu of specific

¹⁴⁹ Lubbe & Murray *Contract* 542.

¹⁵⁰ See text to n 139 above.

¹⁵¹ De Wet & Van Wyk *Kontraktereg en Handelsreg* 214.

¹⁵² The literature on this debate is vast. A recent valuable and insightful addition is S P Stuart-Steer “Reconsidering an understanding of damages as a surrogate of specific performance in South African law of contract” 2013 *Respona Meridiana* 65-97.

¹⁵³ De Wet & Van Wyk *Kontraktereg en Handelsreg* 196: “In plaas van die werklike prestasie kan die waarde daarvan geëis word as surrogaat daarvan.” See further Lubbe & Murray *Contract* 541; Van der Merwe et al *Contract: General Principles* 328-329; Stuart-Steer 2013 *Respona Meridiana* 68 ff.

performance his claim is not for his *id quod interest*, ascertained in the ordinary way.¹⁵⁴ According to Lubbe and Murray “[t]his would not be damages in the ordinary sense at all, but amount to specific performance in another form”.¹⁵⁵

In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*,¹⁵⁶ the majority of the court held that a claim for damages as surrogate for performance does not exist as an independent remedy in South African law as an alternative to specific performance, and that where specific performance is refused, the innocent party is restricted to an ordinary claim for contractual damages.¹⁵⁷ This decision has been severely criticised.¹⁵⁸

Ten years later, the Appellate Division in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*¹⁵⁹ ignored the entire debate; Van Heerden JA simply remarked that “it is trite law that, even if a party to a contract is entitled to resile because of the other party’s failure to perform, he is not obliged to do so. He may instead claim performance, either *in forma specifica* (subject to the Court’s discretion) or by way of damages in lieu of performance”, which reflects De Wet’s view.¹⁶⁰

¹⁵⁴ Receiving compensatory damages for non-performance is not the same as receiving performance. Therefore, a claim for damages as compensation for (provable) loss suffered as a result of non-performance would still be available. See Stuart-Steer 2013 *Responsa Meridiana* 67-68; and see De Wet *Kontraktereg en Handelsreg* 196.

¹⁵⁵ Lubbe & Murray *Contract* 538. See also Joubert *General Principles of the Law of Contract* 228: “The plaintiff merely seeks performance by way of its monetary equivalent. Until such time as the court has made its ward the defendant should be able to disarm this claim by rendering specific performance.”

¹⁵⁶ 1981 (4) SA 1 (A).

¹⁵⁷ 7B-9F.

¹⁵⁸ See *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) 186E-F. In addition to the authorities cited there by the court, see Stuart-Steer 2013 *Responsa Meridiana* 66 ff.

¹⁵⁹ 1991 (1) SA 525 (A).

¹⁶⁰ 530E.

Interestingly, the judge cites *Farmers' Co-operative Society (Reg) v Berry*¹⁶¹ as a source of authority, even though this decision and the cited passage merely confirms the current law, i.e. that the election is with the plaintiff creditor to demand specific performance from the debtor, subject to the discretion of the court to refuse the remedy in favour of "an award of damages" – which can only be construed as being for contractual damages.

In light of the debate which ensued after *Isep*, the Supreme Court of Appeal suggested in *Mostert v Old Mutual Life Assurance Co (SA) Ltd*¹⁶² that the issue of damages as surrogate for performance as independent remedy may be reconsidered.¹⁶³ However, the position on surrogate damages remains unclear in our law. Eiselen recently remarked that "it is worth considering whether there is really any justification for the existence of such an independent claim in our law of contract".¹⁶⁴ Both the Supreme Court of Appeal's call for the reconsideration of the issue and recent academic awareness suggest that there may be room for the development of this remedy in the future.¹⁶⁵ However, these developments are not considered relevant for purposes of the present study problem.

¹⁶¹ 1912 AD 343 350.

¹⁶² 2001 (4) SA 159 (SCA).

¹⁶³ 186E-F *per Smalberger ADCJ*: "it should be noted that the decision has been subjected to severe criticism (see De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed at 212; Joubert (ed) *The Law of South Africa* 1st reissue vol 7 para 45; Oelofse 1982 *Tydskrif vir die Suid-Afrikaanse Reg* 61 especially at 63-5; *Van Immerzeel & Pohl and Another v Samancor Ltd* 2001 CLR 32 (SCA) at 45-46 – the relevant part has been left out of the report at 2001 (2) SA 90 (SCA) at 96F-G) and its correctness is open to doubt. Reconsideration of the majority decision is called for."

¹⁶⁴ "Remedies for breach" in Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 316.

¹⁶⁵ See further Stuart-Steer 2013 *Responsa Meridiana* 94-97, and the recent decision by the South Gauteng High Court in *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ).

1 2 Purpose, motivation and significance of the study

The aim of this study is to evaluate the South African law regulating the exercise of judicial discretion to refuse specific performance, paying special attention to more recent developments in a number of foreign jurisdictions and international instruments. Where appropriate, reference will also be made to recent historical studies.

As indicated above, the rules and principles pertaining to this remedy are in many respects uncertain. The purpose of this study will be to explore possible solutions to this problem using comparative analysis – mainly looking at German and Dutch (civil) law in contrast to English and American (common) law. In this regard, the study proposes to consolidate and develop the different opinions and ideas that have been expressed by local and international commentators.

According to Cockrell we cannot conclude that specific performance is the most appropriate remedy simply because a contract is binding.¹⁶⁶ Contracts generally seek to give expression to the will of the contracting parties; specific performance could undermine this ideal, inasmuch as it forces a party to perform against his will. Furthermore, considerations such as economic efficiency, justice and fairness could militate against making specific performance the routine remedy for breach of contract. These considerations could in fact favour monetary damages as a more appropriate remedy.¹⁶⁷ The objectives of this research are to determine whether specific performance should be the routine remedy for breach of contract in South African law, and if so, how the courts' approach regarding the availability of the remedy can be improved, particularly with regard to the manner in which the courts exercise their discretion. The possibility will be explored whether a more concrete approach, with

¹⁶⁶ Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 331.

¹⁶⁷ 331. See further for reasons why damages is the preferred remedy in common law, Burrows *Remedies for Torts and Breach of Contract* 472-475; J Beatson et al *Anson's Law of Contract* 29 ed (2010) 576; E Peel *Treitel's Law of Contract* 13 ed (2011) 1099; Beale et al (eds) *Chitty on Contracts* 1905-1906.

clearly identified principles to guide courts in the exercise of their discretion, could provide a more effective solution.¹⁶⁸ Alternatively, there is the possibility that the discretion should be done away with in its entirety and that courts should accept certain defined exceptions to the right to specific performance.¹⁶⁹

While certain academic articles and chapters have been written about the topic,¹⁷⁰ it is submitted (as indicated earlier) that it requires further attention, especially with regard to the manner in which the courts exercise their discretion and the major factors that are relevant to the exercise of the courts' discretion to refuse an order for specific performance. Existing works on this particular topic include Lambiris's *Orders of Specific Performance and Restitutio in Integrum in South African Law*, which presents a structured explanation of the nature, purpose and function of specific performance in South African law. However, this work does not take into account recent international developments, such as the innovative solutions adopted in international instruments, and is therefore outdated in many respects. More noteworthy is the doctoral thesis of Oosterhuis entitled *Specific Performance in German, French and Dutch Law in the Nineteenth Century: Remedies in an Age of Fundamental Rights and Industrialisation*. The author concentrates on the limitations to the right of specific performance and whether they are justified and thus provides us with foreign research on the topic, which is useful when considering the same problems in the South African context. The primary motivation behind the present study is the recognition that there is a significant volume of international research on the identified problems which has not recently been subjected to local analysis.¹⁷¹ It is clear that recent international and historical research contains fresh insights on the identified problems, and could therefore benefit the

¹⁶⁸ See para 7.2.1 below.

¹⁶⁹ See para 7.2.2 below.

¹⁷⁰ See in particular Lubbe "Contractual Derogation and the Discretion to refuse an order for Specific Performance in South African Law" in J M Smits et al *Specific Performance in Contract law: National and Other Perspectives* (2008).

¹⁷¹ See eg M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014).

development of our law. It is submitted that these developments necessitate the reconsideration of the South African position.

1 3 Chapter analysis

Chapter 2 begins by laying out the theoretical dimensions of the research further, and looks at the historical development of the remedy and how different legal systems and model instruments approach the remedy. Chapters 3 to 6 describe and evaluate, from a comparative perspective, the different considerations that could be regarded as relevant in exercising the courts' discretion to refuse specific performance. The last chapter summarises and comments on the findings from the research, and contains suggestions for the improvement and reform of the South African law governing specific performance of contracts.

CHAPTER 2: HISTORICAL AND COMPARATIVE BACKGROUND

2 1 Introduction

The purpose of this chapter is to provide a historical and comparative overview of the remedy of specific performance, which will serve as a backdrop to more detailed comparative observations in subsequent chapters. The treatment of the historical origins of the remedy will be limited, since the subject has been extensively researched.¹ The comparative overview will first focus on the common law, represented by English and American law, and the civil law, represented by German and Dutch law, as these jurisdictions are considered to be accurate examples or reflections of the two legal traditions. Thereafter it will move to certain international instruments. The issue of contractual remedies, especially specific performance, has been of great significance in the unification of contract law. Various international instruments of uniform contract law contain provisions granting the creditor a substantive right to specific performance. For that reason, attention will be paid to some of the most prominent of these instruments, namely the United Nations Convention on Contracts for the International Sale of Goods, the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference, and the Common European Sales Law. It is submitted that a meaningful evaluative analysis of the availability of the remedy of specific performance in national legal systems cannot be conducted without having regard to international developments in this area of the law. Furthermore, the examination of

¹ See in particular the doctoral thesis of J Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* Vrije University Amsterdam (2011). See also J W Wessels *History of the Roman-Dutch Law* (1908) 612 ff; P Gross "Specific performance of contracts in South Africa" (1934) 51 SALJ 347; J J du Plessis "Spesifieke nakoming: 'n regshistoriese herwaardering" (1988) 51 THRHR 349; M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 27 ff, and J Hallebeek & H Dondorp (eds) *The Right to Specific Performance: The Historical Development* (2010).

these uniform regulations may reveal gaps and deficiencies in the approaches adopted by the different national legal systems and may provide insightful solutions to improve applicable rules. These instruments may also serve to demonstrate how a successful synthesis of diverging principles can be achieved, and potentially provide valuable guidance for the future development of South African law.

2 2 Historical development

2 2 1 Specific performance of contracts in Roman law

During the pre-classical (*legis actiones*) period a variety of new agreements were recognised as creating legally enforceable contractual obligations. Also, the type of obligation which was considered to be legally enforceable was expanded.² This development caused administrative difficulties, especially with regard to the enforcement of these obligations. The judicial administration depended on a single jurisdictional magistrate (*praetor*), who was assisted by lay judges (*iudices*).³ Because judicial and administrative resources were limited, judgments were executed by way of *manus injectio*,⁴ being the standard form of execution in early Roman law enforced by the aggrieved party himself, i.e. a form of legal or regulated self-help, which inherently led to more complications.⁵

² See J A C Thomas *Textbook of Roman Law* (1976) 259; H F Jolowicz & B Nicholas *Historical Introduction to the Study of Roman Law* 3 ed (1972) 279 ff; M Kaser *Roman Private Law* (tr R Dannenbring) 3 ed (1980) 176; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 546-549.

³ See Jolowicz & Nicholas *Historical Introduction to the Study of Roman Law* 48.

⁴ See Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 30.

⁵ Although the threat of physical seizure and private imprisonment was effective to prompt performance (i.e. as an indirect form of execution) it was still a serious and harsh measure, which often proved to be ineffective if the judgment debtor had no means to satisfy his debt and someone else also did not come forward to perform on his behalf.

The difficulties imposed by the limited judicial and administrative resources of the Roman state and the *legis actiones* system in general,⁶ were eventually surmounted by the practice during the formulary period, used from the last century of the Republic until the end of the classical period, through which every order of a *iudex* was expressed as an order to pay money (*condemnatio pecunaria*).⁷ Thus, the aggrieved party could only claim the economic value of the debtor's performance. However, because such an order required payment of a sum of money, a relatively scarce commodity during the formulary period, the defaulting party often elected to specifically perform his obligations prior to litigation. This indirectly encouraged the discharge of obligations by way of voluntary specific performance. Even so, specific performance was not recognised as a remedy the courts could award. The rights of an aggrieved party were confined to a claim for damages. However, it has been suggested that this indicates that specific performance was considered to be "the most natural and satisfactory way of discharging contractual obligations" even in classical Roman law.⁸

See further Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 30, and P du Plessis Borkowski's *Textbook on Roman Law* 4 ed (2010) 70-72.

⁶ "The faults in the *legis actiones* system – its excessive formality, archaic nature, and limited effectiveness – made it unsuitable in the long term for a rapidly expanding, economically vibrant Rome..." (Borkowski's *Textbook on Roman Law* 72).

⁷ See Gaius *Institutiones* 4 48 & 49: "The *condemnatio*, in all *formulae* containing one, is framed in terms of valuation in money. Accordingly, even where the suit is for a corporeal thing, such as land, a slave, a garment, gold or silver, the *iudex* condemns the defendant not in the actual thing ... but in the amount of money at which he values it. The *condemnatio* in a *formula* may be in terms of a definite or in an indefinite sum of money" (tr Poste). See further T Weir "Contracts in Rome and England" (1992) 66 *Tulane LR* 1615 1623.

⁸ See further Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 31-32.

In discussing classical Roman law, the Roman-Dutch jurist, Voet stated that “a seller cannot be absolutely forced into delivery of a thing sold, but is freed by making good the damages”.⁹ On his version, classical Roman law did not provide methods whereby a defaulting party could be compelled to perform, and if it were allowed, it would amount to expropriation. Even though Voet is not considered to provide a reliable account of classical Roman law,¹⁰ his view in this regard seems to be accurate.

This position was departed from in post-classical law, when the formulary system was replaced by *cognitio extraordinaria*. This meant that litigation took place in a single proceeding before a magistrate or his deputy.¹¹ Accordingly, the *condemnatio pecunaria* was no longer ordered in all cases and the courts often permitted real execution in cases involving obligations to give or transfer ownership (*dare*).¹² However, it seems that specific performance was still not regarded as being generally available and appropriate in cases of breach of contract,¹³ certainly not in respect of obligations to do (*facere*). Instead, the party in breach could discharge his contractual obligations by paying *id quod interest*. The rationale for this position was the principle *nemo praecise*

⁹ *Commentarius ad Pandectas* 19 1 14 (tr Gane); see also 45 1 8.

¹⁰ Beinart describes his arguments as being “rather specious”. In his opinion, the Dutch Romanists “had no real information about the change from the classical position, and could not know that the classical system only allowed judgment in money” (B Beinart “Roman law in South African practice” (1952) 69 *SALJ* 145 158).

¹¹ Thomas *Textbook of Roman Law* 119.

¹² J P Dawson “Specific performance in France and Germany” (1959) 57 *Mich LR* 495 504; W W Buckland *A Text-Book of Roman Law from Augustus to Justinian* 3 rev ed (1963) 669; Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 27.

¹³ See Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 33-35; Beinart 1952 *SALJ* 158.

cogi ad factum (“nobody can be compelled to perform an obligation to do”, as opposed to an obligation to give).¹⁴

2 2 2 Specific performance of contracts in Roman-Dutch law

The availability of the remedy in Roman-Dutch law has always been a subject of dispute among the Roman-Dutch jurists.¹⁵ According to Wessels, there were two schools of thought.¹⁶ Schorer, in his *Aanteekeningen*, remarked that “[t]his warmly discussed

¹⁴ The origin of this maxim can be traced to the works of medieval jurists, for example, Baldus’ commentary on C 4 49 4 during the fourteenth century (see eg Dawson 1959 *Mich LR* 504, and Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 32). But some scholars maintain that this maxim was only phrased in this manner at the beginning of the seventeenth century by the French jurist, Antoine Favre in his *Rationalia in Pandectas II ad D 8 5 6 2* (1659) 248 (see eg J Hallebeek “Direct enforcement of obligations to do: two local manifestations of the *ius commune*” in M Gubbels & C J H Jansen (eds) *Regio: Rechtshistorische Opstellen Aangeboden aan dr. P.P.J.L. van Peteghem* (2010) 33 34; “Specific performance in obligations to do according to early modern Spanish doctrine” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 57, and H Dondorp “Precise *cogi*: enforcing specific performance in medieval legal scholarship” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 21).

¹⁵ See eg J W Wessels *History of the Roman-Dutch Law* (1908) 612 ff; R W Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) 266; Du Plessis 1988 *THRHR* 357; J Hallebeek & T Merkel “Simon Groenewegen van der Made on the enforcement of *obligationes faciendi*” in J Hallebeek & H Dondorp (eds) *The Right to Specific Performance: The Historical Development* (2010) 81 ff. It is important to note that the dispute related to the performance of contracts *ad faciendum* (to perform), as the writers were in agreement that contracts *ad dandum* (to deliver/transfer), could be specifically enforced (see Grotius *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 3 15 6 & 3 2 14; Huber *Heedensdaegse Rechtsgeleertheyt* 3 2 9 & 3 2 10; Neostadius *Decisiones* vennis 50; Pothier *Traité des Obligations* sec 151).

¹⁶ *History of the Roman-Dutch Law* 612.

question has brought into collision two veteran jurists, Martinus and Bulgarus, to an astonishing degree".¹⁷ Martinus was of opinion that a person could be compelled to perform an *obligatio faciendi*, and was supported by Cujacius and Zoesius in this regard.¹⁸ Bulgarus, on the other hand, supported the classical Roman law position that no one could be compelled to perform an obligation to do, and that a person could always discharge this obligation by paying *id quod interest*.¹⁹ He was supported by Donellus, who in turn, was supported by Grotius.²⁰ However, in a note to Grotius' *Inleidinge*, Groenewegen states that, according to the law of Holland at that time, a person could not discharge his obligation by paying damages, but could be compelled by civil imprisonment (*burgerlike gijzeling*) to fulfil what he had promised.²¹ He emphasised that both obligations to give (*dare*) and to do (*facere*), could be specifically enforced.²² Huber²³ supported this view, while van der Keessel,²⁴ Scheltinga,²⁵ and

¹⁷ Schorer ad Gr 3 3 41 (tr Austen: 440 n 94).

¹⁸ See Gross 1934 SALJ 349.

¹⁹ See Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 31.

²⁰ *Inleidinge tot de Hollandsche rechts-geleerdheid* 3 3 41: "although by natural law a person who has promised to do something is bound to do it, if it is in his power, he may nevertheless by municipal law release himself by paying the other contracting party or acceptor the value of his interest, or the penalty, if any has been agreed upon in default of payment" (tr Maasdorp). However, Grotius departs from this view in 3 15 6, where he states that if a vendor fails to deliver, the purchaser may demand delivery or damages at his option – see Lee *An Introduction to Roman-Dutch Law* 266. See also Wessels *History of the Roman-Dutch Law* 612; Gross 1934 SALJ 349.

²¹ *Tractatus de Legibus Abrogatis* ad Gr 3 3 41.

²² In *Tractatus de Legibus Abrogatis* ad D 42 1 13 1, he states: "Today in all obligations to do something, the creditor who is in a position to act, can be compelled to act and he cannot discharge himself by paying damages" (tr Beinart).

²³ *Praelectiones* bk 3 tit 16. See also Huber's *Heedensdaegse Rechtsgeleerdheyt*, in which he states (3 2 9 & 3 2 10): "As soon as the parties have come to an agreement they cannot recede from the sale; the seller must deliver the article sold and the purchaser

Schorer went so far as to say that a person was in fact bound to fulfil his obligation according to the *ius commune*.²⁶ Van Leeuwen²⁷ and Van der Linden²⁸ also endorsed Groenewegen's view. Voet,²⁹ on the other hand, argued that the classical Roman law position was the correct one. However, the views of Voet in this regard have been interpreted to be a recommendation to return to Roman law and a statement of what the position ought to be, rather than an account of the law practiced at that time.³⁰ The view of Groenewegen is considered to provide the most accurate account of the Roman-Dutch position.³¹ This has been attributed to the fact that he introduced new sources into the debate, for example Dutch judicial decisions,³² which other Roman-Dutch jurists

must pay the price, nor can the seller escape delivery and free himself by tendering the *id quod interest*, even if he offered double the price" (tr Gane).

²⁴ *Theses Selectae* 512 (tr Lorenz) citing Neostadius *Decisiones vonnis* 50 (tr Van Nispen).

²⁵ *Dictata ad Gr 3 3 41* (tr De Vos & Visagie).

²⁶ See Wessels *History of Roman-Dutch Law* 614-615; Gross 1934 *SALJ* 350; I C Steyn *Gijzeling: the historical development of the mode of proceeding in “gijzeling” in the provincial court of Holland from 1531* (1939) 30-31; Lee *An Introduction to Roman-Dutch Law* 269.

²⁷ *Het Roomsche Hollandsche Recht* 4 2 13 (tr Kotzé).

²⁸ *Koopmans Handboek* 1 14 7.

²⁹ *Commentarius ad Pandectas* 19 1 14.

³⁰ See Wessels *History of Roman-Dutch Law* 618; R Zimmermann "Roman-Dutch jurisprudence and its contribution to European private law" (1992) 66 *Tulane LR* 1685 1700; Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 36.

³¹ See H Dondorp "Decreeing specific performance: a Roman-Dutch legacy" (2010) 16(1) *Fundamina* 40 46.

³² For example Neostadius *Decisiones vonnis* 50 (tr Van Nispen). See Hallebeek & Merkel "Simon Groenewegen van der Made on the enforcement of *obligationes faciendi*" in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 89.

such as Grotius and Voet neglected to consider.³³ Therefore, it seems settled that specific performance of contracts was in fact possible in Roman-Dutch practice and that compliance with such orders could be achieved by way of civil imprisonment.³⁴ The rationale for this position was that a debtor who agreed to perform an obligation could not discharge himself by paying damages.³⁵ This is in accord with the foundational principle of *pacta sunt servanda*. This principle was developed by the canon lawyers³⁶ who believed that a well-regulated society was only possible if agreements were honoured, and in the end all informal consensual agreements (*nuda pacta*) were generally considered to be enforceable according to the maxim of *ex nudo pacto oritur actio*.³⁷

³³ Hallebeek & Merkel “Simon Groenewegen van der Made on the enforcement of *obligationes faciendi*” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 86-93.

³⁴ After an extensive survey of this debate in *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41, Kotzé CJ concluded (at 45) that “[t]he Roman-Dutch law, therefore clearly recognizes the right to a specific performance of a contract”. In *Wheeldon v Moldenhauer* 1910 EDL 97, Kotzé JP held (at 98) that the remedy of specific performance is “well established in our Roman-Dutch law”. In *Moffat v Touyz & Co* 1918 EDL 316, Kotzé AJP confirmed (at 319) that the power to decree specific performance of obligations to do as well as obligations to give was clearly established by Roman-Dutch law. See also *Thompson v Pullinger* (1894) 1 OR 301.

³⁵ See Hallebeek & Merkel “Simon Groenewegen van der Made on the enforcement of *obligationes faciendi*” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 94.

³⁶ See A T von Mehren & J R Gordley *The Civil Law System* 2 ed (1977) 37; A Jeremy “*Pacta sunt servanda* the influence of Canon Law upon the development of contractual obligations” (2000) 144 *Christian Law Review* 4.

³⁷ For a general account of this development, see Zimmermann *The Law of Obligations* 542-544, 576-582; Von Mehren & Gordley *The Civil Law System* 18-38. See also Zimmermann 1992 *Tulane LR* 1689-1694; H Wehberg “*Pacta sunt servanda*” (1959) 53 *American Journal of International Law* 775-786.

2 2 3 Reception of Roman-Dutch law in South Africa

The South African legal system is often described as a mixed legal system,³⁸ i.e. a legal system which exhibits characteristics of both the civilian and the English common law traditions.³⁹ This is attributed to the fact that South Africa's legal tradition has been shaped both in substance and in methodology by a fusion of influences deriving from periods of Dutch and British Colonial occupation of the Cape of Good Hope.⁴⁰ The arrival of the Dutch East India Company in 1652 and the Dutch presence during the seventeenth century at the Cape saw the introduction of the Roman-Dutch law of Holland into the South African legal system.⁴¹ According to Zimmermann, the Roman-Dutch law which was transplanted to the Cape derives from a unified European intellectual tradition, and "what we usually refer to as *usus modernus pandectarum* [that] existed not only in Germany but in the whole of Central and Western Europe".⁴² This

³⁸ See generally V V Palmer "Mixed legal systems" in M Bussani & U Mattei (eds) *The Cambridge Companion to Comparative Law* (2012) 368 ff, and R Zimmermann "Mixed legal systems" in J Basedow et al (eds) *The Max Planck Encyclopedia of European Private Law II* (2012) 1179-1182.

³⁹ See R Zimmermann & D Visser "Introduction: South African Law as a mixed legal system" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 12 ff.

⁴⁰ See G F Lubbe "*Ex Africa semper aliquid novi?* – the Mixed Character of Contract Law in the New South Africa" in J M Smits (ed) *The Contribution of Mixed Legal Systems to European Private Law* (2001) 51 55.

⁴¹ For a detailed account of the reception of Roman-Dutch law in South Africa, see E Fagan "Roman-Dutch law in its historical context" in Zimmermann & Visser (eds) *Southern Cross* 33 ff.

⁴² See R Zimmermann "Synthesis in South African private law: civil law, common law and *usus hodiernus pandectarum*" (1986) 103 *SALJ* 259 269. See also R Zimmermann "Double cross": comparing Scots and South African law" in R Zimmermann, K Reid & D Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 1 4-5.

remained the case even after the establishment of British rule in 1806 and Roman-Dutch law was retained as the common law.⁴³ Therefore, South African law is most often described as being essentially a Roman-Dutch system influenced by a considerable amount of English law.⁴⁴

Following the Roman-Dutch approach, modern South African law accepts that a party to a contract has a right to specific performance thereof. This principle was recognised at a very early stage of the development of South African law and is also well-documented. For example, in *Cohen v Shires, McHattie and King*,⁴⁵ Kotzé CJ stated that “by the well-established practice of South Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence”.⁴⁶ In *Thompson v Pullinger*,⁴⁷ Kotzé CJ, remarked that “the right of a plaintiff to specific performance of a contract, where the defendant is in a position to do so, is beyond doubt”.⁴⁸ Furthermore, the

⁴³ This was confirmed by the First and Second Charters of Justice of 1827 and 1832. See H J Erasmus “Roman law in South Africa today” (1989) 106 SALJ 666 667; Zimmermann “‘Double cross’: comparing Scots and South African law” in Zimmermann et al (eds) *Mixed Legal Systems in Comparative Perspective* 5.

⁴⁴ Even though the British occupation did not result in the Roman-Dutch law being replaced, it did introduce reform in the law of evidence, procedural law, and large parts of commercial law. The structure of the courts and the legal profession were also reshaped according to the British model (see F du Bois “Introduction: history, system and sources” in C G van der Merwe & J E du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1 10 ff; and see K Reid & R Zimmermann “The development of legal doctrine in a mixed system” in K Reid & R Zimmermann (eds) *A History of Private Law in Scotland I: Introduction and Property* (2000) 1 4).

⁴⁵ (1882) 1 SAR TS 41. See also *Farmers’ Co-operative Society (Reg) v Berry* 1912 AD 343 350 *per* Innes J (dictum in text to n 14 para 1 1 1 above); *Moffat v Touyz & Co* 1918 EDL 316; *Woods v Walters* 1921 AD 309.

⁴⁶ (1882) 1 SAR 45.

⁴⁷ (1894) 1 OR 298.

⁴⁸ 301.

courts often reaffirm the importance of this right.⁴⁹ In the landmark decision of *Benson v SA Mutual Life Assurance Society*,⁵⁰ Hefer JA described it as being the “cornerstone of our law relating to specific performance”.⁵¹ When examining the case law on this matter it is also evident that attention is regularly refocused on the Roman-Dutch rule of specific performance.⁵²

2 3 Comparison: specific performance in selected national legal systems and international instruments

2 3 1 Specific performance in modern civil law, exemplified by German law and Dutch law

Unlike Roman law, modern civil-law systems recognise that a contractual obligation entitles the creditor to claim performance *in specie* from the debtor.⁵³ Indeed, it is a basic principle of these systems that the debtor is obliged to perform his contractual obligation(s) and in the case of non-performance, the creditor has the right to enforce

⁴⁹ See *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A); *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); and see G Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 95 98-99.

⁵⁰ 1986 (1) SA 776 (A).

⁵¹ 782I.

⁵² For more recent examples, see *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C); *Klimax Manufacturing Ltd v Van Rensburg* 2005 (4) SA 445 (O); *Mpange v Sithole* 2007 (6) SA 578 (W); *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W); *Vrystaat Cheetahs (Edms) Bpk v Mapoe* (unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court *per* Van Zyl J (copy on file with author)); *Botha v Rich NO* 2014 (4) SA 124 (CC) para [37].

⁵³ See U A Mattei, T Ruskola & A Gidi *Schlesinger's Comparative Law: Cases, Text, Materials* 7 ed (2009) 879 ff.

this duty. Thus, in the civil law specific performance is considered to be the primary remedy for breach of contract.⁵⁴

German and Dutch law can be regarded as typical of the civil-law approach.⁵⁵ The German Civil Code or *Bürgerliches Gesetzbuch* (BGB) of 1900, of which the law of obligations was partly revised in 2002, expressly grants the creditor a substantive right to specific performance.⁵⁶ Specific performance is also the primary remedy for breach of contract under the Dutch Civil Code or *Burgerlijk Wetboek* (BW), even though no single provision in the BW explicitly grants the creditor a substantive right to this remedy.⁵⁷

2 3 1 1 Specific performance as the primary remedy in German law

A general revision of the German law of obligations entered into force on 1 January 2002,⁵⁸ thereby replacing a complicated regime of statutory and judge-made rules.⁵⁹

⁵⁴ See A Cockrell “Breach of contract” in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303–326; De Wet & Van Wyk *Kontraktereg en Handelsreg* 209.

⁵⁵ See C Szladits “The concept of specific performance in civil law” (1955) 4 *Am J Comp L* 208; G H Treitel “Remedies for breach of contract” in *IECL VII* ch 16 (1976) 6–16; K Zweigert & H Kötz *Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 472–479; H Beale et al *Cases, Materials and Text on Contract Law* (2010) 840 ff; M Torsello “Remedies for breach of contract” in J M Smits (ed) *Elgar Encyclopedia of Comparative Law* 2 ed (2012) 754–761–763.

⁵⁶ See § 241 BGB; see also D Haas “Searching for a basis of specific performance in the Dutch Civil Code” in J Hallebeek & H Dondorp (eds) *The Right to Specific Performance: The Historical Development* (2010) 167–172.

⁵⁷ See Haas’s arguments in text to nn 103–104 para 2 3 1 2 below.

⁵⁸ See generally for the background to the reform R Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 30–35; H Schulte-Nölke *The New German Law of Obligations: An Introduction* (available online at <<http://www.iuscomp.org/gla/literature/schulte-noelke.htm>>); P Schlechtriem “The German Act to Modernize the Law of Obligations in the context of Common Principles and

Generally, the reform was triggered by the necessity to implement the European Consumer Sales Directive.⁶⁰ The most notable feature of the revised BGB is the establishment of a new system of rules regarding breach of contract.⁶¹ According to Zimmermann, the reform attempted to and succeeded in streamlining and harmonising general contract law and consumer contract law, and it effectively moved German contract law closer to modern European views.⁶²

The right to specific performance is traditionally the primary remedy of an aggrieved party in German contract law, and this position has been reinforced by the reform.⁶³ Parties to a contract are entitled as a matter of course to demand performance of their respective obligations *in specie*.⁶⁴ The right to specific performance is contained in § 241 of the BGB.⁶⁵ The provisions of the German Civil Code and Code of Civil Procedure referred to in this thesis are reproduced in the attached addendum.

Structures of the Law of Obligations in Europe" (2002) *Oxford University Comparative Law Forum* 2; T M J Möllers "European Directives on civil law – shaping a new German Civil Code" (2003) 18 *Tulane European & Civil Law Forum* 1.

⁵⁹ See in detail Schlechtriem above.

⁶⁰ See forward to B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) vii (by G Hirsch).

⁶¹ For a brief outline of changes brought about by the reform, see A Heldrich & G M Rehm "Modernisation of the German law of obligations: harmonisation of civil law and common law in the recent reform of the German Civil Code" in N Cohen & E McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 123 125-126.

⁶² See further Zimmermann *The New German Law of Obligations* 1-2.

⁶³ See D Coester-Waltjen "The new approach to breach of contract in German law" in N Cohen & E McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 135 138.

⁶⁴ See Zimmermann *The New German Law of Obligations* 43.

⁶⁵ The relevant provisions of the BGB and ZPO are reproduced in Addendum A (388-401 below).

§ 241 BGB states that the creditor is entitled, by virtue of an obligation, to claim performance from the debtor. This provision clearly indicates that actual performance of an obligation may be demanded, and that a judgment ordering specific performance may be issued by a court.⁶⁶ The debtor's duty to perform (*Leistungspflicht*) "results naturally from contracting".⁶⁷ The creditor's corresponding claim to specific performance of the contract is regarded as an inherent and standard right flowing from the contract.⁶⁸

It is only in highly limited circumstances that the creditor is allowed to claim damages (instead of specific performance).⁶⁹ The emphasis on the enforcement of the contract is also reflected in the requirement that a creditor has to grant the debtor a period of grace or *Nachfrist* before he can rely on secondary remedies, such as rescission and/or damages.⁷⁰ It is only after the expiry of this period (without result) that the creditor is entitled to claim damages instead of performance.⁷¹ Furthermore, the creditor is never confined to the remedy of specific performance; § 893(1) of the German Code of Civil Procedure or *Zivilprozessordnung* (ZPO) specifically provides that the right of a creditor to claim damages instead of (i.e. the equivalent of) performance is not limited by the provisions governing the remedy of specific performance.

As stated above there are, however, certain limited exceptions to the general rule of specific performance. First, according to the Roman principle *impossibilium nulla*

⁶⁶ See Zweigert & Kötz *Comparative Law* 472.

⁶⁷ M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014) 29.

⁶⁸ See Markesinis et al *German Law of Contract* 399, and Smits *Efficient Breach and the Enforcement of Specific Performance* 29: "[s]pecific performance is a logical derivative of contracts..."

⁶⁹ See Markesinis et al *German Law of Contract* 439-441. See also Szladits 1955 *Am J Comp L* 221.

⁷⁰ See Markesinis et al *German Law of Contract* 400.

⁷¹ See § 281(1) BGB (Addendum A 390).

obligatio est ("an obligation for the impossible cannot exist"),⁷² specific performance cannot be claimed when the debtor's obligation has become impossible.⁷³ This exception applies to all types of impossibility, not only to objective, excusing impossibility, but also to subjective impossibility, which does not exclude the debtor's liability.⁷⁴ The revised version of the BGB (in addition to the ZPO in certain instances) also makes it clear that the debtor may refuse to perform (i.e. only the duty to perform is excluded) insofar as the performance would require an effort which would be grossly disproportionate to the interest of the creditor in actual performance,⁷⁵ as well as in cases where the debtor has to render performance in terms of a contract of service (*Dienstvertrag*),⁷⁶ and performance cannot be reasonably expected from the debtor where he is expected to render the performance in person.⁷⁷ The exceptions to the creditor's right to specific performance do not interfere with his right to claim alternative remedies though, provided of course that the requirements for these remedies are met.⁷⁸

Notwithstanding these exceptions, German law still favours specific performance as the primary remedy and the BGB even sets incentives for performance. According to § 285, the creditor can claim the substitute which the debtor would receive through the act

⁷² Kaser *Roman Private Law* (tr R Dannenbring) 176. Cf text to n 30 para 7 2 2 below.

⁷³ See § 275(1) BGB (Addendum A 389). For further discussion see para 6 3 below.

⁷⁴ See Zimmermann *The New German Law of Obligations* 10, 44; and see esp para 6 3 below.

⁷⁵ See § 275(2) BGB (Addendum A 389). See further para 6 3 below.

⁷⁶ See further para 4 5 1 below.

⁷⁷ See further para 6 3 below (esp n 107 below).

⁷⁸ See Heldrich & Rehm "Modernisation of the German law of obligations: harmonisation of civil law and common law in the recent reform of the German Civil Code" in Cohen & McKendrick (eds) *Comparative Remedies for Breach of Contract* 131.

making his performance impossible.⁷⁹ It follows that the creditor can demand that the debtor surrenders any substitute performance or compensation received. For example, if the debtor who was suppose to deliver certain goods to the creditor sold the goods at a better price to another buyer, thereby making it (subjectively) impossible to perform his contract with the creditor, the debtor would have to pay the creditor what he received from the other buyer (or assign his claim against that buyer)⁸⁰ on the creditor's request. This regime therefore discourages so-called "efficient breaches".⁸¹

2 3 1 2 Specific performance as the primary remedy in Dutch law

The remedy of specific performance (*nakoming*) is the primary remedy for breach of contract in Dutch law.⁸² One of the leading principles of Dutch contract law is that parties to a contract are obliged to execute the obligations they have willingly entered into. This principle is not expressly included in the Dutch Civil Code or *Burgerlijk Wetboek* (BW),⁸³ but is implied in Article 6:248(1), which states that a contract has not only the legal effects agreed to by the parties, but also those which according to the nature of the contract result from the law, usage or the requirements of reasonableness and equity (*redelijkheid en billijkheid*).⁸⁴ Hartkamp expresses the view that "[t]he right to

⁷⁹ See § 285 BGB (Addendum A 391); and see Coester-Waltjen "The new approach to breach of contract in German law" in Cohen & McKendrick (eds) *Comparative Remedies for Breach of Contract* 138.

⁸⁰ See § 285 BGB (Addendum A 391).

⁸¹ Coester-Waltjen "The new approach to breach of contract in German law" in Cohen & McKendrick (eds) *Comparative Remedies for Breach of Contract* 138. See further on the theory of efficient breach para 3 4 2 below, and esp reference there to Smits *Efficient Breach and the Enforcement of Specific Performance*, showing that there are indications of a change in thinking in the civil law doctrine about "efficient breach".

⁸² J Hijma & M M Olthof *Compendium Nederlands Vermogensrecht* 8 ed (2002) nr 331.

⁸³ The relevant provisions of the BW are reproduced in Addendum A 401.

⁸⁴ See para 1 1 2 above; A S Hartkamp et al *Contract Law in the Netherlands* 2 rev ed (2011) 34; D Haas & C Jansen "Specific performance in Dutch law" in J Smits et al (eds)

specific performance arises directly from the obligation; it does not result from breach of contract".⁸⁵ The primary position of specific performance can thus be ascribed to the principle of *pacta sunt servanda*.⁸⁶ The primacy of specific performance is also reflected in the limited number of conditions the creditor has to satisfy to obtain an order for specific performance, and the few defences the debtor can raise against such an action, in comparison with the wide range of defences that can be raised against a claim for damages or rescission. For example, the debtor can raise the defence that he is not accountable or responsible for the non-performance (force majeure)⁸⁷ in response to a claim for damages, whereas this defence will not be effective in response to a claim for specific performance, though specific performance may no longer be useful.⁸⁸

⁸⁵ *Specific Performance in Contract Law: National and Other Perspectives* (2008) 11 19-20.

See also Hijma & Olthof *Compendium Nederlands Vermogensrecht* nr 88 & nr 300.

⁸⁶ See Haas "Searching for a basis of specific performance in the Dutch Civil Code" in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 172. See also Hijma & Olthof *Compendium Nederlands Vermogensrecht* nr 331; Asser/Hijma 5-I *Bijzondere Overeenkomsten* (2007) nr 373: "Het recht op nakoming berust op die overeenkomst – althans op de relevante daaruit voortgevloeide verbintenis – zelf; de schuldeiser behoeft niet te stellen of aan te tonen dat sprake is van een tekortkoming aan de zijde van zijn wederpartij".

⁸⁷ As Haas states: "Het recht op nakoming neemt een bijzondere positie in ten opzichte van de overige twee remedies, omdat het de meest directe uitdrukkingsvorm is van het beginsel dat contractuele afspraken geëerbiedigd moeten worden. Het recht op nakoming wordt in Nederland dan ook als de *primaire remedie* beschouwd. Schadevergoeding en ontbinding zijn *subsidiare remedies*" (*De Grenzen Van Het Recht Op Nakoming* doctoral thesis Vrije University (2009) 1-2). See also Hijma & Olthof *Compendium Nederlands Vermogensrecht* nr 331.

⁸⁸ Art 6:75 BW (Addendum A 404).

⁸⁹ See D Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) 342-343 (commentary by J M Smits); Haas & Jansen "Specific performance in Dutch law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 12. Compare also para 6 3 below.

Furthermore, the debtor can raise the defence that the non-performance is insignificant against both a claim for damages in lieu of performance⁸⁹ and a claim for rescission of the contract⁹⁰ by the creditor. But this defence is not effective against a claim for specific performance.⁹¹

When claiming specific performance, the creditor only has to prove that the parties concluded a contract and that the debtor's performance is due.⁹² Furthermore, Dutch law promotes specific performance claims by way of the legal requirement of a written notice, whereby the creditor must give the debtor a reasonable time to perform, before he can claim damages or rescind the contract.⁹³ It follows that the creditor must first place the debtor in default (*verzuim*) by written notice.⁹⁴ The creditor hereby draws the debtor's attention to the obligation that is to be performed and provides him with a further opportunity to perform in order to be released from his obligation under the

⁸⁹ Art 6:87(2) BW (Addendum A 405).

⁹⁰ Art 6:265 BW (Addendum A 405).

⁹¹ Haas & Jansen "Specific performance in Dutch law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 12.

⁹² This position is very similar to South African law. See in this regard Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 102: "the right to an order for specific performance is independent of the existence of a breach of contract by the defendant. It is derived solely from the agreement itself. Although a creditor will ordinarily take steps to obtain specific performance upon a breach by the debtor, the 'right' to an order for performance is juridically speaking not a remedy for breach." See also R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 545; Van der Merwe et al *Contract: General Principles* 4 ed (2012) 328; Hutchison & Pretorius *The Law of Contract in South Africa* 321; Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 52-54 and the authorities cited there.

⁹³ Asser/Hartkamp & Sieburgh 6-II *De Verbintenis in het Algemeen* (2009) nr 343.

⁹⁴ This position is very similar to what South African law calls *mora ex persona*.

contract.⁹⁵ The creditor may only resort to damages or rescission in the event that the debtor does not perform upon expiry of the notice period.⁹⁶ This procedure of *ingebrekstelling* thus demonstrates the primacy of specific performance in the hierarchy of contractual remedies in Dutch law.⁹⁷

Furthermore, Article 3:296 provides that unless the law, the nature of the obligation or a juridical act determines otherwise, the person who is obliged to give, to do or not to do something towards another, shall be ordered by the court to carry out this obligation upon the demand of the person to whom the obligation is owed. This Article is considered to be wide-reaching,⁹⁸ since it also applies to obligations resulting from the law of delict and duties arising from property law and intellectual property law, and not only to contractual obligations.⁹⁹ However, it only gives the creditor a procedural right to enforce his right to performance in court.¹⁰⁰

The only reference to a substantive right to specific performance can be found in Book 7, which deals with specific contracts such as sale and construction contracts.¹⁰¹ It is

⁹⁵ This procedure is comparable to the period of grace or *Nachfrist* under German law – see para 2 3 1 1 above.

⁹⁶ Of course, the requirement of a written notice will not be applicable if the parties specified a date for performance; non-performance by that date allows the creditor to claim damages or terminate instantly (see Haas & Jansen “Specific performance in Dutch law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 13).

⁹⁷ 11-13.

⁹⁸ See Haas “Searching for a basis of specific performance in the Dutch Civil Code” in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 168-169.

⁹⁹ See Hijma & Olthof *Compendium Nederlands Vermogensrecht* nr 299.

¹⁰⁰ Nr 88 & nr 331; and see Asser/Hijma 5-I (2007) nr 372: “De rechtsvordering berust op een processuele bevoegdheid...”

¹⁰¹ See Art 7:21 & Art 7:759(1) BW respectively (Addendum A 405, 407).

peculiar that Book 6, which deals with the law of obligations in general, does not grant the creditor a substantive right to specific performance, considering that it does contain provisions granting the creditor a substantive right to the remedy of damages and the right to cancel the contract in case of breach.¹⁰² According to Haas, the Dutch legislator did not include an explicit provision granting the creditor a substantive right to specific performance, because this right is regarded as an essential feature of the contract itself. It is surprising that even though Dutch law attaches so much weight to the principle of *pacta sunt servanda* and the concomitant right to specific performance,¹⁰³ it was not considered necessary to reinforce it by creating a statutory basis for it. In his research, Haas argues that an explicit statutory provision granting the right to specific performance in Book 6 of the BW would improve the coherence of legal remedies in Dutch law, and that this would also provide a legal basis for the important *pacta sunt servanda* principle, as well as align Dutch law with other continental European legal systems, which entrench a right to specific performance in their Civil Codes.¹⁰⁴

Furthermore, Article 3:299 of the BW provides that an order for specific performance may compel the debtor to act or not to act and that the creditor does not have to be satisfied with monetary compensation.¹⁰⁵ However, as mentioned above, some exceptions to the general principle have been recognised in Article 3:296(1) BW.¹⁰⁶ For example, it is accepted that an order for specific performance will not be granted when

¹⁰² See Art 6:74 & Art 6:265 BW respectively.

¹⁰³ Stolp describes the right to specific performance as the “ruggengraat” of Dutch contract law (see M M Stolp *Ontbinding, Schadevergoeding en Nakoming: De Remedies Voor Wanprestatie in Het Licht van de Beginselen van Subsidiariteit en Proportionaliteit* (2007) 186).

¹⁰⁴ See D Haas *De Grenzen Van Het Recht Op Nakoming* doctoral thesis Vrije University Amsterdam (2009) 338. Examples of such provisions include Art 1184(2) of the French Civil Code and § 241 of the German BGB (see Zweigert & Kötz *Introduction to Comparative Law* 472-479).

¹⁰⁵ See Hartkamp et al *Contract Law in the Netherlands* 141.

¹⁰⁶ See further paras 4 6 & 5 4 below.

the obligation is of a highly personal nature.¹⁰⁷ Non-performance of these obligations would rather be compensated by damages under Dutch law on the basis of the maxim *nemo praecise cogi ad factum*.¹⁰⁸ According to Article 6:3 read with Article 3:296(1), a claim for specific performance of a natural obligation will also be excluded on the basis of the nature of the obligation.¹⁰⁹ Furthermore, if performance has become impossible an order to perform will not be granted.¹¹⁰ The concept of impossibility under Dutch law refers to both objective and subjective impossibility.¹¹¹ In these cases the creditor will have to resort to a claim for damages or rescission, or both of these remedies.¹¹² These exceptions clearly resemble those identified under German law.

It was decided as early as 1956 that the Dutch courts have no discretion to refuse an order for specific performance when all the conditions for allowing such a claim have been met.¹¹³ However, the Dutch Supreme Court held in 2001¹¹⁴ that it is in the courts' discretion to refuse specific performance on the basis of reasonableness and equity.¹¹⁵ The Supreme Court emphasised that deciding such a claim requires a balancing of the

¹⁰⁷ See further para 4 6 below.

¹⁰⁸ See Haas & Jansen "Specific performance in Dutch law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 16; Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 460; and see para 2 2 1 above.

¹⁰⁹ See Haas & Jansen "Specific performance in Dutch law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 11 17. See further para 4 6 below.

¹¹⁰ Hijma & Olthof *Compendium Nederlands Vermogensrecht* nr 88.

¹¹¹ See further para 6 2 3 below.

¹¹² See Hartkamp et al *Contract Law in the Netherlands* 142.

¹¹³ HR 21 December 1956, NJ 1957, 126 (Meegdes/Meegdes).

¹¹⁴ HR 5 January 2001, NJ 2001, 79 (Multi Vastgoed/Nethou).

¹¹⁵ This concept is codified in Art 6:248(2) BW.

mutual interests of the parties.¹¹⁶ Hence, a court may refuse to enforce a contract where the contract will be extremely disadvantageous and unreasonable to the debtor.¹¹⁷ However, specific performance remains the primary remedy for breach and courts will only derogate from this principle in exceptional circumstances.¹¹⁸

2 3 2 Specific performance in common law: early development

When considering the availability of specific performance in the common law, it is useful to begin with a review of the development of the courts of equity, as it was these courts that introduced specific performance into the common law. Their primary function was to alleviate hardship by extending remedies that were not available “at law” and to provide adequate compensation to the aggrieved party. It follows that a party could only have recourse to an equitable remedy if the remedy available “at law” did not provide adequate relief.¹¹⁹ This complementary function of equity was embodied in the rule that “equity follows the law”. It meant that equity could only interfere when the rules of law were insufficient to protect the party’s rights. In fourteenth century England, a set of rules for granting specific performance developed and a separation between law and equity evolved.¹²⁰ The Courts of Chancery began to apply equity in deciding matters

¹¹⁶ HR 5 January 2001, NJ 2001, 79 (Multi Vastgoed/Nethou). See para 6 3 (esp text to n 142) below.

¹¹⁷ See eg HR 16 January 1981, NJ 1981, 312 (X/Y) (cf para 6 3 below).

¹¹⁸ See Haas & Jansen “Specific performance in Dutch law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 19-20. See also para 6 3 below.

¹¹⁹ See generally R A Newman *Equity and Law: A Comparative Study* (1961) 11-20 and more specifically, W S Holdsworth *A History of English Law* (1924) 294 ff; H Potter *An Historical Introduction to English Law and Its Institutions* 3 ed (1948) 578; J Gordley & A T Von Mehren *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (2006) 527-528.

¹²⁰ See J B Ames *Lectures on Legal History* (1913) 247-250; J N Pomeroy Jr *A Treatise on the Specific Performance of Contracts* 3 ed (1926) 32-37.

and the Chancellor, in exercising his equitable powers, observed the requirements of conscience. Since these requirements varied depending on the Chancellor's personal beliefs, the power to grant specific performance was exercised in a discretionary manner.¹²¹ This court was described as being a "court of conscience", rather than of law and defendants could be forced to do whatever good conscience required in the circumstances.¹²² Since equity could only interfere when the redress available at law was inadequate, the remedy of specific performance acquired an exceptional character, with damages being the primary remedy.¹²³

The early English common law therefore adopted an approach comparable to that of classical Roman law. As Sir Edward Fry stated:

"In like manner the Common Law of England made no attempt actually to enforce the performance of contracts but gave the injured party only the right to satisfaction for non-performance."¹²⁴

The reason for the primacy of damages in the English common law appears to be the same as that of Roman law – the English courts, too, were reluctant to compel persons to perform acts other than the payment of money.¹²⁵ Therefore, the only legal right afforded to the aggrieved party was a claim for damages, but this remedy proved to be

¹²¹ See Potter *An Historical Introduction to English Law and Its Institutions* 550 ff.

¹²² See J H Baker *The Oxford History of the Laws of England VI* (2004) 46-48, 174; *An Introduction to English Legal History* 4 ed (2002) 105-115. See also E A Farnsworth *An Introduction to the Legal System of the United States* 4 ed (2010) 103, and *Lumley v Wagner* (1852) De GM & G 604 619.

¹²³ See further para 3 1 below.

¹²⁴ See G R Northcote *A Treatise on the Specific Performance of Contracts by Sir Edward Fry* 6 ed (1921) 4 § 7.

¹²⁵ See E A Farnsworth "Legal remedies for breach of contract" 1970 *Colum LR* 1145 1151-1153; Beinart 1952 *SALJ* 158.

inadequate in many circumstances to achieve justice between the parties.¹²⁶ There were some types of contract in which money did not provide adequate compensation upon breach.¹²⁷ For example, damages often could not adequately compensate someone for the inability to own a particular piece of land.¹²⁸ For that reason, the equity courts gradually developed rules which in very severe cases tempered the rigid principle that claims for specific performance were inadmissible. Under these rules, a plaintiff could exceptionally claim specific performance if he could persuade the court that the remedies available to him at law, especially damages, were inadequate.¹²⁹ This equitable jurisdiction was unique to the equity courts until section 24 of the Supreme Court of Judicature Act 1873, conferred the same jurisdiction to all divisions of the High Court.¹³⁰ The distinction between the jurisdictions of the courts of law and of equity was thus abolished, but the remedy of specific performance was one of the additions to the substantive law which remained.¹³¹ In both England and the United States today all courts concurrently apply the rules developed “at law” and “in equity”.¹³² The principle,

¹²⁶ See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 per Kay LJ 126 (para 3 2 n 6 below).

¹²⁷ Beale et al (eds) *Chitty on Contracts* 1907 ff; M P Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 16 ed (2012) 796-797.

¹²⁸ See W F Walsh *A Treatise on Equity* (1930) § 60. The idea that a purchaser should be able to obtain specific performance of a contract for the sale of land because damages are inadequate has often been criticized (see para 3 2 1 1 below).

¹²⁹ Zweigert & Kötz *Comparative Law* 480; Farnsworth *An Introduction to the Legal System of the United States* 103.

¹³⁰ See A E Randall *Leake on Contracts* (1921) 839; Lord Mackay of Clashfern (ed) *Halsbury's Laws of England* 4 ed reissue vol 16(2) (2003) para 496. See also *Warner v Murdoch, Murdoch v Warner* (1877) 4 Ch D 750 752.

¹³¹ See J H Baker *An Introduction to English Legal History* 3 ed (1990) 232; M J Falcón y Tella *Equity and Law* (2008) 67; Farnsworth *An Introduction to the Legal System of the United States* 104-105; J E Martin *Hanbury & Martin's Modern Equity* 19 ed (2012) 34-35.

¹³² Falcón y Tella *Equity and Law* 62; Zweigert & Kötz *Comparative Law* 480; Farnsworth *An Introduction to the Legal System of the United States* 104.

however, remains that a claim for specific performance is exceptional and even today it is constantly emphasised that an order for specific performance of a contract remains in the complete discretion of the court.¹³³

The common-law approach to the remedy of specific performance will now be discussed with reference to the position in both English law and American law. These two systems follow more or less the same approach to awarding specific performance. They depart from the same principle: both systems regard damages as the norm and specific performance as the deviation, but there are also some divergences, which cannot be ignored. Most authors treat the two systems as one and the same when discussing the remedy of specific performance, but many fail to mention the nuanced difference in application of the general principle of adequacy of damages.¹³⁴

2 3 2 1 Specific performance as a secondary remedy in English law

According to modern English law, a plaintiff has no right to specific performance except so far as the court may see fit to grant it in accordance with settled principles.¹³⁵ The scope of the remedy is much more limited; it is seen as an exceptional remedy for breach of contract, which can only be awarded by a court in the exercise of its equitable discretion.¹³⁶ The only obligations specifically enforceable are those aimed at payment of an agreed sum of money, but a claim for an agreed sum is distinct from a claim for specific performance.¹³⁷

¹³³ Zweigert & Kötz *Comparative Law* 480. See further para 3 2 below.

¹³⁴ See eg the seminal article by R Pound "The development of American Law and its deviation from English law" (1951) 67 *LQR* 49. See further para 3 2 below.

¹³⁵ See list below.

¹³⁶ See para 3 2 below.

¹³⁷ For England, see Sir John Salmon & J Williams *Principles of the Law of Contracts* 2 ed (1945) 593; G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) 62; E Kendrick *Contract Law* 8 ed (2009) 349; Beatson et al *Anson's Law of Contract* 573. For the US, see J O Honnold *Uniform Law for International Sales under the 1980*

As mentioned above, an important factor in determining whether or not a court will grant specific performance of a contract is the existence and adequacy of a remedy at law.¹³⁸ The principal remedy afforded by the courts for breach of contract is damages, and ordinarily this form of relief is preferred. However, where the legal remedy of damages is inadequate, or is insufficient to do complete justice between the parties, it will be in the discretion of the court to grant specific performance.¹³⁹

This discretion is exercised according to settled rules and principles,¹⁴⁰ and specific circumstances have been identified where an order for specific performance would not be granted. These circumstances are the following.¹⁴¹

- i. Damages provide an adequate remedy;¹⁴²
- ii. The order could cause severe hardship;¹⁴³
- iii. The contract requires constant supervision;¹⁴⁴

United Nations Convention 4 ed (2009) 297; Perillo (ed) *Corbin on Contracts* § 1142. See also text to n 199 para 2 3 2 2 below & para 3 2 n 25 below.

¹³⁸ The inadequacy-of-damages criterion is discussed in detail in para 3 2 below.

¹³⁹ See Peel *Treitel's Law of Contract* 1099.

¹⁴⁰ Cockrell "Breach of contract" in Zimmermann & Visser (eds) *Southern Cross* 326.

¹⁴¹ These principles were adopted from the work of Sir John Salmond and James Williams: *Principles of the Law of Contracts* 2 ed (1945) 596-600. See generally Peel *Treitel's Law of Contract* 1099 ff; Beale et al (eds) *Chitty on Contracts* 1917 ff.

¹⁴² In *Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279, Lord Selbourne famously declared (at 284) that "the court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice". See also *Beswick v Beswick* [1968] AC 58 90, and para 3 2 below.

¹⁴³ See *Patel v Ali* [1984] Ch 283 (para 6 2 below). See also H Beale et al *Cases, Materials and Text on Contract Law* (2010) 885-887. This criterion is discussed in detail in ch 6.

¹⁴⁴ See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 (text to n 39 para 5 2 below); *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898 (para 5 2 below). Certain exceptions to this general rule has been recognised in practice, eg where the work is reasonably defined, the plaintiff has a

- iv. Performance consists of a personal service;¹⁴⁵
- v. The contract is unconscionable or illegal;¹⁴⁶
- vi. The contract is too vague to be enforced;¹⁴⁷
- vii. The plaintiff acted unfairly or unconscionably (i.e. has no “clean hands”);¹⁴⁸
- viii. Specific performance is impossible;¹⁴⁹
- ix. The party in breach would be inadequately protected should the aggrieved party consequently be in breach.¹⁵⁰

substantial interest in the performance of the contract which cannot be adequately compensated by an award of damages, and the land on which the works are to be erected is in the possession of the defendant. See in this regard *Wolverhampton Corporation v Emmons* [1901] 1 QB 515; *Molyneux v Richard* [1906] 1 Ch 34. American courts, on the other hand, seem to follow a more liberal approach in this respect, see *Jones v Parker* (1895) 163 Mass. 564. This criterion is discussed in detail in ch 5.

¹⁴⁵ Discussed in detail in ch 4.

¹⁴⁶ As in South African law, this remedy obviously presupposes a valid agreement between the parties.

¹⁴⁷ See para 5 2 below.

¹⁴⁸ See M Chen-Wishart *Contract Law* 4 ed (2012) 543 and examples mentioned there.

¹⁴⁹ Cf text to n 125 para 6 3 below.

¹⁵⁰ It was once maintained that specific performance would not be granted to the aggrieved party unless it could also have been ordered against him at the time the contract was concluded (more often referred to as the requirement of “mutuality in remedy”). See *Clifford v Turrel* (1841) 1 Y & C Ch Cas 138; *Blackett v Bates* (1865) 1 Ch App 117 per Lord Cranworth LC: “The court does not grant specific performance unless it can give full relief to both parties” (meaning the remedy can only be granted if it will secure performance by the plaintiff as well as by the defendant). This doctrine was discredited, and it is clear from *Price v Strange* [1978] Ch 337 367, that the plaintiff is only prevented from claiming specific performance if the defendant, who is compelled to perform, would be inadequately protected if the plaintiff subsequently breaches. Burrows rightly criticises the reformulated version of the requirement, because it seems too “pro-defendant”: it would have already been concluded that damages will not adequately compensate the

In the light of this extensive list of limitations, it may well be asked when specific performance will be awarded in the common law.¹⁵¹ Here the most prominent class of contracts that will be specifically enforced is the contract for the sale of land. These contracts have always been enforced, because the contract gives the purchaser a right to a particular piece of land, and monetary compensation would not provide adequate relief, due to the specific qualities of the piece of land, which are considered to be difficult to quantify.¹⁵²

This justification of granting specific performance on the basis that the property is unique has, however, been criticised, mainly because it is not the case in every agreement to purchase land. The purchaser may, for example, intend to immediately resell the property or retain it as a long-term investment, without having a particular interest in the unique qualities of the land.¹⁵³

In the case of contracts involving movables, equity would traditionally only grant specific performance with respect to goods that were unique in character.¹⁵⁴ The reasoning behind this was that with generic goods, the aggrieved party had an adequate remedy

plaintiff, yet the court is prepared to deny him an admittedly more appropriate and just remedy, because of the mere risk that the defendant may not be adequately compensated, should the plaintiff fail to perform completely. See A Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 491-493; Chen-Wishart *Contract Law* 546-547; Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 799. See for American authority, G Klass *Contract Law in the USA* (2010) 216: "most courts have dropped the old requirement of mutuality of remedy". See also comment "Limitations on the availability of specific performance" published in (1950) 17(2) *U Chi LR* 409 415.

¹⁵¹ The most recognised of which will be discussed in the following chapters.

¹⁵² See Beale et al (eds) *Chitty on Contracts* 1908-1909.

¹⁵³ See para 3 2 1 1 below.

¹⁵⁴ See further para 3 2 1 2 below.

in damages, because he could acquire the goods elsewhere.¹⁵⁵ And with unique goods it would be difficult to assess damages as the object, for example an heirloom, could be more valuable to the plaintiff than the object's actual market-related value, or there may not even be similar objects in the market to compare the heirloom and estimate a value. Ultimately, the amount of damages would be uncertain and speculative, which makes damages inadequate.

However, the enactment of the Sale of Goods Act in 1979 widened the scope of the remedy of specific performance. Section 52 gives the court a discretion to order specific performance in relation to obligations to deliver "specific or ascertained" goods. The discretion is thus no longer limited to cases in which the plaintiff could not get a satisfactory substitute because the goods were regarded as unique. A court can also order specific performance of a contract for the sale of goods that have been ascertained.¹⁵⁶ English courts have also granted specific performance in cases of "commercial uniqueness",¹⁵⁷ i.e. in cases where the goods were purely generic and thus fell outside of the scope of section 52 of the Sale of Goods Act 1979.¹⁵⁸ For example, if obtaining a substitute involves difficulty, it gives the goods a character of commercial

¹⁵⁵ See Beale et al (eds) *Chitty on Contracts* 1911. In *Cohen v Roche* [1927] 1 KB 169, eg, the court refused specific performance to a buyer of a set of Hepplewhite chairs because they were considered to be "ordinary articles of commerce and of no special value or interest".

¹⁵⁶ Section 61(1) of the Sale of Goods Act 1979 (as amended by s 2(a) of the Sale of Goods (Amendment) Act 1995) defines "specific goods" as goods "identified and agreed on at the time a contract of sale is made". The Act does not define "ascertained", but it seems to mean "identified in accordance with the agreement after the time a contract of sale is made" (*In Re Wait* [1927] 1 Ch 606 630), or identified in any other way (*Thames Sack & Bag Co Ltd v Knowles* (1918) 88 LJKB 585 588). See also Burrows *Remedies for Torts and Breach of Contract* 459 ff; Beatson et al *Anson's Law of Contract* 576-577.

¹⁵⁷ A term coined by G H Treitel – see para 3 2 1 2 n 86 below.

¹⁵⁸ See further R J Sharpe *Injunctions and Specific Performance* (1983) 325 and A Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 459 ff.

uniqueness, which could influence a court to grant specific performance even though the situation is not explicitly covered by section 52 of the Sale of Goods Act 1979.¹⁵⁹

It was mentioned earlier that English law has always been reluctant to recognise the specific enforceability of contracts for the sale of ordinary personal property.¹⁶⁰ American law, as we will see in the next section, is more disposed to the idea. The courts in the United States have extended the remedy of specific performance to buyers of generic goods whose need for the actual supply was particularly urgent or who would not be able to get a satisfactory substitute¹⁶¹ on the basis of the appropriateness of the remedy in the circumstances.¹⁶² English courts are slower in accepting this view, but there are some indications that they are moving towards such an approach.¹⁶³ These will be discussed in more detail in the following chapter.¹⁶⁴

2 3 2 2 Specific performance as a secondary remedy in American law

American law also departs from the traditional common-law principle that damages is the standard and preferred remedy for breach of contract while specific performance is an exceptional remedy. In like manner, specific performance is considered to be an

¹⁵⁹ See A S Burrows "Specific performance at the crossroads" (1984) 4 *Legal Studies* 102 103; Beale et al (eds) *Chitty on Contracts* 1915-1917. See further para 3 2 1 2 below and the authorities cited there, esp *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576; *Howard E Perry & Co v British Railways Board* [1980] 1 WLR 1375 and *Thames Valley Power Ltd v Total Gas and Power Ltd* [2006] 1 Lloyd's Rep 441.

¹⁶⁰ See para 1 1 2 above.

¹⁶¹ See text to nn 192-194 para 2 3 2 2 below. See also paras 3 2 1 2 & 3 4 1 below.

¹⁶² See text to n 99 para 3 2 1 2 below.

¹⁶³ The inadequacy-of-damages requirement was strongly challenged in the famous case of *Beswick v Beswick* [1968] AC 58. See in particular, the speech of Lord Pearce (with whom Lord Hudson agreed), who preferred to focus on the question of whether the more "appropriate" remedy was that of specific performance (see para 3 2 1 2 below). See also Burrows 1984 *Legal Studies* 102-107.

¹⁶⁴ See para 3 2 below.

equitable remedy,¹⁶⁵ which is only available if damages would not provide adequate relief.¹⁶⁶ Only then will it be in the discretion of the court to grant specific performance.¹⁶⁷ The system is therefore “not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach”.¹⁶⁸ As indicated in the previous section, it seems that US courts are more readily prepared to grant specific performance as a remedy for breach, even though they depart from the same principle that specific performance is considered the exception rather than the rule. Farnsworth, for example, maintains that the modern approach in American law is to compare remedies to determine which is more effective in protecting the aggrieved party’s interest. “The concept of adequacy has thus tended to become relative, and the comparison more often leads to granting equitable relief than was historically the case.”¹⁶⁹

However, the adequacy of damages remains the definitive factor.¹⁷⁰ Subsection 1 of § 359 of the American Law Institute’s *Restatement (Second) of Contracts*¹⁷¹ specifically

¹⁶⁵ See G R Northcote *A Treatise on the Specific Performance of Contracts* by Sir Edward Fry 6 ed (1921) § 3; J Pomeroy Jr *A Treatise on the Specific Performance of Contracts* 3 ed (1926) §§ 1-3; W H E Jaeger *Williston on Contracts* 3 ed (1968) vol 11 § 1418. See also *Klein v Shell Oil Co* 386 F.2d 659 (8th Cir. 1967).

¹⁶⁶ See E A Farnsworth *Contracts* 3 ed (1999) 773.

¹⁶⁷ See *Lee v Crane* 120 So. 2d 702, 703 (1960). Although certain kinds of contracts (such as contracts for the sale of land) are as a general rule specifically enforced, courts do not feel bound by traditional categories and will sometimes exercise their discretion to deny specific performance of an agreement that would normally be specifically enforceable – see eg *Paddock v Davenport* 107 NC 710 (1890) where specific performance of a contract for the sale of an interest in land (trees standing on the defendant’s land were sold to plaintiff, who bought them with a view to their severance from the soil) was denied on the ground that damages would adequately compensate the plaintiff.

¹⁶⁸ See Farnsworth 1970 *Colum LR* 1147.

¹⁶⁹ Farnsworth *Contracts* 773. See eg paras 3 2 1 2 & 3 4 1 below.

¹⁷⁰ J M Perillo *Calamari and Perillo on Contracts* 6 ed (2009) 556.

provides that specific performance will not be ordered if damages would be adequate to protect the expectation interest of the injured party. Thus, where the aggrieved party can acquire a satisfactory equivalent of what he contracted for from some other source, specific performance will most likely be denied.¹⁷²

As in English law,¹⁷³ the rule was that specific performance of a contract for the sale of ordinary goods was not available because damages, based on the market price, would enable the buyer to purchase substitute goods, thereby providing him with an adequate remedy.¹⁷⁴ However, the continued demand by scholars for the expansion of the availability of specific performance necessitated reform and eventually resulted in the enactment of the Uniform Sales Act 1906, which was effective in most American jurisdictions by the 1920's.¹⁷⁵ It determined in § 68 that "[w]here the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract be performed specifically, without giving the seller the option of retaining the goods on payment of damages..."

This provision reflects the initial intent of the legislature to liberalise the rules regarding the granting of the remedy, by providing a wide discretion to the courts to order specific performance.¹⁷⁶ It was succeeded by § 2-716(1) of the US Uniform Commercial

¹⁷¹ Official text with comments is accessible via Westlaw International. The provisions of the *Restatement (Second) of Contracts* referred to in this thesis are reproduced in Addendum A 382-385 (official comments & illustrations excluded).

¹⁷² For further discussion see para 3 2 below.

¹⁷³ Compare discussion of s 52 of the Sale of Goods Act 1979 above.

¹⁷⁴ See Farnsworth 1970 *Colum LR* 1154-1155.

¹⁷⁵ See H Greenberg "Specific performance under section 2-716 of the UCC" (1982) 87 *Commercial Law Journal* 583 595.

¹⁷⁶ In *Hunt Foods Inc v O'Disho* 36. 98 F. Supp. 267 (N.D. Cal.1951), the court stated (270) that the legislature "unquestionably had in mind the liberalization of the law regarding specific performance of contracts for the sale of chattels". See M Handler "Specific

Code,¹⁷⁷ which states that: “[s]pecific performance may be decreed where the goods are unique or in other proper circumstances”.¹⁷⁸ This provision only deals with the situations in which a buyer is entitled to enforce performance, while § 2-709 of the UCC (discussed below) covers situations in which a seller is entitled to claim the price. The term “may” in § 2-716(1) indicates that the buyer does not have the right to claim specific performance, but rather that it is within the court’s discretion to grant specific performance. The scope of this discretionary power is further extended in the UCC by the inclusion of the phrase “other proper circumstances”. Here, the legislature has left it to the courts to determine the circumstances in which specific performance would be a proper remedy.¹⁷⁹ Clearly, this provision departs from the more circumscribed rule under § 68 of the Uniform Sales Act and further extends the availability of specific performance as a remedy for breach of contracts for sale of goods in the United States.¹⁸⁰

As indicated, § 2-716(1) of the UCC refers to “uniqueness” as an example of a situation where specific performance may be granted.¹⁸¹ The case law that followed the enactment of this provision reveals that the courts have interpreted the term “unique”

performance under section 2-716(1) of the Uniform Commercial UCC – What other proper circumstances?” (1971) 33 *U Pitt LR* 243 245; E Axelrod “Specific performance of contracts for sales of goods” (1982) 7 *Vermont Law Review* 249 254.

¹⁷⁷ Replacing the American Law Institute’s *Restatement (Second) of Contracts* in relation to the sale of goods/moveable property. Official text with comments accessible via Westlaw International. The provisions of the UCC referred to in this thesis are reproduced in Addendum A 385-388.

¹⁷⁸ On the background and drafting of this provision, see Axelrod 1982 *Vermont Law Review* 249-272 and Greenberg 1982 *Commercial Law Journal* 583-599.

¹⁷⁹ Handler 1971 *U Pitt LR* 243.

¹⁸⁰ See Perillo Calamari and Perillo on *Contracts* 554. See also text to nn 100 ff para 3 2 1 2 below.

¹⁸¹ See A T Kronman “Specific performance” (1978) 45 *U Chi LR* 351 355-365. See further para 3 2 1 2 below.

rather widely.¹⁸² Goods may be unique in nature, or they may be unique because of surrounding circumstances.¹⁸³ Traditionally, heirlooms, works of art and antiques were regarded as unique. Recently however, a broader meaning has been introduced by including output¹⁸⁴ and requirements¹⁸⁵ contracts as unique when they involve a particular source or market.¹⁸⁶ Courts also interpret uniqueness based on the circumstances under which the contract is to be performed. Thus, goods that are not considered to be unique *per se* may be considered so for the purposes of enforcing the specific contract.¹⁸⁷ This is very similar to the concept of “commercial uniqueness” that have prompted English courts to enforce contracts in situations where it was difficult to find substitute goods in the market due to surrounding circumstances.

The phrase “other proper circumstances” refers to situations where it is within the court’s discretion to allow specific performance based on the facts of the case.¹⁸⁸ These

¹⁸² See Greenberg 1982 *Commercial Law Journal* 595-596. See further para 3 2 1 2 below.

¹⁸³ See para 3 2 1 2 below.

¹⁸⁴ An output contract is a contract in which a producer agrees to sell its entire production to the buyer, who in turn agrees to purchase the entire output, whatever that is. For examples, see *Feld v Henry S Levy & Sons Inc* 335 N.E.2d 320 (NY 1975); *Technical Assistance International Inc v United States* 150 F.3d 1369 (US Court of Appeals 1998).

¹⁸⁵ A requirements contract is a contract in which one party agrees to supply as much of a good or service as is required by the other party, and in exchange the other party expressly or implicitly promises that it will obtain its goods or services exclusively from the first party. For examples, see J Gordley (ed) *The Enforceability of Promises in European Contract Law* (2001) 193 ff. See also para 3 2 1 2 n 101 below.

¹⁸⁶ See Farnsworth *Contracts* 773; Perillo *Calamari and Perillo on Contracts* 555; § 2-716 UCC, cmt 2. See further para 3 2 1 2 below.

¹⁸⁷ § 2-716 UCC, cmt 2 clearly states that uniqueness should be determined having regard to the circumstances surrounding the contract. By stating this rule, the UCC incorporates what was practiced by US courts for a long time. See Greenberg 1982 *Commercial Law Journal* 596-599. See further para 3 2 1 2 below.

¹⁸⁸ See Handler 1971 *U Pitt LR* 249. See also para 3 2 1 2 below.

situations are determined on the basis of the possibility of replacing the goods.¹⁸⁹ This means that “other proper circumstances” also include situations where it is not easy to find substitute goods in the market. For example, in 1973, when the price of cotton increased significantly, a US court ordered specific performance of a contract for the sale of cotton because substitute goods could not be obtained.¹⁹⁰ US courts have also granted specific performance of contracts for the supply of fuel when the price of fuel increased drastically, making it very expensive to obtain a substitute.¹⁹¹ It is important to note however, that the degree to which it is possible to replace the goods is not the only factor the courts consider in this regard. The quality of substitute goods is also taken into consideration.¹⁹² It may be possible to find goods of the same kind in the market, but courts have granted specific performance because the quality of the replacement goods was inferior.¹⁹³ In such a case, it is considered unfair to award damages and not specific performance.¹⁹⁴

The seller’s right to payment of the price, on the other hand, is governed by § 2-709 of the UCC.¹⁹⁵ The seller has the right to receive the price when goods are accepted and received by the buyer, and when goods perish after the risk of loss has passed to the

¹⁸⁹ See J M Catalano “More fiction than fact: the perceived differences in the application of specific performance under the United Nations Convention on Contracts for the International Sale of Goods” (1997) 71 *Tulane LR* 1807 1825. See also para 3 2 1 2 below.

¹⁹⁰ See *Bolin Farms v American Cotton Shippers Association* 370 F. Supp. 1353 (W.D. La. 1974); Greenberg 1982 *Commercial Law Journal* 583.

¹⁹¹ See *Eastern Airlines Inc v Gulf Oil Corp* 415 F. Supp. 429 (S.D. Fla. 1975); Greenberg 1982 *Commercial Law Journal* 583.

¹⁹² See S Walt “For specific performance under the United Nations Sales Convention” (1999) 26 *Texas International Law Journal* 211 218.

¹⁹³ See *Copylease Corp of America v Memorex Corp* 408 F. Supp. 758 (S.D.N.Y. 1976).

¹⁹⁴ See Walt 1999 *Texas International Law Journal* 225; Catalano 1997 *Tulane LR* 1828.

¹⁹⁵ See Addendum A 386 below.

buyer.¹⁹⁶ In the case of goods that are not delivered, the seller can require performance if he is unable to resell the goods after a reasonable effort or when it is clear from the circumstances that efforts to resell will yield no result.¹⁹⁷ The term “specific performance” is not used in the provisions regarding the payment of the price.¹⁹⁸ This reflects the fact that payment of the price by the buyer is not seen as specific performance in common-law systems.¹⁹⁹ It should be noted that the situation is different in civil law, where performance of the obligation to pay the contractual price is seen as specific performance.²⁰⁰

Even though US courts follow a more liberal approach, specific performance remains a subsidiary remedy. Apart from the adequacy of damages criterion, there are also certain defined cases when the remedy of specific performance will not be available. Most of which resemble those identified under the English law.²⁰¹ It is accepted that a court will not grant specific performance to enforce a contract unless the terms of the contract are certain, if it would burden the enforcement or supervision of the contract, if the contract involves an obligation to provide a personal service or if specific enforcement of the contract will lead to unfairness.²⁰² Thus, the discretion of US courts to grant specific performance is also exercised according to settled rules.²⁰³ Furthermore, based on the

¹⁹⁶ See E A Peters “Remedies for breach of contract relating to the sale of goods under the Uniform Commercial UCC: a roadmap for article 2” (1963) 73 *Yale LJ* 199 241.

¹⁹⁷ See Honnold *Uniform Law for International Sales Under the 1980 United Nations Convention* 297-298.

¹⁹⁸ See § 2-709 UCC.

¹⁹⁹ See Dawson 1959 *Mich LR* 496.

²⁰⁰ 501. Compare also South African law: n 7 para 5 1 below, and distinction between monetary and non-monetary obligations drawn by certain international instruments in para 2 3 3 below.

²⁰¹ See para 3 2 below.

²⁰² See Farnsworth *Contracts* 778-783. See further para 5 3 below.

²⁰³ The mutuality principle has also been discredited under American law, because it was based on the notion that a party in breach should not be compelled to perform without the

same arguments advanced under English law, contracts to convey land are singled out for special treatment and are considered to be specifically enforceable. The reasons for allowing specific performance in such instances are also criticised though.²⁰⁴

2 3 3 Specific performance in various international instruments

As mentioned earlier, the UN Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and the Common European Sales Law (CESL), all determine that the debtor should specifically perform his obligations in case of breach.²⁰⁵ What follows is a more comprehensive analysis of their relevant provisions.

2 3 3 1 Specific performance under the CISG

The United Nations Convention on Contracts for the International Sale of Goods is a multilateral treaty that provides for a uniform international sales law.²⁰⁶ As of July 2014 it

assurance that the agreed exchange will be rendered in return, which could be accomplished by requiring security instead. See American Law Institute's *Restatement (Second) of Contracts* § 363, cmt c. See also Ames *Lectures on Legal History* 370. However, it was stated in *Morad v Silva* 117 N.E.2d 290 (Mass. 1954) that "even under the rule which rejects the mutuality principle specific performance may be refused 'if a substantial part of the agreed exchange ... is not well secured'". The principle has also been reformulated, and it still only applies to the extent that the plaintiff's performance cannot be secured.

²⁰⁴ See Farnsworth *Contracts* 776. See also para 3 2 1 1 below.

²⁰⁵ See para 1 1 2 above. See also V Heutger & J Oosterhuis "Specific performance within the hierarchy of remedies in European contract law" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 147 152.

²⁰⁶ The relevant provisions of the CISG are reproduced in Addendum A 407. The complete UN document is available online via the UNCITRAL website at <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>>.

has 81 contracting parties (excluding South Africa).²⁰⁷ It was developed by the United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980.²⁰⁸ It only came into force eight years later, on 1 January 1988, after being ratified by eleven countries.²⁰⁹ It applies to all international sales contracts where the seller and the buyer maintain their places of business in different states,²¹⁰ unless of course the parties expressly opted out of its application.²¹¹ It thus allows international contracting parties to avoid choice of law issues.²¹²

The CISG has been criticised for its failure to facilitate the development of a uniform set of rules to govern international sale of goods transactions.²¹³ The provisions on specific

²⁰⁷ The list of parties to the CISG can be accessed on the UNCITRAL website at <http://uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

²⁰⁸ See United Nations Conference on Contracts for the International Sale of Goods 11 April 1980 *International Legal Materials* 668.

²⁰⁹ See S Kröll et al (eds) *The United Nations Convention on Contracts for the International Sale of Goods: Commentary* (2011) v.

²¹⁰ Art 1(1) CISG. The CISG excludes consumer sales (Art 2(a)); see U Magnus "CISG vs. CESL" in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (2012) 97 98 n 5 "The CISG covers however consumer sales which the seller could not recognize as such as well as sales where the consumer sells to a professional buyer."

²¹¹ See Art 6 CISG. For treatment of the Art 6 opt-out requirements by the US Federal Courts, see M McQuillen "The development of a Federal CISG Common Law in U.S. courts: patterns of interpretation and citation" (2006-2007) 61 *University of Miami Law Review* 509 518-520.

²¹² For details on the background and the development of the CISG, see N Boghossian "A comparative study of specific performance provisions in the United Nations Convention on Contracts for the International Sale of Goods" 1999/2000 *Pace Review of the Convention on Contracts for International Sale of Goods* 7-14. See also Kröll et al (eds) *The United Nations Convention on Contracts for the International Sale of Goods: Commentary* 4-5.

²¹³ See generally V G Curran "The Interpretive Challenge to Uniformity by C Witz" (1995) 15 *Journal of Law and Commerce* 175-199; J E Bailey "Facing the truth: Seeing the

performance, in particular, have attracted a great deal of academic comment and criticism.²¹⁴ The CISG incorporated a largely unrestricted right to claim specific performance, mirroring the civilian approach to a large extent,²¹⁵ while retaining a proviso in Article 28 regarding the application of this remedy in order to facilitate common-law countries.²¹⁶

Articles 46 (buyer's right) and 62 (seller's right) contain the general provisions regarding specific performance. In principle, the CISG entitles an aggrieved party to demand performance from the defaulting party and authorises judicial enforcement of contractual obligations.²¹⁷ The rationale behind these provisions is to promote the *pacta sunt*

Convention on Contracts for the International Sale of Goods as an obstacle to a uniform law of international sales" (1999) 32 *Cornell International Law Journal* 273-317; P Hackney "Is the United Nations Convention on the International Sale of Goods achieving uniformity?" (2001) 61 *Louisiana Law Review* 473-486.

²¹⁴ Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 289.

²¹⁵ See Kröll et al (eds) *The United Nations Convention on Contracts for the International Sale of Goods: Commentary* 370 687.

²¹⁶ See A H Kastely "The right to require performance in international sales: towards an international interpretation of the Vienna Convention" (1988) 63 *Washington Law Review* 607 625; I Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods* 3 ed (2010) 459-460; 470 (by M Müller-Chen). For details of the negotiations leading up to the compromise, see Boghossian 1999/2000 *Pace Review of the Convention on Contracts for International Sale of Goods* 10-11.

²¹⁷ L Chengwei *Remedies for Non-performance – Perspectives from CISG, UNIDROIT Principles and PECL* (2007) 31-33 (also available online at <http://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upic_c_and_pecl.chengwei_liu/landscape.a5.pdf>).

servanda principle. Notably, this principle was not stated in a specific provision, as the drafters considered it to be self-evident.²¹⁸

However, in terms of Article 28, the judicial willingness under the CISG to order specific performance may vary according to the substantive law of the forum in which an aggrieved party seeks specific performance, i.e. the *lex fori*.²¹⁹ This provision expressly instructs a court to treat an action for specific performance as it would under its own law.²²⁰ This creates serious doubt as to whether the CISG has in this context effected real harmonisation. Therefore, this provision in particular has attracted a great deal of criticism.²²¹ It appears to address the concerns of both common- and civil-law systems, but it creates uncertainty in the CISG's approach to the enforcement of performance, because contracting parties will be unsure whether specific performance will be available in a given transaction if an action can be brought in two or more places, one recognising specific performance as the primary remedy and the other recognising it

²¹⁸ See O Lando "CISG and its followers: a proposal to adopt some International Principles of Contract Law" (2005) 53 *Am J Comp L* 379 388; Boghossian 1999/2000 *Pace Review of the Convention on Contracts for International Sale of Goods* 22-24.

²¹⁹ See S Herman "Specific performance: a comparative analysis" (2003) 7(1) *Edin LR* 5 6.

²²⁰ See M Müller-Chen "Art 28" in Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods* 469-470: "The wording of Article 28 ('braucht nicht', 'not bound to') gives the court some flexibility. Based on Article 28, it can reject the action for performance, but does not have to, even if it would do so according its own law in a specific case. The CISG itself does not reveal how this discretionary scope is to be utilized. That would also be incompatible with the nature of this provision as a rule for conflicts of laws. Instead, it is a matter for the *lex fori* to decide whether room for discretion and evaluation exists and to what extent the cognizant adjudicative panels are permitted to use it..."

²²¹ See eg Kastely 1988 *Washington Law Review* 627 ff; M Wethmar-Lemmer "Specific performance as a remedy in international sales contracts" (2012) 4 *TSAR* 700 707 ff.

only exceptionally.²²² This clearly undermines the spirit of uniformity²²³ underlying the CISG.²²⁴ While the need for such a provision is undeniable in the light of the divergent viewpoints on specific performance as a contractual remedy, it clearly causes uncertainty regarding the availability of specific performance as a remedy for breach.²²⁵ Therefore, it has been suggested that the provisions regulating the availability of specific performance, more specifically Article 28, should be revised.²²⁶

However, several commentators have argued that the variable effect of this provision is tempered by the custom in international trade in terms of which plaintiffs prefer to claim damages rather than specific performance.²²⁷ Lando (more convincingly) argues that

²²² See Boghossian 1999/2000 *Pace Review of the Convention on Contracts for International Sale of Goods* 73-76; B Zeller *CISG and the Unification of International Trade Law* (2007) 55; Kröll et al (eds) *The United Nations Convention on Contracts for the International Sale of Goods: Commentary* 372.

²²³ Uniformity is a goal expressly stated in Art 7(1) CISG: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

²²⁴ See J Erauw & H M Flechtner "Remedies under the CISG and limits to their uniform character" in P Sarecevic & P Volken (eds) *The International Sale of Goods Revisited* (2001) 35 54-55.

²²⁵ See C M Venter *An Assessment of the South African Law Governing Breach of Contract* master's dissertation Stellenbosch University (2004) 68-69; J Fitzgerald "CISG, specific performance, and the civil law of Louisiana and Quebec" (1997) 16 *Journal of Law and Commerce* 291.

²²⁶ See eg Venter *An Assessment of the South African Law Governing Breach of Contract* 68-69.

²²⁷ See Kröll et al (eds) *The United Nations Convention on Contracts for the International Sale of Goods: Commentary* 372. See also J Felemezas "The right to require specific performance: a comparison between provisions of the CISG regarding the right to require specific performance and the counterpart provisions of the UNIDROIT Principles" in J Felemezas (ed) *An International Approach to the Interpretation of the United Nations*

this compromise was in fact unnecessary and gives an alternative solution that appears to be feasible. According to him, civil-law countries could have admitted that specific performance should be restricted to situations for which the remedy is needed in practice, while common-law countries could have admitted that there are situations in which specific performance should be a right which a court would have to grant.²²⁸ An alternative provision (assuming that Article 28 requires revision) would then state that every creditor has a right to specific performance, subject to certain exceptions, where the remedy is not considered necessary. This approach would be in line with the PICC and the PECL, both of which are considered to be more successful in their treatment of the remedy.²²⁹ Lando's solution seems feasible, especially when one considers the experiences of other comparable instruments. It obviates the need to resort to the (often) complex rules of private international law and would result in the application of a single rule embodied in an independent and impartial convention.

2 3 3 2 Specific performance under the PICC

The UNIDROIT Principles of International Commercial Contracts (PICC) is considered to be one of the most important "soft law" instruments in the field of international trade law. The PICC were prepared by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) and were first published in 1994.²³⁰ The scope of the PICC is stated in paragraph 1 of the Preamble, according to which they "set forth general rules for international commercial contracts". Since their first

Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (2007) 148-149.

²²⁸ See O Lando "Non-performance (breach) of contracts" in A Hartkamp et al (eds) *Towards a European Civil Code* 4 ed (2011) 681 687; C M Bianca & M J Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 236-237.

²²⁹ See paras 2 3 3 6, 3 4 3 & 6 4 2 below.

²³⁰ For details on the background and the development of the PICC, see S Vogenauer & J Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009) 3-12.

publication, the PICC have proved to be a serious alternative to national contract laws in international disputes decided by arbitral tribunals, such as the International Chamber of Commerce (ICC). Also, they have been accepted as a model for reforming the laws on international contracts by major exporting and importing countries such as China. The employment of the PICC as a model for legislative reform has perhaps even become their most important role.²³¹ The success of the PICC prompted the UNIDROIT to prepare a second enlarged edition which was published in 2004.²³² A marginally amended third edition was published in 2010,²³³ and contains new sections on illegality, restitution in case of failed contracts, conditions and plurality of parties.²³⁴

The foundational principles of the PICC are freedom of contract, *pacta sunt servanda*, party autonomy, the observance of good faith and fair dealing, informality, openness to commercial usages, and the policy to keep the contract alive wherever possible.²³⁵ The PICC specifically states in Article 1.3 that “[a] contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or

²³¹ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles* 17 68-77. See also J Kleinheisterkamp “UNIDROIT Principles of International Commercial Contracts (PICC)” in J Basedow et al (eds) *The Max Planck Encyclopedia of European Private Law II* (2012) 1727, 1730.

²³² M J Bonell *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* 3 ed (2005) 6. The UNIDROIT Principles of International Commercial Contracts (PICC) 2004 is available online at <<http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>>.

²³³ The UNIDROIT Principles of International Commercial Contracts 2010 is available online at <<http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf>>.

²³⁴ The sections on the right to performance (Arts 7.2.1-7.2.5) were left unchanged. The relevant provisions of the PICC 2010 are reproduced in Addendum A 410.

²³⁵ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 15.

by agreement or as otherwise provided in these Principles". In this regard it differs from the other instruments under review, because the principle of *pacta sunt servanda* is explicitly entrenched.²³⁶

In doing so, the PICC accepts as a general rule that every party has the right to require performance of any obligation owed to him.²³⁷ The PICC distinguishes between the right to require performance of a monetary obligation²³⁸ and the right to require performance of a non-monetary obligation.²³⁹ Article 7.2.1 provides that a creditor is always entitled to require payment of an agreed sum of money. The term "monetary obligation" refers to every obligation to make payment, i.e. the obligation to pay the contractual price as well as any secondary obligations to pay a monetary amount, for example interest or damages. The currency in which payment is to be made also does not affect the application of Article 7.2.1. This right to claim payment obviously only arises when performance becomes due. The only exception that applies to this right is if the seller is required to resell goods which the buyer did not accept or pay for in terms of a certain usage or practice.²⁴⁰

Article 7.2.2 gives an aggrieved party the right to specific performance of non-monetary obligations. Specific performance is considered to be the basic right of every creditor, and does not fall within the discretionary powers of a court. The court must order specific performance, unless one of the exceptions provided by Article 7.2.2 applies.

The right to performance only arises when performance becomes due and the debtor does not perform. The term "non-performance" is broadly defined in Article 7.1.1, and includes situations where the debtor has not performed at all, has provided a partial or

²³⁶ Compare text to nn 265-266 (PECL) below.

²³⁷ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 784-785 (by Schelhaas).

²³⁸ See Art 7.2.1 PICC (Addendum A 415).

²³⁹ See Art 7.2.2 PICC (Addendum A 415).

²⁴⁰ See Art 1.9 PICC (Addendum A 411).

defective performance, or has tendered defective performance which has been validly rejected by the creditor. The rather wide formulation of Article 7.2.2 ("an obligation other than one to pay money") probably suggests that it also covers negative obligations, such as those contained in contracts in restraint of trade.²⁴¹

As stated earlier, the PICC recognises certain exceptions to the creditor's general right to specific performance. This was done to facilitate both the civil-law as well as the common-law systems and to achieve some sort of compromise between the diverging viewpoints on specific performance.²⁴²

Article 7.2.2 lists five exceptions. Although the list is exhaustive, it covers a variety of situations, since it uses open-ended terminology such as "unreasonably burdensome" and "reasonably obtaining from another source". The PICC even endorses the theory of "efficient breach"²⁴³ in Article 7.2.2(c) by denying specific performance if performance can be reasonably obtained from another source. This accords with the common-law position.²⁴⁴ It follows that the creditor is prevented from claiming specific performance, when (a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive,²⁴⁵ (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively personal character,²⁴⁶ 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.

²⁴¹ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 787.

²⁴² 125.

²⁴³ Discussed in more detail in para 3 2 below.

²⁴⁴ See references to Arts 9:102(2)(d) PECL (esp text to n 264) & III-3:302(5) DCFR (esp text to n 278) & 132(2) CESL (n 293) below. See also para 3 4 3 (esp text to n 248) below.

²⁴⁵ See further para 6 4 2 below.

²⁴⁶ See further para 4 7 below.

The practical effect of the operation of one of these exceptions is that the aggrieved party would have to be satisfied with damages²⁴⁷ and/or termination of the contract.²⁴⁸ However, the burden of proof in relation to these exceptions rests on the defaulting party. They should therefore not be regarded as negative requirements that must be met before the remedy of specific performance would be available to the aggrieved party.²⁴⁹

2 3 3 3 Specific performance under the PECL

The PECL is a set of model rules that were prepared by the Commission on European Contract Law (“Lando Commission”). The final part of the PECL was completed in 2002.²⁵⁰ The PECL are based on the concept of a uniform European contract law system, and are intended to serve as a model for the judicial and legislative development of contract law in Europe.²⁵¹ In the broader sense, the PECL is described as being a “set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law”.²⁵²

The PECL were inspired by the CISG of 1980, however, they are a so-called “soft law”, comparable to the American Law Institute’s *Restatement of the Law of Contract*, which

²⁴⁷ See Art 7.4.1 PICC (Addendum A 417). See also Art 9:103 PECL (text to n 268 below).

²⁴⁸ See Art 7.3.1 PICC (Addendum A 417).

²⁴⁹ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 787.

²⁵⁰ For details on the background and the development of the PECL, see preface to O Lando & H Beale (eds) *The Principles of European Contract Law Parts I & II* (2000). The Principles of European Contract Law 2002 (Parts I, II, and III) are available online at <www.lexmercatoria.org>.

²⁵¹ See Art 1:101(1) PECL. See also Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 5.

²⁵² See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 27.

is supposed to restate the common law of the United States.²⁵³ Therefore, the PECL is not considered to be legally binding. As Smits states, “the term ‘soft law’ is a blanket term for all sorts of rules, which are not enforced on behalf of the state, but are seen, for example, as goals to be achieved”.²⁵⁴ In this respect, the PECL are very similar to the PICC. As is the case with the PECL, the PICC are a “private codification” prepared by leading jurists without any national or supranational order or authorisation. The main goal of both the PECL and the PICC was the compilation of uniform legal principles for reference, and, if necessary, the development of national legal systems. However, these two sets of Principles differ in one important respect – their scope of application. The PICC only apply to commercial contracts, whereas the PECL apply to all contracts, including consumer- and private contracts. Furthermore, the PECL only cover (Western) Europe,²⁵⁵ while the PICC are to be applied globally.²⁵⁶

²⁵³ See O Lando “Salient features of the Principles of European Contract Law: a comparison with the UCC” (2001) 13 *Pace International Law Review* 339 340-341; R Backhaus “The limits of the duty to perform in the Principles of European Contract Law” 2004 8(1) *Electronic Journal of Comparative Law* 1 3 (available online at <<http://www.ejcl.org/81/art81-2.PDF>>); Lando 2005 *Am J Comp L* 382.

²⁵⁴ See J M Smits “A European private law as a mixed legal system” (1998) 5 *Maastricht Journal of European and Comparative Law* 328 331.

²⁵⁵ See Art 1:101 PECL. Obviously the PECL will also apply when the parties have agreed to incorporate them into their contract. Conversely, the parties are also allowed to exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by the PECL (Art 1:102(2)).

²⁵⁶ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 14-15. See also S Eiselen “Specific performance and special damages” in H L MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 249 268.

The point of departure under the PECL is that every creditor has a right to claim specific performance.²⁵⁷ The PECL have followed the civilian approach, in granting the remedy as of right. The exceptions to this general rule are explicitly listed and operate strictly. This means that if none of the exceptions are present, a court would not have a discretion to refuse the remedy.²⁵⁸ The reason for recognising certain exceptions is that the PECL sought a compromise between the diverging common-law and civil-law viewpoints on specific performance.²⁵⁹

According to Article 9:101 the creditor is entitled, as a rule, to enforce the performance of any monetary obligation that is due. The term “monetary obligation” refers to every obligation to make a payment, regardless of the form of payment and the currency in which it is to be paid, or even the nature of the obligation. This indicates that it is of no relevance whether the obligation concerns the payment of a price for goods the debtor bought or a service he received, or even the payment of damages or interest.²⁶⁰ Thus, the meaning of the term under the PICC and the PECL is exactly the same.

Article 9:101(2) addresses the situation where a debtor is unwilling to receive the creditor’s performance in terms of a reciprocal contract, thereby preventing its own obligation from becoming due. It states that the creditor may proceed with his performance and subsequently claim performance of the debtor’s obligation. However, it goes on to limit this claim to situations where the creditor could not have made another

²⁵⁷ See Art 9:101(1) & Art 9:102(1) PECL. The relevant provisions of the PECL are reproduced in Addendum A 418.

²⁵⁸ See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 396; Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 347-357.

²⁵⁹ See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 395; G J P de Vries *Remedies op Grond van Niet-Nakoming van Internationale Contracten in het Licht van de PECL* (2002) 25.

²⁶⁰ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 347.

transaction that would not have caused him significant expense or effort and if performance by the creditor would not be unreasonable in the circumstances, for example, “where the debtor makes it clear that he no longer wants it”.²⁶¹

Article 9:102, on the other hand, relates to the right to claim performance of non-monetary obligations. Article 9:102(1) specifically provides that “[t]he aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance”. The following paragraph proceeds to list the situations in which specific performance will not be granted. These include instances where (a) performance would be unlawful or impossible; or (b) performance would cause the debtor unreasonable effort or expense;²⁶² or (c) the performance entails provision of services or work of a personal character or depends upon a personal relationship;²⁶³ or (d) the aggrieved party may reasonably obtain performance from another source.²⁶⁴ Article 9:102(3) adds to this list, by stating that the aggrieved party will lose his right to specific performance if he fails to exercise it within a reasonable time after he has or ought to have become aware of the non-performance.

The aggrieved party’s right to specific performance also stems from the principle of *pacta sunt servanda*.²⁶⁵ While the principle is expressly contained in the PICC, the drafters of the PECL (like those of the CISG) considered it so obvious that they did not include it in a specific provision. It is, however, implied in several articles, including Article 1:102(1), which provides that the “parties are free to enter into a contract and to

²⁶¹ See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 392; and see Art 9:101(2)(a)-(b) Addendum A 421. Compare also text to n 244 (PICC) above.

²⁶² See further para 6 4 2 below.

²⁶³ See further para 4 7 below.

²⁶⁴ See E Clive & D Hutchison “Breach of contract” in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 176 195; Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 353 (by M B M Loos).

²⁶⁵ See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 391.

determine its contents ...”, and Article 6:111(1), which provides that “[a] party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished”.²⁶⁶

It is important to note that enforcement of this right depends on whether the debtor’s performance was due under Article 7:102, and whether a failure to perform at that time actually amounted to non-performance in terms of Article 1:301(4).²⁶⁷ As indicated above, enforcement of this right depends on whether it is not excluded in terms of Article 9:102. Also, note that “[t]he fact that a right to performance is excluded under this Section does not preclude a claim for damages” (Article 9:103).²⁶⁸

2 3 3 4 Specific performance under the DCFR

The Draft Common Frame of Reference (DCFR)²⁶⁹ is “[a]n academic, not politically authorised text”; its purpose is to serve as a “possible model for an actual or ‘political’ Common Frame of Reference”.²⁷⁰ It is based in part on a revised version of the

²⁶⁶ See further D P Flambouras “The doctrines of impossibility of performance and clausula rebus sic stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law – a comparative analysis” (2001) 13 *Pace International Law Review* 261 286. See also para 6 4 2 below on these doctrines.

²⁶⁷ See Addendum A 419.

²⁶⁸ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 351 ff (esp 402 on the issue of termination).

²⁶⁹ Study Group on a European Civil Code & Research Group on Existing EC Private Law *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009) – see Addendum A 422.

²⁷⁰ C von Bar & E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) I* (2009) 3-4: “It must be stressed that what is referred to today as the DCFR originates in an initiative of European legal scholars. It amounts to the compression into rule form of decades of independent research and co-operation by academics with expertise in private law, comparative law

Principles of European Contract Law,²⁷¹ however, it goes further in terms of coverage as it “embraces non-contractual obligations to a far greater extent than the PECL”.²⁷²

This present section is brief, given that the provisions in the PECL and the DCFR on specific performance display a high degree of similarity. According to Article III–3:301 DCFR,²⁷³ the creditor is entitled, as a rule, “to recover money payment of which is due”.²⁷⁴ Article III–3:302 DCFR governs the availability of specific performance for non-monetary obligations. According to Article III–3:302(1)–(2), the creditor is entitled to “enforce specific performance of an obligation other than one to pay money”, which “includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation”.

Article III–3:302(3) contains a number of exceptions, i.e. situations in which specific performance will not be granted for a non-monetary obligation, namely, where (a) performance would be unlawful or impossible; (b) performance would be unreasonably burdensome or expensive;²⁷⁵ or (c) performance would be of such a personal character

and European Community law ... If the content of the DCFR is convincing, it may contribute to a harmonious and informal Europeanisation of private law.”

²⁷¹ See G Low “Performance remedies and damages – a selection of issues”, unpublished paper presented at a conference on *The Relationship between European and Chinese Contract Law* hosted by the Tsinghua University in Beijing 16-17 February 2012 (copy on file with author) 5.

²⁷² 4, 11, 16-17. See also P Varul “Performance and remedies for non-performance: comparative analysis of the PECL and DCFR” 2008 *Juridica International* 104 106; G Dannemann & S Vogenauer “Introduction” in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 1 10.

²⁷³ The relevant provisions of the DCFR are reproduced in Addendum A 422.

²⁷⁴ See further Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 824-828.

²⁷⁵ See para 6 4 2 below.

that it would be unreasonable to enforce it.²⁷⁶ Article III–3:302(4), like the PICC and the PECL, adds to these exceptions, by stating that the creditor will lose the right to specific performance “if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance”.

Furthermore, and unlike the PECL,²⁷⁷ the DCFR provides in Article III–3:302(5) that the “creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense”.²⁷⁸ This provision does not directly restrict the right to claim specific performance, and differs from the provisions contained in the PICC and the PECL that exclude specific performance if the aggrieved party may reasonably obtain performance from another source. Instead, it discourages the creditor from insisting on specific performance if to do so would inflate the damages payable for non-performance, or the amount of stipulated payment for non-performance, if it would have been more reasonable to arrange for a substitute transaction – thereby facilitating an efficient breach. According to Low “[t]he effect of this and the previous rule is to create an incentive towards an efficient breach of contract – where the debtor will prefer to breach and pay expectation damages, rather than incur the relatively higher performance interest”.²⁷⁹

Under the DCFR (like the PICC and the PECL) the creditor has a substantive right to enforce performance of monetary and non-monetary obligations. Also, granting an order

²⁷⁶ See para 4.7 below.

²⁷⁷ Varul 2008 *Juridica International* 109.

²⁷⁸ Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 833-834. See also G Low “Performance remedies and damages – a selection of issues” 5.

²⁷⁹ Low “Performance remedies and damages – a selection of issues” 5-6.

for specific performance is not in the discretion of the court; the court must make such an order, unless the exceptions apply.²⁸⁰ And even if one of these exceptions apply, according to Article III–3:303, damages is always available if the non-performance has caused the creditor loss (unless the non-performance is excused and subject to the proviso contained in Article III–3:302(5)).²⁸¹

2 3 3 5 Specific performance under the CESL

On 11 October 2011,²⁸² the European Commission proposed an optional²⁸³ Common European Sales Law (or CESL),²⁸⁴ which traders may choose to use to govern their cross-border contracts.²⁸⁵ The CESL is based on the Draft Common Frame of Reference (DCFR), which in turn was based in part on the Principles of European

²⁸⁰ Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 828-829.

²⁸¹ 842.

²⁸² See European Commission press release – available online at <http://ec.europa.eu/justice/contract/files/common_sales_law/i11_1175_en.pdf>.

²⁸³ G Low “A psychology of choice of laws” 2013 *European Business Law Review* 363: “Being an optional instrument, CESL adds to the buffet of transnational, national and soft laws that parties may already choose from as regards applicable laws to contracts.” See also H L MacQueen “The Europeanisation of contract law: the Proposed Common European Sales Law” University of Edinburgh School of Law Research Paper No 17 (2014) 3.

²⁸⁴ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final. Annex I to the Regulation contains the text of the Common European Sales Law. The Proposal is available online at <http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf>.

²⁸⁵ Magnus “CISG vs. CESL” in U Magnus (ed) *CISG vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law* 99: “it is only applicable if the parties choose it. Although it contains mandatory provisions, the whole instrument is optional in the sense that it – and also its mandatory provisions – does not apply without a valid choice. In contrast to the CISG it is thus an opt-in solution.”

Contract Law (PECL).²⁸⁶ “The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules ...”²⁸⁷ The proposed CESL covers the sale of goods, the supply of digital content and some related services.²⁸⁸ The European Parliament adopted a legislative resolution on the Proposal in February 2014. A decision by the European Council on its acceptance is, however, pending. The proposal has been met with opposition from the majority of EU states, including the UK and Germany,²⁸⁹ and approval by the Council in the near future therefore seems unlikely.²⁹⁰

Article 106 CESL contains the general provisions on the buyer’s remedies in the case of non-performance of an obligation by the seller.²⁹¹ Three types of remedies are available, namely, first, the right to specific performance (together with other remedies aimed at fulfilment: the right to withhold performance to achieve specific performance of the contract and to claim a price reduction), second, termination together with return of

²⁸⁶ I Schwenzer ‘The Proposed Common European Sales Law and the Convention on the International Sale of Goods’ (2012) 44 *Uniform Commercial Code Law Journal* 457 458. See also Varul 2008 *Juridica International* 106; Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 4; S Whittaker & K Riesenhuber ‘Conceptions of contract’ in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 120 137 ff.

²⁸⁷ Art 1(1) CESL; see also Explanatory Memorandum to the CESL, COM (2011) 4.

²⁸⁸ Art 1(1) CESL; see also para 4 7 n 314 below.

²⁸⁹ Their parliaments specifically question whether the principle of subsidiarity has been respected.

²⁹⁰ See further Dannemann & Vogenauer ‘Introduction’ in Dannemann & Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 15; E Clive *European Private Law News*, 26 February 2014. Post available online at <<http://www.epln.law.ed.ac.uk/2014/02/26/european-parliament-adopts-proposal-for-a-common-european-sales-law/>>.

²⁹¹ The relevant provisions of the CESL are reproduced in Addendum A 425.

the contract price and, third, damages. This framework of remedies reveals that a buyer's primary remedy²⁹² is to "require performance, which includes specific performance, repair or replacement of the goods or digital content".²⁹³

Also, the buyer's remedy corresponds to the seller's right to cure.²⁹⁴ The seller is entitled to cure a defective tender under Article 109(1) CESL and the buyer has the right to require him to do so under Article 110 CESL; which states that the buyer is entitled to "require performance of the seller's obligations", which "includes the remedying free of charge of a performance which is not in conformity with the contract".²⁹⁵

A seller thus has a choice to either repair the defective goods or to replace them with conforming goods. It must be noted that a distinction is made between if the buyer is a trader or if he is a consumer. In the case of a consumer sales contract, this choice is with the consumer pursuant to Article 111, which must be completed by the seller within

²⁹² According to Art 106(1)(a) CESL.

²⁹³ Specific performance for the seller is usually a claim for the purchase price. According to Art 132, the seller is equally entitled to this remedy, to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer. Also, under Art 132(2), where the buyer has not yet taken over the goods or the digital content, and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.

²⁹⁴ See generally R Schulze (ed) *Common European Sales Law (CESL) – Commentary* (2012) 504 ff (by F Zoll); H L MacQueen et al "Specific performance and right to cure" in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 612 629 ff.

²⁹⁵ Compare III–3:302(1)-(2) DCFR above.

a reasonable time not exceeding 30 days from the moment of the buyer's communication; otherwise the consumer may resort to other remedies.²⁹⁶

Exceptions to the right to specific performance are stated in Article 110(3).²⁹⁷ The circumstances where specific performance cannot be required under the CESL are where:²⁹⁸ (a) performance would be impossible or has become unlawful,²⁹⁹ or (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.³⁰⁰

The reason for recognising certain exceptions is that the CESL (like the other instruments under consideration) sought to achieve "a compromise solution reflecting

²⁹⁶ Where the remedy is replacement, the seller has a right and an obligation to take back the replaced item at his own expense. Also, the buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement (Art 112). See further Schulze (ed) *Common European Sales Law (CESL) – Commentary* 509-511 (by Zoll).

²⁹⁷ See also Art 111(1) to the effect that the consumer's entitlement to require specific performance (repair/replacement) is also lost in the cases where the buyer would not be entitled to specific performance (Schulze (ed) *Common European Sales Law (CESL) – Commentary* 509; MacQueen et al "Specific performance and right to cure" in Dannemann & Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 630).

²⁹⁸ In addition to the qualification that the right to demand cure by the seller also requires that the non-performance is not excused – see Schulze (ed) *Common European Sales Law (CESL) – Commentary* 504-505.

²⁹⁹ Art 110(3)(a) CESL.

³⁰⁰ Art 110(3)(b) CESL. See Schulze (ed) *Common European Sales Law (CESL) – Commentary* 507 (by Zoll, explaining the effect of this exclusion): "The right to require performance should not be economically inefficient. If the application of other remedies (eg damages) combined with the substitute transaction is essentially cheaper than imposing the performance on the seller, then this substitute transaction should be preferred." For further discussion see para 6 4 2 below.

the different legal traditions, which contradict at this point".³⁰¹ This way of regulating the availability of specific performance largely corresponds to the other instruments under review. The buyer may demand performance of the seller's obligations, unless certain exceptions apply. And if one of these exceptions applies, it still does not prevent the buyer from exercising other remedies that are available under the CESL,³⁰² including termination of the contract as well as damages for loss suffered as a result of the non-performance.³⁰³

2 3 3 6 Comparative remarks on the international instruments

As indicated above, the PICC, the PECL, the DCFR and the CESL favour specific performance as the primary remedy and a creditor will most likely obtain an order for specific performance under these instruments.³⁰⁴ In contrast to the CISG, these instruments do not treat specific performance as a remedy which is dependent on the rules of the forum.³⁰⁵ However, even though these instruments have adopted the general principle of specific performance, they also recognise a number of important exceptions, for example, when performance is impossible or disproportionately onerous

³⁰¹ Schulze (ed) *Common European Sales Law (CESL) – Commentary* 504 (by Zoll).

³⁰² See again Art 106 CESL.

³⁰³ See again Schulze (ed) *Common European Sales Law (CESL) – Commentary* 505 (by Zoll). See also Art 106(4) CESL: If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in Art 106(1) except requiring performance and damages.

³⁰⁴ See Heutger & Oosterhuis "Specific performance within the hierarchy of remedies in European contract law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 152.

³⁰⁵ See Lando & Beale (eds) *Principles of European Contract Law Parts I & II* 396 (commenting on the PECL in particular): "Granting an order for performance thus is not within the discretion of the court; the court is bound to grant the remedy, unless the exceptions [...] apply. National courts should grant performance even in cases where they are not accustomed to do so under their national law."

by reason of legal or practical difficulties³⁰⁶ or when performance is of an exclusively personal character.³⁰⁷

It is evident that there are several similarities between these instruments and the corresponding provisions in the Civil Codes of both Germany³⁰⁸ and the Netherlands. The ideology is more or less the same. Freedom of contract and the twin notion of *pacta sunt servanda* seem to underpin all of these codifications.³⁰⁹ Contractual freedom is, however, restricted and modified by principles of reasonableness, good faith and equity.³¹⁰ Accordingly, some exceptions to the general principle of specific performance have been recognised.

It has been said that the exceptions recognised under these instruments can be regarded as expressions of the general principle of reasonableness.³¹¹ “It is also clear that some of the specific grounds for refusal have a lot of hidden discretion within them. The rules are therefore flexible. None the less they seem principled in setting out the

³⁰⁶ See para 6 4 2 below.

³⁰⁷ Excluding the CISG & CESL – see para 4 7 n 314 below.

³⁰⁸ See eg MacQueen et al “Specific performance and right to cure” in Dannemann & Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 624-629.

³⁰⁹ See eg Whittaker & Riesenhuber “Conceptions of contract” in Dannemann & Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 148 ff; G Low “Performance remedies and damages – a selection of issues” 6.

³¹⁰ See Whittaker & Riesenhuber “Conceptions of contract” in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 150 ff, and paras 6 3 & 6 4 below.

³¹¹ See eg D Haas, G Hesen & J Smits “Introduction” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 1 2-3. See also para 6 4 2 below.

rules in terms of a qualified right, rather than a discretionary remedy.”³¹² Thus, while adopting the civil-law position regarding the availability of the remedy, these instruments resemble the common-law position in stating that specific performance cannot be awarded in certain circumstances.

Even though all of the instruments favour specific performance as the primary remedy, the conditions for obtaining such an order differ somewhat. It is clear that the rules regarding the right of a creditor to require performance by the debtor under the PICC, the PECL, the DCFR and the CESL, unlike the rules of the CISG, form what is perhaps a more detailed and coherent set of regulations, since they contain defined exceptions to the general principle. This is said to clarify the availability of specific performance as a remedy for breach of contract.³¹³

2 4 Evaluative remarks and conclusions

The civil law and common law clearly differ in their theoretical approach to specific performance.³¹⁴ In Anglo-American law, breach of contract provides the aggrieved party with a right to claim damages, while in civil-law countries, the aggrieved party maintains a right to demand performance of the contract. The Anglo-American approach is regarded as being oriented towards economically desirable solutions, whereas the civil-

³¹² Clive & Hutchison “Breach of contract” in Zimmermann et al (eds) *Mixed Legal Systems in Comparative Perspective* 195-196 (commenting on the PECL in particular).

³¹³ See generally Felemezas “The right to require specific performance: a comparison between provisions of the CISG regarding the right to require specific performance and the counterpart provisions of the UNIDROIT Principles” in Felemezas (ed) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* 143-159; Torsello “Remedies for breach of contract” in Smits (ed) *Elgar Encyclopedia of Comparative Law* 765-766. See also text to n 236 para 2 3 3 1 (CISG) above.

³¹⁴ See further M Hogg *Promises and Contract Law: Comparative Perspectives* (2011) 353; Chen-Wishart *Contract Law* 553.

law approach gives stronger expression to the principle of *pacta sunt servanda*. However, even though their underlying ideologies differ considerably, both systems regulate the remedy in terms of clearly defined rules, and the practical differences are often not as great as the theory suggests.³¹⁵ Shavell, for example, acknowledges that the common law and German law in practice reach much the same solution by different routes, at least in the most important cases.³¹⁶ The civil-law jurisdictions accept that there are certain exceptions to the creditor's right, while Anglo-American law leaves an order of specific performance at the discretion of the courts. This discretion is to be exercised according to settled rules and principles. An analysis of the practical solutions reached in both systems suggests that there is an increasing convergence between them towards similar solutions with respect to the remedy of specific performance. Examining these developments could potentially contribute significantly to our law governing the availability of specific performance.

The model instruments under review also contain certain defined exceptions to the general principle of specific performance based on considerations of good faith and reasonableness. The drafters of these codifications recognised that this right could not be accepted without qualification. The same problems that are currently concerning our courts and academic writers prompted the inclusion of these defined exceptions. These instruments are considered compilations of uniform legal principles for reference, and the development of national legal systems. These insights could also be potentially instructive to our law governing the availability of specific performance.

³¹⁵ See eg Zweigert & Kötz *Comparative Law* 484; M P Furmston "Breach of contract" (1992) 40(3) *Am J Comp L* 671 674, and Haas, Hesen & Smits "Introduction" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 2. See also reference to Beck in text to nn 250-251 para 3 4 3 below, and to Lord Hoffmann in text to n 58 para 5 2 (i) below.

³¹⁶ S Shavell "The design of contracts and remedies for breach" (1984) 97 *Quarterly Journal of Economics* 121-148.

As we have seen, South African law recognises a right to specific performance, but subject to a general judicial discretion unfettered by specific rules. It is quite striking that the civilian jurisdictions and the international instruments under review do not retain such an unrestrictive discretion as our courts do. The question is now whether South African courts should similarly follow a more concrete approach, and adopt defined rules with regard to when specific performance should be refused. In the common law, the jurisdiction of a court to grant specific performance in such circumstances is also confined within well-known rules. It has been said that common-law countries are generally not concerned with abstract theory,³¹⁷ but rather with the practical appropriateness of legal rules and therefore prefer a legal framework that leads to an optimal allocation of resources.³¹⁸ It may therefore be concluded that the South African approach is remarkably out of line with the two major traditions that formed it. This suggests that it requires serious reconsideration, from both a theoretical and practical perspective.³¹⁹

³¹⁷ See eg B J van Heerden “An exploratory introduction to the economic analysis of law” (1981) 4 *Responsa Meridiana* 147.

³¹⁸ In line with the economic theory of law – discussed in more detail in para 3 4 2 below.

³¹⁹ See also para 7 1 below.

CHAPTER 3: ADEQUACY OF DAMAGES

3 1 Introduction

The preceding historical and comparative overviews only dealt with general principles or points of departure. This chapter is the first of a series of discussions of more specific considerations that influence awarding specific performance. It commences with the basic position regarding adequacy of damages as a factor that courts may consider in exercising the discretion to award specific performance in Anglo-American law. Thereafter the discussion turns to the effect of adequacy of damages on the availability of specific performance in South African law, and specifically on the extent to which the English common law has shaped our courts' attitude in this regard. Finally, the chapter explores the relevance of this consideration in other systems, and then draws comparative conclusions, especially with a view to benefiting the development of South African law.

The primary focus of this chapter will be on Anglo-American law and its influence on South African law, rather than on the civil law, where the question as to the inadequacy of damages does not arise as directly as in Anglo-American law. As we have seen, the former tradition regards specific performance as a supplementary remedy that is available only when some other legal remedy is believed to be inadequate,¹ whereas the latter tradition regards specific performance as equally available with other remedies, to be granted when it will be the most appropriate and effective remedy in the circumstances. In the civil law, and model instruments,² the inadequacy-of-damages

¹ See paras 2 1 & 2 3 2 above.

² These instruments, in contrast to Anglo-American law, recognise specific performance as their primary or default remedy for breach of contract and generally do not accord the courts any discretion in granting it. Instead, they grant the creditor a right to specific performance, subject to certain exceptions. The right to claim specific performance under these instruments does not depend on the inadequacy of damages. See paras 2 3 1 & 2 3 3 above. See further A M Garro "Reconciliation of legal traditions in the UN

requirement is not central to the problem of whether the specific performance is available. The enforcement of obligations is more important, and is regarded as essential to give expression to the principle of *pacta sunt servanda*.³

3 2 Adequacy of damages in Anglo-American law

The point of departure in Anglo-American law (which in this respect is curiously similar to Roman law)⁴ is to grant substitutionary relief, normally in the form of damages. It is only when awarding damages is inadequate, or is insufficient to do “complete justice” between the parties, that it will be in the discretion of the court to grant specific performance.⁵ The right to specific performance therefore turns upon whether the plaintiff can be properly compensated by a remedy at law.⁶ The existence and

Convention on Contracts for the International Sale of Goods” 1989 *The International Lawyer* 443 458.

³ See para 2 3 1 above.

⁴ See B J van Heerden “An exploratory introduction to the economic analysis of law” 1981 *Respona Meridiana* 147 152; P Gross “Specific performance of contracts in South Africa” 1934 *SALJ* 347; A Beck “The coming of age of specific performance” 1987 *CILSA* 190 191; J J du Plessis “Spesifieke nakoming: ‘n regshistoriese herwaardering” 1988 *THRHR* 349 356-357, and para 2 2 1 above.

⁵ See generally para 2 3 2 above. See further on this theoretical basis of equitable jurisdiction, A E Randall *Leake on Contracts* (1921) 839; Lord Mackay of Clashfern (ed) *Halsbury’s Laws of England* 4 ed reissue vol 16(2) (2003) para 410; J H Baker *An Introduction to English Legal History* 4 ed (2002) 98 ff; *The Oxford History of the Laws of England VI* (2004) 174 ff; J E Martin *Hanbury & Martin’s Modern Equity* 19 ed (2012) 34-35, 762 ff.

⁶ As was said in the case of *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, 126 *per* Kay LJ: “This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules.” And in *Union Pacific Railway Co v Chicago, Rock Island*

adequacy of such a remedy constitutes the determinative factor when a court has to decide whether or not to grant specific performance of a contract.⁷

This inadequacy-of-damages criterion finds its origin in early English common law, where it was originally adopted to minimise the conflict between courts of law and courts of equity, the latter being able to intervene only where the former could not provide adequate relief.⁸

The concept that the conclusion of a contract creates an enforceable duty to perform is foreign to common law. Instead, the point of departure is the proposition expressed by

& Pacific Railway Co 163 U.S. 564, 600 (1896) per Fuller CJ: "The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." See also R J Sharpe "Specific relief for contract breach" in B J Reiter & J Swan (eds) *Studies in Contract Law* (1980) 123 126.

⁷ See further for the English rule on the adequacy of damages: *Buxton v Lister* (1746) 26 ER 1020, 1021; *Harnett v Yielding* (1805) 2 Sch & Lef 549, 553; *Adderley v Dixon* (1824) 1 Sim & St 607, 610; *Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279, 284; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898, 903; *Bankers Trust Co v P T Jakarta International Hotels Development* [1999] 1 Lloyd's Rep 910, 911. See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785C-D per Hefer JA: "The most important rule, from which many of the others derived, was that specific performance would not be granted where the plaintiff could be compensated adequately by damages. It would thus appear that even in the Court of Chancery the emphasis fell on damages and that an order for specific performance was the exception rather than the rule."

⁸ See I C F Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 8 ed (2010) 59: "Historically the basis for the grant of specific performance by courts of equity has been the inadequacy of legal remedies, and particularly of damages, in the material circumstances."

Holmes⁹ that “the only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass”.¹⁰

The inadequacy-of-damages test is also applied in American law;¹¹ as § 359 (1) of the American Law Institute’s *Restatement (Second) of Contracts* states:

“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”¹²

Thus, where the remedy of damages (or other common law remedies) does provide adequate protection to the creditor, specific performance will not be granted. This criterion ultimately constitutes the central consideration in Anglo-American law

⁹ See para 1 1 1 above.

¹⁰ O W Holmes Jr *The Common Law* (1881) 301. See also “The path of the law” (1897) 10 *Harv LR* 457 462 (reprinted (1998) 78 *Boston University Law Review* 699 702); K Zweigert & H Kötz *Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 480-481; R M Cunningham “The inadequacy of damages as a remedy for breach of contract” in C E F Rickett (ed) *Justifying Private Law Remedies* (2008) 115 133. From an economic point of view “[t]he simple theory of efficient breach advances a prescriptive version of that Holmesian Heresy: the law prefers an efficient breach to inefficient performance, and so a contractual duty is no more than a duty to perform or pay damages, whichever is cheaper ...” (G Klass “Efficient breach is dead; long live efficient breach” Georgetown Public Law and Legal Theory Research Paper No 13-018 (2013) available online at <<http://scholarship.law.georgetown.edu/facpub/1185>>. See also G Klass “Efficient breach” forthcoming in G Klass, G Letsas & P Saprai (eds) *The Philosophical Foundations Of Contract Law*).

¹¹ See generally E A Farnsworth *Contracts* 3 ed (1999) §§ 12.4-12.7; J M Perillo (ed) *Corbin on Contracts 12: Restitution, Specific Performance and Election of Remedies* Interim ed (2002) § 1139; J M Perillo *Calamari and Perillo on Contracts* 6 ed (2009) §§ 16.1-16.4; G Klass *Contract Law in the USA* (2010) 212.

¹² The relevant provisions of the *Second Restatement* and the US Uniform Commercial Code are reproduced in Addendum A (382-388 below).

regarding the availability of specific performance as a remedy for breach.¹³ So it was stated by Lord Redesdale in *Harnett v Yielding*.¹⁴

“Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled: that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed.”¹⁵

It is important to note that the process whereby the aggrieved party obtains a substitute performance and claims the expense of doing so from the party in breach is regarded as a form of damages and not as specific performance in Anglo-American law.¹⁶ If the creditor can procure suitable substitute performance, i.e. if he is able to make a so-called “cover” transaction, equity will not intervene.¹⁷ Therefore, specific performance of contracts for the sale of shares in companies,¹⁸ or of generic goods, which are available in the market at an ascertainable price, is generally not ordered.¹⁹

¹³ Zweigert & Kötz *Comparative Law* 480; R Stone *The Modern Law of Contract* 10 ed (2013) 501 ff.

¹⁴ (1805) 2 Sch & Lef 549, 553. See also H G Beale et al (eds) *Chitty on Contracts I: General Principles* 31 ed (2012) 1907; and for the US, Perillo (ed) *Corbin on Contracts* § 1139.

¹⁵ See more recently I C F Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 8 ed (2010) 59: “Historically the basis for the grant of specific performance by courts of equity has been the inadequacy of legal remedies, and particularly of damages, in the material circumstances.”

¹⁶ Cf for German law: para 4 5 1 n 264 below.

¹⁷ As stated by Andrews CJ in *Dills v Doeblner* 62 Conn. 366 (1892): “The universal test of the jurisdiction of a court of equity to restrain the breach of a contract is the inadequacy of the legal remedy of damages.” See earlier *Snell v Mitchell* 65 Me. 48. (1876). See also n 102 below.

¹⁸ See *Ryan v McLane* 46 A. 340 (1900); *Rimes v Rimes* 111 S.E 34 (1922); *McCutcheon v National Acceptance Corp* 197 So. 475 (1940); *Hurley v Thomas* 169 So. 2d 519 (Fla.

This rationale appears from the following dictum by Leach VC in *Adderley v Dixon*.²⁰

"So a Court of Equity will not, generally decree specific performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock of goods."

Section 2-716(3) of the US Uniform Commercial Code (UCC) likewise determines that a buyer would be entitled to specific performance where he is unable to find replacement goods (i.e. to "cover")²¹ on the open market or if he is only able to do so at considerable expense, inconvenience, or risk.²² However, where the goods involved are not unique,

Dist. Ct. App. 2d Dist. 1964); *Gingerich v Protein Blenders Inc* 95 N.W.2d 522 (1959); *Express Shipping Ltd v Gold* 880 N.Y.S.2d 183 (2d Dep't 2009). And for England, see *Cud v Rutter* (1720) 1 P Wms 570, where specific performance of contract to sell stock was refused; Lord Parker LC holding that "a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's" (at 571).

¹⁹ See Perillo (ed) *Corbin on Contracts* § 1142; E Peel *Treitel's Law of Contract* 13 ed (2011) 1099-1100.

²⁰ (1824) 1 Sim & St 607, 110.

²¹ See n 102 below.

²² See eg *Schweber v Rallye Motors Inc* 12 U.C.C. Rep. Serv. 1154 (N.Y. Sup 1973) (involving a 1973 Rolls Royce vintage automobile); *Gay v Seafarer Fiberglass Yachts Inc* 14 U.C.C. Rep. Serv. 1335 (N.Y. Sup 1974) (involving a fiberglass yacht, customised to the buyer's specifications and having a special hull design manufactured only by the defendant); *Dexter Bishop Co v B Redmond & Son Inc* 22 U.C.C. Rep. Serv. 406 (1st Dep't 1977) (involving machines which process butter and margarine into table service pats); *Cumbest v Harris* 363 So. 2d 294 (Miss. 1978) (involving a stereo system, some of the components of which were irreplaceable or were replaceable only with difficulty and after long waiting periods); *Colorado-Ute Electric Association Inc v Envirotech Corp* 33 U.C.C. Rep. Serv. 965 (D. Colo. 1981) (involving air pollution control equipment, which

and are therefore easily replaceable, and the creditor has an adequate remedy at law in the form of damages, specific performance will not be granted under the UCC.²³

Over the years English and American courts have identified a number of well-recognised situations in which the remedy of damages is considered to be inadequate. The attention will now turn to the situations where Anglo-American law typically grants specific performance, based on the fact that the legal remedy of damages does not provide adequate relief to the aggrieved party.²⁴ In such situations, the courts have the jurisdiction to grant specific performance, but they always maintain the discretion to refuse to do so.²⁵ Their relevance to the South African legal system will subsequently be

was specifically designed for the buyer's needs and was extremely large, complex, technical, and essentially irreplaceable). See further "Specific performance of a contract as a matter of right" 65 *American Law Reports* 7 (originally published 1930) – accessible via Westlaw International.

²³ See *Hilmor Sales Co v Helen Neushaefer Division of Supronics Corp* 6 U.C.C. Rep. Serv. 325 (N.Y. Sup 1969) (holding that an unusually low price does not make the goods unique); *Tower City Grain Co v Richman* 17 U.C.C. Rep. Serv. 1011 (N.D. 1975) (sale of wheat found not specifically enforceable as the wheat was not considered to be unique, the court ignored the fact that the defendants had in their possession the type and quantity of wheat specified in the contract); *Columbia Gas Transmission Corp v Larry H Wright Inc* 23 U.C.C. Rep. Serv. 910 (S.D. Ohio 1977) (deciding that the existence of a national shortage does not show the buyer could not obtain goods elsewhere); *Pierce-Odom Inc v Evenson* 33 U.C.C. Rep. Serv. 1693 (1982) (deciding that a mobile home was not shown to have a unique or peculiar value); *In re Koreag, Controle et Revision SA* 17 U.C.C. Rep. Serv. 2d 1036 (2d Cir. 1992) (holding that US currency was not unique even where cover is not available). See further "Specific performance of a contract as a matter of right" 65 *American Law Reports* 7.

²⁴ These situations follow those originally identified in § 360 of the American Law Institute's *Restatement (Second) of Contracts* and also discussed in *Peel Treitel's Law of Contract* 1099 ff; Beale et al (eds) *Chitty on Contracts* 1907 ff.

²⁵ See A Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 458: "Specific performance will not be ordered unless damages (and the common law remedy of the

considered. In the following four sections, inadequacy of damages will be discussed in the context of those situations where the issue most frequently arises, but it must be appreciated that these fact patterns do not constitute a closed list, since damages may be inadequate in a range of other situations.²⁶

The central objective of the following discussion is to show that there are indications of a change in thinking in the common law doctrine about “adequacy of damages” in that it has developed in the direction of an approach that emphasises the appropriateness of the remedy in the circumstances rather than the inadequacy of the legal remedy of damages.

3 2 1 No market substitute for performance available

3 2 1 1 Contracts for the sale of land

Damages are considered to be inadequate if no market substitute for performance is available. This constitutes the main justification for enforcing contracts involving land. Contracts concerning land are the most prominent class of contracts that will be specifically enforced.²⁷ These contracts provide the purchaser a right to a particular piece of land. Monetary compensation would not provide adequate relief, because of

award of an agreed sum) are inadequate. This is the major hurdle that a claimant seeking performance must overcome, but, even having done so, it may still fail because of one of the several other bars.” See also Spry *The Principles of Equitable Remedies* 60: “Of course, if damages are inadequate in this sense, discretionary considerations may nonetheless lead to a refusal of specific performance, with the consequence that the plaintiff may be confined to damages in any event.”

²⁶ For examples, see Perillo *Calamari and Perillo on Contracts* 552-553.

²⁷ See para 2 3 2 1 above. See also C Szladits “The concept of specific performance in civil law” 1955 *Am J Comp L* 208 209-210; G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) 64; Perillo (ed) *Corbin on Contracts* § 1143; S Shavell “Specific performance versus damages for breach of contract: an economic analysis” (2006) 84 *Tex LR* 831 832.

the specific qualities of the piece of land, which are considered to be difficult to quantify.²⁸ Therefore, the courts generally determine that either party to a contract for the sale of land is entitled, as a matter of right, to obtain an order for its specific performance,²⁹ provided that the contract is not one which would be inequitable to enforce, or which, in its nature and circumstances, is objectionable.³⁰

This principle even applies where the apparent unique value of the land is disproved by the purchaser, who expresses a clear intention of reselling the land by contracting with a third party even before he has taken possession of the property.³¹ For example, in the recent Californian case of *Real Estate Analytics v Vallas*,³² the Court of Appeal reversed the trial court's decision to award damages despite the buyer's request for specific performance, and ordered specific performance of a contract for the sale of a large parcel of coastal property, even though the property was purchased solely for investment purposes. Thus, the inadequacy of damages is presumed in every case involving a contract for the sale of land, and specific performance of the contract follows

²⁸ See nn 34-35 below. Note that specific performance is also ordered of contracts to dispose of lesser interests in land. For example, in *Verrall v Great Yarmouth Borough Council* [1981] QB 202, specific performance was ordered to enforce a contractual license to occupy premises. See G Jones & W Goodhart *Specific Performance* 2 ed (1996) 128, and for the US, Perillo (ed) *Corbin on Contracts* § 1143. Cf para 2 3 2 2 n 167 above.

²⁹ According to Chen-Wishart *Contract Law* 542: "The seller can even obtain specific performance" based on "the court *deeming* interests in land to be unique; the rule that land contracts confer an immediate equitable *proprietary interest* on buyers; and the *mutuality* of granting the seller the same remedy as the buyer is entitled to."

³⁰ See J Beatson et al *Anson's Law of Contract* 29 ed (2010) 577. See also *Wilhite v Skelton* 149 Fed. 67 (1906); *McClurg v Crawford* 209 Fed. 340 (1913). Other cases granting specific performance are collected in Perillo (ed) *Corbin on Contracts* § 1143 n 55.

³¹ Beale et al (eds) *Chitty on Contracts* 1908-1909.

³² 160 Cal.App.4th 463 (2008).

as a matter of course.³³ Where the contract sought to be enforced specifically concerns land, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case.³⁴ So, it is said that when a court orders specific performance in terms of its equitable jurisdiction, it is upon the ground that the remedy at law is inadequate; but when the contract is for the sale of land, it is considered that damages is necessarily inadequate (as courts assume that land is unique and that no market substitute is available).³⁵ Hence, if enforcement of the particular contract is equitable and justifiable (and of course provided it complies with other relevant contractual formalities), “it is almost a matter of course, although spoken of as a matter of sound discretion”, to grant specific performance.³⁶ In this

³³ It was confirmed in *Cummings v Nielson* 129 Pac. 619 (1912), and *Warren v Goodloe's Executor* 20 S.W. 2d 278 (1929), that where a contract for the sale of land is concluded fairly, it is the duty of the court to enforce it.

³⁴ It was asserted in *In Re Scott* [1895] 2 Ch 603, that specific performance has always “been treated as a question of discretion whether it is better to interfere and give a remedy which the common law knows nothing at all about, or to leave the parties to their rights in a court of law. The foundation of the doctrine of specific performance [of a contract for the sale of land] is that land has quite a character of its own, that the real meaning between the parties to a contract for sale of land was not that there should be a contract with legal remedies only, and that the purchaser should get the land, and should not be put off, in an ordinary case, by offering him damages”. See also Perillo (ed) *Corbin on Contracts* § 1143, and the cases collected in n 55.

³⁵ As stated by Stafford J in *Fowler v Sands* 73 Vt. 236 (1901) (relying on J N Pomeroy Jr *A Treatise on Equity Jurisprudence: as administered in the United States of America* (1907) § 1402), and confirmed recently by Haller J in *Real Estate Analytics v Vallas* 160 Cal.App.4th 463, 466 (2008): “The law generally presumes real property is unique and that the breach of an agreement to transfer property cannot be adequately relieved by pecuniary compensation.” This was also confirmed in English case law – see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, 478 per Lord Diplock.

³⁶ As stated by Stafford J in *Fowler v Sands* 73 Vt. 236 (1901) relying on Pomeroy *A Treatise on Equity Jurisprudence* (1907) § 1404. See earlier, *Park v Johnson* 4 Allen

respect the right to an order for the specific performance of a contract for the sale of land presents an apparent exception to the general rule in favour of damages. And specific performance will not be denied simply because the plaintiff has the right to recover damages for the breach.³⁷

However, the justification of granting specific performance on the basis that the property is unique has been severely criticised, mainly because it is not true for every sale of land.³⁸ The purchaser may, as we have seen, intend to resell the property immediately or to retain it as an investment³⁹ (rather than as a home) without having a particular interest in its “uniqueness”.⁴⁰ In these circumstances, where the purchaser has a purely

(Mass.) 259 (1862), per Dewey J at 261, citing *Old Colony Railway Corp v Evans* 6 Gray (Mass.) 25 (1856).

³⁷ See *Louisville Southern Railway Co v Ragland* 15 Ky. L. Rep. 814 (1894): “An agreement will be enforced specifically, where the specific thing or act contracted for, and not mere pecuniary compensation, is the redress practically required; and in such cases, where there is good faith, valuable consideration, clean hands, and no unreasonable hardship to result to the defendant it is as much a matter of course for the chancellor to decree specific performance of a contract as it is for a court of law to give damages for its breach, and specific performance will not be denied simply because the party asking for it may have the right to recover damages for the breach.” (The case concerned an agreement by a railroad company to give a right of way through its land.)

³⁸ See Burrows *Remedies for Torts and Breach of Contract* 458-459; Jones & Goodhart *Specific Performance* 130-132; R J Sharpe *Injunctions and Specific Performance* (1983) 316 ff.

³⁹ See P J Brenner “Specific performance of contracts for the sale of land purchased for resale or investment” (1978) 24 *McGill Law Journal* 513, esp 545-548.

⁴⁰ See “counterpoint” discussion by M Chen-Wishart *Contract Law* 4 ed (2012) 542: “The automatic availability of specific performance in land contracts should be reconsidered. While specific performance is appropriate where the buyer has some unique interest in the land or the seller cannot readily resell the land or wants to free himself from burdens attached to the land, commercial parties motivated by profit should be regarded as adequately compensated by damages.” Cf Klass *Contract Law in the USA* 213: “The rule

monetary interest, (whether it is to achieve a profit by disposing of the property or using it to earn rent), the justification of non-substitutability would not apply.⁴¹ Damages would adequately compensate the purchaser for loss of profits since this assessment would not present the same difficulties as where a purchaser attaches a subjective value to the property over and above that reflected in the (objective) market.⁴² Sharpe explains that “[l]and is a fungible good to such a purchaser”.⁴³

Furthermore, comparable common-law jurisdictions seem to be aligning their views accordingly. Recent case law in Canada⁴⁴ and New Zealand as well as subsequent

is fairly categorical. Thus specific performance will be awarded even if the injured party has already entered into a contract with a third party to resell the land for a higher price, or when there is sufficient demand that an injured seller could quickly resell, if at a slightly lower price – both situations in which it would be simple to compute fully compensatory damages.”

⁴¹ See Burrows *Remedies for Torts and Breach of Contract* 459: “there is no such obvious justification where the claimant was intending a quick resale, particularly where the resale contract has already been concluded”.

⁴² However, as Burrows correctly observes, if “there is no true substitute land, specific performance for the long-term investor is justified because of the acute difficulty of accurately assessing his profits” (*Remedies for Torts and Breach of Contract* 459). See again, *Adderley v Dixon* (1824) 1 Sim & St 607, 110 per Leach VC: “Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.”

⁴³ *Injunctions and Specific Performance* 318.

⁴⁴ It is an established principle in Canadian contract law that if the purchaser bought the property purely as an investment, damages will be an adequate remedy (*Domovics v Orsa Investments Ltd* [1993] 15 OR (3d) 661 (OCGD); *John E Dodge Holdings Ltd v 805062 Ontario Ltd* [2001] 56 OR (3d) 341 (OSCJ)). The Canadian approach is evident from the following obiter dictum in *Semelhago v Paramadevan* [1996] 2 SCR 415 (SCC) 428-429, paras 21-22 *per* Sopinka J: “While at one time the common law regarded every piece of

academic commentary⁴⁵ reveal that this traditional common-law approach in relation to contracts for the sale of land is not convincing.⁴⁶ This assumption of uniqueness where the contract concerns land and the subsequent finding that there is no market substitute available is considered outdated as houses can be “made to order” especially on large residential estates.⁴⁷ This essentially renders the argument that houses are so specific and unique that they are considered one of a kind, and therefore specifically enforceable, as nugatory.⁴⁸ These courts have accordingly abandoned the presumption that specific performance should be awarded unless evidence is presented why it should not.

real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available. It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personality. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognised that the distinction might not be valid when the land had no peculiar or special value ... Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that a substitute would not be readily available.” That this represents the law in Canada was confirmed by the more recent Supreme Court decision in *Southcott Estates Inc v Toronto Catholic District School Board* 2012 SCC 51, paras 38-41.

⁴⁵ See eg S Mills “Specific performance: sale of land” 2006 *New Zealand Law Journal* 196.

⁴⁶ Jones and Goodhart also note that “in Canada provincial courts have denied specific performance on the ground that the land had been bought for investment or resale; an award of damages would adequately compensate the plaintiff for any loss of profits” (*Specific Performance* 130).

⁴⁷ Cunnington “The inadequacy of damages as a remedy for breach of contract” in Rickett (ed) *Justifying Private Law Remedies* 116.

⁴⁸ Burrows uses the example of a contract for the sale of identical new houses on a housing estate (*Remedies for Torts and Breach of Contract* 458).

Although specific performance has on occasion been refused of contracts to sell land, courts in the US and England still grant the remedy as a matter of course in these circumstances.⁴⁹ And since specific performance is routinely ordered of obligations to sell land even if the land can be replaced in the market and damages would be perfectly adequate, it appears that for all intents and purposes specific performance has become the default remedy in these cases. Burrows is thus correct in his observation that “[a]ll in all, it seems clear that specific performance has simply taken over as the primary remedy for breach of an obligation to sell land, and that the adequacy of damages hurdle is in effect ignored”.⁵⁰ Provisionally, it may be said that English law is working with a too crude generalisation or untenable presumption, and it would have been preferable to have a more flexible approach which would have enabled the nuanced treatment of situations which reveal subtle distinctions.⁵¹

3 2 1 2 Contracts for the sale of personal property

Specific performance of contracts for the sale of goods was traditionally only ordered if the goods concerned were unique in character, such as works of art, and certain heirlooms and antiques.⁵² The underlying principle was that with generic goods, the aggrieved party had an adequate remedy in damages, because he could acquire the goods elsewhere.⁵³ For example, in *Thorn v Public Works Commissioners*,⁵⁴ specific

⁴⁹ Jones & Goodhart *Specific Performance* 128-132. See esp 130-131, for comprehensive discussion of why specific performance should normally be granted for a breach of a contract to sell land.

⁵⁰ *Remedies for Torts and Breach of Contract* 459.

⁵¹ For similar concerns relating to our law, see text to n 252 para 3 4 3 below.

⁵² See paras 1 1 2 & 2 3 2 1 above.

⁵³ See Perillo (ed) *Corbin on Contracts* § 1146; Burrows *Remedies for Torts and Breach of Contract* 460; Beale et al (eds) *Chitty on Contracts* 1911.

⁵⁴ (1863) 32 Beav 490. See also *Behnke v Bede Shipping Co Ltd* [1927] 1 KB 649, where Wright J ordered specific performance of a contract to sell a ship on the ground that it “was of peculiar and practically unique value to the plaintiff ... A very experienced ship's

performance was ordered of a contract to sell the arch-stone, the spandril stone and the Bramley Fall stone of the Westminster Bridge, after it had been pulled down for construction of a new bridge.

However, this category was “sparingly used”,⁵⁵ as is illustrated by the decision in *Falcke v Gray*.⁵⁶ In this case the defendant let her furnished house to the plaintiff for six months. She also agreed that upon expiration of this period the plaintiff would have the option of buying certain articles, which included two vases, described by the court “as articles of unusual beauty, rarity and distinction”.⁵⁷ The vases can thus be regarded as physically unique.⁵⁸ The defendant’s agent mistakenly valued them at £40. (During the course of the trial it became apparent that the vases were undervalued, and were in fact worth about five times as much as the initial valuation.) The defendant began to doubt whether the valuation was accurate and removed the vases from the house. She also informed the plaintiff of the removal and subsequently sold the vases for £200 to a curiosity dealer. The plaintiff proceeded to obtain an injunction against the defendant and the second purchaser, and sought specific performance of their agreement. However, the defendant argued that as this was a contract for ordinary personal property, it could not be specifically enforced.

The court would have been prepared to order specific performance of the sale agreement due to the unique and rare nature of the subject matter and the inadequacy

valuer has said that he knew of only one other comparable ship but that may now have been sold” (at 661). Cf *CN Marine Inc v Stena Line A/B (The Stena Nautica) (No 2)* [1982] 2 Lloyd’s Rep 336, where specific performance was refused as the plaintiff had failed to show that the ship was sufficiently different from other ships so that he had a special need for the particular ship.

⁵⁵ Chen-Wishart *Contract Law* 541.

⁵⁶ (1859) 4 Drew 651.

⁵⁷ 658.

⁵⁸ See Cunningham “The inadequacy of damages as a remedy for breach of contract” in Rickett (ed) *Justifying Private Law Remedies* 128.

of damages in compensating for non-performance.⁵⁹ However, specific performance was refused on other grounds. The defendant seller further argued that the contract constituted a hard bargain, as the initial purchase price agreed to by the plaintiff was not nearly market-related, and therefore could not be specifically enforced by the court. After considering case law on the question of inadequacy of price,⁶⁰ the court found that inadequacy of price⁶¹ did justify the refusal of specific performance in this case, as it would be unreasonable to assist the plaintiff in obtaining such a bargain.⁶²

It may be reasoned then that damages will be inadequate (and specific performance will be granted) when the goods are unique, rare, or unusual. However, this rule does not apply if the bargain is unfair, with the consequence that the plaintiff may be confined to damages in any event. The question arises though whether the purchaser would not in any event receive such a bargain if the non-performing seller had to pay the full difference between the purchase price and market value as damages. But Kindersley VC, while denying specific performance, said: "In the present case the contract is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance..."⁶³ Thus, Kindersley VC initially stated that inadequacy is a sufficient reason for the court to exercise its discretion as the subject matter of the contract was unique. However, he continued and stated that the plaintiff purchaser knew that the price put upon the vases was not a fair price. The

⁵⁹ (1859) 4 Drew 651, 658.

⁶⁰ Kindersley VC relied on *Day v Newman* 2 Cox Ch 77 (1788) and *White v Damon* 7 Ves 30 (1802), as the more distinct and authoritative decisions concerning the question whether specific performance could be refused on the ground of inadequacy of price.

⁶¹ Kindersley VC said at 659: "That this was a hard bargain in the sense of its being for a very inadequate price there can be no doubt ..."

⁶² Kindersley VC continued at 659: "The general rule with regard to hard bargains is that the Court will not decree specific performance, because specific performance is in the discretion of the Court for the advancement of justice; such discretion, indeed, to be exercised, not according to caprice, but on strict principles of justice and equity."

⁶³ (1859) 4 Drew 651, 658.

court ultimately refused to order enforcement of the contract as it would have operated strongly in favour of the plaintiff to the corresponding disadvantage of the defendant. It appears, though, that an award of damages would not have alleviated the defendant's position in any event.

The defendant thus succeeded with her second ground of defence and the plaintiff's claim, against both defendant and second purchaser failed. The plaintiff's claim against the second purchaser failed because the court found that there was not sufficient evidence showing that the second purchaser was aware of the fact that the defendant entered into a prior agreement, which prevented her from selling the vases to another.⁶⁴

It is important to note that, despite the judge's suggestion to this effect,⁶⁵ this decision does not provide support for the proposition that the inadequacy of price/consideration could *per se* or "standing by itself"⁶⁶ (i.e. "where there has been not the least impropriety of conduct on the part of the person seeking specific performance")⁶⁷ influence the court to refuse specific performance (even where the goods are considered to be "unique" or "specific"). The prevailing and correct view is rather that specific performance may be refused where inadequacy of consideration is combined with some other factor that does not affect the validity of the contract, for example, unfair advantage taken by the plaintiff of his superior knowledge or bargaining position.⁶⁸ This was in fact what motivated Kindersley VC in *Falcke v Gray*,⁶⁹ to refuse specific performance, i.e. the fact that the plaintiff purchaser, as a dealer in curiosities, china, etc. was well aware of the

⁶⁴ *Falcke v Gray* (1859) 4 Drew 651, 665.

⁶⁵ *Per Kindersley VC* at 664: "I am of opinion that in the present case I ought to refuse specific performance on the mere ground of inadequacy of price, even if there were none other."

⁶⁶ *Martin Hanbury & Martin's Modern Equity* 790.

⁶⁷ *Per Kindersley VC* at 660.

⁶⁸ See Peel *Treitel's Law of Contract* 1107-1108; Beale et al (eds) *Chitty on Contracts* 1926; Chen-Wishart *Contract Law* 543.

⁶⁹ (1859) 4 Drew 651.

value of similar articles (whilst the seller was completely ignorant of the true value of the vases),⁷⁰ in conjunction with the fact that the price appeared to be inadequate.

Thus, the factor of inadequacy of consideration along with other factors (which fall short of actually invalidating the contract) could influence a court to ignore the uniqueness of the subject matter of the contract and refuse specific performance. Inasmuch as the court in *Falcke* refused specific performance based on factors which fell short of invalidating the contract, i.e. the impropriety on the part of the plaintiff purchaser (knowing very well that the vases were undervalued), and that enforcing the contract would bear hardly on the defendant due to the inadequacy of price, this decision can also be relied on in support of the general proposition that specific performance will be refused if it would result in severe hardship to the defaulting party.⁷¹

The position in American law also supports the conclusion arrived at above. The prevailing view is that mere inadequacy of consideration is not sufficient in itself to prevent a court from granting specific performance.⁷² This factor alone will not influence the court to refuse the remedy.⁷³ Thus, American courts too, require that this factor be

⁷⁰ 654, 655, 665.

⁷¹ See generally Peel *Treitel's Law of Contract* 1106-1107: "Specific performance can be refused on the ground of severe hardship to the defendant e.g. where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant", and specifically, para 6 2 below.

⁷² See eg *Adams v Peabody Coal Co* 82 N.E. 645 (1907) (option for \$1, to sell land for further sum of \$15 per acre specifically enforced). Compare the English case of *Coles v Trecotthick* (1804) 9 Ves 234 (contract to sell for £20 000 was specifically enforced even though another person later offered £25 000. Lord Eldon stated: "Unless the inadequacy of price is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing specific performance.").

⁷³ G Blum & M B Morris "Specific performance" 71 *AMJUR* 2 ed § 97; "Specific performance of a contract as a matter of right" 65 *American Law Reports* 7.

accompanied by other facts indicating artifice, sharp practice, hardship, taking advantage of misfortune, or ignorance.⁷⁴

Falcke also serves to illustrate another puzzling aspect of the common-law approach. As indicated, the court would have been prepared to order specific performance of the contract to sell two unique vases even though the plaintiff seemed to have a merely commercial interest in them.⁷⁵ This can then be compared to courts' approach to breach of contracts to sell land. As already noted,⁷⁶ courts will still be inclined to order specific performance of a contract to sell land even though the purchaser has a purely monetary or commercial interest in the property. Thus, the same approach is adopted in relation to other physically unique goods. As Burrows states:

"Analogously to their approach to land, the courts appear not to be concerned with the purpose for which the claimant is buying the physically unique goods. In other words, no distinction appears to be drawn between the consumer, with his non-monetary interest, and the businessman who wants the goods for profitable use or resale. The same criticism can be made as in relation to land contracts: namely that for the reseller damages are adequate, since his interest is purely monetary and, unlike the long-term investor, they can generally be readily assessed."⁷⁷

Now consider the specific enforceability of contracts of which the subject matter concerns ordinary (i.e. non-unique) personal property. It is clear that English courts at one time seemed reluctant to recognise the specific enforceability of contracts for the sale of ordinary personal property, i.e. goods that were not considered to be specific or unique, based on the substitutability of performance.⁷⁸ There are, however, some

⁷⁴ See Perillo (ed) *Corbin on Contracts* § 1165.

⁷⁵ (1859) 4 Drew 651, 658.

⁷⁶ See para 3 2 1 1 above.

⁷⁷ *Remedies for Torts and Breach of Contract* 461.

⁷⁸ See G H Treitel "Remedies for breach of contract" in *IACL VII* ch 16 (1976) 18; G H Treitel *The Law of Contract* 7 ed (1987) 788.

indications that the English courts are moving towards such an approach.⁷⁹ For example, the criterion was strongly challenged in the famous case of *Beswick v Beswick*.⁸⁰ Lord Pearce in particular preferred to focus on the question of whether the more appropriate remedy was that of specific performance.⁸¹ It is said that the courts have changed their approach, by asking instead, what remedy is the most appropriate in the circumstances of the individual case.⁸² The question therefore, is not whether damages is an adequate remedy anymore. For example, in *Evans Marshall & Co Ltd v Bertola SA*⁸³ Sachs LJ proclaimed: “The standard question ..., ‘Are damages an adequate remedy?’ might perhaps, in the light of the authorities in recent years, be rewritten: ‘Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?’”⁸⁴ It is apparent from the case law that the courts are slowly accepting the view that specific performance should be ordered when it is the more appropriate remedy, even though damages may be regarded as an adequate remedy in the sense of the older authorities. This is illustrated by the fact that English courts seem

⁷⁹ See G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) 65.

⁸⁰ [1968] AC 58. For a discussion of the facts, see para 3 2 4 below.

⁸¹ [1968] AC 88. See also *Coulls v Bagot's Executor and Trustee Co* [1967] ALR 385, 412.

⁸² See Beale et al (eds) *Chitty on Contracts* 1907-1908. See also Burrows *Remedies for Torts and Breach of Contract* 457-458: “Some recent cases indicate a weakening of this bar, and it has even been argued that specific performance is now the primary remedy in England.” He then adds that this “seems exaggerated” but admits that “The recent apparent weakening not only of this, but of several other of the traditional bars, [means] that specific performance may be more freely available now than it was in the past.” See also 470-472.

⁸³ [1973] 1 WLR 349. See also *Tito v Waddell (No 2)* [1977] Ch 106, 322; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898 903; *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, 73 per Lawrence Collins QC: “Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy, or, in the more modern formulation, when specific performance is the appropriate remedy.” See also para 5 2 (iii) below.

⁸⁴ [1973] 1 WLR 349, 379.

increasingly more willing to grant specific performance of contracts, even where the subject matter concerns generic goods,⁸⁵ if the goods are in such short supply that the buyer is unable to obtain alternative performance from another source, referred to as cases of “commercial uniqueness”.⁸⁶

This was the case in *Howard E Perry & Co v British Railways Board*.⁸⁷ Here the court granted specific performance of a duty to deliver a quantity of steel in favour of a steel stockholder against a rail carrier who refused to allow the steel to be moved during a period of industrial strike action by its employees, so as to avoid further industrial action. The court maintained that during the strike “steel [was] available only with great difficulty, if at all”. Council for the plaintiff argued that at that moment “steel [was] gold”. The court found that damages would not provide adequate compensation in the circumstances as the equivalent of what was detained was unobtainable in the market.⁸⁸ This view is supported by an earlier decision *Sky Petroleum Ltd v VIP Petroleum Ltd*,⁸⁹ in which the court also granted specific performance of goods considered to be generic under normal circumstances. Ordinarily, petroleum is not considered to be unique, but in this case it became a rare commodity because there was inadequate supply. The court granted specific performance of the sale of petroleum due to the surrounding circumstances that rendered it commercially unique.

⁸⁵ And thus falls outside of the scope of s 52 of the Sale of Goods Act 1979, which gives the court a discretion to order specific performance where an action is brought “for breach of a contract to deliver specific or ascertained goods”. See para 2 3 2 1 above.

⁸⁶ This term was introduced by Treitel – see G H Treitel “Specific performance in the sale of goods” 1966 *Journal of Business Law* 211 215; *Remedies for Breach of Contract: A Comparative Account* 64; Peel *Treitel's Law of Contract* 1102. See also V Mak *Performance-Oriented Remedies in European Sale of Goods Law* (2009) 84-89.

⁸⁷ [1980] 1 WLR 1375.

⁸⁸ [1980] 1 WLR 1383.

⁸⁹ [1974] 1 WLR 576.

This view is further supported by a more recent decision in *Thames Valley Power Ltd v Total Gas and Power Ltd*.⁹⁰ Here Thames Valley Power Limited (TVP) contracted to buy gas from Total for the operation of a combined heat and power plant at Heathrow Airport in 1995. The contract contained a floor and ceiling pricing mechanism to fix what TVP would pay. It also contained a clause relieving an affected party from the performance of its obligations upon the occurrence of a *force majeure* event. Gas prices rose and it became uneconomic for Total to keep supplying TVP at the contract price. As a result, Total informed TVP in writing that it was unable to perform its obligation to supply gas. TVP's response was that the price increases did not make Total unable to perform – it just meant that the performance of Total's side of the agreement would be less profitable for Total – and TVP accordingly requested an undertaking that Total continue to supply gas in accordance with the contract. In 2005, Total invoked the *force majeure* clause, and argued that its performance had become “commercially impracticable”.⁹¹ However, the court held that Total's non-performance could not be excused or justified on this ground. Clarke J emphasised that a *force majeure* event must have made Total unable to supply gas. He distinguished between inability and inconvenience and held that “[t]he fact that it is much more expensive, even very greatly more expensive for it to do so, does not mean that it cannot do so”.⁹²

He further held (though it was “not strictly necessary” to decide whether it was a case for specific performance)⁹³ that Total's obligation was specifically enforceable, because the basis of the contract was that TVP “would be assured of a source of supply from a first-rank supplier at an agreed price for a 15 year term” and to “confine them to a claim in damages would deprive them of substantially the whole benefit that the contract was

⁹⁰ [2006] 1 Lloyd's Rep 441.

⁹¹ 450.

⁹² 451.

⁹³ 455.

intended to give them".⁹⁴ Beale et al hold that "[t]his amounts to saying that damages were not an adequate remedy because no substitute was available".⁹⁵

Thus, if obtaining a substitute involves difficulty, it gives the goods a character of commercial uniqueness, which could consequently influence a court to grant specific performance even though the goods are (strictly speaking) generic and the situation is not explicitly covered by section 52 of the Sale of Goods Act 1979.⁹⁶ Thus, goods may be unique in nature, or they may be unique because of surrounding circumstances.

Treitel observes that if this development continues, English and American law, where it concerns this point, will move more closely together, so that the requirement that damages must be an inadequate remedy will be restored to its proper function, in line with American law. This proper function is to restrict the plaintiff's claim to damages if he can thereby be placed in as good a position as specific performance. This would be the more sensible route in such a situation, because a judgment to pay money is easier and quicker to execute, and also minimises the risk of hardship to the debtor if he were to be compelled to perform.⁹⁷

The same reluctance is, however, not expressed in American law. According to Corbin,

"There is no doubt that the American courts have become progressively more liberal in the granting of this effective remedy and have become less astute in enforcing the requirement that the remedy in damages shall be inadequate."⁹⁸

⁹⁴ 455.

⁹⁵ *Chitty on Contracts* 1916.

⁹⁶ See A S Burrows "Specific performance at the crossroads" 1984 *Legal Studies* 102 103; Beale et al (eds) *Chitty on Contracts* 1915-1917. See also n 85 above.

⁹⁷ Treitel *Remedies for Breach of Contract: A Comparative Account* 65.

⁹⁸ See Perillo (ed) *Corbin on Contracts* § 1139. See also Zweigert & Kötz *Comparative Law* 481-484.

The courts in the United States have extended the remedy of specific performance to buyers of generic goods whose need for the actual supply was particularly urgent or who would not be able to get a substitute. The US Uniform Commercial Code has broadened the possibility of specific performance as a buyer's remedy.⁹⁹ As indicated in chapter 2 this is accomplished by the wording of § 2-716(1),¹⁰⁰ which provides that “[s]pecific performance may be decreed where the goods are unique *or in other proper circumstances ...*” (own emphasis).¹⁰¹ The latter phrase therefore broadens the “uniqueness” requirement. This provision is an indication of the growing tendency of US courts to order specific performance on the basis of the appropriateness of the remedy and not on the adequacy of damages.¹⁰²

⁹⁹ See M A Schmitt & M Pasterczyk “Specific performance under the Uniform Commercial Code – will liberalism prevail?” (1976-1977) 26 *De Paul Law Review* 54.

¹⁰⁰ See para 2 3 2 2 above.

¹⁰¹ The official comment (2) to this section reads: “Uniqueness should be determined in light of the total circumstances surrounding the contract and is not limited to goods identified when the contract is formed. The typical specific performance situation today involves an output or requirements contract rather than a contract for the sale of an heirloom or priceless work of art. A buyer's inability to cover is evidence of 'other proper circumstances'.” (Output and requirements contracts are the major types of long-term supply contracts – see para 2 3 2 2 nn 184-185 above.) See also M Nichols “Remedies – specific performance and long-term supply contracts: an application of U.C.C. § 2-716” (1976) 30 *Arkansas Law Review* 65.

¹⁰² For discussion of the trend in the US, see M T van Hecke “Changing emphasis in specific performance” (1961-1962) 40 *North Carolina Law Review* 1; Comment “Specific performance: a liberalization of equity standards” (1964) 49 *Iowa Law Review* 1290. In practice, though, plaintiffs tend to prefer the remedy of “cover” (i.e. the recovery of the difference between the contract price and the price of purchasing replacement goods without unreasonable delay) provided by § 2-712 of the UCC (Addendum A 387), as it provides a more convenient and less time-consuming solution (see Treitel *Remedies for Breach of Contract: A Comparative Account* 64 n 28).

The case of *Sedmak v Charlie's Chevrolet Inc*¹⁰³ is particularly informative on the interpretation and effect of § 2-716. The court adopted a liberal approach to the Code in allowing specific performance even though the legal remedy of damages would have been adequate. Here the plaintiffs were told they could buy a limited edition “pace car” when it arrived at the dealership for the suggested retail price of approximately \$15,000. Factory changes were made to the car at the plaintiff’s request before delivery to the dealer. When the car arrived at the dealership they were told they could bid on the car, but its popularity had increased the price. They did not bid, but instituted a claim for specific performance. The court held that the pace car was not unique in the traditional legal sense, however, its “mileage, condition, ownership and appearance” did make it difficult, if not impossible, to obtain the replication without considerable expense, delay, and inconvenience.¹⁰⁴ The court ordered specific performance even though the legal remedy of damages may have been available to adequately compensate the plaintiffs.¹⁰⁵

¹⁰³ 622 S.W.2d 694 (Mo.App.1981).

¹⁰⁴ 699.

¹⁰⁵ The court specifically addressed the the UCC’s adoption of the term “in other proper circumstances” and the official comment (2) to § 2-716 (at 700): “In view of this Article’s emphasis on the commercial feasibility of replacement, a new concept of what are ‘unique’ goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract.... [U]niqueness is not the sole basis of the remedy under this section for the relief may also be granted ‘in other proper circumstances’ and inability to cover is strong evidence of ‘other proper circumstances.’” Quoted with approval in *King Aircraft Sales Inc v Lane* 68 Wash.App. 706, 714 (1993): “We agree with the *Sedmak* court’s interpretation of § 2-716 and, like that court, find the liberal interpretation urged by the UCC drafters to be entirely consistent with the common law of our state. Prior to adoption of the UCC, our cases did not always require the absence of a legal remedy before awarding specific performance nor did these cases require the goods to be absolutely ‘unique.’ Hence, the

Furthermore, certain statutory provisions in some of the states have also developed in this direction. For example, the draft Civil Code originally prepared for the state of New York in 1865 by David Dudley Field II, adopted in a number of other states (but not by its intended state), contained the traditional provision that specific performance could be ordered where damages did not provide “adequate” relief.¹⁰⁶ Most of the states which adopted Field’s Code, such as California, North Dakota and South Dakota, have since repealed this provision. Maryland even adopted a statutory provision which determines that specific performance is not to be refused merely because the plaintiff has an “adequate” remedy at law.¹⁰⁷ As for the other states which have not promulgated statutory provisions to this effect, their case law indicates that they are also moving in this direction.¹⁰⁸

English courts, on the other hand, are slower in accepting this view, and the requirement that damages must be inadequate before specific performance will be ordered, is still maintained.¹⁰⁹ As Burrows puts it:

“While *Beswick* can be given such a wide interpretation, and it is hard to interpret Lord Pearce’s judgment in any other way, the courts have taken the narrow view, for they have continued to apply the adequacy of damages bar without even mentioning *Beswick*.¹¹⁰

liberal approach to ‘other proper circumstances’ suggested in Official Comment 2 is not a departure from our law.”

¹⁰⁶ D D Field, Civil Code (Albany 1865) § 1887. See further on the Field Civil Code (1865), Treitel *Remedies for Breach of Contract: A Comparative Account* 65; and on the Field Code of Civil Procedure (1848) which abolished the distinction in forms of procedure between an action at law and a suit in equity, E A Farnsworth *An Introduction to the Legal System of the United States* 4 ed (2010) 104.

¹⁰⁷ Annotated Code of Maryland (Commercial Law) § 11-508 (accessible via Westlaw International).

¹⁰⁸ See Perillo (ed) *Corbin on Contracts* § 1139 and the cases collected there in n 28.

¹⁰⁹ See eg M P Furmston *Cheshire, Fifoot & Furmston’s Law of Contract* 16 ed (2012) 796.

In the light of the above it can be concluded that there are two instances where specific performance will be ordered in respect of contracts for the sale of personal property. First, specific performance will be ordered where the subject matter of the contract is unique on the basis that a market substitute is unavailable.¹¹¹ Secondly, it will be ordered in cases where the contract involves non-unique goods, but the circumstances are such that a substitute is practically unavailable.¹¹² Courts have also started to recognise the specific enforceability of contracts for the sale of shares,¹¹³ even though these contracts would not ordinarily be specifically enforced, as shares are deemed readily available on the market and easily substitutable, making damages an adequate remedy. The courts have been influenced by the fact that the purpose of a contract for the sale of shares is often to secure control of the company. This has influenced the courts to grant specific performance, as the value of such control is considered difficult to quantify. Thus, if the number of shares contracted for would ensure the purchaser majority shareholding by obtaining the majority of the voting shares, it would make the shares unobtainable on the market.¹¹⁴ This example demonstrates how the substitutability of the subject matter of the contract could complicate the quantification of damages. The following section is devoted to this issue.

¹¹⁰ See Burrows *Remedies for Torts and Breach of Contract* 458, 471; E McKendrick *Contract Law* 8 ed (2009) 360 ff, and the authorities cited there.

¹¹¹ *Falcke v Gray* (1859) 4 Drew 651; H G Beale et al *Cases, Materials and Text on Contract Law* 2 ed (2010) 846.

¹¹² *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576; *Howard E Perry & Co v British Railways Board* [1980] 1 WLR 1375 confirmed in a recent English case *Thames Valley Power Ltd v Total Gas and Power Ltd* [2006] 1 Lloyd's Rep 441 (discussed above).

¹¹³ See eg *Harvela Investments Ltd v Royal Trust Co of Canada (Cl) Ltd* [1986] AC 207.

¹¹⁴ Perillo (ed) *Corbin on Contracts* § 1148; Burrows *Remedies for Torts and Breach of Contract* 465; Chen-Wishart *Contract Law* 542.

3 2 2 Damages would be difficult to quantify

Damages has also been deemed inadequate due to difficulties with quantification.¹¹⁵ This position is closely related to the approach to uniqueness considered above.¹¹⁶ Consider contracts for the sale of land. As indicated, these contracts are generally specifically enforced based on the fact that damages would not provide adequate relief, because of the unique qualities of the piece of land, which are considered to be difficult to quantify.¹¹⁷ Furthermore, courts have also specifically enforced contracts to pay for or to sell annuities because the value of the rights is difficult to determine;¹¹⁸ contracts to execute a mortgage for money already advanced because the value of having security for the loan is impossible to quantify,¹¹⁹ and contracts to indemnify because quantification of damages depends upon examination of long and intricate accounts, which a court cannot be expected to do.¹²⁰ Courts have also enforced contracts for the

¹¹⁵ Peel Treitel's *Law of Contract* 1100-1101; Beale et al (eds) *Chitty on Contracts* 1909.

¹¹⁶ See Burrows *Remedies for Torts and Breach of Contract* 466: "This head and the previous one (uniqueness) are inextricably linked: difficulty in assessing damages – whether in putting a value on a consumer's interest, or in calculating possible investment profit, or in putting a figure on the serious disruption to a business – lies as the root justification for specific performance, where the contractual subject matter is unique" (citing Kronman "Specific performance" (1978) 45 *U Chi LR* 351 362). See also Cunningham "The inadequacy of damages as a remedy for breach of contract" in Rickett (ed) *Justifying Private Law Remedies* 117.

¹¹⁷ As already noted, courts do not appear to be concerned with the purpose for which the plaintiff bought the property, in other words specific performance will be ordered even if the buyer wants the property for profitable use or resale.

¹¹⁸ *Kenney v Wexham* (1822) 6 Madd 355; *Swift v Swift* (1841) 31 IR Eq 267; *Beswick v Beswick* [1968] AC 58.

¹¹⁹ *Ashton v Corrigan* (1871) LR 13 Eq 76; *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584.

¹²⁰ *Ranelagh (Earl) v Hayes* (1683) 1 Vern 189; *Sporle v Whayman* (1855) 20 Beav 607; *Anglo-Australian Life Assurance Co v British Provident Life and Fire Society* (1862) 3 Giff

sale of debts because damages can only be calculated by speculation in these instances.¹²¹ Thus, if supply of substitute performance is limited, it may be difficult to quantify damages on the ground that it is unclear how much it will cost the plaintiff to obtain alternative performance.¹²² In such circumstances damages will be considered inadequate and specific performance will be ordered.¹²³

521; *Ascherson v Tredegar Dry Dock & Wharf Co Ltd* [1909] 2 Ch 401; and see Fry *Specific Performance of Contracts* 731-732.

¹²¹ *Adderley v Dixon* (1824) 1 Sim & St 607. Cited by Grigsby *Story's Equity Jurisprudence* 2 ed (1892) § 718 as authority for the following important statement: "But although the general rule now is, not to entertain jurisdiction in equity for a specific performance of agreements respecting chattels [...] the rule is a qualified one, and subject to exceptions; or, rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. Cases may readily be enumerated, which are, and have been deemed, fit for the exercise of equity jurisdiction. Thus, where there was a contract for the sale of 800 tons of iron, to be paid for in a certain number of years, by instalments, a specific performance was decreed; for such sort of contracts (it was said) differ from those which are to be immediately executed. But the true reason probably was, that under the particular circumstances of the case, there could be no adequate compensation in damages at law; for the profits upon the contract, being to depend upon future events, could not be correctly estimated by the jury in damages, inasmuch as the calculation must proceed upon mere conjecture."

¹²² Cunningham "The inadequacy of damages as a remedy for breach of contract" in Rickett (ed) *Justifying Private Law Remedies* 117-118.

¹²³ See in particular *Restatement (Second) of Contracts* § 360, cmt b: "The damage remedy may be inadequate to protect the injured party's expectation interest because the loss caused by the breach is too difficult to estimate with reasonable certainty (§ 352). If the injured party has suffered loss but cannot sustain the burden of proving it, only nominal damages will be awarded. If he can prove some but not all of his loss, he will not be compensated in full. In either case damages are an inadequate remedy. Some types of interests are by their very nature incapable of being valued in money. Typical examples include heirlooms, family treasures and works of art that induce a strong sentimental

Recent literature and case law have expressed doubts on whether difficulties in quantifying the aggrieved party's loss justify a finding of inadequacy of damages, and accordingly, awarding specific performance. Some contract scholars contend that “[i]t is not enough to point to difficulty in quantifying the claimant's loss [to show that damages should be regarded as inadequate] since courts are very willing to overcome quantification difficulties”.¹²⁴

In this regard it is significant that in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (discussed fully below),¹²⁵ the Court of Appeal emphasised the inadequacy of damages in compensating the plaintiff who faced enormous obstacles in proving what loss was caused by the defendant's breach in closing its store.¹²⁶ However, the House of Lords played down this factor, and confirmed the trial court's decision to refuse specific performance and its view that the courts too readily refuse damages where the loss would be difficult to quantify.¹²⁷

attachment. Examples may also be found in contracts of a more commercial character. The breach of a contract to transfer shares of stock may cause a loss in control over the corporation. The breach of a contract to furnish an indemnity may cause the sacrifice of property and financial ruin. The breach of a covenant not to compete may cause the loss of customers of an unascertainable number or importance. The breach of a requirements contract may cut off a vital supply of raw materials. In such situations, equitable relief is often appropriate.”

¹²⁴ Chen-Wishart *Contract Law* 541. See also Jones & Goodhart *Specific Performance* 146; Mak *Performance-Oriented Remedies in European Sale of Goods Law* 88-89.

¹²⁵ See para 5 2 below.

¹²⁶ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286 (CA) 295 per Legatt LJ: “The plaintiffs would have very considerable difficulty in trying to prove their loss. An award of damages would be unlikely to compensate them fully; and the losses of the other tenants of the shopping centre would be irrecoverable, except in so far as they might be mitigated by reduced rents. Argyll have acted with gross commercial cynicism, preferring to resist a claim for damages rather than keep an unambiguous promise.”

¹²⁷ See para 5 2 (iv) below.

The relevance of the difficulty of assessing damages was denied in earlier decisions. For example, in *Fothergill v Rowland*,¹²⁸ Sir George Jessel MR said:¹²⁹

“To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years ... is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing. Therefore I do not think it is a case in which damages could not be ascertained at law.”

However, it is difficult to see how the remedy of damages would be adequate to protect the injured party’s expectation interest if the loss caused by the breach is too difficult to estimate. The correctness of this approach has rightly been doubted by Burrows:

¹²⁸ (1873) LR 17 Eq 132. See also *Societe des Industries Metallurgiques SA v Bronx Engineering Co* [1975] 1 Lloyd’s Rep 465 where Buckley LJ states at 469-470: “I think there might well be difficulties in quantifying the damages, but mere difficulty in quantification is not, in my judgment, a matter which really affects the principle at all. I do not doubt that the damages would eventually be satisfactorily quantified.” The court ruled that an interim injunction restraining the sellers from removing (out of the court’s jurisdiction) and disposing of certain machinery which the sellers had contracted to sell to the buyers should not be granted since, even if the sellers were in breach, there was no “likelihood of the Court of trial decreeing specific performance of the contract of sale” since the machinery was available from another source making damages adequate. Curiously and rather remarkably, damages was considered to be adequate even though the court had acknowledged that the delay of up to 12 months in obtaining substitute machinery might substantially disrupt the plaintiff’s business. In doing so, the court clearly rejected uniqueness (both commercial and physical) as a reason for awarding specific performance based on inadequacy of damages. The case was decided after *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576, but before *Howard E Perry & Co v British Railways Board* [1980] 1 WLR 1375 and *Thames Valley Power Ltd v Total Gas and Power Ltd* [2006] 1 Lloyd’s Rep 441.

¹²⁹ (1873) LR 17 Eq 132, 140. This quotation appears in Burrows *Remedies for Torts and Breach of Contract* 466.

"This approach is most unfortunate, for where there is grave doubt about whether damages will put the claimant into as good a position as if the contract had been performed, specific performance is *prima facie* a better remedy..."¹³⁰

3 2 3 Insolvency of the defendant

Support has been expressed in English law for awarding specific performance against an insolvent debtor. The justification is that an award of damages would be ineffective against a person who is insolvent, and who would therefore be unable to satisfy a claim for damages.¹³¹ Spry, for example, adopts this view, maintaining that:

"A significant risk that a legal remedy such as damages will be ineffective on the ground of the inadequate resources of the defendant or otherwise, may of itself justify the conclusion that it is inadequate."¹³²

The law governing the effect of insolvency on the availability of specific performance is simple: inadequacy of damages is the primary reason for granting specific performance and when the breaching party is insolvent, damages are inadequate, and therefore, the aggrieved party is entitled to claim specific performance.¹³³

However, authority also exists in support of the opposite view. It is true that the insolvency of one of the parties is generally conceded to have a very material bearing

¹³⁰ *Remedies for Torts and Breach of Contract* 467. See also Mak *Performance-Oriented Remedies in European Sale of Goods Law* 89.

¹³¹ H L McClintock "Adequacy of ineffective remedy at law" 1932 *Minn LR* 233.

¹³² I C F Spry *The Principles of Equitable Remedies* 5 ed (1997) 68, citing *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S ("The Oakworth")* [1975] 1 Lloyd's Rep 581, where the Court of Appeal granted an injunction on the ground that the defendants had no assets to satisfy the damages claim. See also Beale et al (eds) *Chitty on Contracts* 1910.

¹³³ This analysis appears from the earlier decisions – see eg *Doloret v Rothschild* 57 ER 233, 236 (1824); *Clark v Flint* 39 Mass. 231, 238-239 (1839). See also E Yorio *Contract Enforcement: Specific Performance and Injunctions* (loose-leaf updated by S Thel) § 7.1.

upon the question of the granting or refusing of relief, but many courts have doubted whether the defendant's inability to satisfy a damages claim against him is sufficient reason to grant specific performance.¹³⁴ The primary reason advanced in support of the remedy of damages where the defendant is insolvent, is that to grant specific performance would create an inequitable preference in favour of the plaintiff over the other creditors.¹³⁵ In both England and America, specific performance has been refused against an insolvent on this ground. It was the fear of giving the buyer priority over secured creditors that prevented the court from ordering specific performance in *In Re Wait*¹³⁶ for example.¹³⁷

¹³⁴ See H C Horack "Insolvency and specific performance" (1918) 31 *Harv LR* 702; Perillo (ed) *Corbin on Contracts* § 1156.

¹³⁵ McClintock 1932 *Minn LR* 233 234; Horack 1918 *Harv LR* 702 706, saying: "Since each creditor can make out a case for relief exactly similar to that of the party now before the court, and as each has at some time contributed to the enlarging of the defendant's estate, it ought to make no difference whether one claimant got into his unfortunate position sooner or later than another."

¹³⁶ [1927] 1 Ch 606.

¹³⁷ In *National Bank of Kentucky v Louisville Trust Co* 67 F.2d 97 (C.C.A.6th, 1933), the court said: "The granting to the complainant of relief in the nature of specific performance would be the equivalent of full satisfaction of its claim, and it would thus receive preference to which it is not entitled." And in *Geo E Warren Co v AL Black Coal Co* 102 S.E. 672, 673 (1920), the court similarly stated: "It is true some courts have held that insolvency is a consideration in determining whether or not a contract should be enforced; but, on the contrary, other courts have held that insolvency furnishes an additional reason for denying jurisdiction, for the reason that performance of his contract by an insolvent defendant would enable a plaintiff to obtain preference over the defendant's other creditors." See also *Roundtree v McLain Hempst* 245, 20 F.Cas 1260, 1262 (1834) (cf n 144 below); *Jamison Coal & Coke Co v Goltra* 143 F.2d 889 (1944).

This is why insolvency of the debtor is one of the recognised exceptions to a claim for specific performance under South African law.¹³⁸ Thus, the opposite rule applies in our law. Specific performance can never be awarded because it would upset the *paritas creditorum* (whereby all unsecured creditors have an equal right to payment and proceeds of the insolvent estate).¹³⁹ Eiselen explains the rationale as follows:

¹³⁸ See generally D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 322; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 330. Therefore a trustee of an insolvent estate (or liquidator of a company) generally cannot be compelled to carry out the insolvent's pre-sequestration (or pre-liquidation) contracts if the trustee elects to repudiate liability. The other party is confined to a concurrent claim for damages based on the trustee's repudiation – see in this regard *Bryant & Flanagan (Pty) Ltd v Muller* 1977 (1) SA 800 (N) 247; *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981 (1) SA 171 (A) 182; *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C) 85; *Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd* 1987 (1) SA 827 (A) 837; *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) 567A; *Du Plessis v Rolfes Ltd* 1997 (2) SA 354 (A) 363; *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) 192. See also R Sharrock et al *Hockly's Insolvency Law* 9 ed (2012) 86 ff; A D J van Rensburg, J G Lotz & T van Rijn (R D Sharrock) "Contract" in W A Joubert & J A Faris (eds) *LAWSA 5(1)* 2 ed (2010) para 495. That this represents the law in South Africa was confirmed by the recent SCA decision in *Ellerines Bros (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) paras [11]-[12] *per Van Zyl AJA*.

¹³⁹ According to South African insolvency law, once a sequestration order is granted, a *concurrus creditorum* (or "community of creditors") is established by which the interests of the creditors as a group enjoy preference over the interests of individual creditors. This means that all (unsecured) creditors will have an equal right to payment and proceeds of the estate (see Sharrock et al *Hockly's Insolvency Law* 4; *Walker v Syfret* 1911 AD 141 166; *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 223. More recently, in discussing the working of a *concurrus creditorum*, Harms JA in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) para [1], maintained that it "crystallises

"The reason for [this] exception is to be found in the need to treat all concurrent creditors of an insolvent estate equally. Since there are insufficient assets in an insolvent estate to discharge all the liabilities of the insolvent, an order of specific performance in favour of one creditor would necessarily result in that creditor's claim being preferred to that of the other creditors."¹⁴⁰

Common law courts have to find reasons for awarding specific performance, whereas South African courts have to give reasons for refusing the remedy.¹⁴¹ Based on the central requirement of inadequacy of damages, specific performance will be awarded, irrespective of the consequences of ordering specific performance against an insolvent debtor. However, it may be questioned whether this is a valid reason for awarding this remedy in common law. It appears to give rise to an inconsistency: the efficacy of the remedy at law is the determining factor, but how would the equitable remedy of specific performance be effective against an insolvent debtor? In practice it may be difficult to ensure that a contract is fulfilled if the debtor is insolvent,¹⁴² and this in turn subverts the point of awarding specific performance.

the insolvent's position by preventing a creditor from advancing its own position to the detriment of other creditors").

¹⁴⁰ "Remedies for breach" in Hutchison & Pretorius *The Law of Contract in South Africa* 309 322.

¹⁴¹ J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 15 ed (1992) 211; G F Lubbe & C M Murray *Farlam & Hathaway Contract: Cases, Materials, Commentary* 3 ed (1988) 542.

¹⁴² As contended by Horack for example 1918 *Harv LR* 711: "The conclusion to which we must then come, if insolvency is a basis for specific performance in any case, is that all persons to whom the insolvent owes obligations are entitled to specific performance, or to some sort of relief which is equitable in its nature. But where there are many creditors who are all practically in the same situation specific performance is obviously impossible, since all cannot be paid in full and there is no reason for preferring one creditor over the others or giving preference to one class of obligations merely because goods were to be given rather than money. In each case, though the legal remedy would under normal

However, the prevailing common law view remains that insolvency of the defendant will of itself influence a court to decide that damages is inadequate. Spry confirms this in the most recent edition of *Equitable Remedies*:

“[D]espite occasional statements to the contrary it appears to be clear that a significant risk that a legal remedy such as damages will be ineffective on the ground of the inadequate resources of the defendant or otherwise, may of itself justify the conclusion that it is inadequate.”¹⁴³

The likelihood that the damages claim will be satisfied must therefore be taken into account when the adequacy question is considered. And the inability to collect damages will make damages inadequate. Whilst the *paritas creditorum* principle underpins most insolvency laws, including the insolvency laws of America and England,¹⁴⁴ it appears

circumstances give adequate relief, this remedy is of but little value here because of the insolvency of the defendant. The relief which is needed is not specific performance of any particular obligation, but rather an equal distribution of assets to all persons having similar claims which cannot be paid in full.” See also Perillo (ed) *Corbin on Contracts* § 1156.

¹⁴³ I C F Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 8 ed (2010) 68; Beale et al (eds) *Chitty on Contracts* 1909-1910: “Damages may also be an inadequate remedy because … the defendant may not be ‘good for the money’ [citing Sachs LJ in *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 379, 380].” See also (for the US) Klass *Contract Law in the USA* 213; Yorio & Thel *Contract Enforcement: Specific Performance and Injunctions* (2012 supplement) § 7.4.1: “both scholars and early nineteenth-century cases agree that inability to collect damages makes the remedy in damages inadequate …” Cf Cunningham “The inadequacy of damages as a remedy for breach of contract” in Rickett (ed) *Justifying Private Law Remedies* 119.

¹⁴⁴ See again *Roundtree v McLain Hempst* 245, 20 F.Cas 1260, 1262 (1834) where the court refused to order specific performance against the administrator of the debtor’s insolvent estate where the debtor had promised his creditor, the plaintiff, to procure and to assign to him certain securities; saying (at 1262) “to grant relief would violate the rule that a court of

that their approach compromises the *paritas* principle. But, as we know, the adequacy test is merely the first hurdle in obtaining specific performance.¹⁴⁵ This was confirmed recently by Thel:¹⁴⁶

“[The] judicial inquiry does not end with a finding that damages are inadequate. Rather, the court must address the second and distinct issue of whether all the circumstances justify the equitable remedy of specific performance. On this issue, courts and scholars concur that factors other than adequacy of damages must be considered.”¹⁴⁷

Insolvency is relevant in the context of inadequacy. But, the insolvency of the defendant, though it might justify the conclusion that damages is inadequate, does not necessarily provide a basis for specific performance.¹⁴⁸ Public policy considerations may nonetheless lead to a refusal of specific performance, with the consequence that

equity will never allow one creditor to gain an inequitable or undue advantage or preference over others”. See also Perillo (ed) *Corbin on Contracts* § 1156.

¹⁴⁵ See n 25 para 3 2 above. See also introductory statement by McClintock 1932 *Minn LR* 233: “By a process of inclusion and exclusion, the classes of cases in which courts of equity consider that the remedy at common law is inadequate to meet the needs of justice have been fairly well determined, and whenever a case in equity falls into one of those classes we may be quite confident that the court will grant equitable relief unless some factor is present which, according to other principles of equity, precludes relief even though the remedy at law is concededly inadequate.”

¹⁴⁶ Yorio & Thel *Contract Enforcement: Specific Performance and Injunctions* (2012 supplement) § 7.4.1.

¹⁴⁷ See also McClintock 1932 *Minn LR* 234: “In cases involving contracts of such a nature that the recovery of damages for their breach is admittedly an inadequate remedy, courts have refused to decree specific performance because to grant that relief would prejudice the interests of the public, or of other persons not parties to the contract.”

¹⁴⁸ Yorio & Thel *Contract Enforcement: Specific Performance and Injunctions* (2012 supplement) § 7.4.1; Fry *Specific performance of Contracts* 30 (arguing against *Doloret v Rothschild* 57 ER 233, in which case Leach VC suggested that insolvency does provide a basis for specific performance).

the plaintiff may be confined to his legal remedies in any event. These considerations would typically arise if the plaintiff is not the only person affected by the defendant's insolvency.¹⁴⁹ Accordingly, specific performance may be denied if it would upset *paritas creditorum*. As Thel states:¹⁵⁰

"If the defendant is insolvent, there may be creditors other than the plaintiff who have a right to share in the remaining assets. If specific performance or an injunction would result in a preference with respect to these assets, the equitable remedy may be denied on grounds of public policy."¹⁵¹

Indeed, an order of specific performance in favour of one creditor would necessarily result in that creditor's claim being preferred to that of the other creditors. Therefore, the South African solution of confining the creditor to a concurrent claim for damages (to ensure that all creditors are treated equally) may be regarded as preferable.

However, as Corbin points out, specific performance could be granted without this effect. If the plaintiff is the defendant's only creditor, "clearly no preference problems arise". Then "there is no reason not to protect the plaintiff".¹⁵² These are all valid arguments which cannot be ignored when courts determine what relief to afford the

¹⁴⁹ Spry *The Principles of Equitable Remedies* 68; Perillo (ed) *Corbin on Contracts* § 1156.

¹⁵⁰ Yorio & Thel *Contract Enforcement: Specific Performance and Injunctions* (2012 supplement) § 7.4.2. For further discussion of this point, see Horack 1918 *Harv LR* 702; McClintock 1932 *Minn LR* 233.

¹⁵¹ He cites: *Restatement (Second) of Contracts* § 360, cmt d; § 365, cmt b; and *In re MJK Clearing Inc* 286 B.R. 109 (Bkrtcy.D.Minn. 2002) (affirmed by District Court 2003 WL 1824937 (D.Minn.), and by Court of Appeals 371 F.3d 397 (8th Cir. 2004)); *Seci Inc v Chafitz Inc* 493 A.2d 1100, 1104 (Md.App. 1985); *Block v Shaw* 95 S.W. 806,808 (1906).

¹⁵² Perillo (ed) *Corbin on Contracts* § 1156. See also Sharpe *Injunctions and Specific Performance* 284; Spry *The Principles of Equitable Remedies* 68.

plaintiff. The effect and effectiveness¹⁵³ of the remedy once granted should be considered when courts decide on a remedy.¹⁵⁴

3 2 4 Only nominal damages available

Finally, damages is also regarded as an inadequate remedy in cases where damages would be purely nominal, since the plaintiff suffered no pecuniary loss. The case most often cited in this regard is the by now familiar *Beswick v Beswick*.¹⁵⁵ This case involved a contract that provided for Mr Beswick to transfer property to his nephew, and for the nephew in turn to make certain payments to Mr Beswick's wife after his death. Mr Beswick died only a year after conclusion of this agreement. The nephew only made one weekly payment subsequent to his death and refused to make any further payments. Mrs Beswick brought an action for breach of contract in her capacity as Mr Beswick's personal representative. The nephew in turn contended that, since Mr Beswick had died, his estate had suffered no loss as a result of the breach of contract, and thus nominal damages were adequate.

The House of Lords rejected his argument, holding that the nephew "wholly misunderstood" the adequacy test, as "[e]quity will grant specific performance when damages is inadequate to meet the justice of the case".¹⁵⁶ The fact that only nominal damages could be recovered therefore did not constitute a reason to refuse specific performance. Instead, it was held to be the main reason for granting specific performance. The House of Lords held that damages were an inadequate remedy as the estate itself had suffered no loss, since the payments were due to be made to the widow in a personal capacity. Accordingly, they made an order for specific performance compelling the nephew to carry out his obligations. Thus, specific performance will be

¹⁵³ See the argument in favour of the relevance of insolvency based on efficiency in McClintock 1932 *Minn LR* 233.

¹⁵⁴ Cf for South African law: text to n 181 para 3 3 below.

¹⁵⁵ [1968] AC 58.

¹⁵⁶ 102.

ordered in the situation where the plaintiff has a non-pecuniary interest in performance, which would be left unprotected by an award of nominal damages. Here Mr Beswick had an interest in performance for the benefit of a third party – his wife.

The other relevant case that requires analysis in this context is *Ruxley Electronics & Construction Ltd v Forsyth*.¹⁵⁷ This case concerned a contract for the construction of a swimming pool. The contract stipulated that the pool must be seven feet, six inches deep. However, it appeared that after construction, the pool was only six feet deep. This was still considered to be a safe depth for diving but Forsyth nonetheless brought an action for damages, claiming the cost of correcting the defect, i.e. having the pool demolished and rebuilt (totaling about £21 500). The trial court rejected this claim because it was considered unreasonable in the circumstances, and instead awarded Forsyth £2 500 for loss of amenity. This decision was reversed by the Court of Appeal but restored by the House of Lords. Here the plaintiff had a subjective non-pecuniary interest in obtaining a swimming pool that was seven feet, six inches deep regardless of whether this particular depth actually increased the value of his property. Lord Mustill found counsel's contention that the plaintiff should only be able to recover damages if he could indicate that the defect decreased the value of his property, "unacceptable"¹⁵⁸ because in this particular case the amount by which the defect decreased the value of the property was nil, leaving Forsyth with no more than nominal damages. He acknowledged that the cost of reinstatement would be "wholly disproportionate"¹⁵⁹ to the non-monetary loss suffered by the plaintiff, but that it would be equally unreasonable to deny all recovery for such a loss. Lord Mustill held that loss of amenity damages were required to recognise the plaintiff's "consumer surplus" (a concept which has been defined as "excess utility or subjective value that the consumer receives from the good, over and above the utility associated with its market price").¹⁶⁰ These damages were

¹⁵⁷ [1996] AC 344.

¹⁵⁸ 360.

¹⁵⁹ 361.

¹⁶⁰ D Harris, A Ogus & J Phillips "Contract remedies and the consumer surplus" (1979) 95 *LQR* 581 582. See also G Hesen & R Hardy "Is the system of contract remedies in the

consequently not merely nominal, and hence there was no need to award specific performance.

The discussion will now turn to South African law. It will be seen that our courts, under the influence of English law, have regarded adequacy of damages as a relevant factor in the exercise of their discretion, but currently adopt a predominantly civilian approach, inasmuch as they focus on maintaining the right to specific performance.¹⁶¹ The subsequent evaluative part will therefore examine whether and how our law can benefit from the experiences of modern English law. After dealing with English law, and potentially underlying economic efficiency arguments, the discussion will turn to whether our law currently gives sufficient weight to the adequacy of damages as a consideration against granting specific performance. Finally, suggestions will be made for the future development of our law.

3 3 South African law

South African courts have been influenced by English law in taking adequacy of damages into account when giving content to the discretion to refuse specific performance.¹⁶² There is a clear dictum to this effect in *Thompson v Pullinger*:¹⁶³

Netherlands efficient from a law and economics perspective?" in J M Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 287 290; E McKendrick *Contract Law* 8 ed (2009) 342-343; Stone *The Modern Law of Contract* 467.

¹⁶¹ See n 2 and related text in para 3 1 above on the absence of an adequacy of damages principle in the civil law.

¹⁶² See generally para 1 1 3 1 above. See also De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg I* 210-211; Lubbe & Murray *Contract* 542-543; A Cockrell "Breach of contract" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 327; S Eiselen "Specific performance and special damages" in H L MacQueen & R Zimmermann *European Contract Law: Scots and South African Perspectives* (2006) 249 251.

"... it is said that in a contract of purchase and sale of shares which are daily dealt in on the market, as a rule, no specific performance is decreed, because the payment of compensation, calculated by the difference between the purchase price of the shares and that at which they can be obtained at the time when the defendant is placed in mora, is a full and satisfactory compensation. With respect to transactions in the public funds, and shares in companies which can daily be obtained on the market without difficulty, this is the case; but not with respect to shares which cannot easily be obtained, nor where, owing to some circumstance or the other, the rule ought not to be applied. (2 Story, Eq. § 717, a; 3 Parsons on Contract, part 2, Division 2, s. 3.)"¹⁶⁴

Wessels, similarly, after reviewing some English authorities, came to the conclusion that¹⁶⁵

¹⁶³ (1894) 1 OR 298, 301 *per* Kotzé CJ. See also *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 350; *Schierhout v Minister of Justice* 1926 AD 99, 107; *Rex v Milne and Erleigh* (7) 1951 (1) SA 791 (AD) 873G-874C; *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) 227G-228C; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 922H-923H, and Beck 1987 CILSA 196 ff.

¹⁶⁴ Kotzé CJ then affirmed an English judgment by the Chancery Division, and said (at 301-302): "In a well-known case on this point [*Duncuft v Albrecht* (1841) 12 Sim 189, 199], specific performance of a contract for the sale of certain shares in a railway company was granted. Shadwell, V.-C., gave the following reasons for his judgment: 'Now, I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But in my opinion there is not any sort of analogy between a quantity of 3*l.* per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market.'"

¹⁶⁵ J W Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3136. See also §§ 3113 ff (esp § 3119) where Wessels indicates which English principles should be followed by our courts, as they are more than mere technicalities, but sound reasons for refusing specific performance, and in harmony with our Roman-Dutch legal foundation.

"Where damages are an adequate remedy and there is nothing in the nature of the contract to lead the court to the conclusion that the contract ought to be specifically performed, the court will not issue a decree of specific performance (*Cud v Rutter*, 1720, 1 P. Wms 570: 24 E.R. 521; *Withy v Cottle*, 1823, 1 L.J.O.S Ch.117: 37 E.R.1024, L.C)."¹⁶⁶

There are situations where the remedy has been refused based on the fact that money would adequately compensate the plaintiff for his loss.¹⁶⁷ The example most often referred to as illustration, is where the item could be easily repurchased on the open market. As the quote from *Thompson v Pullinger*¹⁶⁸ above reflects, Kotzé CJ held that specific performance should not be granted in the case of shares in companies which can be obtained on the market daily without much difficulty.¹⁶⁹ In this case the plaintiff was employed in a managerial position by a company of which the defendant was the managing director. The employment contract granted the plaintiff the option to purchase 2 000 shares in the company at £1 per share. During the course of his employment, the plaintiff was wrongfully dismissed, and he sought specific performance of their agreement, claiming delivery of the 2 000 shares against payment of £2 000. The defendant, however, argued that the option was no longer available as it terminated upon the plaintiff's dismissal, and refused to deliver the shares. The court found that the defendant could not derive any advantage from the wrongful dismissal and that the

¹⁶⁶ See n 18 above. See further Wessels § 3137: "Thus, if ordinary goods or chattels are sold such as may be bought anywhere, the court will not order specific performance, but if the goods are of a special nature, such as a picture by a particular artist, a vase or other work of art, an heirloom or indeed anything which has acquired a peculiar value, the court will order specific performance (Leake, *Contracts*, 8th ed., p. 874)."

¹⁶⁷ In *Visser v Neethling* 1921 CPD 176, for example, specific performance was refused of an agreement to sell immovable property because the property had "no special and peculiar value" to the purchaser who had purchased the property, not for his own occupation, but in order to make a profit on re-sale thereof. (This is a peculiar example, for English law would surely have awarded specific performance due to the presumed uniqueness of land irrespective of the subjective intention of the purchaser – see text to nn 31 & 77 above.)

¹⁶⁸ (1894) 1 OR 298.

¹⁶⁹ 301.

plaintiff therefore was entitled to delivery of the 2 000 shares against payment of £2 000 to the defendant, as the defendant failed to prove that the shares in his company could be easily purchased on the market daily.

However in *Benson v SA Mutual Life Assurance Society*,¹⁷⁰ it was held that *Thompson's* case did not reflect our law accurately, as it was based on the incorrect assumption that English law became the source of practical application of the remedy.¹⁷¹ In *Benson*, the respondent claimed from the appellant delivery of 63 600 ordinary shares in a listed company known as the McCarthy Group Limited. The respondent had purchased from the appellant 171 500 shares in the company at a price of 210 cents per share. It was an implied term of the agreement that delivery of the shares would take place within a reasonable time. The appellant had delivered 107 900 of the shares but had failed to deliver the remaining 63 600. The trial court ordered the appellant to transfer the shares, and pay the respondent damages for the loss of a dividend he would have received had the shares been timeously delivered. On appeal, the appellant admitted his failure to deliver the 63 600 shares, but contended that the trial court should have exercised its discretion against granting specific performance because ordinary shares in the company were readily available in the market at the relevant time. And the respondent, once it became apparent that the remaining 63 600 shares would not be delivered, could have bought shares elsewhere and could have sued the appellant for such damages as it may have suffered as a result of the purchase.

However, the Appellate Division rejected this contention, accepting and confirming the trial court's decision. The latter court considered the fact that the shares were readily available in the market and the fact that the respondent could have been adequately compensated by damages, but ultimately found that it did not provide sufficient reason to refuse specific performance. The Appellate Division emphasised that although the right to specific performance is subject to a judicial discretion to refuse specific performance, this discretion cannot in any way be regulated by rigid rules which would

¹⁷⁰ 1986 (1) SA 776 (A).

¹⁷¹ 784-785. See also Beck 1987 CILSA 205.

restrict the court's discretion and erode the right to specific performance.¹⁷² Because of the fundamental difference between English law and Roman-Dutch law when it comes to the exercise of the discretion to order performance, Hefer JA said that there is "neither need nor reason" for courts to continue following rules deriving from English law when exercising their discretion.¹⁷³

It follows that the adequacy of monetary damages does not constitute an independent ground on which courts will refuse an order for specific performance.¹⁷⁴ Adequacy of damages was also mentioned in *Haynes v Kingwilliamstown Municipality*¹⁷⁵ as one of the grounds on which the court may, in its discretion, refuse specific performance, but it is clear from *Benson* that it is not, *per se*, sufficient.¹⁷⁶ Hefer JA authoritatively stated that "a rule like the one contended for unduly limits the Court's discretion, and is a complete negation of a plaintiff's right to select his remedy".¹⁷⁷ In this regard he relied

¹⁷² 782I-783C. See also para 1 1 1 above.

¹⁷³ 785E.

¹⁷⁴ See generally D J Joubert *General Principles of the Law of Contract* (1987) 226; F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 874; Sharrock "Contract" in Joubert & Faris *LAWSA* 5(1) 2 ed para 495, and specifically Eiselen "Specific performance and special damages" in MacQueen & Zimmermann *European Contract Law: Scots and South African Perspectives* 257.

¹⁷⁵ 1951 (2) SA 371 (A) 378.

¹⁷⁶ See also *Botes v Botes* 1964 (1) SA 623 (O) 629; *Santos Professional Football Club (Pty) Ltd v Iglesund* 2003 (5) SA 73 (C) 81.

¹⁷⁷ 1986 (1) SA 776 (A) 784C, cited with approval by Foxcroft J in *Santos Professional Football Club (Pty) Ltd v Iglesund* 2003 (5) SA 73 (C) 81I. Hefer JA added at 784D that the related "available substitute" rule is "equally foreign to our law and inconsistent with a plaintiff's right to performance".

on an earlier decision, *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council*,¹⁷⁸ where Hiemstra J (in turn relying on De Wet)¹⁷⁹ held the following:

“Only English authorities are however quoted for the proposition. I doubt whether the mere possibility of recovering damages is enough in all cases. If it should be so, the plaintiff’s right of election would largely be rendered nugatory. It would cease to be a right and become a matter of indulgence by the Court.”¹⁸⁰

In rejecting the notion that adequacy of damages generally warrants refusing specific performance or result in damages being awarded, our courts have been reluctant to consider the effect the remedy will have once granted.¹⁸¹ Courts have chosen to ignore

¹⁷⁸ 1960 (2) SA 1 (T).

¹⁷⁹ J C de Wet & J P Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 2 ed (1953) 142.

See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 15 ed (1992) 211.

¹⁸⁰ 1960 (2) SA 1 (T) 3C-D. This quotation appears in Beck 1987 *CILSA* 198. In *Botes v Botes* 1964 (1) SA 623 (O), Hofmeyr J, having also relied on *Swartz & Son*, similarly stated that “As so ‘n bevel egter sou geweier word bloot om die rede dat skadevergoeding voldoende vergoeding vir die eiser sou oplewer, sou die beginsel wat in die Haynes-saak herbevestig is naamlik dat die Hof sover as moontlik uitvoering aan ‘n eiser se voorkeur vir reële eksekusie gee, nutteloos wees ...” (629).

¹⁸¹ The locus classicus is the judgment of Innes J in *Farmers’ Co-operative Society (Reg) v Berry* 1912 AD 343 350: “And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of *Storey Equity Jurisprudence*, Sec 717(a) it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it. The election is rather with the injured party, subject to the discretion of the Court.” See also *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41; *Shakinovsky v Lawson and Smulowitz* 1904 TS 326 330; *Stacy v Sims* 1917 CPD 533; *Woods v Walters* 1921 AD 303 309; *Shill v Milner* 1937 AD 101 109; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) 305B; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 433D-F; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 440G-H. For more

the fact that specific performance of the contract might result in wastage or loss, and the plaintiff can equally well be compensated by an award of damages. For example, in *Industrial & Mercantile Corporation v Anastassiou Brothers*,¹⁸² Davidson J granted specific performance despite the heavy transaction costs of performance.¹⁸³ In this case the plaintiff sold to the defendant machinery and equipment, which were to be used for refrigeration. The defendant agreed to pay the purchase price against delivery of the equipment. However, when the plaintiff tendered delivery of the goods to the defendant, he refused to accept such delivery or to pay the purchase price. The plaintiff did not accept the defendant's repudiation and consequently claimed the purchase price of the goods. The defendant argued that it would be inappropriate for the court to order payment of the purchase price against performance of the plaintiff's obligation "as this would involve making an order which Courts should and do avoid making, namely, in which the want of supervision over the performance of the acts, on which the order is dependent, makes it either improper or useless to order the performance".¹⁸⁴ Furthermore, the installation of the equipment would take between two weeks and a month, during which time its refrigerated goods would have to be stored elsewhere and the equipment presently in the shop would have to be removed, and this would cause the defendant "considerable loss and discomfort".¹⁸⁵ Accordingly, it was argued that damages was the more appropriate remedy. However, the court strongly disagreed and rejected the defendant's argument.¹⁸⁶

recent authority, see *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C); *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W), and *Vrystaat Cheetahs (Edms) Bpk v Mapoe* para 110.2 (unreported judgment with case no 4587/2010 discussed in paras 4 2 1 2 & 4 8 4 below).

¹⁸² 1973 (2) SA 601 (W).

¹⁸³ Van Heerden 1981 *Responsa Meridiana* 156; Lubbe & Murray *Contract* 549.

¹⁸⁴ 1973 (2) SA 601 (W) 605H-606A.

¹⁸⁵ 606C.

¹⁸⁶ 609B-C *per* Davidson J: "That it would be inconvenient [for the defendant if he were compelled to accept performance by the plaintiff to install equipment in his premises] is

In relation to this aspect of our courts' approach, it is important to note the concept of "efficient breach". From an economic point of view, it may make sense for a party to commit breach of contract if this would lead to wealth/value maximisation or rather, minimise loss.¹⁸⁷ This theory and its implications are dealt with in depth in the following section.¹⁸⁸ It suffices for present purposes to note that efficiency justifications for the restriction of specific performance have not received much favour with South African courts.¹⁸⁹ The familiar case of *Santos Professional Football Club (Pty) Ltd v Igesund*,¹⁹⁰ which is considered in more detail elsewhere in this study, serves as an example.¹⁹¹ One of the reasons why the court saw it fit to order specific performance of an obligation to work against the employee, a football coach, was the fact that he wanted to end the employment relationship with his employer, a football club, for a commercial reason: to conclude a more lucrative coaching contract with another club in the same soccer league (he committed "cynical breach").¹⁹² In rejecting this argument, the court

likely, that he will suffer some financial loss is likely, but that he has brought on himself by an arrogant denial of his commitments and I do not believe he should earn particular sympathy for that." See also para 6 1 2 below.

¹⁸⁷ See generally Van Heerden 1981 *Responsa Meridiana* 154-156; Stone *The Modern Law of Contract* 463, M Bigoni et al "Unbundling efficient breach" University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No 695 (2014); M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014) 6-10 (and reference there to Ronald Dworkin's critique of Posner's efficiency theory (para 3 4 2 below)).

¹⁸⁸ See para 3 4 2 below.

¹⁸⁹ Apart from the cases cited in n 181 above, see *Shill v Milner* 1937 AD 101; *Industrial & Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W) (cf para 6 1 2 below); *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W). See also Van Heerden 1981 *Responsa Meridiana* 155-156 and the authorities cited there.

¹⁹⁰ 2003 (5) SA 73 (C).

¹⁹¹ See para 4 2 1 2 below.

¹⁹² See text to n 99 para 4 2 1 2 below.

effectively rejected the theory of efficient breach, which allows debtors to breach when it is more efficient for them to do so and pay damages (if any), rather than to perform the contract.

Another reason why the court granted specific performance in this case was because specific performance is the primary remedy for breach of contract in our law.¹⁹³ In deciding this and emphasising the supremacy of specific performance in our remedial system, according to Naudé,¹⁹⁴ the court effectively rejected the position that specific performance should not be granted where an award of damages would adequately compensate the aggrieved party. However, what the court failed to consider,¹⁹⁵ was the suggestion in *Benson* that the adequacy of damages as well as other obstacles to specific performance derived from English law, “remained relevant factors which are to be considered on the same basis as any other relevant fact ...”¹⁹⁶ Rules to the effect that specific performance should be refused where ordinary goods are sold, or shares which are readily available on the market (because damages would constitute an adequate remedy) were rejected in *Benson*, but, as Beck stated, Hefer JA “did not say that the principles of English law could never be referred to”.¹⁹⁷

¹⁹³ 2003 (5) SA 73 (C) 81A-E, 84I, 87A. See also para 2 2 3 above.

¹⁹⁴ T Naudé “Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Iglesund*” 2003 SALJ 269 272. See also K Mould “The suitability of the remedy of specific performance to breach of a ‘player’s contract’ with specific reference to the *Mapoe* and *Santos* cases” 2011 PELJ 189 204.

¹⁹⁵ 2003 SALJ 272. See also Sharrock “Contract” in Joubert & Faris *LAWSA* 5(1) 2 ed para 496.

¹⁹⁶ 1986 (1) SA 776 (A) 785F-G.

¹⁹⁷ Beck 1987 *CILSA* 190 205. See also Cockrell “Breach of contract” in Zimmermann & Visser (eds) *Southern Cross* 330: The *Benson* judgment affirmed, *inter alia*, that “the English legal guidelines regarding the circumstances in which specific performance is an inappropriate remedy cannot fetter the discretion of a South African court (although they may continue to be relevant as factors to be considered in a pool of relevant considerations)”; G Lubbe “Contractual derogation and the discretion to refuse an order

The question is thus not whether adequacy of damages might be a relevant factor in the court's decision; this was affirmatively answered by *Benson*. The question is rather under what circumstances adequacy of damages might carry sufficient weight to warrant denying specific performance. In the following concluding section it will be sought to provide greater clarity in this regard.

3 4 Evaluative remarks and conclusions

3 4 1 Introduction

The point of departure in Anglo-American law is that specific performance is only available when damages would not adequately compensate the aggrieved party. However, even though this adequacy-of-damages test is long established, it remains controversial. Professor Dawson once described it as "an unnecessary and irksome restriction of specific performance", which is applied in an "arbitrary and irrational" manner.¹⁹⁸ However, other commentators contend that it actually fulfils an important and valuable role in restricting the availability of "contempt-backed" remedies, which include specific performance.¹⁹⁹ Section 3 2 above deals with a number of situations where damages is said to be inadequate, the underlying reason being that it fails to protect the parties' interest in performance. Anglo-American law will then award specific performance as an alternative, secondary remedy whenever damages is inadequate to protect the plaintiff's interest in performance.

for specific performance in South African Law" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 95 110-111: "The Benson judgment itself recognises that factors that in the past have served as reasons to deny specific performance remain relevant to the exercise of the discretion."

¹⁹⁸ J P Dawson "Specific performance in France and Germany" (1959) 57 *Mich LR* 495 532.

¹⁹⁹ Cunnington "The inadequacy of damages as a remedy for breach of contract" in Rickett (ed) *Justifying Private Law Remedies* 116. Burrows *Remedies for Torts and Breach of Contract* 459 also maintains that "the adequacy of damages restriction rests on a sound footing".

It is clear that Anglo-American law has developed in the direction of an approach that places emphasis on the appropriateness of the remedy in the circumstances. The extraordinary remedy of specific performance rarely was available to a creditor at common law. However, as indicated above, the possibility of obtaining specific performance as a remedy has increased in the common law. This was accomplished by the development of the “inadequacy of damages” requirement to the “appropriateness of the remedy” requirement by the courts. This is an indication that common lawyers have gradually started to realise that their traditional approach is unduly restrictive.²⁰⁰ Even one of their major justifications for the restriction of specific performance, namely economic efficiency, has been cast in doubt. As was mentioned in the introduction to this thesis and in the previous section, the theory of efficient breach goes some way to explaining why the common law of contract is generally more disposed to award damages than to insist on literal performance.²⁰¹ The following section looks closely and critically at the efficiency justification and questions its tenability.

3 4 2 The efficient breach fallacy

In the common law an important motivation behind the approach that the remedy should provide adequate relief has been the need to promote economic efficiency. This view has been strongly advanced by proponents of the “economic analysis of law” approach.²⁰² More specifically, academic support for the primacy of damages has been

²⁰⁰ See esp para 3 2 1 2 above on the specific enforceability of contracts of which the subject matter concerns ordinary (i.e. non-unique) personal property.

²⁰¹ See also n 10 para 3 2 above.

²⁰² For a detailed consideration of the economic analysis of contract remedies, see Van Heerden 1981 *Responsa Meridiana* 147; L Kornhauser “An introduction to the economic analysis of contract remedies” (1986) 57 *University of Colorado Law Review* 683; S Shavell “Specific performance versus damages for breach of contract: an economic analysis” (2006) 84 *Tex LR* 831; L Smith “Understanding specific performance” in N Cohen & E McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 221; G Klass “Efficient breach is dead; long live efficient breach” Georgetown Public Law and

expressed in the theory of efficient breach, which has attempted to explain and justify the common law's preference for damages.²⁰³ Anglo-American jurists and scholars often justify the limitation of specific performance on efficiency grounds.²⁰⁴ The basic premise of the economic analysis of law is that the primary purpose of legal rules and institutions is to achieve efficiency in the use of resources.²⁰⁵ Therefore, the proponents of the economic analysis of law argue that efficiency might suffer as a result of expanding the remedy of specific performance, because it prevents a debtor from reallocating his resources to higher valued uses even though damages would adequately compensate the creditor.²⁰⁶ Thus, the common law's continuing preference for damages has been regarded as preferable (from an economic point of view) because damages allow the debtors to breach when it is more efficient for them to do so than to perform the contract.²⁰⁷ Furthermore, they argue that specific performance is over-compensatory

Legal Theory Research Paper No 13-018 (2013), and recent LLM thesis by Smits *Efficient Breach and the Enforcement of Specific Performance*.

²⁰³ See E A Farnsworth "Damages and specific relief" (1979) 27 *Am J Comp L* 247 247-248; Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 123 139 ff; G Hesen & R Hardy "Is the system of contract remedies in the Netherlands efficient from a law and economics perspective?" in J M Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 287 295; R A Posner *The Economic Analysis of Law* 8 ed (2011) 149 ff. For analysis of this position, see Van Heerden 1981 *Responsa Meridiana* 154 ff.

²⁰⁴ For book-length discussion on the efficiency standard for evaluating the law, see S Shavell *Foundations of Economic Analysis of Law* (2004) and Posner *The Economic Analysis of Law* 8 ed (2011).

²⁰⁵ See A T Kronman "Specific performance" (1978) 45 *U Chi LR* 351-354; P Burrows & C G Veljanovski *The Economic Approach to Law* (1981) 3; Posner *Economic Analysis of Law* 15-20; A Schwartz & D Markowits "The myth of efficient breach" 2010 Yale Law Faculty Scholarship Series Paper 93.

²⁰⁶ See Farnsworth 1979 *Am J Comp L* 250-251; Posner *Economic Analysis of Law* 150 ff.

²⁰⁷ Chen-Wishart *Contract Law* 552; B H Bix *Contract Law: Rules, Theory, and Context* (2012) 141 ff.

in many cases, because the rules regarding mitigation are not applicable. This would result in the plaintiff receiving more than he would receive if damages (which include the rules of mitigation) were awarded.²⁰⁸ Posner, who is a pioneer in law and economic analysis,²⁰⁹ contends that it is uneconomical to enforce performance of a contract after it has been breached, because it often results in a waste of resources.²¹⁰ A breach is therefore regarded as efficient in economic terms if it entails an advantage to the breaching party that is greater than the monetary loss to the aggrieved party. In such a

²⁰⁸ See E A Farnsworth "Legal remedies for breach of contract" (1970) 70 *Colum LR* 1145 1158-1159; Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 123 139 ff; Smith "Understanding specific performance" in Cohen & McKendrick (eds) *Comparative Remedies for Breach of Contract* 227; and see *Domowicz v Orsa Investments Ltd* (1993) 15 O.R. (3d) 661 (paras 56-57 in particular) and the authorities cited there.

²⁰⁹ According to Schwartz & Markowitz "The myth of efficient breach" 2010 Yale Law Faculty Scholarship Series paper 93, the general law and economics view is captured in the title of Posner's article "Let us never blame a contract breaker" (2008-2009) 107 *Mich LR* 1349. See also P Cserne *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach* (2012) 7.

²¹⁰ See eg *Patton v Mid-Continent Systems Inc* 841 F.2d 742 (7th Cir.1988), in which Posner CJ states: "Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred and the law doesn't want to bring about such a result" (at 750). The example often referred to in this regard is that of the supplier who contracts to provide components to a manufacturer for use in the production of a product, but before delivery the supplier is approached by another manufacturer, who explains that he urgently needs the same component, and is prepared to pay more than the first manufacturer. Based on the efficiency argument, the supplier is allowed or even encouraged to breach, because he would benefit from it.

case, compensating the aggrieved party would still leave the breaching party in a better position than if the contract were required to be performed *in specie*.²¹¹

However, some law and economics scholars argue that specific performance actually protects the expectation interest and therefore avoids over-compensation and under-compensation.²¹² They argue that specific performance should be made routinely

²¹¹ This is in line with the concept of Pareto efficiency, which is obtained when a distribution strategy exists whereby one party's situation cannot be improved without making another party's situation worse. A Pareto improvement occurs when it is possible to make at least one person better off by moving resources from one allocation to another, without making any other person worse off. Presently, economists often refer to the Kaldor-Hicks concept of efficiency. Under this criterion the market outcome is efficient if the gains of those that are made better off are higher than the losses of those that are made worse off by the re-allocation of resources, so that the former group would be capable of compensating the latter group (see Posner *Economic Analysis of Law* 15-20). See also Cserne *Freedom of Contract and Paternalism* 6; Smits *Efficient Breach and the Enforcement of Specific Performance* 8, 38, and M Bigoni et al "Unbundling efficient breach" University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No 695 (2014) 3.

²¹² The most well-known version of this claim (i.e. that specific performance is no less ex post efficient than expectation damages) appears in A Schwartz "The case for specific performance" (1979) 89 *Yale LJ* 271. See further P Linzer "On the amorality of contract remedies" (1981) 81 *Colum LR* 111; T S Ulen "The efficiency of specific performance" (1984) 83 *Mich LR* 341; A Sadanand "Lost profits, market damages, and specific performance: an economic analysis of buyer's breach" (1987) 20(4) *The Canadian Journal of Economics* 750; D Friedmann "The efficient breach fallacy" (1989) 18 *J Legal Stud* 1; A Schwartz "The myth that promises prefer supra compensatory remedies" (1990) 100 *Yale LJ* 369. For more recent treatments of these claims, see R Brooks "The efficient performance hypothesis" (2006) 116 *Yale LJ* 568, 591-592; J S Kraus "A critique of the efficient performance hypothesis" (2007) 116 *Yale LJ* Pocket Part 424; G Klass "Efficient breach is dead; long live efficient breach" Georgetown Public Law and Legal Theory Research Paper No 13-018 (2013); T Eisenberg & G P Miller "Damages versus specific performance: lessons from commercial contracts" NYU Law and Economics Research

available to aggrieved parties, as it provides the most effective method of achieving the compensation goal of contract remedies, because it gives the creditor precisely what he contracted for.²¹³ Their dissatisfaction and opinions resemble those expressed by civilian lawyers. Civil-law systems are inimical towards allowing the debtor to avoid performing his obligations by merely paying damages. German law does not completely preclude the idea of efficient breach,²¹⁴ for example in relation to service contracts,²¹⁵ but the predominant view is against allowing the debtor to breach where the breach would provide a greater advantage to him.²¹⁶ Demanding performance remains the primary right of the creditor, and performing the contract the primary duty of the debtor.²¹⁷

It can be doubted, though, whether the efficient breach justification is tenable.²¹⁸ It has been contested in common law court decisions²¹⁹ and scholarly literature alike.²²⁰ The

Paper No 13-09 (2013) (electronic copy available online at
[<http://ssrn.com/abstract=2241654>](http://ssrn.com/abstract=2241654)).

²¹³ Cf Schwartz & Markowits "The myth of efficient breach" 2010 Yale Law Faculty Scholarship Series Paper 93, for a response to what the authors describe as "a growing chorus of claims that the standard remedy for breach of contract – the expectation remedy – is unjust". The authors also provide a detailed analysis of the arguments that are advanced to support this claim in part 4 of their contribution.

²¹⁴ See in this regard, Smits *Efficient Breach and the Enforcement of Specific Performance* 30, for a European civil law perspective and, perhaps, a more impartial and reliable portrayal of the efficiency justification for the restriction of specific performance in certain instances. See also reference to Smits in n 81 para 2 3 1 1 above.

²¹⁵ See para 4 5 1 below.

²¹⁶ Compare also text to n 81 para 2 3 1 1 above.

²¹⁷ B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 399. Compare also text to n 81 para 2 3 1 1 above.

²¹⁸ Whether economic efficiency really requires substitutional rather than specific relief goes far beyond the scope of this chapter. This debate has been the subject of extensive discussion in law and economics scholarship, which cannot be consolidated here. See

criticisms are that the efficient breach theory does not give adequate consideration to the law's role in preventing and resolving conflict, the purpose of creating a contract, the intrinsic value of a promise, and the law's concern to prevent people from profiting as a consequence of their own wrongdoings.²²¹ Furthermore, it is argued that the theory fails to translate into practice, as it limits the ability of creditors to recover fully. This is because determining the true extent of the loss suffered is difficult, and even if this obstacle is overcome, the law of contract contains a number of doctrines which have the effect of preventing creditors from recovering the full extent of their loss.²²² The theory is also regarded as in itself inefficient, because it generates more transactions, and therefore related costs, than specific performance.²²³ Critics further contend that the

esp in this regard, Schwartz 1979 *Yale LJ* 271, and Van Heerden 1981 *Responsa Meridiana* 147.

²¹⁹ See eg *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 (CA); *Day v Mead* [1987] 2 NZLR 443 (CA); *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC); *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 (HC).

²²⁰ See esp F Cuncannon "The case for the specific performance as the primary remedy for breach of contract in New Zealand" (2004) 35 *VUWLR* 659. The author provides us with an extremely one-sided argument in support of specific performance and fails to recognise that the remedy also has some shortcomings, which substantiate the common law's preference for damages. See also N C Z Khouri "Efficient breach theory in the law of contract: an analysis" (2002) 9 *Auckland University Law Review* 739.

²²¹ Cuncannon 2004 *VUWLR* 662.

²²² Friedmann 1989 *J Legal Stud* 13. See more recently, Bigoni et al "Unbundling efficient breach" University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No 695 (2014) 11, 27-28.

²²³ Cuncannon submits that if the debtor chooses to breach the contract, there will be at a minimum two additional transactions. First, there will be the transaction with the new creditor. Secondly, there will be the transaction forced upon the original creditor as a result of the breach. It is unrealistic to assume there will be no transaction costs in making the compensation payment. It is likely only to be resolved after negotiation or litigation. It may also lead to a third transaction, a delictual claim against the new creditor for interference with a contractual relationship (2004 *VUWLR* 667). See further I R Macneil "Efficient

theory is based upon the assumption that, as rational economic actors, creditors will be satisfied by an award of damages and will not be upset by the debtors being able to unilaterally determine the best use of the creditor's contractual rights. This would be inconsistent with the parties' motivations for entering into the contract and the principle of freedom of contract.²²⁴ Critics insist that, as a result of these shortcomings, the theory of efficient breach should be rejected as a justification for the supremacy of damages, as expressed in the adequacy-of-damages doctrine.²²⁵

The international commercial environment similarly values the principles of freedom and sanctity of contract. International instruments place considerable emphasis on keeping promises in order to promote international business confidence and, as a consequence, facilitate international contractual negotiations and relationships.²²⁶ The model instruments under review also specifically incorporate a duty to observe good faith.²²⁷ A major point of criticism against the common law position is that it encourages parties to breach contracts, based on economic considerations of efficiency, i.e. provided that it

breach of contract: circles in the sky" (1982) 68 *Virginia Law Review* 947; E A Posner "Economic analysis of contract law after three decades: success or failure?" (2003) 112 *Yale LJ* 829; Smith "Understanding specific performance" in Cohen & McKendrick (eds) *Comparative Remedies for Breach of Contract* 225, and Smits *Efficient Breach and the Enforcement of Specific Performance* 13-16.

²²⁴ Friedmann argues that "the essence of contract is performance. Contracts are made in order to be performed" ("The performance interest in contract damages" (1995) 11 *LQR* 628 629). See also C S Warkol "Resolving the paradox between legal theory and legal fact: the judicial rejection of the theory of efficient breach" (1998-1999) 20 *Cardozo Law Review* 321 343-345.

²²⁵ Cuncannon 2004 *VUWLR* 666-667. See also Friedmann 1989 *J Legal Stud* 1; 1995 *LQR* 628; C Webb "Performance and compensation: an analysis of contract damages and contractual obligation" (2006) 26 *OJLS* 41; and "counterpoint" discussion by Chen-Wishart *Contract Law* 552.

²²⁶ See para 2 3 3 above.

²²⁷ See Articles 1.7 PICC; 1:201 PECL; III-1:103 DCFR; 2 CESL; 7 CISG (Addendum A). See also paras 6 3 & 6 5 1 below.

results in a more efficient allocation of resources. Parties are encouraged to commit breach of contract, which is in direct opposition to the principle of *pacta sunt servanda* and the underlying ideology of the international instruments.²²⁸

3 4 3 The supplementary role of adequacy of damages in South African law

Although South African courts have rightly rejected the traditional English adequacy of damages limitation, our law can gain from the experiences of modern English law. As indicated above, English law has more recently increasingly appreciated that in deciding which remedy to grant, courts engage in a context-specific evaluation of which remedy would be the most appropriate in the circumstances. The *Benson* decision provides insight and direction in this regard.

In this case, Hefer JA identified three general principles which guide the discretion to refuse an order of specific performance. Firstly, the discretion “is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant”. Secondly “the remedy of specific performance should always be granted or withheld in accordance with legal and public policy”. Thirdly, Hefer JA says that “the Court will not decree specific performance where performance has become impossible”.²²⁹

Hence, it is well settled that courts should always bear in mind that granting the remedy should not produce injustice. According to Hutchison and Du Bois “[t]he basic principle underlying the exercise of the discretion is that the order made by the court should not

²²⁸ See again para 2 4 above.

²²⁹ 1986 (1) SA 776 (A) 783C-F. See also M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 132-134; A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 681, and para 7 2 1 below.

produce an unjust result".²³⁰ It is then in this context that the issue of adequacy of damages becomes relevant. The implication is that the debate regarding the adequacy of damages rule in our law cannot be separated from the broader requirement (reiterated in *Benson*) that granting specific performance should not produce an unjust result.

Benson provides more recent and more authoritative support for the proposition that the harsh operation of the remedy on the defaulting party or third parties should be a concern to our courts especially if the loss can be prevented by granting damages.²³¹ From *Benson* we can infer that although adequacy of damages is not, *per se*, a sufficient basis for refusing specific performance; it is relevant to the courts' decision where there are other considerations, namely injustice and harshness, which militate against the granting of specific performance.²³² And the adequacy criterion may aid in applying the general "Benson principles" which (currently) regulate the discretion to refuse an order of specific performance.²³³ In this regard the reasoning of Hiemstra J in *Swartz & Son* is instructive. Here the applicant agreed to erect a building for the respondent municipality. Whilst engaged in such work, the applicant received a letter from the respondent's attorneys in which they notified him that they were terminating the agreement (because he failed to furnish security and because the work was neglected, i.e. because he violated the terms of their agreement) and that another building contractor had been appointed to complete the work. Hiemstra J considered the provision of security as vital to their agreement, and held that the applicant's continued failure to provide it whilst the contract required security "forthwith" amounted to a breach which justified the respondent's cancellation.²³⁴ He further refused to order specific

²³⁰ Du Bois (ed) *Wille's Principles of South African Law* 873. See also Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 131.

²³¹ See also text to n 245 below.

²³² See *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) esp 307 (discussed in para 4 2 1 2 below). See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 211.

²³³ See, however, para 7 2 2 below.

²³⁴ 1960 (2) SA 1 (T) 4F-5A.

performance, because it would be unreasonable towards the respondent in the circumstances,²³⁵ and because damages would in any event provide adequate compensation to the applicant.²³⁶

The overlapping operation of the “adequacy” and “injustice”/“hardship” factors and the supplementary role of adequacy of damages is also illustrated by *Haynes v Kingwilliamstown Municipality*²³⁷ and the leading modern English case on specific performance, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.²³⁸ The facts of these cases and the reasons for the decisions have been dealt with elsewhere.²³⁹ It is sufficient for present purposes to note that in both cases the oppressiveness of requiring the defendant to perform his contractual obligations and the fact that damages would adequately compensate the plaintiff, influenced the courts to refuse the remedy.²⁴⁰

Lubbe and Murray also offer valuable guidance in this regard. They contend that even though case law suggests that South African law has been unnecessarily influenced by English principles,²⁴¹ it fails to explain why specific performance should be the preferred remedy, even where damages is an adequate remedy.²⁴² The authors also pose the following insightful question/s:

²³⁵ 4.

²³⁶ 1960 (2) SA 1 (T) 3 (own emphasis). The judge rejected the applicant's contention that damages could not be accurately assessed because the loss of the contract may imperil his chances of getting other contracts, describing this argument as “far-fetched” (at 5B).

²³⁷ 1951 (2) SA 371 (A).

²³⁸ [1997] 2 WLR 898.

²³⁹ See paras 5 2 (*Argyll*) & 6 1 1 (*Haynes*) below.

²⁴⁰ On the relevance of undue hardship for the decision whether to specifically enforce a contract, see ch 6 below.

²⁴¹ Citing *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

²⁴² Lubbe & Murray *Contract* 547-548.

"Is the financial loss that the guilty party might suffer a factor that the court should consider in choosing to exercise its discretion not to order specific performance? Might this be one of the circumstances in which, in the words of Hefer JA in the *Benson* case, 'the order will operate unduly harshly on the defendant'?"

McLennan has also suggested that in spite of there being no rule that a court will refuse to order specific performance where a contract involves goods that are readily available on the market, our courts should be wary when exercising their discretion in favour of specific performance in these cases.²⁴³ The main reason advanced is that damages could be the more appropriate remedy in some of these cases, as it provides a more convenient and less time-consuming and therefore less expensive solution.²⁴⁴ Phrased in economic analysis of law terminology, he thus argues that courts should be mindful of exercising their discretion in favour of specific performance if the result would be an inefficient use of resources.²⁴⁵

It is submitted that these are valid arguments which cannot be ignored when courts determine what form of redress to afford the plaintiff. We can also take instruction from other jurisdictions, which support greater use of specific performance as a remedy for breach of contract, such as Germany and the Netherlands. While they accept the right

²⁴³ See case comment on *Benson* by J S McLennan "Specific performance and the court's discretion" 1986 *SALJ* 522. See also Lubbe & Murray *Contract* 548.

²⁴⁴ See 1986 *SALJ* 524: "We are not told why the appellant failed to deliver the shares nor why the respondent did not purchase them on the stock market. If it had done so, and if it could, in fact, have acquired the shares for 210 cents or less, it might have saved itself an enormous amount of trouble, time and expense." See also Lubbe & Murray *Contract* 549.

²⁴⁵ In his words (524): "the English rule, despite its drawbacks, does at least have an appeal to good commercial sense, and it probably operates to discourage (a) plaintiffs from acting unreasonably and thereby (b) unnecessary litigation". According to Lubbe & Murray (*Contract* 549), McLennan thereby "suggests that the very failure to deliver goods that are freely available may reflect a background that makes a plaintiff's insistence on specific performance unreasonable, and thus that courts should be disinclined to order specific performance". Compare also Van Heerden 1981 *Responsa Meridiana* 155.

of every contractual party to specific performance of the contract, these systems also accept that there are certain limitations to this general entitlement to specific performance. It follows that the right will only be enforced in situations where one of the defined exceptions does not apply.²⁴⁶ For example, in German law, § 275(2) of the BGB excludes the duty of performance “to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee”. In Dutch law, the courts will similarly refuse to enforce a contract where the contract will be extremely disadvantageous and unreasonable to the debtor.²⁴⁷ Thus, the enforceability of the right to performance is determined by the facts of the case and courts are able to refuse to enforce an obligation where it would have harsh and unreasonable effects on the debtor.

Moreover, the international instruments, which accommodate both common-law and civil-law systems, and demonstrate how a synthesis of diverging principles could be achieved in a more successful manner, recognise exceptions in terms of which the remedy can be refused if the facts of the case demand it. The PECL, for example, provides in Article 9:102(2)(b) that specific performance will not be granted where performance would cause the debtor unreasonable effort or expense. Subsection (2)(d) also restricts the aggrieved party's entitlement to specific performance if he may reasonably obtain performance from another source. The PICC, the DCFR, and the CESL contain similar provisions.²⁴⁸ In an insightful manner, Chen-Wishart, in concluding her comparative discussion of the considerations that weigh against the remedy, observes that

²⁴⁶ See generally para 2 3 1 above. See esp Smits *Efficient Breach and the Enforcement of Specific Performance* (n 214 above).

²⁴⁷ See eg, HR 16 January 1981, NJ 1981, 312 (X/Y) (cf text to n 138 para 6 3 below).

²⁴⁸ See Articles 7.2.2 PICC, III–3:302 DCFR, 110–111, 132 CESL and paras 2 3 3 2 (esp n 244) above & 6 4 below.

"[t]he open-textured nature of these considerations means that, no matter how the discretion is structured (whether as the primary or supplementary remedy), courts of all systems must engage in the same delicate balancing of competing policies on the facts of particular cases".²⁴⁹

Finally, the following meaningful passage by Beck²⁵⁰ also merits attention, because it drives the point home in the South African context:

"In theory there is certainly an important difference between Roman-Dutch law and common law; in practice, however, it is of considerable less moment. As shown above, the tendency in England has been to move away from the rigid categories of the past and to grant specific performance when it is the most appropriate remedy; a similar development has been seen in the South African cases considered above. While there can be no doubt, therefore, that logically speaking the approach of Hefer JA is sound, some of his reasoning seems to smack of the purist movement illustrated by Forsyth in his study of the Appellate Division. It is submitted that the court would have done better to stick to a more systematic exposition of the *best* solution."²⁵¹

This means that our courts must carefully consider and balance the circumstances of each case in deciding between awarding specific performance and damages. Our courts should focus on finding the appropriate remedy for the specific case and must be mindful not to proceed too dogmatically in order to preserve Roman-Dutch principles.²⁵²

²⁴⁹ *Contract Law* 553.

²⁵⁰ 1987 *CILSA* 190 205.

²⁵¹ Citing C F Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985).

²⁵² The following statement by Hefer JA certainly "smacks" of the "purist movement" Beck alludes to above: "This right is the cornerstone of our law relating to specific performance. Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another" (1986 (1) SA 776 (A) 782I-783A).

It is suggested that Hefer JA's argument in favour of specific performance²⁵³ may not be strong enough where the party in breach is likely to suffer considerably from having to comply with the agreement and the aggrieved party can equally well be compensated by an award of damages. Insistence on specific performance may be unreasonable in these circumstances.²⁵⁴

3 4 4 Conclusion

While reasserting the "unfettered" discretion of the courts to refuse specific performance, the court in *Benson* also made it clear that this discretion is not an arbitrary capricious discretion,²⁵⁵ and therefore it must be regulated by principles that will make it equitable²⁵⁶ and judicial.²⁵⁷ *Benson*'s case thus provides certain parameters within which courts can exercise their discretion.²⁵⁸ For example, if the granting of the order will cause undue hardship to the defendant, courts should refuse to grant it. This is an aspect of the equitable nature of the discretion, which requires the court always to have in mind the need to avoid injustice. As was mentioned earlier, *Benson*'s case did not render the English or "Haynes" factors irrelevant.²⁵⁹ These can be applied, in order

²⁵³ See text to n 173 above.

²⁵⁴ See reference to Lubbe & Murray in n 245 above.

²⁵⁵ See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321, 323.

²⁵⁶ 323. See also Beck 1987 *CILSA* 200.

²⁵⁷ 1986 (1) SA 776 (A) 783B-C. See also F du Bois (ed) *Wille's Principles of South African Law* 873; R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 547.

²⁵⁸ 1986 (1) SA 776 (A) 783C *per* Hefer JA: "This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle..." It follows that, although the discretion is not circumscribed by any other rules, there are factors that may play a role in the exercise of the discretion due to this inherent requirement (cf text to n 229 above).

²⁵⁹ See esp text to nn 196-197 above. See also Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al

to decide whether specific performance would cause injustice.²⁶⁰ Accordingly, it is suggested that, subject to the overriding need to avoid injustice or oppression, courts should take into account the possibility that the plaintiff would be adequately compensated by damages. However, it is suggested that the relevance of damages as remedy is limited. The purpose of this chapter was to indicate that if the adequacy of damages is to influence the decision whether to refuse specific performance, it can only be of secondary or “parasitic” significance inasmuch as it supports other considerations for refusing the remedy, such as preventing injustice or harshness, rather than acting as a main or primary reason for doing so. These other considerations are dealt with in detail in the following chapters.

(eds) *Specific Performance in Contract Law: National and Other Perspectives* 100, and paras 4 8 2, 6 1 1 & 6 1 2 below.

²⁶⁰ See also Joubert *General Principles of the Law of Contract* 226: “[i]n our law the creditor has a right to specific performance which should only be refused when factors appear that make the decree inequitable to the defendant”, and Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 134: “courts will do everything in their power to preserve the plaintiff’s right to choose an order of specific performance as his remedy *except* issue an order that is unjust, inequitable or impossible for the debtor to comply with. This guiding light has been kept under a bushel at times but its glimmer is often discernable in the cases if one is looking out for it”.

CHAPTER 4: PERSONAL SERVICE CONTRACTS

4 1 Introduction

This chapter is primarily concerned with the enforcement of agreements for personal services, and especially with how the courts from various jurisdictions have balanced competing factors in awarding this remedy. The chapter first discusses and analyses how South African courts currently treat the enforcement of personal service contracts. Thereafter, it deals with the treatment of this problem by different legal systems and international instruments, with the aim of determining what principles they adopted to the enforcement of these contracts and what considerations underlie these principles. The chapter concludes with an evaluative discussion, which takes into account the different approaches revealed by the comparative analysis. Finally, some suggestions will be made for the future development of our law.

Whereas chapter 3 aimed to indicate that the adequacy of damages should not constitute a decisive factor in refusing specific performance, this chapter intends to explore to what extent the fact that a contract involves highly personal obligations should generally be an impediment to an order for specific performance.

When examining orders of specific performance of personal service contracts, it is important to appreciate that they could assume various forms or types, or could be divided into specific sub-categories.¹ In the following section a distinction will be drawn between two main categories of personal service contracts, namely employment contracts and other service contracts. The latter category includes agreements to perform a specific service that do not entail a continuous personal relationship.²

The phenomenon that a personal service contract can assume various forms has ancient origins. Roman law, for example, distinguished between *locatio conductio*

¹ See eg A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 681.

² See *Pougnet v Ramlakan* 1961 (2) SA 163 (N) 166, referring to *Schierhout v Minister of Justice* 1926 AD 99 107.

operarum and *locatio conductio operis*.³ *Locatio conductio operarum* relates to the letting and hiring of someone's personal services in exchange for remuneration;⁴ it typically is a contract of employment. In South African law, *locatio conductio operarum*⁵ is sometimes translated as "contract of employment" or (rather confusingly and vaguely) as "contract of service".⁶ *Locatio conductio operis* in turn relates to the letting and hiring of a specific piece of work,⁷ such as the repair or construction of a building. It is sometimes (again rather confusingly) translated as "contract of work".⁸ For purposes of this discussion and to avoid any unnecessary confusion, the general category "personal service contracts" is used. This is divided into two branches referred to above, namely *locatio conductio operarum* (contract of employment) and *locatio conductio operis* (contract of work). Thus, the category includes general services (*operarum*) and specific work assignments (*operis*).

³ See D J Joubert "Die kontraktuele verhouding tussen professionele man en kliënt" 1970 *Acta Juridica* 9; J A C Thomas *Textbook of Roman Law* (1976) 296-298; M Kaser *Roman Private Law* 3 ed trans R Dannenbring (1980) 219-224; P du Plessis *Borkowski's Textbook on Roman Law* 4 ed (2010) 277-279; R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 394-395, *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 56-58; B Jordaan "Employment relations" in R Zimmermann & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 389 390; M Freedland & N Kountouris *The Legal Construction of Personal Work Relations* (2011) 116 ff.

⁴ See D 16 3 1 9; 19 2 19 9; 19 2 38; Thomas *Textbook of Roman Law* 297.

⁵ See generally on *locatio conductio operarum* in South African law, J S A Fourie *Die Dienkontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis UNISA Pretoria (1977).

⁶ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A); *Minister van Polisie v Gamble* 1979 (4) SA 759 (A); *Mtetwa v Minister of Health* 1989 (3) SA 600 (D); *Toerien v Stellenbosch University* 1996 (1) SA 197 (C); *Marais v Bezuidenhout* 1999 (3) SA 988 (W); *Motor Industry Bargaining Council v Mac-Rites Panel Beaters & Spray Painters (Pty) Ltd* 2001 (2) SA 1161 (N); *Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C).

⁷ See D 19 2 22 2; 19 2 30 3; 19 2 36; 50 16 5 1; Thomas *Textbook of Roman Law* 296.

⁸ See cases cited in n 6 above.

Quite often, *locatio conductio operarum* has been regarded as distinguishable from *locatio conductio operis* in the civilian tradition on the basis that the provider of the service does not promise that he will ensure that a certain result comes about but merely that he will perform the service as promised.⁹ In South African law, the distinction was further explained as follows by the court in *Colonial Mutual Life Assurance Society Ltd v Macdonald*:¹⁰

"In the former case (*locatio conductio operarum*) the relation between the two contracting parties is much more intimate than in the latter (*locatio conductio operis*), the servant becoming subordinate to the master, whereas in the latter case the contractor remains on a footing of equality with the employer. Where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant."

Hence "[t]he more independent, generally speaking, the position of the person rendering the services, the stronger the probability that we are dealing with *locatio conductio operis*".¹¹ However, in *Smit v Workmen's Compensation Commissioner*¹² Jansen JA held that the element of supervision and control is not the sole determinative factor but

⁹ See P van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) 181-187; Zimmermann *The Law of Obligations* 393-394; B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 153 528.

¹⁰ 1931 AD 412. Here the respondent, an insurance agent, was classified as an independent contractor under the *locatio conductio operis* and not an employee or "servant" of the insurance society, for whose negligent acts the society (principal) would have been liable.

¹¹ Zimmermann *The Law of Obligations* 397.

¹² 1979 (1) SA 51 (A). In this case the appellant, an agent of an insurance company, suffered severe bodily injuries in a motor car accident arising out of and in the course of performance of his duties. He was classified as an independent contractor in accordance with an agreement of *locatio conductio operaris*, because there was no right of supervision and control of an agent by the insurance company; he was not a "workman" as contemplated by the Workmen's Compensation Act 30 of 1941, and he was therefore not entitled to compensation and payment of medical aid expenses under the provisions of the Act.

merely one of the *indicia*, and that there may also be other important criteria to be considered to distinguish between a contract of service (*locatio operarum*) and a contract for work (*locatio operis*) or, to use the terminology of English law, an employee and independent contractor.¹³

Apart from the existence of a relationship of authority, a number of other criteria have been applied in South African law in drawing the distinction. The employer generally provides tools and equipment to the employee, whereas an independent contractor uses his own tools and equipment. An employee must perform the services personally; a contractor may perform through others. An employee is paid periodically, for instance daily, weekly or monthly; an independent contractor is usually paid at the end of the contract or project. A contract of service terminates on expiry of the period of service stipulated in the contract, whereas a contract for work terminates on completion of the work or production of the specified result.¹⁴

Based on these indicators of independence, performers such as musicians, singers, comedians, disc jockeys and magicians can be categorised as independent contractors: they provide their own equipment, they retain the right to exercise artistic control over the elements of their performance, they set or negotiate the rate of pay received from the establishment where they perform, and they normally provide their services under a single engagement arrangement.

¹³ 1979 (1) SA 51 (A) 62-63.

¹⁴ For further distinguishing factors, see *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 64-68; *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC) 590F-591D; F van Jaarsveld & S van Eck *Principles of Labour Law* 2 ed (2002) 58-63; F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 928-929; R le Roux "The evolution of the contract of employment in South Africa" 2010 *Ind LJ* 139 157. For the importance of this distinction, see B Jordaan & R G L Stelzner "Sport and the Law of Employment" in J A A Basson & M M Loubser (eds) *Sport and the Law in South Africa* (2000) 13-14.

The preceding overview reflects that there is no single satisfactory test governing the question whether a person is an employee or an independent contractor. In determining whether or not a person is an employee, the courts attempt to discover the true relationship between the parties. They consider all the factors that are present in, or absent from, the contract and the relationship¹⁵ and then stand back and consider the picture or dominant impression that emerges. It should also be noted that the fact that the provisions of a contract categorises a party as an independent contractor or employee is not conclusive of the true relationship between the parties.¹⁶

Against the background of this conceptual overview of the meaning of the concept of a personal service contract, and its sub-division into employment contracts and other service contracts, we can now turn to the way in which the specific enforcement of these contracts is dealt with in specific jurisdictions. Where appropriate, some further conceptual clarification may be called for in the context of specific legal systems or model instruments.

4 2 South African law

4 2 1 Contract of employment (*locatio conductio operarum*)

Although the contemporary version of the employment contract is Roman-Dutch in origin, it is generally accepted that much of the modern South African common law

¹⁵ See further on the theory of characterisation or *Typenlehre*, sources cited in n 358 para 4 8 3 below.

¹⁶ In *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo* (2007) 28 ILJ 1100 (LC) the court applied the “dominant impression” test and decided that the respondent, an estate agent, was an employee, even though the contract stated that the agent was an independent contractor and not an employee of the company. The degree of control that the company had over the agent was a significant factor in deciding that there was an employment relationship. See also *Pam Goldings Properties (Pty) Ltd v Erasmus* (2010) 31 ILJ 1460 (LC).

relating to it developed in accordance with English law.¹⁷ In accordance with the latter system, it was often held in our law that courts will not enforce a contract of employment, whether against the employer or employee.¹⁸ For example, in *Pougnet v Ramlakan*,¹⁹ the court refused to order the owner of a farm to continue to employ a manager in whom he had lost confidence and decided that an award of damages would be more appropriate.²⁰ It is a well-established rule of English law that the only remedy

¹⁷ See generally Jordaan “Employment relations” in *Southern Cross* 400-414; A C Basson et al *Essential Labour Law* 5 ed (2009) 22; K Mould “The suitability of the remedy of specific performance to breach of a ‘player’s contract’ with specific reference to the *Mapoe* and *Santos* cases” 2011 *PELJ* 189 193. According to Le Roux 2010 *Ind LJ* 142, no culture of employment had developed by the time of the British occupation, although free artisans had worked at the Cape by that time.

¹⁸ See *Ingle Colonial Broom Co Ltd v Hocking* 1914 CPD 495; *Schierhout v Minister of Justice* 1926 AD 99 107; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785; G F Lubbe & C M Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3 ed (1988) 544-545; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 1 5 ed (1992) 210 n 69; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 331 n 31.

¹⁹ 1961 (2) SA 163 (D).

²⁰ See further *Gracie v Hull Blythe and Co (SA) Ltd* 1931 CPD 539; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53; *Rogers v Durban Corporation* 1950 (1) SA 65 (D); *Ngwenya v Nataalspruit Bantu School Board* 1965 (1) SA 692 (W) (where it was held that in the absence of legislation to the contrary, an employee’s only remedy for an employer’s breach of contract/wrongful dismissal is damages). These decisions appear to establish that such a contract can be terminated unilaterally and that thereafter no contract exists which can be specifically enforced. Cf *Myers v Abramson* 1952 (3) SA 121 (C) 123-124 where Van Winsen J doubted whether the practice of the court in allowing only the particular remedy of damages to the wrongfully-dismissed employee can rightly be elevated to a rule of law to the effect that such contracts can be terminated unilaterally so that they cannot be specifically enforced under any circumstances. Thus the general rule prevails: if one party to the contract had unjustifiably repudiated it, the injured party has the right to elect to accept the repudiation, and consensually to put an end to the contract

available to an employee who has been wrongfully dismissed is damages. English courts will not grant specific performance against the employee, nor will they order an employer to reinstate or pay an employee for the remainder of his service contract.²¹ This means that an employer or employee is restricted to a claim for damages in the event of a breach by the other.²²

It has already been pointed out that our modern labour law traditionally has a strong Roman-Dutch and English law foundation.²³ However, this branch of our law has been developed extensively by case law and legislation. The following section provides a general overview of the current legal position. It commences with a more in-depth analysis of the specific characteristics and nature of the modern employment contract. This analysis builds on the more general distinction between employment contracts and other service contracts set out in the previous section.

According to Grogan, a contract of employment can be defined as “an agreement between two parties in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee’s duties and to control the manner in which the employee discharges them”.²⁴ The parallels with the *locatio*

and sue for damages, or to ignore the repudiation, and hold the other party to the contract and claim specific performance. See in this regard *Van Wyk v Albany Bakeries Ltd* [2003] 12 BLLR 1274 (LC) para [13] quoted with approval by the CCMA in *Bonthuys v Central District Municipality* [2007] 5 BALR 446 (CCMA) 455.

²¹ Sir John Macdonell *The Law of Master and Servant* 2 ed (1908) 162; Viscount Hailsham (ed) *Halsbury's Laws of England* 1 ed vol 31 (1917) para 366, as referred to by Milne J in *Pougnet v Ramlakan* 1961 (2) SA 163 (N) 166. See more recently H Collins et al *Labour Law* (2012) 843.

²² See para 4.3 below.

²³ See text to n 17 above and Van Jaarsveld & Van Eck *Principles of Labour Law* 7-8.

²⁴ J Grogan *Employment Rights* (2010) 43.

conductio operarum of the earlier civil law are clear. A similar definition is provided by Basson et al: “the contract of employment as we know it today can be defined as an agreement between two parties in terms of which one party (the employee) works for another (the employer) in exchange for remuneration”.²⁵

Furthermore, the Labour Relations Act,²⁶ the Basic Conditions of Employment Act²⁷ and the Employment Equity Act²⁸ all define an employee in similar terms:

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- “(b) any other person who in any other manner assists in carrying on or conducting the business of an employer.”²⁹

The identification of the essentials of a contract of employment is a controversial matter because there is no unanimity regarding the basic features of the contract.³⁰ However, from the above it can be inferred that the basic elements of a contract of employment are:³¹

- (i) a mutual agreement;
- (ii) in terms of which services are rendered;

²⁵ Basson et al *Essential Labour Law* 22.

²⁶ 66 of 1995.

²⁷ 75 of 1997.

²⁸ 55 of 1998.

²⁹ Section 213 of the Labour Relations Act, s 1 of the Basic Conditions of Employment Act and s 1 of the Employment Equity Act.

³⁰ According to Le Roux 2010 *Ind LJ* 139-140, the South African concept of the contract of employment, “as it is currently understood, is a relatively new concept and is in a state of relative unity”. She cautions that this reality must be comprehended when engaging with the future of the contract of employment.

³¹ See also Van Jaarsveld & Van Eck *Principles of Labour Law* 48; M W Prinsloo “Enkele opmerkinge oor spelerskonakte in professionele spansport” 2000 *TSAR* 229 230; J Grogan *Workplace Law* 10 ed (2009) 29.

- (iii) under the authority (or “control”, to use Grogan’s words) of the employer;
- (iv) for an indefinite or determined period;³²
- (v) in return for remuneration.

In line with the English approach referred to earlier, it has repeatedly been held by South African commentators³³ and courts³⁴ that specific performance of employment contracts will not ordinarily be granted whether against the employer or employee.³⁵ Kerr emphasises that even though there are no specific rules governing the exercise of our courts’ discretion, certain categories when specific performance will not be granted have received the courts’ attention.³⁶ One of these categories is contracts for personal

³² Under South African law employees are normally appointed on a permanent basis and the contract continues until the employee reaches a predetermined age, or until the contract is terminated by one of the parties in accordance with the contract. See Van Jaarsveld & Van Eck *Principles of Labour Law* 56; Jordaan & Stelzner “Sport and the Law of Employment” in *Sport and the Law in South Africa* 15.

³³ See eg R H Christie & G B Bradfield *Christie’s The Law of Contract in South Africa* 6 ed (2011) 550.

³⁴ See nn 18-20 above.

³⁵ See further De Wet & Van Wyk *Kontraktereg* 210; Van der Merwe et al *Contract: General Principles* 331-332; Jordaan “Employment relations” in *Southern Cross* 407; J V du Plessis & M A Fouché *A Practical Guide to Labour Law* 7 ed (2012) 19; Van Jaarsveld & Van Eck *Principles of Labour Law* 98; Basson et al *Essential Labour Law* 54-55. See also more recently *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) para [17]; *Masetsha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para [88] and *Abdullah v Kouga Municipality* [2012] 5 BLLR 425 (LC).

³⁶ Kerr *Principles of the Law of Contract* 680-681. See also Christie & Bradfield *Christie’s The Law of Contract in South Africa* 546-553.

services.³⁷ A number of reasons have been advanced for this approach. The majority relates to social policy.³⁸

It has been suggested that it is inadvisable to force parties to resume a close, perhaps confidential relationship while the trust between them has been compromised.³⁹ On this basis, it was held in *Pougnet v Ramlakan*⁴⁰ that specific performance will not be granted even in situations where the employer and the employee are unlikely to come into frequent contact with each other. Furthermore, the order would not ensure that the employee would fulfil his duties diligently and adequately.⁴¹ And pertinent to this point, the fact that it would be difficult for the courts to ensure compliance with an order of

³⁷ See Christie & Bradfield *Christie's The Law of Contract in South Africa* 550; D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 323; Van der Merwe et al *Contract: General Principles* 331.

³⁸ See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 323; Van der Merwe et al *Contract: General Principles* 331; M S M Brassey "Specific performance – a new stage for labour's lost love" (1981) 2 *ILJ* 57 58; Lubbe & Murray *Contract* 543; N Smit *Labour Law Implications of the Transfer of an Undertaking* LLD thesis Rand Afrikaans University (2001) 208-209.

³⁹ As emphasised in *Schierhout v Minister of Justice* 1929 AD 99; *Pougnet v Ramlakan* 1961 (2) SA 163 (D) and more recently, *Masetsha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para [88] where Moseneke DCJ, for the majority of the court said: "Although it is clear that there has been a breakdown in trust that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. In my view, even if the contract of employment were terminated unlawfully, Mr Masetsha would not be entitled to reinstatement as a matter of contract." Quoted with approval by Lagrange J in *Abdullah v Kouga Municipality* [2012] 5 BLLR 425 (LC) para [11]. See also Lubbe & Murray *Contract* 543; Van der Merwe et al *Contract: General Principles* 331.

⁴⁰ 1961 (2) SA 163 (D) 166.

⁴¹ As emphasised by Trollip J in *Gründling v Beyers* 1967 (2) SA 131 (W) 146.

specific performance is also one of the reasons adduced in support of the refusal to grant specific performance.⁴² The rationale essentially is that because of the personal relationship involved and its continuing nature, there would be a constant threat of disputes arising over whether the contract was being performed properly. The court is not regarded as sufficiently equipped to provide the constant supervision which would be necessary to prevent such disputes arising or to adjudicate them as they arose.⁴³ The latter reason and the merits thereof will be dealt with in depth in the following chapter.⁴⁴

According to Jordaan, the reasons set out above clearly correspond with those set forth by the English courts for their refusal to grant claims for specific performance of employment contracts.⁴⁵ However, it can be questioned whether these reasons actually justify our courts' refusal to grant specific performance with regard to contracts of employment. Our courts appear to have accepted them blindly, without recognising the exceptional nature of the remedy in English law. It is well-established that specific performance is an equitable remedy in English law, granted as an exception to the principal remedy of damages.⁴⁶ However, as we have seen, the general point of departure in South African law is that specific performance is available "as of right".⁴⁷ It

⁴² See *Ingle Colonial Broom Co Ltd v Hocking* 1914 CPD 495; *Gründling v Beyers* 1967 (2) SA 131 (W) 146; S Eiselen "Specific performance and special damages" in H L MacQueen & R Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 249 258.

⁴³ See De Wet & Van Wyk *Kontraktereg en Handelsreg* 210; Christie & Bradfield *Christie's The Law of Contract in South Africa* 550.

⁴⁴ For a concise explanation of this argument as well as convincing counter-arguments, see the English case of *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 318, and the comparative study by S Rowan *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (2012) 56-58.

⁴⁵ See Jordaan "Employment relations" in *Southern Cross* 408.

⁴⁶ See paras 2 3 2 1 & 3 2 above and 4 3 below.

⁴⁷ See para 1 1 1 above.

is therefore problematical for our courts to refuse to order specific performance of contracts of employment based on policy reasons uncritically received from English law.⁴⁸ In the light of the emphasis that is placed on a party's right to specific performance in modern South African law,⁴⁹ it therefore appears that the applicability of these reasons in our law and the correct justification for this rule need to be re-examined to determine whether there is merit in recognising a restriction to specific performance based on the personal nature of the obligation. Especially where employment contracts assume a more hybrid nature, and reflect characteristics of contracts to provide a specific service (*locatio conductio operis* or contract of work) or cases where the one party's liberty is less constrained by enforcement, for example the employer, rather than the employee.⁵⁰

In relation to employment contracts, a distinction may be drawn between ordering payment or reinstatement by the employer, and compelling the employee to perform.⁵¹ The focus will first be on the employee's claim against his employer.⁵²

⁴⁸ See eg *Schierhout v Minister of Justice* 1926 AD 99 107-108; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) 305-306; *Myers v Abramson* 1952 (3) SA 121 (C) 125-126; *Pougnet v Ramlakan* 1961 (2) SA 163 (D) 166 ff; *Gründling v Beyers* 1967 (2) SA 131 (W) 146, and *Mabaso v Nel's Melkery (Pty) Ltd* 1979 (4) SA 358 (W) 359.

⁴⁹ *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 350; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 781-782; A Beck "The coming of age of specific performance" 1987 CILSA 190 195; G Lubbe "Contractual derogation and the discretion to refuse an order for specific performance" in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77 84-87 (reproduced with minor changes in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 95).

⁵⁰ See para 7 2 below.

⁵¹ Kerr *Principles of the Law of Contract* 681.

⁵² In this context, it is worth remembering that before *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A), most courts assumed that the repudiation of an employment contract, albeit wrongful, automatically terminated it. However, in this case the Appellate Division held that a fundamental breach of an employment contract does not *per se* end

4 2 1 1 The employee's claim against the employer

In *National Union of Textile Workers v Stag Packings (Pty) Ltd*,⁵³ it was held that, in principle, an employee is entitled to specific performance, although there may be factors which could influence a court to refuse such an order.⁵⁴ The court reaffirmed that it has a discretion whether or not to order specific performance and that there was no rule prohibiting such an order.⁵⁵ It follows that the reasons traditionally advanced in arguing against specific performance as a remedy in the context of the employment contract are only to be regarded as factors that have to be taken into consideration in the exercise of its discretion.⁵⁶

Thus, the court in *Stag Packings* rejected the traditional (English common law) rule against an employee's claim for specific performance of an employment contract, and held that there was no reason why there should be a departure in such cases from the general principle that a plaintiff is entitled to specific performance of his contract, subject to the court's discretion to refuse it. It follows that ordering specific performance of the employer's obligations is more generally accepted.⁵⁷ However, Christie makes an important observation in this regard, namely that the reasons why the courts have not granted such orders in the past remain valid and applicable, and it should not be forgotten that in every case the court has a discretion to refuse the remedy depending

the contract, but serves only to give the innocent party the choice either to enforce the contract or to terminate it (confirmed recently by the SCA in *NUMSA v Abancedisi Labour Services* (857/12) [2013] ZASCA 143 (30 Sep 2013)). See also Jordaan "Employment relations" in *Southern Cross* 408.

⁵³ 1982 (4) SA 151 (T).

⁵⁴ 158. See also *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) 952.

⁵⁵ 1982 (4) SA 151 (T) 156H.

⁵⁶ Basson et al *Essential Labour Law* 55; *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) paras [19]-[21].

⁵⁷ Van der Merwe et al *Contract: General Principles* 331.

on the circumstances.⁵⁸ He supports and illustrates this by saying that the court was justified in exercising its discretion in *Seloadi v Sun International (Bophuthatswana) Ltd*,⁵⁹ where the court refused to grant an order that a hotel should reinstate employees whom it had summarily dismissed, because there was hostility towards the hotel. Furthermore, in the more recent case *Masetlha v President of the Republic of South Africa*⁶⁰ the head of the National Intelligence Agency had been dismissed by the President and the Constitutional Court refused to order reinstatement. The reason, *per* Mosenke DCJ, was that the special relationship of trust between the head of the Intelligence Agency and the President was “irretrievably breached” and therefore specific performance was considered inappropriate in the circumstances.⁶¹ This decision was applied and followed in *Abdullah v Kouga Municipality*⁶² where the court similarly declined to order reinstatement of the chief financial officer of Kouga Municipality, who had been suspended by the municipality due to a breakdown of trust, and instead awarded contractual damages (consisting of remuneration for the remaining period of his contract).⁶³

The current position regarding enforcement against employers has been summarised as follows by Kerr:

“It used to be said that a court would not normally grant an order of specific performance of contracts of service. Now it is clear that no general rule can be made for all contracts of

⁵⁸ Christie & Bradfield *Christie's The Law of Contract in South Africa* 551.

⁵⁹ 1993 (2) SA 174 (BG) 186I-190E.

⁶⁰ 2008 (1) SA 566 (CC).

⁶¹ Paras [88]-[91].

⁶² [2012] 5 BLLR 425 (LC).

⁶³ Para [18] *per* Lagrange J: “the summary termination of the applicant’s services was an unlawful, but given the breakdown of trust an order of reinstatement would not be appropriate and his remedy should be confined to his contractual damages”.

service. Contracts of employment in industry and in similar spheres of work are governed by a number of statutes and specific precedents.”⁶⁴

As far as labour legislation is concerned, section 193 of the Labour Relations Act⁶⁵ and section 77A(e) of the Basic Conditions of Employment Act,⁶⁶ provide the Labour Court with the power to make an order of specific performance in relation to employment contracts. As such, these provisions are also indicative of the movement away from the traditional reluctance of our courts, which was first introduced by *Stag Packings*. Instead, our law is moving towards recognition of the employee’s right to remain employed once he has entered into the employment contract. Labour courts are using their powers to make *status quo* orders instead of ending employment relationships.⁶⁷

⁶⁴ *Principles of the Law of Contract* 681.

⁶⁵ 66 of 1995. If the unfairness of a dismissal is confirmed by the Labour Court or arbitrator appointed in terms of the Act it may according to s 193 direct the employer to do the following: (a) to reinstate the employee from any date not earlier than the date of dismissal; (b) to re-employ the employee; or (c) to pay compensation to the employee.

⁶⁶ 75 of 1997. Section 77A(e) provides that “the Labour Court may make any appropriate order, including an order making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation”.

⁶⁷ See Eiselen “Specific performance and special damages” in *European Contract Law: Scots and South African Perspectives* 258-259; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 323; *Majake v Commission for Gender Equality* 2010 (1) SA 87 (GSJ). Considering s 77A(e) BCEA, the Labour Court in *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd* [2012] 5 BLLR 434 (LC) ordered an employer to restore the salary of an employee after it had unilaterally reduced her remuneration to align it with the salaries earned by other employees. See also *SAPU v National Commissioner of the South African Police Service* [2006] 1 BLLR 42 (LC) para [82] per Murphy AJ.

The rest of this discussion will focus on the employer's claim for enforcement against the employee. The reason for doing so is that the position concerning the enforcement of the employer's obligations can by and large be regarded as resolved. In line with the international trend⁶⁸ it is now well established by statute that a court may force the employer to reinstate an employee for the remainder of his employment contract.⁶⁹ This position, which was also confirmed in *Toerien v Stellenbosch University*,⁷⁰ is also defensible as a matter of principle and policy. A consideration that weighs heavily in this regard is that an employee enjoys a constitutional right to fair labour practices; when an employer unlawfully terminated his services, the only way to give full effect to this right might be enforcement of his contract (subject only to the court's discretion, as for example in the *Masetsha* case).⁷¹ Furthermore, even though the personal freedom of the employer is also implicated when he is compelled to have an employee work for him, one can argue that this happens to a lesser degree, since the employer is not forced to work, but to reinstate. In contrast to an employee, an employer's liberty is less constrained by enforcement, and hence the traditional civil liberty argument is less relevant.

⁶⁸ See eg Part X of (UK) Employment Rights Act 1996 (para 4 3 below); and § 8 of Protection Against Unfair Dismissal Act of Germany (para 4 5 1 below).

⁶⁹ It should be noted that employees' rights in this regard is limited in the case of the magistrates' courts. See s 46(2)(c) of the Magistrates' Courts Act 32 of 1944 and A A Landman "Saving of costs: a ground for reducing specific performance of a claim sounding in money?" 1997 SALJ 263.

⁷⁰ (1996) 17 ILJ 56 (C).

⁷¹ Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides that "Everyone has the right to fair labour practices" and s 33(1) further provides that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

4 2 1 2 The employer's claim against the employee

The position is more complicated where an employer seeks an order for specific performance against his employee.⁷² Here the personal freedom of the employee is implicated more strongly than when the employer is compelled to reinstate employees. Many South African judgments and academic works have expressed the view that courts should not *generally* award specific performance of the obligation to work against an employee.⁷³ Following the English courts, our courts in the past would never specifically enforce an employment contract by ordering an employee to work for an employer because this would constitute forced labour (a concept we will return to later on).⁷⁴ For example, in the English case of *Millican v Sullivan*⁷⁵ the court held that it would be “monstrous” to compel an unwilling employee to work in terms of an order, and that they have “never dreamt of enforcing by injunction agreements that were strictly personal in their nature”.

The position in our law resembles the position in England and the United States, where specific performance against an employee is similarly viewed with disfavour. Therefore these contracts could give rise to a claim for damages instead.⁷⁶ It is especially

⁷² Van der Merwe et al *Contract: General Principles* 331.

⁷³ See *Schierhout v Minister of Justice* 1926 AD 99 108; *Troskie v Van der Walt* 1994 (3) SA 545 (O) 552A; *Tiger Bakeries Ltd v FAWU* (1988) 9 ILJ 82 (W) 87D; *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) para [17]; Lubbe & Murray *Contract* 544; A Roycroft & B Jordaan *A Guide to South African Labour Law* 2 ed (1992) 101-103; Christie & Bradfield *Christie's The Law of Contract in South Africa* 550-551; Kerr *Principles of the Law of Contract* 680-681.

⁷⁴ See para 4 2 1 above; Jordaan “Employment relations” in *Southern Cross* 407.

⁷⁵ (1888) 4 TLR 203 204.

⁷⁶ See eg *Subaru Technica International Inc, Prodrive Limited v Richard Burns, CSS Stellar Management Limited, Automobiles Peugeot SA* 2001 WL 1479740 Ch D para 77 per Strauss J (citing decision of Oliver J in *Nichols Advanced Vehicle Systems Inc v De Angelis*, unreported, 21 December 1979, involving a F 1 racing driver); B M Loeb

noteworthy that our law differs from English and American law insofar as our courts display a reluctance⁷⁷ to award specific performance to compel employees to work, rather than recognise a rule that it should never be awarded. Civil-law systems, as represented here by German and Dutch law, also recognise as a rule that specific performance will not be granted against an employee.⁷⁸ It appears that our law faces a choice between continuing with its flexible approach or adopting a rule that specific performance may never be awarded against employees (which is also followed in some systems). In the rest of this section it will be enquired whether denying specific performance against employees should be a concrete rule or exception to the right to specific performance, or whether our courts should merely be reluctant to award specific performance against an employee.

Let us first consider claims aimed at forcing a party to work for the employer. In this regard the court in *Troskie v Van der Walt*⁷⁹ refused specific performance of a positive undertaking to enter into the service of an employer because the contract involved the rendering of services of a personal and skilled nature that required close cooperation between the parties.⁸⁰ In this case the respondent repudiated his contract to play rugby for the second appellant (Old Greys Rugby Club) by joining the opposing Collegians Rugby Club, with the intention of remaining with them. However, the appellants did not

"Deterring player holdouts: who should do it, how to do it, and why it has to be done" (2001) 11 *Marquette Sports Law Review* 275 287 n 64; Naudé 2003 *SALJ* 269.

⁷⁷ Le Roux stated in 2003 that "courts are reluctant to order specific performance in cases of breach of contract where the defaulting party is required to render performance of a very personal nature, such as contracts of employment" ("How divine is my contract? Reflecting on the enforceability of player or athlete contracts in sport" 2003 *SA Merc LJ* 116). Christie agrees with this statement, noting that "[a]n order for the specific performance of a contract of employment will, in the exercise of the court's discretion, not normally be granted" (*Christie's The Law of Contract in South Africa* 550).

⁷⁸ See paras 4 5 & 4 6 below.

⁷⁹ 1994 (3) SA 545 (O) 552.

⁸⁰ Van der Merwe et al *Contract: General Principles* 331.

accept the respondent's repudiation and applied for an order compelling him to play for the Old Greys Club for the period stipulated in the contract.⁸¹ The trial court *per* Malherbe JP, decided the following:⁸²

"Na my mening is dit 'n belaglike smeekbede en sal geen redelike Hof so 'n bevel tot spesifieke nakoming van Van der Walt se beweerde kontraktuele verpligting gelas nie."

On appeal, Wright J, refused to order specific performance of the respondent's contractual obligation on the following basis:⁸³

"Die aard van die dienste wat in die onderhawige saak gelewer moes word, is die speel van rugby vir 'n besondere klub. Die lewering van die betrokke diens is nie alleen afhanklik van die persoonlike entoesiasme, bereidwilligheid en deursettingsvermoë van die besondere speler nie, maar ook is daar aan die betrokke dienste 'n groot mate van kundigheid, bedrewenheid en vaardigheid van persoonlike aard verbonden en wat afhanklik sal wees van die besondere speler se spesifieke eienskappe en ook sy verhouding met die klub vir wie hy rugby speel. Dit is sterk te betwyfel of daar in die besondere omstandighede van hierdie saak ooit 'n bevel van spesifieke nakoming gepas sou kon wees ..."

It is interesting that Wright J emphasises the nature of the performance sought to be enforced. According to him it is highly doubtful whether an order of specific performance would be appropriate where the performance is entirely dependent on the personal enthusiasm, willingness and drive of the debtor, and where the performance involves a great deal of ability, proficiency and skill of a personal nature which will be dependent on the specific qualities of the debtor as well as on his relationship with the creditor.⁸⁴ He compares performance of this nature to the rule that applies to cession, namely that where the performance is of such a personal nature, and is closely connected to the person of the creditor, the creditor's personal right may not be transferred without the

⁸¹ *Troskie v Van der Walt* 1994 (3) SA 545 (O) 548.

⁸² 553.

⁸³ 552.

⁸⁴ 552H-J.

consent of the debtor.⁸⁵ Accordingly, an employer is not entitled to cede his right to the services of an employee to another.⁸⁶ In other words, he equates non-transferability to unenforceability: in the same way as an employer may not transfer his claim against an employee to one of his creditors so that the latter can enforce it, the employer himself may not specifically enforce his personal right or claim against an employee. The *Troskie* decision demonstrates how the availability of specific performance (in the context of employment contracts) depends on the nature of the performance. The nature of the performance can also determine that specific performance should be granted of an employment contract and thus yield an opposite conclusion.

In the absence of the characteristics typically associated with employment contracts, as discussed by Wright J, the Full Bench in *Santos Professional Football Club (Pty) Ltd v Iglesund*⁸⁷ was prepared to order specific performance of an obligation to work against an employee. The case concerned the right of the court to order specific performance of a contract for personal services, more specifically a contract of employment, albeit that the court held that "this was not a case of an ordinary contract of employment",⁸⁸ as we will also presently see. The first respondent, a football coach, had entered into a coaching contract with the appellant club. The contract provided that a breach by either of the parties entitled the other either to cancel the contract and claim damages or to claim specific performance. Before the expiry of his contract, the first respondent was made a more lucrative offer by the second respondent, another club in the same soccer league. He proceeded to give the appellant notice of termination of his services and thereby effectively committed breach of contract in the form of repudiation. The appellant approached the court to declare that the contract was binding and to grant an order of specific performance against the first respondent. The application failed in the

⁸⁵ 553. See also G F Lubbe "Cession" in L T C Harms & J A Faris (eds) *LAWSA 3* 3 ed (2013) para 165; Van der Merwe et al *Contract: General Principles* 408-409.

⁸⁶ *Isaacson v Walsh & Walsh* (1903) 20 SC 569.

⁸⁷ 2003 (5) SA 73 (C).

⁸⁸ 76D.

court *a quo*,⁸⁹ but the Full Bench ordered the first respondent to continue as head coach of the appellant and thereby distanced itself from the view held by many South African commentators and case law, that specific performance of an obligation to work should generally not be granted against an employee.⁹⁰

There were, however, special circumstances that persuaded the Full Bench to grant specific performance.⁹¹ According to Naudé, there were four main reasons for granting specific performance.⁹² In the first instance the court emphasised that the contract was a unique contract of employment.⁹³ Three characteristics distinguished the particular contract from an ordinary contract of employment:⁹⁴ the contract contained a clause which granted the right to claim specific performance in case of breach;⁹⁵ the parties contracted on an equal footing, and Iggesund enjoyed considerable latitude in performing his duties.⁹⁶ A second consideration which swayed the court in favour of granting specific performance was the primacy of specific performance in our remedial scheme. The court emphasised that specific performance was the primary remedy for breach of employment contracts.⁹⁷ It held that the constitutional value of contractual autonomy, part of “freedom” and informing the constitutional value of “dignity”, also favours the primacy of specific performance as a remedy for breach.⁹⁸

⁸⁹ *Santos Professional Football Club (Pty) Ltd v Iggesund* 2002 (5) SA 697 (C).

⁹⁰ See eg Christie & Bradfield *Christie's The Law of Contract in South Africa* 551; A J Kerr *The Principles of the Law of Contract* 680-681; *Schierhout v Minister of Justice* 1926 AD 99 108; *Troskie v Van der Walt* 1994 (3) SA 545 (O) 552A.

⁹¹ See Naudé's case note 2003 SALJ 269; Mould 2011 PELJ 198 ff.

⁹² Naudé 2003 SALJ 270.

⁹³ 2003 (5) SA 73 (C) 76D.

⁹⁴ Naudé 2003 SALJ 270; Mould 2011 PELJ 203.

⁹⁵ 2003 (5) SA 73 (C) 76A-C.

⁹⁶ 79D.

⁹⁷ 81A-E, 84I, 87A.

⁹⁸ 86F-87C. See also Naudé 2003 SALJ 277.

The third reason for granting specific performance was that there was also no breakdown of the relationship between the parties. Instead, the employee's principal reason for leaving was commercial, namely a more lucrative contract with a competitor.⁹⁹ According to Naudé this distinguishes the present case from other breaches by employees, where the employee had a more legitimate reason to be unwilling to continue with the contract and was justified in leaving the relationship.¹⁰⁰ This was relevant because there was an important distinction between a wrongfully dismissed employee and one who contracted with his employer on equal terms and unlawfully resiled from his contract of employment in order to earn more money from a competitor.¹⁰¹

The fourth and final reason for granting specific performance was that there was no recognised hardship to the respondent.¹⁰² The Full Bench emphasised that "Courts should be slow and cautious in not enforcing contracts. They should, in a specific performance situation, only refuse performance where a recognised hardship to the defaulting party is proved". According to Foxcroft J, the reasons given by the court *a quo* in refusing the application, merely amount to "practical considerations" which do not meet the proper test.¹⁰³

The Full Bench made a very bold move in rejecting Wright J's reliance in *Troskie*¹⁰⁴ on Kerr's view that "[n]o court, for example, can force a singer to sing or an artist to paint a picture because these tasks require the application of highly personal skills".¹⁰⁵ The

⁹⁹ 2003 (5) SA 73 (C) 77F-G.

¹⁰⁰ 2003 SALJ 277.

¹⁰¹ 2003 (5) SA 73 (C) 78I. See also Christie & Bradfield *Christie's The Law of Contract in South Africa* 551.

¹⁰² 2003 (5) SA 73 (C) 86H. See also para 6 1 2 below.

¹⁰³ 2003 (5) SA 73 (C) 86G-H.

¹⁰⁴ See *Troskie v Van der Walt* 1994 (3) SA 545 (O) 552C.

¹⁰⁵ A J Kerr *The Principles of the Law of Contract* 4 ed (1989) 530 (repeated in 6 ed (2002) 680-681).

court thereby implied that specific performance might be equitable in situations “where an opera house, having advertised that an international star will perform, will face great criticism and possibly financial loss when it cannot force the artist to appear, no matter how bad his performance might actually be”.¹⁰⁶ The conclusion drawn here is that there might be circumstances where a court will not be prevented from ordering enforcement of personal service contracts especially when concerns typically associated with its enforcement, such as the threat to the debtor’s personal freedom, are not present.¹⁰⁷

The example of the singer who cannot be forced to perform probably has its roots in the old English case of *Lumley v Wagner*.¹⁰⁸ In this case, a Miss Wagner had agreed to sing for three months at Her Majesty’s Theatre in London. The case concerned an action instituted to restrain her from singing for a third party by granting an injunction for that purpose.¹⁰⁹ The Chancery Court held¹¹⁰ that

“[w]herever this court has no proper jurisdiction to enforce specific performance, it operates to bind men’s consciences, as far as they can be bound, to a true and literal performance of their agreements and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in another; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for guidance in the administration of such an equity”.

¹⁰⁶ 2003 (5) SA 73 (C) 83I.

¹⁰⁷ See para 4 8 below.

¹⁰⁸ (1852) 1 De G M & G 604. As observed by Foxcroft J, 2003 (5) SA 73 (C) 83J-84A.

¹⁰⁹ For further details of the case and ratio, see Jones & Goodhart *Specific Performance* 177 ff; *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) 84. See also para 4 4 n 251 below.

¹¹⁰ (1852) 1 De G M & G 604 619.

The Chancery Court effectively achieved specific performance in an indirect manner.¹¹¹ The defendant could not be forced to sing at the plaintiff's theatre, but she could be compelled to refrain "from the commission of an act which she has bound herself not to do", even if this ultimately meant fulfilling her employment contract with the theatre.¹¹² By granting an injunction which prevented her from singing elsewhere, the court indirectly forced her to sing at the plaintiff's theatre.¹¹³ But it must be noted that in this particular case sufficient confidence existed on the part of the employer in the employee's ability to fulfil her duties diligently. The traditional reasons against specific performance therefore did not apply, and the case was distinguishable on a variety of grounds.¹¹⁴ Judges also consequently refused to allow this decision to be a precedent for any general principle that the court had jurisdiction to grant specific performance of contracts to provide services.¹¹⁵ Thus, it can still be maintained that in English law the original rule against specific performance remains. English courts will not grant an

¹¹¹ *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C) 83J.

¹¹² Jones & Goodhart *Specific Performance* 177-178.

¹¹³ Wagner never performed her contract to sing for Lumley, but the two were reconciled four seasons later. For these details see Z Chaffee "Equitable servitudes on chattels" (1928) 41 *Harv LR* 945 975 n 89.

¹¹⁴ Jones & Goodhart *Specific Performance* 170; R J Sharpe *Injunctions and Specific Performance* (1983) § 695.

¹¹⁵ The Court of Appeal in *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, 428 *per* Lindley LJ described the decision as "an anomaly which it would be very dangerous to extend". See also *MacDonald v Casein Ltd* [1917] 35 DLR 443, 444-445 *per* Macdonald CJA "The tendency of the Courts now appears to be not to follow *Lumley v. Wagner* ... and the line of cases founded on that decision, unless there be in the particular case an express negative stipulation." Another similar case is *Chapman v Westerby* [1913] WN 277, 278 where it was held *per* Warrington J that "[there must be a stipulation] requiring the contracting party not to do some particular act on which the Court can put its finger".

injunction where the claim essentially boils down to an attempt to have the contract of employment specifically enforced.¹¹⁶

In *Santos*, the Full Bench relied on the practice in England of granting indirect specific performance against employees by injunction as illustrated in the case of *Lumley* to support its view that the right to specific performance also applies in relation to employment contracts.¹¹⁷ The *Lumley* case also persuaded another South African court to prohibit an employee from working for another employer in the same sector for the remainder of his contract in *Roberts Construction Co Ltd v Verhoef*.¹¹⁸ This was a standard restraint of trade case: there was an express term prohibiting employment elsewhere. The court insisted that it would provide “all the relief in its power, without looking to the effect which may ultimately be produced by the restraint which it places on the party who is disposed to break the contract, although the effect of such an injunction may be to compel the specific performance of the contract”.¹¹⁹

The *Santos* decision, which has been described as “far-reaching”¹²⁰ has given rise to a number of difficulties. The first relates to content and relevance of the boundaries between employment contracts and other service contracts. As briefly indicated earlier, the employment contract between the football club and Igesund by no means constituted an ordinary employment contract. According to Van der Merwe et al “the special circumstances of the case weighed heavily with the court. The factor that tipped

¹¹⁶ Sharpe *Injunctions and Specific Performance* § 693, referring to *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416. See also R S Stevens “Involuntary servitude by injunction” (1921) 6 *Cornell Law Quarterly* 235.

¹¹⁷ *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) 84A-D; and see Naudé 2003 SALJ 275.

¹¹⁸ 1952 (2) SA 300 (W).

¹¹⁹ 305B.

¹²⁰ See Eiselen “Specific performance and special damages” in *European Contract Law: Scots and South African Perspectives* 258; repeated by the same author in Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 323.

the scales was that the contract in issue was not an ordinary contract of employment".¹²¹ The contract concerned departed from the general concept of an employment contract. Iglesund's contract, due to its unusual nature, is distinguishable from an ordinary employment contract, which is less likely to be enforced due to policy considerations, such as concern for the employee's personal freedom, and the fact that the employee often is in a weaker bargaining position. Iglesund was an employee, but an unusual one: he contracted on equal terms with the applicant, demanded a very high sum of money for his services, and was given complete freedom in the exercise of his duties. Because Iglesund had more bargaining power, and Santos had no control over his functions, it can be argued that he was actually comparable to an independent contractor. Based on all of these factors, the court ultimately made an order of specific performance. The case is therefore clearly distinguishable from ordinary employment contracts, and other factors trumped the concerns typically associated with enforcement of an employment contract against an employee.¹²²

A further problematic aspect of *Santos*, is that it did not take into account policy considerations such as forced labour.¹²³ The court *a quo*, *per* Desai J, cited "disapproval of forced labour" as one of the factors militating against ordering specific performance against an employee.¹²⁴ However, the Full Bench did not engage with the court *a quo*'s forced labour argument.¹²⁵ They emphasised that the only operative reason for refusing specific performance was to avoid hardship to the employee, a consideration which, according to the Full Bench, did not apply in this particular case.¹²⁶

¹²¹ Van der Merwe et al *Contract: General Principles* 332.

¹²² See para 7 2 2 text to n 51 below.

¹²³ See, on the term "forced labour", A Naidu "The right to be free from slavery, servitude and forced labour" 1987 *CILSA* 108; Naudé 2003 *SALJ* 280-281; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 291-293.

¹²⁴ *Santos Professional Football Club (Pty) Ltd v Iglesund* 2002 (5) 698 (C) 701C.

¹²⁵ Naudé 2003 *SALJ* 280; Currie & De Waal *Bill of Rights Handbook* 314.

¹²⁶ Naudé 2003 *SALJ* 280; Currie & De Waal *Bill of Rights Handbook* 314.

According to Naudé, “[t]here appears to be merit in the forced labour argument”, seeing that section 13 of the Constitution of the Republic of South Africa, 1996, which states that “no one may be subjected to slavery, servitude or forced labour”, possibly creates a presumption against specific performance of an employment contract.¹²⁷ However, this is not an outright prohibition: in some circumstances, granting an order of specific performance could be a justifiable limitation of the section 13 right.¹²⁸ Rautenbach has pointed out that, section 13 prohibits extreme forms of the limitation of the right to occupational freedom such as “military service, prison labour and the performance of civil service in, for example, times of emergency”.¹²⁹ Naudé acknowledges that specific performance of an employment contract does not seem to fall under this definition.¹³⁰ However, there are also broader definitions of forced labour. Currie and De Waal¹³¹ refer to the International Labour Organization’s definition as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.¹³² It can be argued that specific performance of an employment contract falls within this definition and can be considered an instance of forced labour. However, notwithstanding such a technical approach, it can undoubtedly be said that considerations such as the human free will and autonomy go against direct enforcement of such obligations. In concluding her discussion of section 13, Naudé makes the following important comment:

“Section 13 and the policy behind s 22 of protecting personal freedom should, however, make courts very wary of granting specific performance against an employee.”¹³³

¹²⁷ Naudé 2003 *SALJ* 280.

¹²⁸ Currie & De Waal *Bill of Rights Handbook* 292.

¹²⁹ I M Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* (RS 2011) para 1A61.

¹³⁰ Naudé 2003 *SALJ* 280.

¹³¹ Currie & De Waal *Bill of Rights Handbook* 291.

¹³² See Art 2(1) Forced Labour Convention of 1930 of which South Africa is a member state.

¹³³ Naudé 2003 *SALJ* 281.

Naudé argues that even though Iglesund was no ordinary servant, forcing him to continue to coach for the applicant, still raises concern for his personal freedom. The Full Bench also overlooked the respondent coach's contention that the move to the second respondent club would provide him with the necessary financial security to allow relocation of his family, in order for them to be reunited and live together in Cape Town.¹³⁴ Ultimately she argues that courts should refuse specific performance in such a case, on the basis that it would cause unfair hardship to the employee.¹³⁵

Although one would agree with Naudé that policy considerations such as preventing forced labour should indeed be taken into account by our courts in refusing to order specific performance of employment contracts against employees, these considerations are not conclusive, and were indeed outweighed by others in the *Santos* case: it is especially significant that the contract in issue was not an ordinary contract of employment, which is less likely to be enforced based on policy considerations such as the concern for the employee's personal freedom to favour the employer. As Naudé correctly points out, *Santos* is distinguishable from *Troskie* on the basis that the rugby player, "[u]nlike the first respondent, is under the constant control of his employer, and continually has close personal contact with his employers in the performance of his duties".¹³⁶ The justifications that apply to typical employment contracts did not apply,

¹³⁴ But see Naudé 2003 *SALJ* 281: "The court's response was simply that commercial reasons were the principal factors causing the breach [...] It appears from the affidavits filed that the first respondent had probably also lived apart from his family during his previous contract with Orlando Pirates Football Club [...] so that the importance of being reunited with his family perhaps did not carry much weight. The first respondent also did not make any allegation that his family had indeed agreed to relocate to Cape Town if he joined the second respondent, so that it was not clear that specific performance of his contract with the appellant was all that stood in the way of such relocation. It is therefore not surprising that the resolution of the 'problems with his family' as a result of his move to the second respondent was only mentioned as a possibility by the court a quo..."

¹³⁵ Naudé 2003 *SALJ* 281.

¹³⁶ Naudé 2003 *SALJ* 274.

and hence did not provide sufficient reason for refusal of specific performance. Therefore it is submitted that the Full Bench's reasoning and finding was correct, and that enforcement was warranted in this instance.¹³⁷

This reasoning could also be applied to *Nationwide Airlines (Pty) Ltd v Roediger*.¹³⁸ Here an airline captain was held to his agreement to give three months' notice of termination of his employment. The court pointed out that, in the exercise of the court's discretion to refuse specific performance of an employment contract, the remedy was not normally granted, but there was no "hard-and-fast rule" to that effect.¹³⁹ The court ordered specific performance, having regard to the particular relationship between the applicant and respondent and the nature and circumstances of the agreement.¹⁴⁰ The real reason the respondent had sought to terminate his employment was to be able to take up more lucrative employment with another airline.¹⁴¹ Furthermore, the respondent was not an ordinary employee because he was a highly qualified professional pilot who had contracted on equal terms with the applicant and was able to command a high sum of money for doing so, and in the performance of his duties, the respondent was in exclusive command of the aircraft he was piloting, i.e. his decision-making insofar as piloting the aircraft was concerned was not subject to the applicant's control.¹⁴² It can therefore be argued that he was also comparable to an independent contractor. The justifications that apply to typical employment contracts did not apply, and hence did not provide sufficient reason for refusal of specific performance and the court was also correct in enforcing the particular contract.

¹³⁷ See also para 7 2 2 below.

¹³⁸ 2008 (1) SA 293 (W). See further Christie & Bradfield *Christie's The Law of Contract in South Africa* 551.

¹³⁹ Para [17].

¹⁴⁰ Paras [28]-[30].

¹⁴¹ Para [23]. Compare text to n 99 above.

¹⁴² Paras [24]-[26].

Both cases give rise to difficulties of classification. It is submitted that both respondents (the football coach and the airline captain) may be regarded as employees (inasmuch as they performed services of a continuous nature in terms of a mutual agreement in return for remuneration),¹⁴³ but unusual ones. Specific enforcement was warranted even though specific performance is generally not awarded against employees. There were certain aspects of these particular employment contracts that made them so unusual that the courts did not yield to the general reluctance of our judiciary to order specific performance in cases of breach of contract where the debtor is required to render performance of a very personal nature.

Thus far, the focus was only generally on whether an employer could force an employee to continue working for him. Related to this is an undertaking (for example in a bursary agreement) where a person undertakes to become an employee in the future. These undertakings are likewise not enforced. Instead, if the person fails to commence work with the employer/grantor he will be required to reimburse the amount that was granted to him in terms of the bursary agreement.¹⁴⁴

Both these situations must be distinguished from the important phenomenon in practice of restraint of trade agreements, whereby employers seek to enforce various undertakings by employees not to enter into the service of another employer during or after the term of his employment contract, which they incorporate to protect their economic interests.¹⁴⁵ As Christie correctly points out “[a] plaintiff who asks for an interdict to prohibit such a breach is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure

¹⁴³ See again criteria listed in text to nn 33 ff para 4 2 1 above.

¹⁴⁴ See eg Namibian High Court decision in *Namibia Post Limited v Hiwilepo* [2011] NAHC 172.

¹⁴⁵ For in-depth discussion of restraints of trade, see J Saner *Agreements in Restraint of Trade in South African Law* (loose-leaf); P J Sutherland *The Restraint of Trade Doctrine in England, Scotland and South Africa* PhD thesis Edinburgh (1997).

performance of the contract".¹⁴⁶ This type of undertaking is more readily enforced in our law.¹⁴⁷

In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,¹⁴⁸ the appellate division held that restraints of trade should be treated like all other contractual terms and, in principle, be regarded as enforceable. Thus, in general, restraint of trade clauses are valid in our law, provided that they conform to public policy and are reasonable. This means that the party seeking to enforce the restraint is entitled to its enforcement, unless the party bound by the restraint is able to prove on a balance of probability that it would be unreasonable to enforce the restraint in the circumstances of the particular case.¹⁴⁹ In practical terms this means that the employer seeking to enforce the restraint merely has to invoke the provisions of the contract and prove the breach, whilst the employee who wants to avoid its enforcement will be burdened with the onus of proving its illegality because public policy requires that people should be bound by their contractual

¹⁴⁶ Christie's *The Law of Contract in South Africa* 555. Cf remarks made by Zulman J in *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd* 1995 (3) SA 836 (W) 843C-D, that this type of relief is not specific performance, which, according to Eiselen, "are hard to explain or understand" (*European Contract Law: Scots and South African Perspectives* 253 n 34).

¹⁴⁷ See *Roberts Construction v Co Ltd v Verhoef* 1952 (2) SA 300 (W); Van der Merwe et al *Contract: General Principles* 331. However, a court is less inclined to enforce an implied restraint than would be the case where it is express – *Troskie v Van der Walt* 1994 (3) SA 545 (O) 556F-G.

¹⁴⁸ 1984 (4) SA 874 (A).

¹⁴⁹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 893A-B, 898C-D; *Basson v Chilwan* 1993 (3) SA 742 (A) 768D-E; *Coetzee v Comitis* 2001 (1) SA 1254 (C) 1273; *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) 482-483; Kerr *Principles of the Law of Contract* 211-212; Eiselen "Specific performance and special damages" in *European Contract Law: Scots and South African Perspectives* 253-255.

undertakings.¹⁵⁰ If the employee can prove that the restraint is unreasonable (by proving that it does not protect a substantive interest),¹⁵¹ he will not be bound,¹⁵² because by the same token public policy discourages unreasonable restrictions on people's freedom of trade.¹⁵³

One question that still needs to be answered, however, is whether enforcement of an agreement in restraint of trade amounts to an infringement of the employee's personal liberty and similarly leads to forced labour, since the employee is indirectly forced to honour his employment contract. Whether this is the case and should be an impediment to the enforcement of restraints will be addressed later.¹⁵⁴

4 2 2 Contract of work (*locatio conductio operis*)

As indicated earlier,¹⁵⁵ in South African law the contract of employment must be distinguished from other personal service contracts, more specifically, the contract of work (*locatio conductio operis*). The contract of work has been defined as a mutual agreement between a *locator* (the employer/client who commissions the work) and a *conductor* (the contractor) in terms of which the latter undertakes to execute a particular piece of work and promises to produce a certain specified result.¹⁵⁶ A significant

¹⁵⁰ Thus, freedom of contract is preferred over freedom of trade in our law. See *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) 505F; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 891; Van der Merwe et al *Contract: General Principles* 185.

¹⁵¹ Examples of such interests include business connections and business secrets. See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

¹⁵² Which will be the case if, for example, the sole objective of the restraint is to eliminate competition. See in this regard, *Hirt & Carter (Pty) Ltd v Mansfield* 2008 (3) SA 512 (D).

¹⁵³ *Basson v Chilwan* 1993 (3) SA 742 (A) 776I-777B.

¹⁵⁴ See para 4 8 4 below.

¹⁵⁵ See para 4 1 above.

¹⁵⁶ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 61B; quoted with approval in *Phaka v Bracks* (JR1171/11) [2013] ZALCJHB 91 para [17].

distinguishing factor between a contract of employment and a contract of work in our law is that the services as such are not the object of the contract of work. The client is not interested in the contractor's labour, but in the result of his labour.¹⁵⁷

Examples of work undertaken by an independent contractor include the construction of a road¹⁵⁸ or of a dam,¹⁵⁹ the repair of a building or of a road,¹⁶⁰ the demolition of a building,¹⁶¹ the sinking of a borehole,¹⁶² the installation of an electric service,¹⁶³ and the cartage of goods.¹⁶⁴ The work performed by the independent contractor does not have to be of a physical nature, it may also be intellectual services (*operae liberales*).¹⁶⁵ For example, accountants and advocates are also considered to be independent contractors.¹⁶⁶

Our law treats these contracts as regular commercial contracts to which the general principles of the law of contract apply. Hence, a contractor's breach will entitle the client to claim specific performance, subject only to the qualification that the court has a discretion to refuse it.¹⁶⁷ Nienaber, however, holds that "[s]uch an order will usually but

¹⁵⁷ Zimmermann *The Law of Obligations* 393-394. Comparable to *obligations de résultat* in French law. See also n 278 para 4 5 2 below.

¹⁵⁸ *Naude v Kennedy* 1909 TS 799; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

¹⁵⁹ *Viljoen v Visser* 1929 CPD 473; *Uitenhage Municipality v Schuddingh* 1936 CPD 506.

¹⁶⁰ *East London Municipality v Murray* (1894) 9 EDC 55.

¹⁶¹ *Dukes v Marthinusen* 1937 AD 12.

¹⁶² *Van Rensburg v Straughan* 1914 AD 317.

¹⁶³ *Breslin v Hichens* 1914 AD 312.

¹⁶⁴ *Parke v Hamman* 1907 TH 47; *Horne v Williams & Co* 1940 TPD 106.

¹⁶⁵ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 56H.

¹⁶⁶ *Spurrier v Coxwell NO* 1914 CPD 83. For more examples, see F du Bois Wille's *Principles of South African Law* 9 ed (2007) 942.

¹⁶⁷ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

not necessarily be refused when it involves the execution of work".¹⁶⁸ Van der Merwe et al similarly hold that "courts in the past have also been reluctant to grant specific performance of obligations arising from mandate and contracts for services (*locatio conductio operis*), for example where a builder has undertaken to do alterations to a house or where a lessor is bound to repair the leased property".¹⁶⁹ The authors suggest that the reason for this approach is that it would be difficult for a court to supervise the execution of an order for specific performance. According to Christie, building contracts have not been specifically enforced on the ground of the imprecision of the obligations.¹⁷⁰ This is essentially the same reason explained from a different angle, since the preciseness of the obligations affects the court's ability to decide whether the work is being performed properly.¹⁷¹ A contractual obligation may be imprecise in the sense that granting an order for specific performance may lead to a lengthy dispute on whether it has been carried out properly.¹⁷²

The facts of *National Butchery Co v African Merchants Ltd*¹⁷³ show that there is merit in these concerns. It illustrates how an order to perform construction work can run into trouble and consequently require repeated applications to the court. The court ordered

¹⁶⁸ P M Nienaber "Building and engineering contracts" in L T C Harms & J A Faris (eds) *LAWSA 2(1)* 2 ed (2003) para 478.

¹⁶⁹ Van der Merwe et al *Contract: General Principles* 332 esp n 37.

¹⁷⁰ See Christie & Bradfield *Christie's The Law of Contract in South Africa* 552. See also J W Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3117 ff; *Barker v Beckett & Co Ltd* 1911 TPD 151 164.

¹⁷¹ Lubbe & Murray *Contract* 546.

¹⁷² Christie "suggests that where obligations are imprecise further disputes might arise between the parties, the defendant claiming that he has performed satisfactorily pursuant to an order of specific performance, and the plaintiff denying this" (Lubbe & Murray *Contract* 546). Compare statements by Lord Hoffmann in text to n 64 & n 80 para 5 2 (i) below.

¹⁷³ (1907) 21 EDC 57. See also Christie & Bradfield *Christie's The Law of Contract in South Africa* 553; Van der Merwe et al *Contract: General Principles* 306.

African Merchants Ltd to perform its contract to erect a cold storage and ice-making plant for National Butchery Co. National Butchery Co had to return to the court twice, seeking its intervention to ensure the erection of the plant in accordance with the contract. However, more recently, Coetzee J in *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*¹⁷⁴ emphatically rejected the traditional objection to the enforcement of building contracts and explained his reasoning as follows:

“I wonder if this so-called difficulty is not grossly over-emphasised. Is it not imaginary rather than real? I could not find a case on record where such a difficulty actually arose in practice and which had to be dealt with by the Court after an order to perform a building contract had been made. Why should there be any difficulty? What is the need of supervision anyway? Does the Court ever supervise the execution of its judgments? Surely not. Orders *ad factum praestandum* are made all the time. There is no supervision thereof and no intervention by the Sheriff. If there is an intentional refusal to perform, contempt proceedings may follow. Why should different considerations then apply to building contracts? Accurate performance of them with the requisite skill or workmanship is irrelevant in this context. As it is in the case of every other order *ad factum praestandum*. The judgment creditor will surely cancel the contract when it is unintentionally incorrectly performed. The judgment does not replace the contract. After all, this risk, as well as that of not succeeding in contempt proceedings, the owner took when he asked the Court for this order. It is his affair. If the owner has elected to claim this remedy and he is prepared to take these risks, why, one may ask, should it lie, as a matter of logic, in the mouth of the defaulting builder to advance any reason connected with the quality of his performance or his general unwillingness, as a basis for avoiding an order compelling him to perform his bargain?”¹⁷⁵

On these grounds an order of specific performance was granted against the client, forcing it to cooperate with the contractor in completing the work in the sense of allowing him to perform. By pointing out that the judgment does not replace the contract and therefore introduces no new difficulty in deciding whether the work is being performed

¹⁷⁴ 1984 (3) SA 861 (W) 880G-881F.

¹⁷⁵ 880H-881B.

properly, Coetzee J discredited the traditional objection to the specific enforcement of construction contracts. Furthermore, in the light of the emphasis that is now placed on a contractant's right to specific performance, Van der Merwe et al assert that our courts' current approach should be fundamentally reconsidered.¹⁷⁶

It would appear that there is merit in this suggestion. The question whether difficulties with supervision should influence awarding specific performance will only be investigated in detail in the next chapter, but it may as well be remarked here that Coetzee J's objections in *Ranch International Pipelines* appear to be cogent, and, that it is doubtful whether this rationale justifies refusing a creditor his right to specific performance.¹⁷⁷ It may therefore be argued that there is no apparent sustainable reason for courts to exercise their discretion against specific enforcement of such contracts. The *Ranch* case has not, however, resolved the matter and it is submitted that intervention by our courts is required to bring coherence to this area of our law.

It should also be noted that the Consumer Protection Act¹⁷⁸ impacts on the rules applicable to these contracts.¹⁷⁹ Section 54 provides that a consumer has the right to demand quality service. In particular, a consumer has the right to the timely performance and completion of the services, or, if that is not possible, timely notice of any unavoidable delay in the performance of the services; the performance of the services in a manner and quality that persons are generally entitled to expect; the use, delivery or installation of goods (if any such goods are required for performance of the services) that are free of defects and of a quality that persons are generally entitled to expect; the return of their property in at least as good a condition as it was when the

¹⁷⁶ Van der Merwe et al *Contract: General Principles* 332.

¹⁷⁷ See also *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 151 (T) 5, and authority cited there.

¹⁷⁸ 68 of 2008, which applies to services delivered by independent contractors under *locatio conductio operis* but not to services delivered under *locatio conductio operarum* (section 5(2)(e)).

¹⁷⁹ Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 459.

consumer made it available to the supplier for the purpose of performing such services.¹⁸⁰ This would be the case, for example, where a consumer has to leave an electrical appliance with an electrician.

If the service provider fails to meet these standards of service delivery, the consumer can choose between demanding that the service provider performs properly or demanding a refund of “a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure”.¹⁸¹

The Act provides an express basis for the enforcement of the obligations of suppliers of services by consumers. It gives priority to specific performance of service contracts in accordance with our law’s general point of departure, and supports the previous statement that there is no apparent convincing reason for courts to exercise their discretion against specific enforcement of such contracts.

4 3 English law¹⁸²

The references to English law thus far were mainly incidental to explain developments in South African law. We will now consider English law in more detail to understand these developments better and to determine the road ahead for our law. Although the English law relating to the contract of employment was still in its developmental stages during the nineteenth century, it has shaped the attitude of our courts to the enforcement of personal service contracts.¹⁸³

¹⁸⁰ Section 54(1).

¹⁸¹ Section 54(2).

¹⁸² See generally para 2 3 2 1 above.

¹⁸³ See *Schierhout v Minister of Justice* 1926 AD 99 108. See also Jordaan “Employment relations” in *Southern Cross* 389; Brassey 1981 *ILJ* 58; Le Roux 2010 *Ind LJ* 139.

The majority of English commentators do not distinguish between employment contracts and other contracts for services in discussing their enforceability.¹⁸⁴ Generally, broad terminology such as “contracts of personal service” or “contracts involving personal service” is used.¹⁸⁵ An employment contract is usually defined to mean the same as a “contract of service”.¹⁸⁶ The literature on the enforceability of personal service contracts therefore does not uphold the traditional Roman law divide between a person who is employed (under *locatio conductio operarum*) and someone who is self-employed (under *locatio conductio operis*). It can be said that this distinction is unnecessary since the general rule is that contracts for personal services or involving the continuous performance of services will not be specifically enforced, no matter how defined.

English courts were still prepared to order specific enforcement of personal service contracts during the eighteenth century,¹⁸⁷ but they would not even consider doing so in the late nineteenth century.¹⁸⁸ As Lord Reid pointed out in *Ridge v Baldwin*,¹⁸⁹ “[t]he law regarding master and servant is not in doubt. There cannot be specific performance of a

¹⁸⁴ The dichotomy between employees and the self-employed is recognised and more influential in other areas of English law, for example in tax law. See S Deakin “The contract of employment: a study in legal evolution” (2001) 31 ESRC Centre for Business Research, University of Cambridge, Working Paper No 203 available online at <<http://www.cbr.cam.ac.uk/pdf/WP203.pdf>>.

¹⁸⁵ See J Beatson *Anson's Law of Contract* 28 ed (2002) 639; E Peel *Treitel's Law of Contract* 13 ed (2011) 1110.

¹⁸⁶ See s 230 of the Employment Rights Act 1996. See also H Beale et al *Cases, Materials and Text on Contract Law* 2 ed (2010) 869-870.

¹⁸⁷ See eg *Ball v Coggs* (1710) 1 Bro Parl Cas 140; *East India Co v Vincent* (1740) 2 Atk 83. Macdonell (*Master and Servant* 2 ed 162) points out that Equity Courts did at one time order specific performance of service contracts.

¹⁸⁸ See eg *Pickering v The Bishop of Ely* (1843) 2 Y & C Ch Cas 249; *Johnson v Shrewsbury and Birmingham Railway Co* (1853) 43 ER 358.

¹⁸⁹ [1964] AC 40 65. See also M R Freedland *The Personal Employment Contract* (2003) 352.

contract of service". The underlying reasoning for this position appears from Innes CJ's dictum in *Schierhout v Minister of Justice*:¹⁹⁰

"Now, it is a well established rule of English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The Courts will not decree specific performance against the employee ... Equity Courts did at one time issue decrees for specific performance. But the practice has long been abandoned, and for two reasons: the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by South African Courts, and probably for the same reason. No case was quoted to us where a master has been compelled to retain the services of an employee wrongly dismissed ... and I know of none. The remedy has always been damages."

Another relevant passage, and one more appropriate for present purposes, appears in an old English case, *Johnson v The Shrewsbury and Birmingham Railway Company*¹⁹¹ in which Knight-Bruce LJ, in refusing specific performance of a contract of service for the management of a railway company, said:¹⁹²

"There is here an agreement, the effect of which is that the plaintiffs are to be the confidential servants of the defendants in most important particulars, in which, not only for the sake of the persons immediately concerned but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of co-operation between the contracting parties. How is this possible to prevail in the position in which (I assume for the purpose of the argument by the default of the defendants) the defendants have placed themselves? We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done."

¹⁹⁰ 1926 AD 99 107.

¹⁹¹ (1853) 43 ER 358.

¹⁹² (1853) 43 ER 358 362-363.

The prevailing view in modern English law is that employment contracts are not specifically enforceable by either the employee or the employer.¹⁹³ According to Beale et al “[i]t has long been settled that a contract of personal service (or employment) will not, as a general rule, be specifically enforced at the suit of either party”.¹⁹⁴ And according to Sir Roger Ormrod: “Nobody would willingly grant an injunction forcing either an employer on an employee or an employee on an employer, simply on the basis that it would not work.”¹⁹⁵ This is also reflected in a more recent decision, where it was held that specific performance will not be granted against an employee because it implicates his personal liberty.¹⁹⁶

A number of reasons have been advanced in support of this rule (apart from Ormrod’s rather vague assertion that it would not work).¹⁹⁷ The first is that the order might be unreasonable towards the party who is now required to employ someone with whom he does not wish to work anymore, or in whom he has lost confidence or trust. Since it is the employer who pays for the work, he should be entitled to decide who remains

¹⁹³ Jones & Goodhart *Specific Performance* 56; M P Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 16 ed (2012) 800; H G Beale et al *Chitty on Contracts* 31 ed vol 1 (2012) 1918. Specific performance was refused against an employee in *Clark v Price* (1819) 2 Wils Ch 157; *De Francesco v Barnum* (1890) 45 Ch D 430, and against an employer in *Johnson v Shrewsbury and Birmingham Railway Co* (1853) 43 ER 358; *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404; *Rigby v Connol* (1880) 14 Ch D 482.

¹⁹⁴ See Beale et al *Chitty on Contracts* 1918, and the cases collected in n 101.

¹⁹⁵ *Powell v London Borough of Brent* [1987] IRLR 466 476. See also *Rigby v Connol* (1880) 14 Ch D 482, 487 per Jessel MR: “The courts have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy.”, and *Alexander v Standard Telephones and Cables plc* [1990] ICR 291.

¹⁹⁶ *Young v Robson Rhodes* [1999] 3 All ER 524 534.

¹⁹⁷ Jones & Goodhart *Specific Performance* 169.

employed by him.¹⁹⁸ Then there is also the by now familiar, but less compelling consideration of difficulties of constant supervision by the court.¹⁹⁹ Finally, and most importantly, the order is thought to promote forced labour since the employee will have to resume his duties against his will.²⁰⁰ The latter constitutes one of the main reasons why English courts have in the past refused to enforce personal service contracts, as evidenced by Fry LJ's statement in *De Francesco v Barnum*:²⁰¹ "the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery". It is this policy ground, which we have also encountered in the South African context, that accounts for the rule.²⁰² Thus, English law follows a very strict and straightforward approach – a contract of employment will not be enforceable against the employee first of all, due to the traditional civil liberty reasons, and also not against the employer on the ground that an employer should not have to employ anyone against its will; employers will thus never be compelled to employ employees they do not wish to employ.²⁰³

¹⁹⁸ See A Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 482-483.

¹⁹⁹ See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116. This argument is dealt with in detail in the following chapter. See also n 44 para 4 2 1 above.

²⁰⁰ Jones & Goodhart *Specific Performance* 56; Beale et al *Chitty on Contracts* 1918.

²⁰¹ (1890) 45 Ch D 430 438. Here a 14 year old girl entered into a 7 year apprenticeship agreement with De Francesco to be taught stage dancing. The girl agreed that she would be at De Francesco's total disposal during the 7 years. She would accept no professional engagements except with De Francesco's express approval, he was under no obligation to maintain her or to employ her, the payment scale was extremely low, she could not marry without his permission and De Francesco could terminate their arrangement whenever he wished. The girl, however, accepted other work and De Francesco's action failed to prevent it. The Court held that the apprenticeship deed was unfair and unenforceable against her.

²⁰² Peel *Treitel's Law of Contract* 1110.

²⁰³ See generally M R Freedland *The Contract of Employment* (1976) 273 ff; Jones & Goodhart *Specific Performance* 173; Beale et al *Cases, Materials and Text on Contract Law* 871-872.

The common law principle against specific performance of employment contracts has also received statutory recognition. Section 236 of the Trade Union and Labour Relations (Consolidation) Act 1992, provides that no court shall, whether by way of an order for specific performance or specific implement of a contract of employment, or an injunction or interdict restraining a breach or threatened breach of such a contract, compel an employee to do any work or attend at any place for the doing of any work.

English law further recognises the principle that contractual undertakings not to compete or restraints of trade are *prima facie* void and unenforceable unless the restraint of trade is reasonable to protect the interest of the party who imposed the restraint.²⁰⁴ This places the onus to prove reasonableness on the party seeking to enforce the restraint, compared to our law,²⁰⁵ where the onus is on the party under restraint to prove that the restraint is unreasonable.²⁰⁶ The employer in effect has to

²⁰⁴ Peel Treitel's *Law of Contract* 502 ff; Beale et al *Chitty on Contracts* 1269 ff, 1950 ff. The principle was famously encapsulated as follows in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 565 per Lord Macnaghten: "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

²⁰⁵ See text to nn 145 ff para 4 2 1 2 above.

²⁰⁶ See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* 1968 AC 269 319; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 887. See also T Floyd "The constitutionality of the onus of proof when enforcing restraint-of-trade agreements: an appropriate evaluation of the common-law rules" 2012 *THRHR* 521 522.

prove that the restrictions he has placed on the employee's freedom of trade is not more than is reasonably necessary for the protection of his legitimate commercial interests.²⁰⁷

Legislative force is also (supposedly) given to the principle that an employer cannot be forced to employ. This principle is reflected in the provisions of the Employment Rights Act 1996, in Part X on unfair dismissals. Under these provisions, a tribunal may order the reinstatement of the employee, but if such an order is not complied with, the employer can only be made to pay compensation. Reinstatement provides a potential solution to unfair dismissals and it appears that the primacy of the remedy of reinstatement is emphasised in the legislation. However, even though it might seem to provide a solution; it is not an attractive option in practice. According to Collins et al "the dismissal and its surrounding events will probably have led to a loss of trust and confidence on both sides, to such an extent that neither party wishes to continue the relationship. Reinstatement therefore appears to be a solution that usually no one wants".²⁰⁸ It follows that in practice, reinstatement is "effected in only a tiny proportion of ... cases"²⁰⁹ so that it is compensation which is the employee's "primary remedy".²¹⁰ The Act allows for an order to reinstate in principle, but it is not generally given effect to. Thus, despite the emphasis in the legislation upon reinstatement being the primary remedy, it appears that the remedy is rarely effective. And for the reasons listed above, most employees do not desire reinstatement. Therefore the normal remedy for unfair dismissal comprises financial compensation.²¹¹

²⁰⁷ Beale et al *Chitty on Contracts* 1287; Peel *Treitel's Law of Contract* 508. See also *Lumley v Wagner* discussed in paras 4 2 1 2 above & 4 4 below.

²⁰⁸ Collins et al *Labour Law* 839.

²⁰⁹ *Johnson v Unisys Ltd* [2003] 1 AC 518 para [78], *per* Lord Millet; Lord Steyn states the proportion to be "only about 3%" (para [23]).

²¹⁰ *Johnson v Unisys Ltd* [2003] 1 AC 518 para [23].

²¹¹ Collins et al *Labour Law* 844; Freedland *The Personal Employment Contract* (2003) 352-354; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 1586. See also Burrows *Remedies for Torts and Breach of Contract* 491.

We now turn to service contracts that do not amount to employment contracts. As indicated above, English law does not deal with the enforceability of employment contracts and other contracts for service separately. However, some authors have employed such a distinction. Jones and Goodhart, for example, note that some non-employment contracts are specifically enforceable and others are not. They cite the following examples which illustrate the distinction. The first is that of the author who enters into an agreement with a publisher to write a book. It is held that courts will not order specific performance of such an obligation,²¹² but it is said that courts will order specific performance of a contract to assign a publisher the copyright of a work not yet written.²¹³ Similarly, specific performance can be ordered of a contract to publish a book which has been completed.²¹⁴ Thus, before its completion, the court will not grant specific performance against an author to complete the book or article, but will do so upon its completion. Even though the examples given by the authors are not personal service contracts *sensu stricto* and it may be said that an author can be ordered to hand over the completed work to the publisher because this is rather a contract to deliver the final product of the author's labour,²¹⁵ it remains a personal service contract under the broad definition adopted at the outset.

It should be noted that in recent years it has been said that the general principle that contracts should not be enforced if this were to restrain another's personal freedom is less persuasive than it once was.²¹⁶ And there is "some evidence"²¹⁷ that indicate that English courts are becoming more willing to grant specific performance of contracts of personal service outside the employment context – as shown by the comment of

²¹² Jones & Goodhart *Specific Performance* 169.

²¹³ Jones & Goodhart *Specific Performance* 169, citing (n 3) *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631, as authority.

²¹⁴ Citing *Barrow v Chappel & Co Ltd* [1976] RPC 355.

²¹⁵ Cf for Dutch law: text to n 300 para 4 6 below.

²¹⁶ Jones & Goodhart *Specific Performance* 57.

²¹⁷ 171.

Megarry J, reviewing in 1971 the status of the principle against specific enforcement of contracts for personal service in *CH Giles & Co Ltd v Morris*.²¹⁸

“One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced. Such a rule is plainly not absolute and without exception, nor do I think that it can be based on any narrow consideration such as difficulties of constant superintendence by the court ... I do not think it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance.”

However, such statements have not been repeated since then, and modern textbooks still contain the traditional rule. In the latest version of *Treitel's Law of Contract*, for example, contracts involving personal services are discussed under the heading: “Contracts not specifically enforceable” under which the same familiar line appears: “It has long been settled that equity will not, as a general rule, enforce a contract of personal service”.²¹⁹ Burrows also concedes that despite evidence that English law has moved closer to the principle of specific performance as adopted in civil-law jurisdictions, a plaintiff must still prove that damages is inadequate before a court will grant specific performance of personal service contracts.²²⁰ However, Burrows' statement requires qualification. In this respect, an important point made in *Young v Robson Rhodes*,²²¹ is worth highlighting. In this case it was held that “questions of the adequacy of damages are irrelevant” when it comes to the issue of (non-) enforcement of personal service contracts, because it is the policy ground of personal freedom that justifies the refusal.²²² Thus, while it is technically required to prove inadequacy of

²¹⁸ [1972] 1 WLR 307 318.

²¹⁹ See Peel *Treitel's Law of Contract* 1110 and cases collected in n 180. See also Beale et al *Chitty on Contracts* 1918 and cases collected in n 101.

²²⁰ A S Burrows “Judicial remedies” in P Birks (ed) *English Private Law II* (2000) 813 874 para 18.185.

²²¹ [1999] 3 All ER 524.

²²² *Young v Robson Rhodes* [1999] 3 All ER 524 534.

damages, this rule is not dependent upon damages being an adequate remedy. The main reasons for the general rule against specific performance of personal service contracts remains the policy considerations as discussed above. Burrows' statement may also create the incorrect impression that a plaintiff can convince a court to grant specific performance of a personal service contract based on the inadequacy of damages. Even if damages are inadequate, the remedy will not be available to enforce such a contract, based on policy considerations such as the concern for the defendant's dignity and liberty. These considerations underlie the general rule against specific performance of such contracts. Hence, there is a general prohibition of specific enforcement of personal service contracts. The courts are not merely generally reluctant, as in South Africa. However, as indicated by authors such as Jones and Goodhart, there are exceptions to this general rule where English courts will consider specifically enforcing personal service contracts, especially those that do not amount to employment contracts / involve the continuous performance of services.

4 4 American law²²³

American law adopts the same point of departure as English law. As a general rule,²²⁴ and in line with the common law tradition, a contractual obligation to perform a personal service will not be specifically enforced by US courts.²²⁵ The literature does not

²²³ See generally para 2 3 2 2 above.

²²⁴ As will be indicated, there are exceptions to this general rule where courts will consider specifically enforcing personal service contracts. See eg *Metropolitan Sports Facilities Commission v Minnesota Twins Partnership* 638 N.W. 2d 214, 216 (Minn. Ct. App. 2002): “While personal-services contracts generally are not enforceable by specific performance, they may be enforceable under genuinely extraordinary circumstances.”

²²⁵ *Rutland Marble Co v Ripley* (1870) 77 U.S. 339; *Beverly Glen Music Inc v Warner Communications Inc* 178 Cal. App. 3d 1142 (1986), M A Foran *Williston on Sales* 5 ed III (1996) 697 § 25-45; E Yorio & S Thel *Contract Enforcement: Specific Performance and Injunctions* 2 ed (2012) § 15.2; Loeb 2001 *Marquette Sports Law Review* 287; J M Perillo

distinguish between different types of personal service contracts and the rules relating to specific performance are generally discussed under the broad heading “personal service contracts”, of which the prime example is the contract of employment.²²⁶ As explained by official comment b (“What is personal service”) to § 367 of the American Law Institute’s *Restatement (Second) of Contracts*, examples of personal services include the professional obligations of actors, singers and athletes, as well as the obligations of employees in traditional master-servant relationships. Notably, however, courts and commentators have held that a service will only be considered personal if it cannot be delegated or performed vicariously. A service must therefore be non-delegable to be unenforceable.²²⁷ It follows that, under American law, an artist cannot be compelled to paint a portrait.²²⁸

§ 367 of the *Second Restatement* states (under the heading “contracts for personal service or supervision”):

- “(1) A promise to render personal service will not be specifically enforced.
- “(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.”²²⁹

(ed) *Corbin on Contracts 12: Restitution, Specific Performance and Election of Remedies* Interim ed (2002) § 1204; J M Perillo *Calamari and Perillo on Contracts* 6 ed (2009) 557.

²²⁶ See eg Perillo (ed) *Corbin on Contracts* § 1204; Perillo *Calamari and Perillo on Contracts* 557-558.

²²⁷ See *Wilson v Sandstrom* 317 So. 2d 732 (Fla. 1975); E A Farnsworth *Contracts* 3 ed (1999) 781; Perillo (ed) *Corbin on Contracts* § 1204.

²²⁸ Compare text to nn 240-242 below.

²²⁹ The provisions of the *Second Restatement* referred to in this section are reproduced in Addendum A 382-385. The official text and comments are also accessible via Westlaw International.

According to the official comment to this paragraph (entitled “rationale of refusal of specific performance”) the refusal is based in part upon the undesirability of compelling the continuance of personal relationship after disputes have arisen and confidence and loyalty have been affected and of imposing what might seem like involuntary servitude.²³⁰ It further determines that to this extent the rule stated in subsection (1) is an application of the more general rule under which specific performance will not be granted if the use of compulsion is contrary to public policy (contained in § 365). The refusal is also based upon the difficulty of enforcement inherent in passing judgment on the quality of performance. To this extent the rule stated in subsection (1) is also an application of the more general rule on the effect of difficulty of enforcement (contained in § 366).

Commentators’ explanations of why specific performance is refused are in similar vein:²³¹

“The rule for personal service contracts is explained in part by judicial discomfort with ordering an individual to undertake specifically described acts or enter into unwanted associations, as evidenced by courts’ and commentators’ frequent reference to the prohibition on involuntary servitude in the Thirteenth Amendment of the U.S. Constitution. Courts have also observed that the enforcement of a decree of specific performance is particularly problematic in the case of personal services, as it is often difficult for the court to evaluate the quality of performance. Nor is it clear that such orders are effective, given that the value of personal services often depends on the trust and loyalty, which breach and recourse to legal remedies might have destroyed.”

These reasons are equally applicable where specific performance is sought of an employer’s obligation to retain an employee in his service, save for the fact that enforcement against an employer does not involve the issue of involuntary servitude (the same reason our law enforces employment contracts against employers), but

²³⁰ See § 367, cmt a. See also Farnsworth *Contracts* 781.

²³¹ G Klass *Contract Law in the USA* (2010) 216. See also Farnsworth *Contracts* 781; Perillo *Calamari and Perillo on Contracts* 557-558.

would nevertheless involve difficulty of supervision, and the possible continuation of an unpleasant personal relationship.²³² US courts will not order an employer or an employee to maintain the undesirable personal relationship that performance of these contracts requires.²³³ Perillo, however, convincingly argues that the reasons for refusing specific performance against an employer are questionable, because arbitration awards ordering reinstatement have been specifically enforced, and reinstatements have also been ordered under civil service and civil rights legislation.²³⁴ But the prevailing view in modern American law remains that employment contracts are not specifically enforceable by either the employee or the employer.

However, as § 367(2) reflects, courts may prevent (by way of a prohibitive order)²³⁵ a party (the one who has to perform a service) from breaching a negative clause which restrains him from providing services for another specified party (i.e. it may prevent him from working for third parties).²³⁶ This means that the court in effect indirectly enforces the contract. The purpose of such a negative injunction is not to force the breaching party to perform, but to enforce a negative contractual term that services will not be rendered to the aggrieved party's competitors. According to Perillo "[t]he theory is that the court is merely enforcing an express or implied negative covenant not to work for competitors during the contract term".²³⁷ However, § 367(2) of the *Second Restatement* observes that such a negative injunction will not be granted "if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of

²³² Perillo *Calamari and Perillo on Contracts* 557-558.

²³³ Perillo (ed) *Corbin on Contracts* § 1204; Perillo *Calamari and Perillo on Contracts* 557-558.

²³⁴ See *Calamari and Perillo on Contracts* 558 and authority cited there.

²³⁵ Or "negative injunction", which is the term more commonly used in common-law systems.

²³⁶ See Perillo (ed) *Corbin on Contracts* § 1204; S Shavell "Specific performance versus damages for breach of contract: an economic analysis" 2006 *Tex LR* 831 857; Perillo *Calamari and Perillo on Contracts* 557.

²³⁷ *Calamari and Perillo on Contracts* 557.

making a living".²³⁸ (These considerations are of course also familiar in the context of South African law on restraint of trade agreements.) It follows that § 367(2) grants a right of indirect enforcement by way of an injunction against working for third parties, but then qualifies this right in certain circumstances – as illustrated in *Beverly Glen Music, Inc v Warner Communications, Inc*²³⁹ discussed below.

Another example where a court will consider specifically enforcing contracts for services, is if the contract contains aspects that make it less personal in nature.²⁴⁰ For example, in *Mellon v Cessna Aircraft Co*²⁴¹ the court awarded specific performance of a contract to maintain an airplane, due to the fact that “Cessna service is available throughout the country at a number of authorized Cessna service centers”. It added that “[t]he very availability of Cessna-authorized service at multiple locations distinguishes Cessna’s obligation under this contract from a personal services contract between, for example, a performer with a unique style and a promoter or theatre”.²⁴²

The general rule adopted in the US is also policy-based, especially when the interests of society are at stake. For example, in *Fitzpatrick v Michael*,²⁴³ the court held that even if there is no adequate remedy at law, equity will not specifically enforce a contract for personal services, because “the mischief likely to result from the enforced continuance of the relationship incident to the service when it has become personally obnoxious to one of the parties is so great that the best interests of society require that the remedy be refused”.²⁴⁴ It follows that the same policy grounds or societal interests are advanced in favour of the general (common law) rule against enforcement. According to Scott and

²³⁸ See Farnsworth *Contracts* 331; Perillo *Calamari and Perillo on Contracts* 557; Klass *Contract Law in the USA* 216-217; Yorio & Thel *Contract Enforcement* § 16.1.

²³⁹ 178 Cal. App. 3d 1142 (1986).

²⁴⁰ R E Scott & J S Kraus *Contract Law and Theory* 3 rev ed (2003) 991.

²⁴¹ 64 F.Supp.2d 1061 (D. Kan 1999).

²⁴² 1064. See also Scott & Kraus *Contract Law and Theory* 991.

²⁴³ 177 Md. 248, 9 A.2d 639 (1939).

²⁴⁴ 641 per Offutt J. See also Farnsworth *Contracts* 781.

Kraus,²⁴⁵ these include that compelled performance is likely to be unsatisfactory since the compelled party is less likely to perform to the best of his abilities, or may perhaps even intentionally deliver the worst service possible. They also specifically rely on the Thirteenth Amendment argument,²⁴⁶ and state that such enforcement might lead to claims of constitutionally-prohibited forced labour.²⁴⁷

A good example of the US courts' strict approach to enforcement of contracts for personal services is *Beverly Glen Music Inc v Warner Communications Inc.*²⁴⁸ Here, Anita Baker, a singer, breached her contract with the plaintiffs by signing with their competitors, the defendants. The plaintiffs first claimed specific performance of the contract, which the court refused based on the Thirteenth Amendment of the US Constitution. Then they claimed an injunction prohibiting her from working for their competitor, which the court also refused based on the absence of a negative term in their contract. Finally, they claimed an injunction preventing the defendant from hiring her, but the court also refused this claim stating that this will still be tantamount to involuntary servitude as it would deny her the opportunity to earn money elsewhere and pressure her to honor her contract with them.²⁴⁹ It is clear from this decision that US courts are even stricter in enforcing the principle against specific performance of personal service contracts than English courts. The facts of this case clearly correspond with those of *Lumley v Wagner*.²⁵⁰ It will be recalled that in the latter case, the Chancery Court was willing to indirectly enforce Wagner's contract by granting an injunction to

²⁴⁵ *Contract Law and Theory* 990.

²⁴⁶ Section 1 of the Thirteenth Amendment to the US Constitution reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

²⁴⁷ See also Perillo *Calamari and Perillo on Contracts* 557.

²⁴⁸ 178 Cal. App. 3d 1142 (1986). See Scott & Kraus *Contract Law and Theory* 990.

²⁴⁹ Scott & Kraus *Contract Law and Theory* 990-991.

²⁵⁰ 1852 1 De GM & G 604.

refrain “from the commission of an act which she has bound herself not to do”.²⁵¹ The court thus specifically enforced a negative clause even if Wagner was thereby in effect forced to fulfil her contract to sing at Her Majesty’s Theatre.²⁵² However, this case can be distinguished from the US case discussed above,²⁵³ on the ground that the contract between the parties in *Lumley* contained an express term which prevented Wagner from singing at another theatre. Such a negative clause was absent in the *Warner* case. It is of particular significance that the Chancery Court in *Lumley* still held that Wagner could indirectly be “forced” to sing, while the US court was not prepared to order the artist to sing; the US court specifically emphasised that

“Whether the plaintiff proceeds against Ms Baker directly or against those who might employ her, the intent is the same; to deprive Ms Baker of her livelihood and thereby pressure her to return to plaintiff’s employ. Plaintiff contends that this is not an action against Ms. Baker, but merely an equitable claim against Warner to deprive it of the wrongful benefits it gained when it ‘stole’ Ms. Baker away. Thus, plaintiff contends, the equities lie not between the plaintiff and Ms. Baker, but between plaintiff and the predatory Warner Communications company. Yet if Warner’s behaviour has actually been predatory, plaintiff has an adequate remedy by way of damages. An injunction adds nothing to plaintiff’s recovery from Warner except to coerce Ms. Baker to honor her contract. Denying someone his livelihood is a harsh remedy ... To expand this remedy so that it could be used in virtually all breaches of a personal service contract is to ignore over 100 years of common law on this issue.”²⁵⁴

²⁵¹ See text to nn 112 ff para 4 2 1 2 above. In this case the parties included the following term in their agreement: “Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorisation of Mr Lumley.”

²⁵² 1852 1 De GM & G 604 619; Jones & Goodhart *Specific Performance* 177 ff; B H Bix *Contract Law: Rules, Theory, and Context* (2012) 107; para 4 2 1 2 above.

²⁵³ *Beverly Glen Music Inc v Warner Communications Inc* 178 Cal. App. 3d 1142 (1986); Scott & Kraus *Contract Law and Theory* 990-991.

²⁵⁴ *Beverly Glen Music Inc v Warner Communications Inc* 178 Cal. App. 3d 1142, 1145 (1986).

To summarise, American courts justify their refusal to grant specific performance with regard to personal service contracts on the following grounds: difficulty of enforcement of such an order, public policy considerations, such as concerns for individual autonomy, and the unwillingness to force parties into an unwanted personal association.²⁵⁵ Thus, in order to qualify as an unenforceable personal service contract, the breaching party's performance must be non-delegable and the order must be problematic because of difficulty of enforcement, public policy considerations or the personal nature of the performance. The fact that an order of specific performance is thought to interfere unduly with the personal liberty of the employee constitutes the main reason why specific performance is not available against an employee in the US, as evidenced by courts' and commentators' repeated reference to the prohibition on involuntary servitude in the US Constitution.²⁵⁶ This is similarly a recurrent theme in English law. In the following sections, the relevance of this consideration, as well as certain others, will be investigated in the context of certain civil-law systems and model instruments.

4 5 German law²⁵⁷

The enforcement of personal service contracts in German law is notoriously controversial and uncertain. The following exposition is limited to the majority views, as reflected in comparative materials.²⁵⁸

²⁵⁵ Perillo *Calamari and Perillo on Contracts* 558.

²⁵⁶ See eg *Arthur v Oakes* 63 Fed. 310, 317-318 (7th Cir. 1894) *per* Harlan CJ: "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,— a condition which ... shall not exist within the United States ..."

²⁵⁷ See generally para 2 3 1 1 above.

²⁵⁸ Markesinis et al *German Law of Contract*; H Beale et al *Cases, Materials and Text on Contract Law* 2 ed (2010).

German law, in accordance with the civil-law tradition,²⁵⁹ distinguishes between a contract of services (*Dienstvertrag*), which resembles *locatio conductio operarum*,²⁶⁰ and a contract for work (*Werkvertrag*), which in turn resembles *locatio conductio operis*.²⁶¹ The main difference between a contract of services (*Dienstvertrag*) and a contract for work (*Werkvertrag*) is that the provider of the service does not promise that he will ensure that a certain result comes about, but merely that he will perform the service as promised.²⁶² A contract for services could therefore encompass the typical contract of employment,²⁶³ but could also cover the services provided by a medical practitioner, who could also not promise a result (i.e. that the patient would be healed). Whereas in South African law, the latter contract would be a *locatio conductio operis*, based on other factors. For example, the practitioner is not under the control of his patient, he uses his own equipment and generally receives payment (or issues an account) after completion of the procedure. German law attaches no significant weight to these factors; the central question to classification is whether a certain result is promised. The consequences and enforceability of a contract of services (*Dienstvertrag*) and a contract for work (*Werkvertrag*) will now be discussed in turn.

4 5 1 Contract of services (*Dienstvertrag*)

The point of departure in § 888(1) of the *Zivilprozessordnung* (German Code of Civil Procedure or ZPO) is that if an act cannot be performed by a third party (*nicht vertretbare Handlungen*), and it depends entirely on the will of the party obliged to perform it, the court can impose a fine to induce performance, and if this is not successful, even order imprisonment.²⁶⁴ Thus, where the obligation is solely dependent

²⁵⁹ See para 4 1 above.

²⁶⁰ See § 611 ff BGB.

²⁶¹ See § 631 ff BGB.

²⁶² See generally Markesinis et al *German Law of Contract* 528.

²⁶³ See eg Markesinis et al *German Law of Contract* 153.

²⁶⁴ See F Faust & V Wiese “Specific performance – a German perspective” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 47

on the specific debtor's will and incapable of being delegated to a third party, specific performance will be ordered, because this is work that only the debtor can properly perform.

However, on a procedural level, the ZPO forbids the enforcement of service agreements.²⁶⁵ § 888(3) determines that § 888(1) does not apply to where someone has to perform services (*Diensten*) in terms of a contract of service (*Dienstvertrag*). §611 BGB (broadly) states the typical contractual duties in a service contract:

- "(1) By means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration.
- (2) Services of any type may be the subject matter of service contracts."

Because German procedural law maintains that the personal obligation to provide services cannot be specifically enforced,²⁶⁶ it follows that an employment contract will

49: "acts which can be performed by third parties and not only by the debtor ... are enforced by the court allowing the plaintiff to employ a third party to perform the act at the debtor's expense. Thus, the practical result is the same as if the creditor had made a cover transaction and claimed damages from the outset ... But ... the court renders judgment not for damages but for performance ..." Also noting (n 7) that, according to Treitel "Remedies for breach of contract" in *IECL VII* (1976) 7, "the conversion into a pecuniary claim would cause the claim to be regarded as one for damages in the common law context". Compare text to n 16 para 3 2 above.

²⁶⁵ Thus, as explained by Faust & Wiese "Specific performance – a German perspective" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 49: "courts will render judgment for specific performance because, under German substantive law [§ 241(1) BGB], the employee is under an obligation to work ... However, in order to protect the personal freedom of the [employee], procedural law forbids the enforcement of these judgments".

²⁶⁶ See S Shavell "Specific performance versus damages for breach of contract: an economic analysis" (2006) 84 *Tex LR* 831 862; Faust & Wiese "Specific performance – a German perspective" in Smits et al (eds) *Specific Performance in Contract Law: National and Other*

not be specifically enforced by German courts. The contract is governed by §§ 611 ff BGB, a number of statutes,²⁶⁷ and the *Grundgesetz* (Federal Law), specifically Article 12.²⁶⁸

In this regard, German law further distinguishes between ordering payment/reinstatement by the employer (which is more generally accepted) and ordering specific performance against an employee. German courts will not award specific performance of an obligation to perform a service, i.e. compel an employee to perform in terms of his employment contract. The same traditional underlying reasons is given in support of this rule, namely that it essentially amounts to forced labour, which is contrary to the debtor's human dignity, since there is an interference with his personal freedom.²⁶⁹

However, like South African law (and unlike American law, and in effect, unlike English law), German law generally accepts that employers' obligations can be specifically enforced. In Germany, a court can order an employer that wrongfully dismissed an employee to reinstate the employee. According to the Protection Against Unfair Dismissal Act (*Kündigungsschutzgesetz* or KSchG)²⁷⁰ if the unlawfulness of a dismissal is confirmed by the labour court,²⁷¹ the employer is required to continue the employment

Perspectives 49; Beale et al *Cases, Materials and Text on Contract Law* 870; M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014) 29.

²⁶⁷ A number of professional duties are set out by statute, for example, legislation governing service-delivery by hospitals and other service providers.

²⁶⁸ This Article guarantees freedom to choose and exercise one's profession and to choose where to do so.

²⁶⁹ See Markesinis et al *German Law of Contract* 405; Faust & Wiese "Specific performance – a German perspective" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 49.

²⁷⁰ 1951 (amended several times since then).

²⁷¹ § 1 KSchG determines when a dismissal will be considered fair and justified.

and must reintegrate the employee into its operational structure (i.e. reinstate him into his former position).²⁷² The courts have gone so far as to order reinstatement even where it required the employer to restructure its operations in such a way as to provide the employee with work.²⁷³

Even though reinstatement is the prescribed remedy in the case of unlawful dismissal, the court may also decide to terminate the employment relationship on request of either the employer or the employee if it would be unreasonable to order the continuation of the relationship, for example, because the mutual trust was destroyed between the parties.²⁷⁴ If the court finds that the employment relationship should be dissolved, the employer is required to pay compensation²⁷⁵ to the employee.²⁷⁶ This means that the employee can institute legal action in the labour court to protect himself against dismissal, but even if he wins the case, the court might dissolve the employment relationship, and order the employer to pay compensation. Whether this legislation is effective in preserving jobs and protecting employees against unfair dismissal is therefore doubtful. According to a study published in 2009 “only about 9 per cent of applications made to the courts by dismissed employees lead to their reinstatement”.²⁷⁷

²⁷² § 8 KSchG; H Küsters *Social Partnership: Basic Aspects of Labour Relations in Germany* (2007) 115-118.

²⁷³ See “Radiologist case”: BAG, NJW 1956, 359 (10.11.1955), discussed in Beale et al *Cases, Materials and Text on Contract Law* 870.

²⁷⁴ § 9 KSchG. See also Küsters *Social Partnership: Basic Aspects of Labour Relations in Germany* 117-118.

²⁷⁵ § 10 KSchG determines the maximum amounts of such compensation.

²⁷⁶ Küsters *Social Partnership: Basic Aspects of Labour Relations in Germany* 117-118; M Weiss & M Schmidt *Labour Law and Industrial Relations in Germany* 4 rev ed (2008) 131-132.

²⁷⁷ “Protection Against Dismissal” published by Eurofound, a European Union body, established to work in specialised areas of EU policy, available online at <<http://www.eurofound.europa.eu/erire/GERMANY/PROTECTIONAGAINSTDISMISSAL-DE.htm>>.

This means that unfortunately a high proportion of applications by employees normally result in the employment relationship being cancelled in return for compensation and not the retention of their job. Even so, the KSchG provides an express basis for the employee's right to enforcement of the employer's obligations in unfair dismissal cases.

4 5 2 Contract for work (*Werkvertrag*)

In illustrating the distinction between a contract of services (*Dienstvertrag*) and a contract for work (*Werkvertrag*), Markesinis refers to the stock example of the contractual relationship between the medical practitioner and his patient. The medical practitioner merely promises to perform a procedure but does not promise to bring about a certain result, i.e. that the patient recovers.²⁷⁸ This type of contract therefore falls under the category of service contracts. § 888(3) ZPO, however, does not preclude the enforcement of personal service obligations under a contract for work (*Werkvertrag*).²⁷⁹ This effectively means that obligations to do work (i.e. a promise to achieve a particular result) are capable of being specifically enforced. § 631 BGB refers to the typical contractual duties in a contract to produce a work:

- “(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration.
- (2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service.”

It can be derived from § 887(1) ZPO, that the reasoning behind this approach is that if obligations can be performed vicariously, i.e. by a third party, they are capable of being indirectly enforced. The execution of obligations to perform an act that can be

²⁷⁸ Markesinis et al *German Law of Contract* 528. Cf for French law, Zimmermann *The Law of Obligations* 395 n 65: “the position is the same as in German law: the *obligation de médicale* is an *obligation de moyens* [promise for best efforts], not an *obligation de résultat* [promise for results]” (see also n 157 para 4 2 2 above).

²⁷⁹ Beale et al *Cases, Materials and Text on Contract Law* 870.

performed vicariously (*vertretbare Handlungen*) consists of allowing the creditor to have the act done at the expense of the debtor.

However, where the obligation is solely dependent on the specific debtor's will and incapable of being delegated to a third party, specific performance will be ordered, because this is work that only the debtor can properly perform.²⁸⁰ According to Markesinis, activities that do not require the special skill of the debtor can, generally, be performed vicariously. Repairs on a building work can, for example, be performed vicariously, whereas the painting of a portrait cannot be vicariously performed.²⁸¹ It follows that, under German law, an artist can be compelled to paint a portrait.²⁸²

This position radically departs from the position under the common law, and is problematical for a number of reasons. First of all, forcing someone to perform against his will similarly raises concerns for his personal freedom. A decision to order an artist to paint may in effect give rise to the by now familiar problem of forced labour. Furthermore, forced performance may ultimately lead to sub-standard work. Beale et al therefore maintain that, due to these "practical difficulties and the probably unsatisfactory nature of the end product", specific performance of these personal obligations would rarely be claimed in practice.²⁸³

²⁸⁰ Subject to § 275(1)-(3) BGB (see para 6 3 below). For example, "[i]f the obligation to provide the service is impossible to perform, the promisee is released from that obligation by § 275[1] BGB" (Markesinis et al *German Law of Contract* 530). See also text to n 77 para 2 3 1 1 above.

²⁸¹ Markesinis et al *German Law of Contract* 404.

²⁸² Beale et al *Cases, Materials and Text on Contract Law* 870. It is worth remembering that if it is a *Dienstvertrag* under § 888(3) ZPO, the court cannot fine or imprison him to induce performance.

²⁸³ Beale et al *Cases, Materials and Text on Contract Law* 870.

4 6 Dutch law²⁸⁴

Dutch law, in line with the civil-law tradition,²⁸⁵ maintains that a creditor may claim specific performance of any obligation. In terms of Article 3:296(1) BW, this includes obligations to do or not to do something.²⁸⁶ However, specific performance will not be ordered in case of obligations with a personal character.²⁸⁷ Again, the textbook example is obligations which are of an artistic nature, such as the obligation to write a book.²⁸⁸ In such a case the creditor will have to be satisfied with damages, termination or both of these remedies.²⁸⁹

Dutch law does not explicitly or directly exclude specific performance of personal service contracts; Article 3:296(1) BW makes it clear that the right to specific performance may not be enforced if it is restricted by law, the nature of the obligation or juridical act.²⁹⁰ Thus, in certain instances, the nature of the obligation can determine that its performance cannot be enforced, as in the case of the obligation with a personal character.²⁹¹ This can be inferred from the wording of Article 3:296 and subsequent interpretation thereof by commentators such as De Vries²⁹² and Hartkamp.²⁹³

²⁸⁴ See para 2 3 1 2 above.

²⁸⁵ See generally para 2 3 1 above.

²⁸⁶ D Busch et al (eds) *The Principles of European Contract Law and Dutch Law* (2002) 348; Asser/Hartkamp & Sieburgh 6-II *De Verbintenis in het Algemeen* (2009) nr 343 & nr 356. See also Art 3:299 BW.

²⁸⁷ A S Hartkamp et al *Contract Law in the Netherlands* 2 rev ed (2011) 145.

²⁸⁸ G de Vries “Recht op nakoming in het Belgisch en Nederlands contractenrecht” in J Smits & S Stijns (eds) *Remedies in het Belgisch en Nederlands Contractenrecht* (2000) 27 46.

²⁸⁹ Hartkamp et al *Contract Law in the Netherlands* 145.

²⁹⁰ Asser/Hartkamp & Sieburgh 6-II (2009) nr 344. The relevant provisions of the BW are reproduced in Addendum A 401-407.

²⁹¹ De Vries “Recht op nakoming in het Belgisch en Nederlands contractenrecht” in Smits & Stijns (eds) *Remedies in het Belgisch en Nederlands Contractenrecht* 27 46; D Haas *De*

The exact same justification for this (indirect) restriction as in the reviewed systems is applicable in Dutch law; the underlying reason is that compelling the artist to paint or the author to write, implicates their personal freedom, and that compulsion could also compromise the quality of the work. Haas, firstly explains that

"[h]et meest principiële bezwaar tegen een veroordeling tot nakoming van een hoogstpersoonlijke verbintenis is de inbreuk die de veroordeling maakt op de persoonlijke vrijheid van de debiteur".

According to him, this is because enforcement of such obligations is contrary to the principle *nemo praecise cogi ad factum*.²⁹⁴ And therefore, a debtor cannot be compelled to perform obligations of a personal nature, but would instead be liable for the monetary equivalent.²⁹⁵

Furthermore, Haas explains that

"het tweede argument is dat een veroordeling tot nakoming contraproductief is, omdat het dwangaspect aan de correcte uitvoering van de hoogstpersoonlijke verbintenis in de weg staat".²⁹⁶

Therefore, a plaintiff would in any event not want to claim specific performance, because there is a risk that it might lead to sub-standard performance, because even if

Grenzen Van Het Recht Op Nakoming doctoral thesis Vrije University Amsterdam (2009) 69.

²⁹² De Vries "Recht op nakoming in het Belgisch en Nederlands contractenrecht" in Smits & Stijns (eds) *Remedies in het Belgisch en Nederlands Contractenrecht* 27 46.

²⁹³ Hartkamp et al *Contract Law in the Netherlands* 145. See also Haas *De Grenzen Van Het Recht Op Nakoming* 340: "According to the current law, an obligee can defend against a claim for specific performance of a personal contractual obligation by referring to the 'nature of the obligation' (Article 3:296(1))."

²⁹⁴ See para 2 2 1 above.

²⁹⁵ Haas *De Grenzen Van Het Recht Op Nakoming* 72.

²⁹⁶ 76-77.

the defendant could be forced to perform, the quality of the resultant performance cannot be guaranteed.²⁹⁷ This objection is familiar from the overview of South African and Anglo-American law above.

De Vries, however, holds that “[z]odra het persoonsgebonden karakter aan de te verrichten prestatie komt te ontvallen, is deze uitzonderingsbepaling dan ook uitgewerkt”. Accordingly, he says (in the context of a familiar example) that once the “ink has flown from the author’s pen”, nothing prevents a court to order him to deliver the completed manuscript to the publisher.²⁹⁸ This prevents the scope of the exclusion from being too wide and arbitrary. As soon as the work is completed, considerations of forced labour are no longer relevant. It follows that, before the manuscript is completed, the court will not grant specific performance,²⁹⁹ but will do so upon its completion.³⁰⁰

Although the Dutch and the German positions on the enforceability of personal service contracts often correspond in practice, they differ in theory, inasmuch as a claim for specific performance of, for example, an obligation of an employee to perform his services (*Diensten*) in terms of a contract of service (*Dienstvertrag*), is admissible in Dutch law,³⁰¹ whereas in German law such an obligation cannot be specifically enforced according to § 888(3), inasmuch as it is not aimed at a specific result.³⁰² This is why

²⁹⁷ See Busch et al *The Principles of European Contract Law and Dutch Law* 355.

²⁹⁸ De Vries “Recht op nakoming in het Belgisch en Nederlands contractenrecht” in Smits & Stijns (eds) *Remedies in het Belgisch en Nederlands Contractenrecht* 27 46.

²⁹⁹ Asser/Hartkamp & Sieburgh 6-II (2009) nr 344.

³⁰⁰ Cf for English law: text to nn 212 ff para 4 3 above.

³⁰¹ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law* 355. See also H Dondorp & H de Jong “Coercive measures to enforce obligations under Dutch law (1838-1933)” in J Hallebeek & H Dondorp (eds) *The Right to Specific Performance: The Historical Development* 135 148.

³⁰² See para 4 5 1 above.

German law awards damages to the employer, even though the general remedy for breach of a contract is specific performance.³⁰³

Crucially, though, in Dutch law such a claim may not be accompanied by a demand for a *dwangsom* (a periodic penalty payment for non-compliance with the court order)³⁰⁴ or *gijzeling* (imprisonment in order to force the employee to perform),³⁰⁵ because including such additional measures would inevitably and ultimately lead to labour that can be considered involuntary and therefore contrary to the constitutional value protecting each individual's personal freedom.³⁰⁶ This is why, in practice, plaintiffs instead claim either damages or termination or both, since no other (permissible) measures exist to ensure performance.³⁰⁷ It can be argued therefore that the theoretical or procedural principle that obligations to do or not to do must be enforced is never realised in practice, and that specific performance of personal service contracts is in effect not feasible. Moreover, on the basis of the maxim *nemo praecise cogi ad factum*,³⁰⁸ obligations to perform highly personal acts would also give rise to a claim for damages under Dutch

³⁰³ K Zweigert & H Kötz *Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 472-474. See paras 2 3 1 1 & 4 5 above.

³⁰⁴ See Dondorp & De Jong "Coercive measures to enforce obligations under Dutch law (1838-1933)" in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 135 153.

³⁰⁵ See J J du Plessis "Spesifieke nakoming: 'n regshistoriese herwaardering" 1988 *THRHR* 349 359; M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 40; Dondorp & De Jong "Coercive measures to enforce obligations under Dutch law (1838-1933)" in Hallebeek & Dondorp (eds) *The Right to Specific Performance: The Historical Development* 135 148.

³⁰⁶ Art 15(1) of The Constitution of the Kingdom of the Netherlands 2008, provides that "[o]ther than in the cases laid down by or pursuant to Act of Parliament, no one may be deprived of his liberty".

³⁰⁷ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law* 355.

³⁰⁸ See text to n 14 para 2 2 1 above.

law.³⁰⁹ In practice, however, these obligations are often indirectly secured by way of contractual penalties.³¹⁰ The prospect of being liable for a penalty sum would probably encourage an employee not to breach the contract in the first place.³¹¹ The threat of a penalty thus serves as an incentive to specific performance.

4 7 International instruments

As previously indicated, all the instruments under review adopt the same point of departure.³¹² Specific performance is recognised as the primary remedy by the PECL, the PICC, the DCFR the CISG, and the CESL but subject to certain exceptions.³¹³ The present discussion focuses on the relevant principles under the PECL, PICC and the DCFR.³¹⁴

³⁰⁹ Art 3:296 BW. See J Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 360.

³¹⁰ J Oosterhuis *Specific Performance: German, French and Dutch Law in the Nineteenth Century* 448.

³¹¹ See Asser/Hartkamp & Sieburgh 6-II (2009) nr 346; Du Plessis 1988 *THRHR* 359.

³¹² See para 2 3 3 above.

³¹³ See L Chengwei *Remedies for Non-performance* 36; G de Vries "Recht op nakoming in het Belgisch en Nederlands contractenrecht" in J Smits & S Stijns (eds) *Remedies in het Belgisch en Nederlands Contractenrecht* (2000) 27 30; R Schulze (ed) *Common European Sales Law (CESL): Commentary* (2012) 504 575; G Dannemann & S Vogenaue (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 618. See also para 2 3 3 above.

³¹⁴ It does not take into account the CISG or the CESL, which only applies to contracts for the sale of goods. According to Art 3(2) of the CISG it "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consist in the supply of labour or other services". The CESL is similarly limited to the sale of goods (and digital content) and does not cover service contracts *sensu strictu*. It only applies to so-called related services, i.e. any service related to the goods or digital content such as installation, maintenance, repair or processing provided by the seller of the goods or the

The Principles of European Contract Law (PECL) establish a clear right to specific performance.³¹⁵ According to Article 9:102(2)(c), the remedy cannot, however, be obtained where “the performance consists in the provision of services or work of a personal character or depends upon a personal relationship”.³¹⁶ Similar limitations can be found in each of the other instruments.³¹⁷ Article 7.2.2 of the PICC provides that the creditor may require performance, unless “(d) performance is of an exclusively personal character” and paragraph 3(c) of DCFR III-3:302 excludes specific performance of an obligation to perform personal services if the services are “of such personal character that it would be unreasonable to enforce it”. Noteworthy is the difference in reference to the type of contract: PECL refers to services or work; PICC does not refer to either; and DCFR refers to personal services. The international instruments say nothing about employment contracts specifically. It is therefore uncertain what types of obligations are covered. It is not clear why these instruments do not distinguish between various types of personal service contracts, or between contracts binding parties in an existing relationship and those aimed at a future relationship, or why they generally do not recognise an equitable discretion (except the DCFR).³¹⁸ Furthermore, the literature and commentaries do not seem to distinguish between different categories of services. The present section is therefore relatively short for the simple reason that, unlike the other systems under review, the rules on the contract of services, although equally important, are not as developed or well-researched and documented.

supplier of the digital content under the sales contract. Since the CESL applies to “related service contracts”, irrespective of whether a separate price was agreed for the related service, as stated in Art 5(c) CESL, specific performance can also be required of these services and no limitation is recognised in respect thereof (see CESL Part V: Obligations and remedies of the parties to a related service contract).

³¹⁵ See para 2 3 3 3 above.

³¹⁶ See R Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 49.

³¹⁷ See paras 2 3 3 2 & 2 3 3 4 above.

³¹⁸ See text to n 351 para 4 8 3 below.

It has been said that DCFR III-3:302 was inspired by Europe's concern for human rights protection.³¹⁹ Therefore, due regard must be had to the debtor's fundamental and human rights and freedoms.³²⁰ The official comment to this Article specifically states that

"Paragraph (3)(c) is based partly on considerations of practicality. It might be pointless to try to enforce specific performance of certain obligations of a highly personal character. Mainly, however, it is based on respect for the debtor's human rights. The debtor should not be forced to perform if the performance consists in the provision or acceptance of services or work which is of such a personal character or is so dependent upon a personal relationship that enforcement would infringe the debtor's human rights. The criterion here is not simply the personal nature of the work or services to be provided. To exclude enforcement of specific performance of all obligations to provide work or services of a personal character would be far too broad. The criterion is whether enforcing performance would be unreasonable. In deciding that question regard would have to be had to the debtor's human rights and fundamental freedoms, including in particular the rights to liberty and bodily integrity."

The official comment then states as an example, the obligation to participate in a clinical trial involving surgical procedures would accordingly not be enforceable.³²¹

³¹⁹ C von Bar & E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) I* (2009) 8.

³²⁰ See G Low "Performance remedies and damages – a selection of issues", unpublished paper presented at a conference on *The Relationship between European and Chinese Contract Law* hosted by the Tsinghua University in Beijing 16-17 February 2012 (copy on file with author).

³²¹ DCFR III-3:302, cmt G (Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) I* 832); and see Low "Performance remedies and damages – a selection of issues"; P Varul "Performance and remedies for non-performance: comparative analysis of the PECL and DCFR" 2008 *Juridica International* 104 108.

Thus, paragraph 3(c) of DCFR III-3:302 specifically excludes specific performance of an obligation to perform personal services if the services are of such a personal character that it would be unreasonable to enforce it.³²² The comment also provides that there might be situations, for example, where a painting is nearly done, where it would be reasonable for the creditor to enforce the obligation to complete the work.³²³ In commenting on this limitation and its implications, Varul, similarly holds that “there is no reason that many ordinary employment contracts should not be enforced, although certain employment contracts requiring work or services of a highly personal nature from the debtor’s point of view, or the continuance of a highly personal relationship, might be covered by DCFR article III.-3:302, paragraph 3(c)”.³²⁴ One could argue here that the *Igesund* situation³²⁵ will not be covered by the limitation, which supports the conclusion reached earlier that there might be cases when compelling performance by an employee may be possible after all (i.e. when the “general” approach does not apply), due to the fact that the specific employment contract was less personal in nature and there was no reason why its enforcement would be unreasonable. The criterion under the DCFR is whether enforcing performance would be unreasonable. This stands in contrast to the all-or-nothing approaches of some legal systems which, as indicated earlier, either contain outright prohibitions on specific performance in these cases, or allow it.

It is also noteworthy, that the expression “of a personal character” in paragraph 3(c) of DCFR III-3:302 does not cover services or work which may be delegated.³²⁶ The same

³²² Beale et al *Cases, Materials and Text on Contract Law* 870.

³²³ DCFR III-3:302, cmt G (Von Bar & Clive above).

³²⁴ 2008 *Juridica International* 104 108 (Varul incorrectly refers to paragraph 2(c)).

³²⁵ See text to nn 88 ff para 4 2 1 2 above.

³²⁶ See cmt G on DCFR III-3:302. See also Beale et al *Cases, Materials and Text on Contract Law* 870; Varul 2008 *Juridica International* 104 108.

principle also applies to the PECL and PICC.³²⁷ This narrows the scope of the exclusion.

Both the PECL and the PICC are based on the same considerations as DCFR III-3:302, namely that ordering specific performance of personal service/work contracts would implicate the non-performing party's personal freedom as it is tantamount to forced labour, and the quality of services rendered under compulsion might not be satisfactory.³²⁸

This view is formulated by Lando and Beale (commenting on the PECL) as follows:

"[F]irstly, a judgment ordering performance of personal services or work would be a severe interference with the non-performing party's personal liberty; secondly, services or work which are rendered under pressure will often not be satisfactory for the aggrieved party..."³²⁹

Schelhaas (commenting on the PICC) similarly objects that specific performance would unduly interfere with the personal freedom of the debtor:

"The fourth exception to the right to performance occurs when performance is of an exclusively personal character ... The basic rationale for denying performance in such situations is that it interferes with the personal freedom of the aggrieved party, and that it gives rise to a number of practical difficulties: even if the aggrieved party were to succeed in compelling the unwilling non-performing party, this would presumably impair the quality of the service subsequently rendered."³³⁰

³²⁷ Chengwei *Remedies for Non-performance* 64.

³²⁸ Chengwei *Remedies for Non-performance* 64; Haas *De Grenzen Van Het Recht Op Nakoming* 70; Varul 2008 *Juridica International* 104 108.

³²⁹ O Lando & H Beale (eds) *Principles of European Contract Law Parts I & II* (2000) 397.

³³⁰ S Vogenauer *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009) 794-795 para 42. See also International Institute for the Unification of Private Law *Unidroit Principles of International Commercial Contracts* (2004) (para 2 3 3 2 n 232 above) 212: "Where a performance has an exclusively personal

Ultimately it can be said that even though the application of the instruments varies, they all accept and recognise a limitation to the right to specific performance, based on the personal nature of the performance, and reinforced by the same policy considerations. These instruments adopt a modern and uniform approach to specific performance, whereby they establish a clear right to specific performance, but subject to certain exceptions. This suggests that they have some potential to serve as models for reform, should our courts decide to engage in a modernization of the rules relating to the remedy of specific performance. It is to this potential that we will now turn.

4 8 Evaluative remarks and conclusions

4 8 1 Introduction

The foregoing discussion reveals that by and large similar reasons are advanced by the systems and instruments under consideration for refusing to award claims for specific performance in the context of personal service contracts, even though the content of these contracts may have differed. The underlying rationales for refusing the remedy in these cases may also be applied to our law. These considerations are apparent when considering South African practice, as evidenced by the analyses of the case law.

The aim of the following section is to explain the current South African position and indicate how specific performance of service contracts is dealt with at present, identify its shortcomings, and explore possible solutions. As indicated, the rules on specific performance of personal service contracts provide an example where there is a large degree of convergence between common law, civil law and international instruments aimed at harmonisation. The comparison of these systems and their experiences could therefore be instructive.

character, enforcement would interfere with the personal freedom of the obligor. Moreover, enforcement of a performance often impairs its quality ...”

4 8 2 The current approach and the need to prioritise social policy considerations

It will be recalled that earlier in this chapter it was shown that in South African law the reasons traditionally advanced in arguing against specific performance as a remedy in the context of personal service contracts are currently only to be regarded as factors that have to be taken into consideration in the exercise of the courts' discretion in refusing specific performance.³³¹ In *National Union of Textile Workers v Stag Packings (Pty) Ltd*³³² it was held that the factors discussed were practical considerations rather than legal principles that restrict the court's discretion to refuse specific performance.³³³ The court in *Benson v SA Mutual Life Assurance Society*³³⁴ also recognised that factors that served as reasons to deny specific performance in the past remain relevant to the exercise of the discretion.³³⁵ This means that these considerations are not definitive, but guiding principles that courts should take into account in the exercise of their discretion.³³⁶ Cases decided after this decision also followed and confirmed this approach.³³⁷

It is clear that the refusal of specific performance was mostly based on considerations of social policy. The fundamental objection is that courts are extremely wary to turn contracts of service into contracts of forced labour, or even, contracts that essentially impose a form of slavery. Thus, one general reason most often given for denying specific performance is that it interferes with the debtor's personal freedom, whilst due regard must always be had to the debtor's fundamental and human rights and

³³¹ See para 4 2 1 1 above.

³³² 1982 (4) SA 151 (T) 157C.

³³³ Jordaan "Employment relations" in *Southern Cross* 409.

³³⁴ 1986 (1) SA 776 (A).

³³⁵ 785.

³³⁶ See Christie & Bradfield *Christie's The Law of Contract in South Africa* 546.

³³⁷ See eg *Myburgh v Daniëlskuil Municipaliteit* 1985 (3) SA 335 (NC); *Consolidated Frame Cotton Corp Ltd v President of the Industrial Court* 1985 (3) SA 150 (N); *Tshabalala v Minister of Health* 1987 (1) SA 513 (W).

freedoms. The question that arises is which of the two competing sides of party autonomy deserves priority: that agreements willingly entered into should be fulfilled *in specie*, or that no one should be compelled to act against their will?

It is well-established that one of the main concerns of our law of contract is to enforce agreements willingly entered into. This notion finds expression in the maxim *pacta sunt servanda*.³³⁸ According to Christie, this maxim “serves as a useful reminder of the fundamental social and economic importance of the enforcement of contracts”.³³⁹ This principle basically has two inter-related meanings: that the parties to a contract are entitled to contract on whatever terms and in whatever manner they wish, as well as to have their contract enforced. Our courts have elevated this principle to the highest level of the values entrenched in the Constitution.³⁴⁰

³³⁸ See Zimmermann *The Law of Obligations* 576-582.

³³⁹ “The law of contract and the Bill of Rights” in *Bill of Rights Compendium* (RS 33 2013) § 3H5. See also C Lewis “The uneven journey to uncertainty in contract” 2013 *THRHR* 80, esp 82: “Bargains struck by parties should in principle be observed. That is foundational to our law of contract. There may be exceptions where public policy determines that the bargain is unconscionable as far as any party to it is concerned. But where that is not so, commerce requires that parties to a contract must observe it.”

³⁴⁰ Van der Merwe et al *Contract: General Principles* 280. See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [57] per Ngcobo J: “public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.”

Cameron JA made the following important statement in *Brisley v Drotsky*³⁴¹ regarding the place of this right to enforcement of a contract in our constitutional context:

"[T]he Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts *or declining to enforce them* with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity ... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."³⁴²

Hawthorne³⁴³ also provides some guidance in the weighing up of these competing interests:

"The present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights such as equality or freedom from servitude or forced labour ... These implications do not, however, in my opinion mean that where the effect of an application of a rule or principle amounts to a limitation of fundamental rights as between private individuals, the protection of fundamental rights will necessarily take precedence over subjective rights of performance validly acquired."

In its finding, and as indicated above, the Full Bench in *Santos*³⁴⁴ relied on the constitutional value of contractual autonomy, as favouring specific performance as the

³⁴¹ 2002 (4) SA 1 (SCA). See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 37-38, and R H Christie "The law of contract and the Bill of Rights" in *Bill of Rights Compendium* (RS 33 2013) § 3H6.

³⁴² 2002 (4) SA 1 (SCA) paras [94]-[95] (own emphasis added).

³⁴³ L Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157. See also Christie "The law of contract and the Bill of Rights" in *Bill of Rights Compendium* (RS 33 2013) § 3H6.

³⁴⁴ 2003 (5) SA 73 (C).

primary remedy for breach.³⁴⁵ Contractual autonomy does indeed provide a general justification for preferring specific performance as a remedy in case of breach, because the parties chose to bind themselves to perform and should therefore be held to their promises. However, our law's commitment to the protection of an innocent party's interest in the performance of the contract naturally cannot be absolute, and according to Cockrell:³⁴⁶

“There would be no contradiction involved in affirming the principle of *pacta sunt servanda* at the level of the ascription of contractual responsibility, and still maintaining that for policy reasons the law should restrict the availability of specific performance as a remedy in favour of an award of damages. For example, it might be argued that for reasons of ‘justice’ specific performance should be refused where such an award would be unduly intrusive and oppressive.”

Therefore it is suggested here that instead of upholding the sanctity of contracts, courts should restrict the availability of specific performance where performance is of such a personal nature that it would be unreasonable to enforce it, for instance, due to infringement of the debtor's right to liberty and dignity, since there are less invasive methods of protecting the creditor's expectation interest in this instance. Either damages or termination or both will prove to be better remedies.

4 8 3 The proposal for reform: unreasonable enforcement of personal services as exceptional category

The analysis thus far has revealed that even though our courts “have studiously refrained from unpacking legal principles and engaging in a process of substantive

³⁴⁵ For which the court also relied (at 86F-87C) on *Brisley v Drotsky* 2002 (4) SA 1 (SCA). See also Naudé 2003 SALJ 277.

³⁴⁶ A Cockrell “Breach of contract” in R Zimmermann & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 331.

reasoning” regarding the considerations relevant to the exercise of its discretion,³⁴⁷ and display a concern “to avoid the stultification of the judicial discretion by the development of rules”,³⁴⁸ they “normally” refuse specific performance where the contract sought to be enforced is of a very personal nature. As recently as 2008, it was decided in *Nationwide Airlines* that “[w]here it concerns a contract of employment … a court will in the exercise of its discretion not normally grant specific performance”.³⁴⁹ This prompts considering whether it may be desirable to recognise a more general or “concrete” limitation to the principle of specific performance. Under such an approach the point of departure would remain the same: the remedy would still be available “as of right” or “in principle”, however, this right to specific performance would not be absolute, but subject to certain exceptions.

According to most authorities, there are two recognised exceptions where the discretion is actually illusory or absent, namely impossibility of performance and the debtor's insolvency.³⁵⁰ It is proposed here that this list of exceptions be expanded to accommodate the reality that in the context of personal service contracts, the judicial discretion is generally exercised to refuse specific performance. This can be ascribed to important policy considerations. In the context of service contracts, the notion that specific performance is the norm and refusal the exception is therefore often an illusion.

³⁴⁷ 333. This quotation is taken from Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 109.

³⁴⁸ To quote Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111.

³⁴⁹ *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) para [17]. See also *Troskie v Van der Walt* 1994 (3) SA 545 (O) 552.

³⁵⁰ See *Ward v Barrett NO* 1963 (2) SA 546 (A) 552-553; *Rampathy v Krumm* 1978 (4) SA 935 (D) 941; D J Joubert *General Principles of the Law of Contract* (1987) 224; Lubbe & Murray *Contract* 542; and see para 7 2 2 below.

However, we are not dealing with an exception which is identical to the impossibility and insolvency cases, for it cannot be said that specific performance of service contracts invariably has to be refused: this is apparent from the judicial enforcement of employment contracts against employers, and the hybrid *Igesund*-type contract cases. South African law therefore does not have to follow the broad approach of some instruments which provide that all personal service contracts are unenforceable. The test proposed here is that there should be a more narrow rule, which sets out a third exception relating to services, and does so in a more nuanced manner. Although it is admitted that the following test is abstract, it is proposed that such a rule could be that specific performance should be refused where performance is of such a personal character that it would be unreasonable to enforce it. This rule emanates from the principle that, as a matter of human dignity and personal liberty, no person should be compelled to work or maintain a personal relationship against his will. The wording of the rule was adopted from the DCFR, which as we have seen, adopts a broad test, based on whether it would be unreasonable to enforce obligations to perform personal services.³⁵¹ This approach was preferred for its flexibility, which stands in contrast to the more rigid PICC approach, in terms of which the remedy is excluded if performance is of an exclusively personal character. The approach adopted by PECL may further be regarded as too imprecise, because the criterion is simply the personal nature of the work or services to be provided. The proposed approach is also comparable to the approach adopted by German law where reinstatement is the prescribed remedy for unfair dismissals,³⁵² unless the court decides to terminate the employment relationship if it would be unreasonable to order reinstatement, in which case the employer is required to pay compensation to the employee.³⁵³

As we have seen, the courts have strictly maintained its general discretion to award specific performance and have repeatedly rejected the development of rules that would

³⁵¹ See text to n 322 para 4 7 above.

³⁵² § 8 KSchG (Protection Against Unfair Dismissal Act).

³⁵³ See para 4 5 above.

regulate the exercise of their discretion.³⁵⁴ However, as Lubbe contends, this strictly maintained (open-ended) discretion hampers the development of our law.³⁵⁵ The insistence that this discretion remains “unfettered”³⁵⁶ has resulted in a failure by our courts to recognise that certain policy considerations should influence the availability of this remedy more strongly than is recognised at present.³⁵⁷ The desirability of a rule-based approach with a residual discretion or the removal of this specific performance discretion will be investigated in the final chapter of the thesis.

Lubbe, in considering the desirability and tenability of a rule-based approach in our law, provides us with a possible solution. He considers the possibility of recognising certain *Fallgruppen* or case groups³⁵⁸ in which the remedy should be denied.³⁵⁹ According to Lubbe, the adoption of this methodology might lead to the denial of the remedy in cases

³⁵⁴ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Isep Structural Engineering (Pty) Ltd v Inland Exploration (Pty) Ltd* 1981 (4) SA 1 (A); *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T). See also Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 126, and the authorities cited there.

³⁵⁵ See “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111-112.

³⁵⁶ 1986 (1) SA 776 (A) 783.

³⁵⁷ See Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111.

³⁵⁸ On *Fallgruppen*, see T Naudé “The function and determinants of the residual rules of contract law” 2003 *SALJ* 820 838; T Naudé & G Lubbe “Exemption clauses – a rethink occasioned by *Afrox Healthcare Bpk v Strydom*” 2005 *SALJ* 441 454, and the authority cited there.

³⁵⁹ See Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits *Specific Performance in Contract Law* 112-113.

of hardship.³⁶⁰ He then specifically suggests that “a rule that specific performance generally will not be granted as against an employee might develop from the practice of our courts in such cases”.³⁶¹ Lubbe thereby confirms that practice has possibly opened the way for such a development. More importantly, he also states that

“[t]he recognition that specific performance might in particular circumstances be appropriate even as against an employee [eg Iggesund] does not contradict this view. It merely reflects the need to develop [our] law by means of the elaboration of sub-rules which enable the differentiated treatment of situations which reveal factual distinctions and are governed by different policy considerations”.³⁶²

4 8 4 The operation of the proposed exception relating to personal service contracts

It has been argued above that there must be a recognised exception to the general point of departure that specific performance is a right, and it was further argued that this exception should be that performance must be refused if the service is of such a personal nature that it would be unreasonable to enforce it. It now remains to be considered how this exception should operate.

As indicated, this would almost invariably be the case where an employer claims specific performance of an employment contract against an employee. The implication of this proposed development will be that the right to specific performance will (generally) be limited in cases of employment contracts based on the fact that the contract sought to be enforced is so personal in character that its enforcement would be unreasonable.³⁶³

³⁶⁰ 113. See also para 6 5 4 below.

³⁶¹ 112-113.

³⁶² 113.

³⁶³ See para 4 2 1 above.

However, since employees' conditions of service are governed by legislation, which prescribe the procedure whereby employers may terminate the employment contract, courts should be allowed to enforce employment contracts against employers by ordering reinstatement of employees where employers have not followed the prescribed procedure in dismissing them. In such a case it has been held that what was done contrary to the provisions of the legislation was of no effect, and that the employee was still in the employer's service.³⁶⁴

Moving on from the employment contract to the independent contractor under the contract for work or *locatio conductio operis*, we see that currently a contractor's breach entitles the client to claim specific performance, subject only to the qualification that the court has a discretion to refuse it. In terms of the proposed approach, a contract for work (*locatio conductio operis*) will also not be enforced if performance is of such a personal nature that its enforcement would be unreasonable. Generally, contracts for work are less personal in nature than employment contracts, in terms of which services are rendered under the authority of the employer. An employment contract can therefore be distinguished from a contract for work based on, *inter alia*, the absence of the element of control.³⁶⁵ The contractor performs his duties independently from the client. It is therefore also recognised in our law that a contractor may perform through others, whereas an employee must perform the services personally. Electrical wiring or repairs on a building can, for example, be performed vicariously. As indicated above, US courts are also prepared to order specific performance of a contract if it contains aspects that make the contract less personal in nature.³⁶⁶ A service will only be considered personal (and unenforceable) in the US if it cannot be delegated or performed vicariously.³⁶⁷ It has also been shown that the expression "of a personal

³⁶⁴ *Rogers v Durban Corporation* 1950 (1) SA 65 (D) 70 per Broome J.

³⁶⁵ See para 4 1 above.

³⁶⁶ See eg *Mellan v Cessna Aircraft Co* 64 F.Supp.2d 1061 (D. Kan 1999).

³⁶⁷ See para 4 4 above.

character" in DCFR III-3:302 does not cover services or work which may be delegated. The same principle also applies to the PECL and the PICC.³⁶⁸

The operation of the exception in the context of the contract of work or *locatio conductio operis* will depend on the nature of the work, specifically whether the work requires a high level of ability, proficiency and skill of a personal nature or is dependent upon the personal volition and drive of the party.

This would almost invariably be the case where specific performance is sought against independent contractors whose obligations cannot be delegated because their skills are not generic such as artists and singers. However, courts may even order an artist to paint, provided it is reasonable. This would be the case, for example, where an artist's signature is required to complete a portrait, because the value of the painting largely depends on the signature. In this instance it would be entirely reasonable to order specific performance of the obligation (to sign the painting), because this would not involve a large degree of ability, proficiency or skill. The outcome is also objectively testable, since the court can compare the signature to other signatures by the same artist. However, a court cannot force an artist to complete an incomplete painting because there is a large degree of ability, proficiency and skill of a personal nature involved and performance of such an obligation is dependent on the volition of the artist. And due to the nature of the performance there would be constant doubt whether the contract was being performed properly.³⁶⁹

³⁶⁸ See para 4 7 above.

³⁶⁹ In 1894 the Court of Appeal in Paris held in *Cass civ*, 14 March 1900, S 1900.1.489 ("Lady Eden's portrait") that a portrait of Lady Eden commissioned by her husband, Sir William Eden, belonged to the artist, Whistler, until its delivery, and that Eden could not sue for the execution and delivery of the portrait, since obligations to execute or not to execute can only be settled by an award of damages. The case came before the court after a dispute arose about the price of the portrait. Eden sent a cheque which Whistler considered inadequate and he refused to deliver the portrait. Eden instituted legal proceedings against Whistler whereupon he adapted the composition originally intended

The proposition also addresses the concerns raised in relation to German law which permits the enforcement of non-delegable obligations. An artist, for example, can be ordered to produce a portrait under German law, whereas under the proposed development for our law, artists will only be ordered to perform if it would be reasonable to do so.

Thus, even though the classification of the type of contract is problematic, it is ultimately not indicative of enforceability if one considers the formulation of the proposed exception: that specific performance will be refused where performance is of such a personal character that it would be unreasonable to enforce it. To exclude specific performance of all obligations to provide work or services of a personal character would be far too broad – as the court said in *Roberts Construction v Verhoef*:³⁷⁰ “Strict adherence to the rule that no contract of service may be even indirectly enforced may give rise to grave injustice and the evasion of plain contractual duties.”³⁷¹ There is a need for differentiation according to the policy considerations that govern cases that are different in nature.³⁷² Therefore, the criterion is whether enforcing performance would be unreasonable. The limitation contains a qualification or discretionary component. The discretion would be limited to cases where courts are confronted with the enforcement of obligations to provide work or services of a personal character.

Under this limitation, a fair degree of latitude is accorded to the courts. What is unreasonable will largely depend on the facts of individual cases. The proposition is

for Lady Eden to another head. In the end Whistler was allowed to keep the portrait, on the condition that the face was made unrecognisable. See further Beale et al *Cases, Materials and Text on Contract Law* 868-869.

³⁷⁰ 1952 (2) SA 300 (W) 306D.

³⁷¹ Quoted with approval by Naudé 2003 *SALJ* 281. See also *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T); quoted with approval by Horn J in *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) para [18], and reference to Kerr in para 7 2 2 and related text to n 41 below.

³⁷² Cf reference to Lubbe in text to n 362 above.

therefore also in line with the *Nationwide Airlines* decision,³⁷³ in that the limitation does not amount to a “hard-and-fast rule”³⁷⁴ but allows for a more nuanced approach to refuse specific performance of certain obligations of a (highly) personal character. However, the criterion is not simply the personal nature of the obligations, but whether enforcing these obligations would be unreasonable.³⁷⁵ In deciding whether enforcement would be unreasonable, courts may have to consider the debtor’s human rights and fundamental freedoms,³⁷⁶ including in particular the rights to dignity, liberty and bodily integrity.³⁷⁷

Accordingly, employment contracts requiring work or services of a highly personal and skilled nature or the continuance of a highly personal relationship, such as a contractual obligation to play rugby for a particular club or franchise, would not be specifically enforced. Thus, Wright J’s line of reasoning in *Troskie*³⁷⁸ is supported here and it is therefore suggested that a court should not order specific performance of a contractual obligation that would essentially compel a rugby player to play for a team for which he is unwilling to play.³⁷⁹ This would not only protect the interests of the player but also that of

³⁷³ See esp paras [17]-[21].

³⁷⁴ Para [17].

³⁷⁵ See esp Varul’s commentary on the DCFR 2008 *Juridica International* 104 108.

³⁷⁶ In accordance with s 39(2) of the Constitution of the Republic of South Africa, 1996, which requires a court to promote the spirit, purport and objects of the Bill of Rights when interpreting and developing the common law.

³⁷⁷ According to I M Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* (RS 33 2013) § 1A61, the conduct and interests protected by s 13 overlap with those covered by the right to freedom and security of the person (s 12), which encompasses the right to bodily integrity (s12(2)).

³⁷⁸ *Troskie v Van der Walt* 1994 (3) SA 545 (O) 552.

³⁷⁹ Cf S Cornelius “Sanctity of contract and players’ restraints in South African sport” 2003 *TSAR* 727; K Mould “A critical study of the recurring problem of repudiation in the context of professional rugby in South Africa with particular emphasis on transformative constitutionalism” (2010) 35(1) *Journal for Juridical Science* 49; 2011 *PELJ* 207 ff.

the team, since the nature of the services would make it impossible to determine whether the contract was being performed properly and the team could eventually receive sub-standard performance by an unwilling player.

*Vrystaat Cheetahs (Edms) Bpk v Mapoe*³⁸⁰ provides a good illustration of the consequences of ordering specific performance of such an obligation.³⁸¹ The facts largely correspond to the facts of *Troskie*. The respondent, a professional rugby player, repudiated his contract with the applicant, the Free State Cheetahs, by signing an employment contract with another provincial rugby team, the Natal Sharks. The Cheetahs refused to release the respondent and brought an urgent application against him, to force him to return and play for them. The High Court (*per Van Zyl J*, who relied primarily on the Full Bench decision in *Santos*)³⁸² found that the respondent could not offer his services as a professional rugby player to the Sharks before his contract with the Cheetahs ended, and ordered him to return to the Cheetahs and honour his obligations to play professional rugby for them (thereby confirming the arbitrator's initial order).³⁸³ The Sharks were also prohibited from infringing on the contract between the respondent and the Cheetahs.³⁸⁴

However, despite the High Court's decision, Mapoe never returned to the Cheetahs, who ultimately had no choice but to release him, albeit to a different team, the Golden Lions.³⁸⁵ This shows that a judgment ordering an unwilling rugby player to perform in

³⁸⁰ Unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court *per Van Zyl J* (copy on file with author).

³⁸¹ And possibly explains why Malherbe JP described a similar application as "ridiculous" in *Troskie v Van der Walt* 1994 (3) SA 545 (O) 553.

³⁸² *Vrystaat Cheetahs (Edms) Bpk v Mapoe* 4587/2010 (unreported) paras [106] ff.

³⁸³ Para [126].

³⁸⁴ Paras [119]-[121].

³⁸⁵ As confirmed on the news site "Sport24": <<http://www.sport24.co.za/Rugby/Lions-confirmed-Mapoe-signing-20101104>>. Mapoe also ignored the arbitrator's initial order that he had to

accordance with his employment contract is not of much use to his employer, because the performance of the obligation is (to quote Wright J in *Troskie*) “not only dependent upon the personal enthusiasm, willingness and drive of the player concerned, but there is also a great deal of ability, proficiency and skill of a personal nature involved in the services in question which will be dependent upon the specific qualities of the player concerned as well as on his relationship with the club for which he plays rugby”.³⁸⁶

Unfortunately, it appears that in *Vrystaat Cheetahs*, the *Santos* decision was read out of context. Van Zyl J was correct in finding that a professional rugby player is a unique employee, like the coach in *Santos*, but incorrect in finding that despite the skilled and highly personal nature of the particular service, specific performance was warranted. She overlooked the fact that there was a fundamental difference between Iglesund and Mapoe even though both were unique employees. A rugby player (irrespective of his classification as either amateur or professional),³⁸⁷ “... is under the constant control of his employer, and continually has close personal contact with his employers in the performance of his duties”.³⁸⁸ Had she fully acknowledged the significance of the nature of the performance, instead of focusing on the fact that Mapoe was a professional and not an amateur rugby player, she might have realised that specific performance was still an unsuitable remedy as confirmed in *Troskie*.³⁸⁹

The *Santos* judgment can be explained on this basis (albeit with opposite effects). As indicated, the contract between the club and its head coach, whilst in essence a contract of employment, possessed certain *sui generis* characteristics which eventually

honour his contract with the Cheetahs until it lapsed and continued practising with the Sharks (*Vrystaat Cheetahs (Edms) Bpk v Mapoe* para [12]).

³⁸⁶ *Troskie v Van der Walt* 1994 (3) SA 545 (O) 546.

³⁸⁷ Van Zyl J held (para [104]) that *Troskie* “baie duidelik onderskeibaar van die onderhawige geval is, deurdat daardie uitspraak verleen is in ‘n situasie en era van amateurrugby, terwyl die onderhawige geval baie duidelik slaan op professionele rugby teen vergoeding”.

³⁸⁸ Naudé 2003 *SALJ* 274.

³⁸⁹ Cf Mould 2010 *Journal for Juridical Science* 57 ff; 2011 *PELJ* 207 ff.

persuaded the court to enforce the contract. It was reasonable to enforce this particular contract of employment because there were elements present which made the contract less personal in nature.³⁹⁰

As indicated, the current South African definition of a contract of employment possesses an element of authority of the employer over the employee. Our courts regard the element of control by the employer over the employee as one of the main characteristics, if not the key characteristic, of the employment relationship,³⁹¹ but the club in this instance had no right to dictate to the coach how he should exercise his duties. Iglesund was given complete freedom in the exercise of his duties. Unlike a usual employee, Iglesund was not at the beck and call of his employer to render his services at the latter's request. He stood in a more independent position vis-à-vis the club. However, unlike an independent contractor, Iglesund was still obliged to perform his duties himself (though he probably could avail himself of the services of assistants to assist him in the performance thereof). Even though the agreement displayed elements of a contract of work (*locatio conductio operis*), it did not make Iglesund an independent contractor, but due to these characteristics, the contract was enforceable. Irrespective of Iglesund's classification or the type of contract between the club and its coach, specific performance was reasonable and justifiable because there were aspects of the contract that made the contract so unusual that the general rule could not apply. At this juncture, it is worth remembering that US courts will consider specifically enforcing contracts for services, if the contract contains aspects that make the contract less personal in nature. As mentioned earlier, in *Mellon v Cessna Aircraft Co*³⁹² the appeal court awarded specific performance of a contract to maintain an airplane, due to the fact that it was a generic type of service, rather than a unique type of service.

³⁹⁰ See text to n 42 para 7 2 2 below.

³⁹¹ See eg cases cited in n 16 para 4 1 above and J Grogan *Workplace Law* 10 ed (2009) 42-43.

³⁹² 64 F.Supp.2d 1061 (D. Kan 1999).

It can therefore be inferred from the above discussion that the nature of the performance, rather than the specific type of contract (*locatio conductio operis/operarum*), is crucial in applying the rule.³⁹³ An order for specific performance would not be granted where, due to the highly personal and skilled nature of the performance, there would be constant doubt whether the contract was being performed properly. For this reason, specific performance should not be awarded against singers, writers, artists or professionals who participate in team sports. Depending on the facts of the case, these persons may be either employees or independent contractors. Hence, the limitation cuts through the *locatio conductio operarum/operis* distinction. Some of these contracts might involve such a close personal relationship and highly skilled work or services that the exception would apply. Others might not. But no one, be it a contractor or employee, should be forced to perform if the performance consists in the provision of work or services that is of a highly personal or skilled character.

Under the proposed development, a court will still be able to prevent a party in breach from providing the same or similar services to the aggrieved party's competitors, and thereby grant specific performance in an indirect manner (i.e. enforce restraints of trade). This is in complete accordance with our current law³⁹⁴ and with other legal systems – even English law (which departs from the principle of damages), considers an injunction the appropriate remedy for preventing the breach of a negative contractual duty.³⁹⁵ As we have seen, English courts cannot force an employee to perform according to their contract, but they can issue an injunction barring the employee from performing an act which he has expressly bound himself not to do. Article 7.2.2(d) of the PICC similarly allows a party to seek an injunction under the applicable national law to prevent the non-performing party from performing for a competitor.³⁹⁶ The same

³⁹³ In Dutch law the nature of the obligation can also determine that it cannot be enforced (as in the case of the obligation with a highly personal character) – see para 4 6 above.

³⁹⁴ See para 4 2 1 2 above.

³⁹⁵ See para 4 3 above.

³⁹⁶ See para 4 7 above.

principle also applies in the US,³⁹⁷ where (as in our law) restraints of trade are considered valid and enforceable except if it would be unreasonable to enforce the restraint clause in the circumstances of the case.

According to Burrows, the English position on indirect enforcement can “presumably” be explained on the ground that “the law considers it less of an infringement of individual liberty to be ordered not to do something than to be ordered to do something”.³⁹⁸ The argument basically is that to force someone to perform a service is an impermissible imposition on their individual autonomy, whereas if you restrain them from working for someone else you are not forcing them to positively work for the person they contracted with. The purpose of such a negative or prohibitive order is not to force the breaching party to perform, but to enforce a contractual term in terms of which he expressly undertook not to compete or perform his services elsewhere.³⁹⁹ Indirect enforcement of such undertakings by way of an interdict is therefore regarded as one of the instances where specific performance should be awarded for the rule would not apply, since the aim is to prevent rather than to compel performance.

In essence the proposed limitation resembles our law on restraint of trade clauses: such a clause is considered enforceable to the extent that its enforcement is not

³⁹⁷ See para 4 4 above.

³⁹⁸ Burrows “Judicial remedies” in *English Private Law* 875. His view is supported and considered one of the reasons why it will depend on the circumstances whether the remedy will not be awarded of a personal service contract.

³⁹⁹ In *Doherty v Allman* (1878) 3 App Cas 709 720, Lord Cairns said: “if parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction the process of the Court to which already is the contract between the parties.” See also Stevens 1921 *Cornell Law Quarterly* 235.

unreasonable in the circumstances of the particular case.⁴⁰⁰ Thus, our law recognises a similar defence with regard to these clauses, which have a well-established test of unreasonableness.⁴⁰¹ By the same token, a personal service contract should not be enforced if it would be unreasonable with reference to the nature of the performance concerned. The onus to raise such an impediment to an order for specific performance (i.e. that the contract sought to be enforced is of such a personal character that it would be unreasonable to enforce it) rests on the defaulting party who wants to avert specific enforcement of the personal service contract.⁴⁰²

4 8 5 Conclusion

This chapter set out to investigate the possibility of adopting a more concrete approach to enforcing personal service contracts by way of an order of specific performance. Drawing on certain international instruments and legal systems as a frame of reference, it was shown that such a development would be valuable due to the unpredictability and incoherence of our current approach.⁴⁰³

It is clear from the analyses of the relevant case law that the open-ended discretion to award or refuse specific performance is misleading. One of the more significant findings to emerge from this study is that our courts generally refuse specific performance in

⁴⁰⁰ See text to n 149 para 4 2 1 2 above.

⁴⁰¹ See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 197; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) 482.

⁴⁰² The same procedural principle applies to raising other possible impediments to specific performance (i.e. impossibility or insolvency): *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 442B-443G; *Klimax Manufacturing Ltd v Van Rensburg* 2005 (4) SA 445 (O) para [12]; *Vrystaat Cheetahs (Edms) Bpk v Mapoe* (unreported) para [115]). See also *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para [49] in the context of restraints. See further para 7 2 2 below.

⁴⁰³ See Cockrell “Breach of contract” in Zimmermann & Visser *Southern Cross* 330; Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 252.

cases of breach of contract where the defaulting party is required to render performance of a very personal nature. The implication of this finding is that the law could be discredited if this reality is not reflected in legal doctrine.⁴⁰⁴ A definite need therefore exists for recognising a concrete exception to the right to specific performance where the contract sought to be enforced is of such a personal character that it would be unreasonable to enforce it. This is essential to ensure the sustainability and coherence of our law on the availability of specific performance.

⁴⁰⁴ This finding is consistent with Lubbe's views (see "Contractual derogation and the discretion to refuse an order for specific performance" in Glover (ed) *Essays in Honour of AJ Kerr* 94; "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111). See also para 7 3 below.

CHAPTER 5: SUPERVISION OF PERFORMANCE

5 1 Introduction

South African courts have been reluctant to order specific performance in cases where the task of supervising the performance could be unduly burdensome. This is especially apparent where specific performance was sought of obligations arising from agreements of mandate, contracts for services, lease agreements, and building contracts.¹ Specific obligations our courts have refused to enforce on this basis include obligations to incorporate a company,² to do repairs to a house,³ to appoint someone as director,⁴ or to apologise to someone.⁵ The lower courts in any event have no jurisdiction⁶ in matters where an order of specific performance (*ad factum praestandum*)⁷ without an alternative of damages⁸ is sought.⁹

¹ P Gross “Specific performance of contracts in South Africa” 1934 (51) *SALJ* 347 365 ff; G F Lubbe & C M Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3 ed (1988) 545-547; J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 15 ed (1992) 210; R H Christie & G B Bradfield *Christie’s The Law of Contract in South Africa* 6 ed (2011) 551-552; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 332.

² *Lucerne v Asbestos Co Ltd v Becker* 1928 WLD 311.

³ *Mink v Vryheid Coal & Iron Co* (1912) 33 NPD 182.

⁴ *Dey v Goldfields Building Finance & Trust Corp* 1927 WLD 180.

⁵ *Keyter v Terblanche* 1935 EDL 186 (the undertaking to apologise was contained in a settlement agreement).

⁶ Section 46(2)(c) Magistrates’ Courts Act 32 of 1944; s 16(d) Small Claims Courts Act 61 of 1984.

⁷ The preferred view in our law is that orders *ad pecuniam solvendam* are not, for the purposes of these provisions, orders for specific performance (*Otto v Basson* 1994 (2) SA 744 (C) confirming *Tuckers Land & Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 (T)). See further I M Bredenkamp *The Small Claims Court* (1986) 21; D J Joubert *General Principles of the Law of Contract* (1987) 222; Christie & Bradfield

This view that specific performance will not be ordered where it will be difficult for a court to enforce the order has been supported by local academic writers¹⁰ and the courts.¹¹ Some favour denying specific performance on this ground without really providing specific and sufficient justifications and merely accept it as self-evident, whereas others have criticised it, for example, in the context of lease.¹²

One example of such an obligation, which is often referred to in this context, is a lessor's obligation to afford the lessee *commodus usus*¹³ of the leased property during

⁸ Christie's *The Law of Contract in South Africa* 544; D E van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* / 10 ed (2012) 305.

⁹ Van der Merwe et al *Contract: General Principles* 333: "Except for orders *ad pecuniam solvendam* specific performance in principle cannot be claimed in the magistrate's court."

¹⁰ See *Carpet Contract (Pty) Ltd v Grobler* 1975 (2) SA 436 (T); *Otto v Basson* 1994 (2) SA 744 (C); *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] 1 All SA 57 (T). The prohibition provisions do, however, contain certain exceptions (Van der Merwe et al *Contract: General Principles* 333 n 47).

¹¹ See especially J W Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3124: "Where the court cannot ensure performance, it will not decree specific performance. A contract which requires constant supervision, or where the duties to be performed are continuous, is not such a contract as the court will order to be specifically performed ... Thus, the court will not decree specific performance of a building contract or of a contract to do work and labour. If the court did decree specific performance, it would have to punish for contempt of court if the work were not properly performed, and this would involve direct superintendence of the work by an officer of the court, a proceeding for which manifestly a court of law is not suited."

¹² See eg *Barker v Beckett & Co Ltd* 1911 TPD 151 164; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311 331; *Marais v Cloete* 1945 EDL 238 242; *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W) 249; *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) 440-441; *Lottering v Lombaard* 1971 (3) SA 270 (T) 272.

¹³ See G Bradfield & K Lehmann *Principles of the Law of Sale and Lease* 3 ed (2013) 146.

Holmes JA defines *commodus usus* as "the snugness and benefit of his occupation" in *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 (A) 748.

the full term of the lease. In our law there is a positive contractual obligation on a lessor to deliver and maintain the leased premises in a proper condition.¹⁴ In accordance with every contracting party's general right to specific performance, our courts have ordered lessors to carry out their duty to deliver the property to the lessee.¹⁵ However, our courts have been reluctant to order specific performance of the lessor's duty to maintain the leased property in a proper¹⁶ condition.¹⁷ In *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd*¹⁸ De Villiers J described the position as follows:

"[W]here the tenant complains of disrepair or failure to repair, or failure to add or build something on to a building, by the landlord, the Court will not order specific performance. It is clear that where specific performance is claimed, the matter is in the discretion of the Court ... The judgment [in *Marais v Cloete* 1945 EDL 238] seems to indicate, as I have stated, that as a general rule in disputes between landlord and tenant as to repair of buildings, or neglect to repair or failure to carry out some structural alterations, the Court will not order specific performance because it is a difficult matter for the Court to supervise and see that its order is carried out, and as the question whether there has been specific performance of the Court's order was difficult to determine, it would be difficult to enforce it."¹⁹

¹⁴ Bradfield & Lehmann *Principles of the Law of Sale and Lease* 144.

¹⁵ See eg *Woods v Walters* 1921 AD 303; *Tshandu v City Council Johannesburg* 1947 (1) SA 494 (W); *Heynes Mathew Ltd v Gibson NO* 1950 (1) SA 13 (C).

¹⁶ The term "proper" in this context means that the premises should be reasonably fit for the purpose for which it is leased. The "purpose" is then determined by considering the use to which the premises are to be put by the lessee. See A J Kerr *The Law of Sale and Lease* 3 ed (2004) 302-303.

¹⁷ See eg *Barker v Beckett & Co Ltd* 1911 TPD 151; *Chauncey v Blood's Estate* 1911 WLD 213; *Marais v Cloete* 1945 EDL 238; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C); *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W); *Gijzen v Verrinder* 1965 (1) SA 806 (D).

¹⁸ 1953 (1) SA 246 (W).

¹⁹ 249G-H. Note, however, that the court subsequently pointed out that the general rule against specific performance in this context is not an absolute one (249H-250A).

Thus, the main basis for such reluctance was that it was difficult for the court to supervise and see that its order was in fact carried out. The justification is that a lessee is allowed to effect the necessary repairs himself and then to recover the costs from the lessor or deduct it from the rental due,²⁰ provided of course notice was given to the lessor of the defects.²¹

Our courts have also been reluctant to specifically enforce building contracts on the ground that they would be unduly burdened with the task of supervising the performance.²²

Different concerns have been raised with regard to this position. First, will it be necessary for the court itself to supervise the work?²³ If the lessor (or builder for that matter) has been ordered to effect repairs and failed to do so, the lessee may once again approach the court for relief, and any court then has the power to deal with such a reluctant defendant.²⁴ Secondly, is it reasonable and fair towards the lessee that he has

²⁰ The same procedure exists in civilian systems, and is known as specific performance by equivalence or third party performance, which is typically claimed for generic acts resulting from leases or building contracts (see J Oosterhuis *Specific Performance in German, French and Dutch Law in the Nineteenth Century: Specific Performance: German, French and Dutch Law in the Nineteenth Century: Remedies in an Age of Fundamental Rights and Industrialisation* (published) doctoral thesis Vrije University Amsterdam (2011) 448).

²¹ Bradfield & Lehmann *Principles of the Law of Sale and Lease* 146; Kerr *The Law of Sale and Lease* 315; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C); *Bhima v Proes Street Properties (Pty) Ltd* 1956 (1) SA 458 (T); *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A); *Steynberg v Kryger* 1981 (3) SA 473 (O).

²² See para 5 5 below. See also para 4 2 2 above.

²³ De Wet & Van Wyk *Kontraktereg en Handelsreg* 210-211; W E Cooper *The South African Law of Landlord and Tenant* 2 ed (1994) 89; Bradfield & Lehmann *Principles of the Law of Sale and Lease* 146.

²⁴ Bradfield & Lehmann *Principles of the Law of Sale and Lease* 146. See also M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 137.

to effect the repairs at his own cost, when the lessor is the one who is contractually bound to maintain the leased property in a proper condition? Furthermore, what happens where a lessee is not financially able to repair the leased property?²⁵

These questions, which deal with fundamental problems relating to our courts' approach to the availability of the remedy of specific performance, will be considered and analysed from a predominantly comparative perspective in this chapter.²⁶ The justification for adopting such a perspective is familiar, namely that the experiences of other legal systems and instruments may prove to be particularly useful and instructive by revealing shortcomings in our approach and, more importantly, by providing insights into how these deficiencies can be addressed. The discussion will centre on the underlying reasons given in a decision to refuse to order specific performance, based on the fact that enforcing such an order would require constant supervision. In this regard specific reference will be made to the key arguments raised in the leading English case of *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.²⁷ Since the South African position was significantly influenced by the approach that English courts adopted, it is especially important to examine developments in the latter jurisdiction. The chapter therefore commences with an analysis of the English position, followed by the American position. The influence of the Anglo-American position on our legal system will then be discussed. The purpose is to establish whether their justifications (as will be discussed in the following section) for denying specific performance substantiate the refusal of an order for specific performance, and how our courts' approach may be improved, bearing in mind the experiences of the English courts and their American counterparts.

Thereafter the treatment of the objection under German, Dutch and international law will be examined. These systems and international instruments do not recognise constant supervision as an obstacle to specific performance. However, factors such as certainty

²⁵ See para 5 5 below.

²⁶ See para 5 5 below.

²⁷ [1997] 2 WLR 898.

and reasonableness, which form the foundation of this objection (as will be indicated further on), emerge in the defined exceptions recognised by the civil-law systems and the different international instruments. Although these approaches will not be discussed as comprehensively as the common law, it does not indicate that their experiences are less important or less relevant, since they also provide valuable insights that may assist in evaluating and informing our law on specific performance.

5 2 English law

It has long been maintained in English case law that it is not possible to order specific performance of an obligation which is to be performed over a period of time.²⁸ The classic justification for this position is that the court has no effective mechanism for supervising performance.²⁹ Thus, even where it is clear that, according to the traditional consideration of adequacy, damages would not be adequate, courts further refuse specific performance on the ground that the order would require constant supervision.³⁰ English courts distinguish between orders to carry on an activity and orders to produce

²⁸ See *Pollard v Clayton* (1855) 1 K & J 462; *Blackett v Bates* (1865) 1 Ch App 117; *Fothergill v Rowland* (1873) LR 17 Eq 132; *Powell v Duffryn Steam Coal Co v Taff Vale Railway Co* (1874) 9 Ch App 331 335 per James LJ: “Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the Court has never found its way to do this by injunction.”

²⁹ In plain language: “it is a recognized rule that the Court will not decree specific performance of a contract, the execution of which would require watching over and supervision by the Court” (G R Northcote *Fry's Specific Performance of Contracts* 6 ed (1921) 46-47 § 99). See also E Peel *Treitel's Law of Contract* 13 ed (2011) 1113. Note that this principle only applies to non-monetary obligations and not continuous obligations to pay money, and it follows that an agreement to pay an annuity can be specifically enforced.

³⁰ See R J Sharpe “Specific relief for contract breach” in B J Reiter & J Swan (eds) *Studies in Contract Law* (1980) 123 126; M Hogg *Promises and Contract Law: Comparative Perspectives* (2011) 350.

a particular result, and generally the former is regarded problematic.³¹ This distinction and the relevance thereof will be maintained throughout this chapter.

In 1920, Pound explored the origins of the supervision objection in an article about the progress of law and equity.³² He traced the objection to the reluctance of the English Chancellors, during the early development of the Chancery courts' equitable jurisdiction, to make orders if they were not certain of their enforceability.³³ They generally avoided orders requiring performance beyond a single act, because imprisonment of the defendant for contempt, if he proves recalcitrant, will not get the contract performed *in specie*.³⁴ And this, in turn, could threaten their authority as a court separate from the courts of law. Hence, there developed a "prejudice for historical reasons against affirmative decrees in cases calling for more than a simple act".³⁵

Essentially, this objection originated from a fear of not being able to enforce orders to perform, which would jeopardise the Chancery Court's reputation and dignity as a capable functioning entity, as they were still in the process of establishing their position

³¹ See generally A S Burrows "Specific performance at the crossroads" 1984 *Legal Studies* 102 107; H G Beale et al *Cases, Materials and Text on Contract Law* 2 ed (2010) 877 ff; H G Beale et al (eds) *Chitty on Contracts I: General Principles* 31 ed (2012) 1924 ff. This distinction between orders to carry on an activity and orders to produce a particular result incidentally is also to be found in civil law (see B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 153).

³² R Pound "Progress of the law, 1918-1919 equity" (1920) 33 *Harv LR* 420 434-437. See also H L Oleck "Specific performance of builders' contracts" (1952) 21 *Fordham LR* 156; Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 126 144; J M Perillo (ed) *Corbin on Contracts 12: Restitution, Specific Performance and Election of Remedies* Interim ed (2002) § 1171.

³³ Pound 1920 *Harv LR* 434.

³⁴ Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 126.

³⁵ This quotation is taken from Sharpe, who in turn, relies on Pound 1920 *Harv LR* 435.

and their authority.³⁶ However, the question arises whether a fear of risking one's reputation provides sufficient justification for avoiding orders requiring performance beyond a single act or where it is said that the court cannot ensure performance, especially when one considers that courts of equity would have been willing to do so had they been more established. Sharpe therefore contends that "[i]n the modern age, it is not at all obvious that the dignity of the court suffers in the unlikely event that resort must be had to imprisonment for contemptuous refusal to comply with a positive decree. It might well be said that a greater threat to the integrity of the judicial system is posed by the grant of a damages award in that sanctions for noncompliance by the defendant are much less severe". The argument is that the court's dignity and integrity is more likely to be negatively affected by the fact that they make damages orders which are less likely to be complied with, since there are less severe sanctions which will prompt the defendant to perform (indirectly). Where the court refuses to order specific performance the innocent party may not even be able to recover the benefit of his bargain by means of damages. Since there is less of a threat in orders to pay a sum of money (orders *ad pecuniam solvendam*),³⁷ it is even less likely that the plaintiff will obtain relief.

A classic modern authority on the supervision objection is *Ryan v Mutual Tontine Westminster Chambers Association*.³⁸ Here the Court of Appeal held that a provision in a lease agreement of a residential flat providing that the lessors appoint a porter who was to be "constantly in attendance" could not be specifically enforced, because it

³⁶ See also Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 126 144, and Perillo (ed) *Corbin on Contracts* § 1171.

³⁷ The order must be one *ad factum praestandum* (order to do or refrain from doing something which includes specific performance) before the court will enforce it by committal for contempt. When the order is for the payment of money (eg an order to pay damages) it cannot be enforced by committal for contempt. See reference to Dawson n 69 below.

³⁸ [1893] 1 Ch 116. See Sharpe "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 144 n 72.

would require “constant superintendence by the court which the court has always in such cases declined to give”.³⁹ Specific performance has also been refused in numerous other cases for the same reason. For example, specific performance has been refused of obligations of a railway company to operate signals and provide engine power,⁴⁰ to cultivate a farm in a particular manner,⁴¹ to deliver goods by instalments,⁴² and to keep an airfield in operation.⁴³

The relatively more recent House of Lords decision in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*,⁴⁴ reinforced the principle that courts would not generally make orders requiring a party to perform an obligation that is continuous in nature, such as “keep-open” clauses. This decision is of particular significance as it provides the underlying reasoning for this principle.⁴⁵ Not only did Lord Hoffmann explain why in general the common-law system does not award specific performance as the primary remedy, he systematically and scrupulously explained the rationale behind the English courts’ approach to orders of specific performance requiring constant supervision by the court. This exposition contains a number of fundamental insights that may be very useful in evaluating the South African approach to similar fact patterns.

Before embarking on an in-depth analysis of the ratio of Lord Hoffmann’s judgment, it would be useful to provide a brief discussion of the facts of this case. The defendant (lessee) entered into a long-term lease of 35 years with the plaintiff (lessor) for the largest shop in a shopping centre. The defendant owned a chain of supermarkets, one of which was located and operated on the plaintiff’s premises. However, due to fierce

³⁹ [1893] 1 Ch 116 123.

⁴⁰ *Blackett v Bates* (1865) 1 Ch 117.

⁴¹ *Phipps v Jackson* (1887) 56 LJ Ch 350.

⁴² *Dominion Coal v Dominion Iron & Steel* [1909] AC 293.

⁴³ *Dowty Boulton Paul v Wolverhampton Corporation* [1971] 2 All ER 277.

⁴⁴ [1997] 2 WLR 898.

⁴⁵ See A Phang “Specific performance – exploring the roots of ‘settled practice’” 1998 *Modern Law Review* 421 422.

competition, the defendant decided to close down its less profitable supermarkets, which included one located in the plaintiff's shopping centre, and gave the plaintiff only about a month's notice. The lease itself had about another 19 years to run and the defendant's actions were therefore in breach of a provision in the agreement which stipulated that he had "[t]o keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner in keeping with a good class parade of shops".⁴⁶ The plaintiff attempted to persuade the defendant to continue trading until a suitable assignee or sub-lessee had been found, and also offered to negotiate a temporary rent concession, but the defendant proceeded to close the supermarket as planned. The plaintiff thereafter claimed specific performance of the provision in conjunction with damages.

In the court of first instance, Maddocks J refused to order specific performance, based on authority that there was a "settled practice"⁴⁷ that courts would not make orders which would require a defendant to run a business.⁴⁸ The judge did not merely follow authority, but also provided reasons why he thought that specific performance would be inappropriate. Two such reasons were justifications for the general practice. First, an order to carry on a business, as opposed to an order to perform a "single and well defined act",⁴⁹ was difficult to enforce by the sanction of committal, i.e. imprisonment for contempt.⁵⁰ And secondly, where a business was being run at a loss, specific relief would be "too far reaching and beyond the scope of control which the court should seek

⁴⁶ [1997] 2 WLR 898 901.

⁴⁷ See eg *Braddon Towers Ltd v International Stores Ltd* [1987] 1 EGLR 209 213, where Slade J said: "Whether or not this may be properly described as a rule of law, I do not doubt that for many years practitioners have advised their clients that it is the settled and invariable practice of this court never to grant mandatory injunctions requiring persons to carry on business."

⁴⁸ [1997] 2 WLR 898 902.

⁴⁹ 902.

⁵⁰ See also Burrows 1984 *Legal Studies* 107.

to impose".⁵¹ The other reasons related to the particular case: resumption of the business would be expensive (refitting the shop was estimated to cost over £1 million) and although the defendant had knowingly acted in breach of the "keep open" provision, it had done so "in the light of the settled practice of the court to award damages".⁵² Finally, Maddocks J found that, while the assessment of damages might be difficult, it was not the kind of exercise which the courts were unfamiliar with.⁵³

After the matter was taken on appeal, the Court of Appeal⁵⁴ granted specific performance compelling the defendant to carry on their business in terms of the long-term lease. However, the House of Lords reversed this decision, and refused to order specific performance of the contract.⁵⁵

The attention now turns to the primary underlying reasons provided in Lord Hoffmann's decision to refuse to order specific performance. He delivered the sole substantive judgment with which the other Law Lords agreed. This judgment is regarded as the leading case in all scholarly treatments of the supervision objection, as it illustrates the balancing of factors for and against ordering specific performance in cases where the supervision issue arises.⁵⁶ No subsequent case law deals with these competing factors so extensively.

(i) The supervision argument

According to Lord Hoffmann, the long-established practice that the court will not grant orders compelling a party to trade, "has never, so far as [he knows], been examined by this House and it is open to [the plaintiff] to say that it rests upon inadequate grounds or

⁵¹ [1997] 2 WLR 898 902.

⁵² 902.

⁵³ 902.

⁵⁴ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286.

⁵⁵ [1997] 2 WLR 898 902.

⁵⁶ See eg Markesinis et al *German Law of Contract* 394; Beale et al *Cases, Materials and Text on Contract Law* 878; Beale et al (eds) *Chitty on Contracts* 1924.

that it has been too inflexibly applied".⁵⁷ Furthermore, he pointed out that while specific performance is traditionally regarded as an exceptional remedy under English law, the opposite was true with respect to legal systems based on civil law, such as France, Germany and Scotland, where the plaintiff is *prima facie* entitled to specific performance. In this regard, he made the following insightful observation, that

"[i]n practice, however, there is less difference between common law and civilian systems than these general statements might lead one to suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but a priori I would expect that judges [in these systems] take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case".⁵⁸

Turning to the main reasons advanced in support of the settled practice, Lord Hoffmann began by pointing out that this principle was "not entirely dependent upon damages being an adequate remedy".⁵⁹ He concluded that "the reasons which underlie the established practice may justify a refusal of specific performance even when damages are not an adequate remedy". Instead, he focused on another reason more frequently

⁵⁷ [1997] 2 WLR 898 902.

⁵⁸ [1997] 2 WLR 898 903.

⁵⁹ Citing (at 903) Sir John Pennycuick VC in *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 1 WLR 204, who refused to order a corporation to maintain an airfield as a going concern because (at 211) "[i]t is very well established that the court will not order specific performance of an obligation to carry on a business". He added (at 212): "It is unnecessary in the circumstances to discuss whether damages would be an adequate remedy to the company."

used in support of this practice, namely that it would require constant supervision by the court.⁶⁰

Lord Hoffmann first clarified what is meant by “continued superintendence”, the phrase used in the *Ryan* case, referred to above.⁶¹ He emphasised that it did not imply literal supervision by the court (or some other officer of the court) itself. He then cites⁶² Megarry J in *CH Giles & Co v Morris*,⁶³ who said that “difficulties of constant superintendence” were a “narrow consideration” because “there is normally no question of the court having to send its officers to supervise the performance of the order ... Performance ... is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court ...” But according to Lord Hoffmann this is rather besides the point, and does not serve to discredit the supervision objection, as the underlying difficulty which courts want to avoid is giving an indefinite series of rulings in order to ensure the execution of its order. According to him, constant supervision of specific performance is regarded as a problem because it envisages numerous further applications to court over an extended period with the prospect of detailed investigations of each successive breach. In his words:

“[S]upervision would in practice take the form of rulings by the court, on applications made by the parties, as to whether there had been a breach of the order. It is the possibility of the

⁶⁰ Citing (at 903) Dixon J in *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 297-298: “Specific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfillment of the contract.”

⁶¹ See text to n 38 above. According to Burrows, “[t]his is not an easily understood notion, but what it appears to mean is that, irrespective of the uncertainty bar, specific performance will be denied where too much judicial time and effort would be spent in seeking compliance with the order” (*Remedies for Torts and Breach of Contract* 3 ed (2004) 475-476).

⁶² [1997] 2 WLR 898 903.

⁶³ [1972] 1 WLR 307 318.

court having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable.”⁶⁴

Such repeated rulings are undesirable because punishment for contempt is “the only means available to the court to enforce its order”,⁶⁵ a mechanism which he describes as “so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court’s order”.⁶⁶ And apart from damaging the defendant’s commercial reputation, it would force the defendant to run its business in a certain manner when it had decided that it was not in its economic interest to continue running the business. He regarded this as an inappropriate way to compel the running of a business.⁶⁷

However, this argument has been met with opposition, mainly because it ignores the reality that every circumstance does not necessarily demand the employment of this serious mechanism. It is often ignored that other means exist to ensure compliance with a court order.⁶⁸ Dawson, in a much earlier work, for example, refers to substituted performance as a viable alternative:⁶⁹

“The interesting question is whether we [common lawyers], like the French, have become prisoners of our own system or, more accurately, whether we have become confused by our lack of system. Would our courts be more willing to grant specific performance if a sharp line were drawn and firmly maintained between civil and criminal contempt – between execution

⁶⁴ [1997] 2 WLR 898 903.

⁶⁵ 903. Lord Hoffmann’s concern for the efficacy of punishment for contempt for enforcing anything beyond a single act returns to the explanation for the Chancery courts’ initial reluctance to order specific performance of such obligations. See discussion above about the origins of the supervision objection.

⁶⁶ 904.

⁶⁷ 904.

⁶⁸ See Beale et al (eds) *Chitty on Contracts* 1923-1924.

⁶⁹ J P Dawson “Specific performance in France and Germany” (1958) 57 *Mich LR* 495 537-538.

process for the benefit of the litigant and punishment for attack on judicial authority? Why must every equity order, except some decrees establishing simple money debts, be thought of as carrying implicitly the threat of arrest, money fine, sequestration – the whole panoply of coercive devices that our equity courts draw on at their discretion? Our courts could surely have made a much wider use of substituted performance, by plaintiff, by third parties or by receivers and other persons that they temporarily invest with a limited public authority. This could be done without any commitment to go further with money fines and especially with arrest. If limited means were adapted to limited ends, with greater selectivity, more might be attempted and the barriers to specific performance that we have inherited might be reduced.”

It has also been held that it is perhaps not even necessary to employ coercive measures, because in practice orders are often obeyed without recalcitrance.⁷⁰ Burrows, for example, submits that defendants rarely disobey court orders. He argues that the mere possibility of recalcitrance is not a sufficient reason to refuse the remedy, and on the rare occasion that a defendant does not obey a court order, courts are able to ensure compliance without having to invoke the “full judicial machinery” by, for example, appointing a single officer of the court to oversee performance.⁷¹ He also stresses that “even if judicial time and effort are involved, it is still strongly arguable that this is outweighed by the fact that justice otherwise requires the claimant to be granted specific performance”.⁷²

⁷⁰ See *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 318 per Megarry J. See also A Schwartz “The case for specific performance” (1979) 89 *Yale LJ* 271 304; Burrows 1984 *Legal Studies* 110; A M Tettenborn “Absolving the undeserving: shopping centres, specific performance and the law of contract” 1998 Jan/Feb *Conveyancer and Property Lawyer* 23 30; Phang 1998 *Modern Law Review* 426; E Peel *Treitel's Law of Contract* 13 ed (2011) 1113.

⁷¹ Burrows 1984 *Legal Studies* 107-110; *Remedies for Torts and Breach of Contract* 481.

⁷² *Remedies for Torts and Breach of Contract* 481.

Moreover, it is clear that even where an order is not complied with, viable alternatives (to punishment for contempt) exist to ensure performance in the end.⁷³ Treitel, for example, argues that it may be possible for the court to appoint an expert as its officer in order to supervise performance of a recalcitrant defendant or, alternatively, the court could empower the plaintiff to appoint a person to act as an agent of the defendant who then supervises the latter in ensuring enforcement of the order.⁷⁴ Lord Wilberforce also expressed his doubts as to the validity of the supposed difficulties with supervision in *Shiloh Spinners Ltd v Harding*,⁷⁵ maintaining that it is “an irrelevance: for what the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by enquiry, to do precisely this”. Lord Pearce in *Beswick v Beswick*⁷⁶ held that these technical difficulties could be overcome and therefore “the court should not be deterred by such a consideration from making an order which justice requires”. This led Sharpe to conclude that “both on principle and on authority … the tendency to refuse specific performance in cases involving supervision should become much less pronounced”.⁷⁷

According to Lord Hoffmann, such contempt proceedings are also undesirable because enforcement, particularly in the context of repeated applications over a period of time, is “likely to be expensive in terms of cost to the parties and the resources of the judicial

⁷³ See eg Schwartz 1979 *Yale LJ* 293-294; Sharpe “Specific relief for contract breach” in Reiter & Swan (eds) *Studies in Contract Law* 123-150; Burrows *Remedies for Torts and Breach of Contract* 481; G Jones & W Goodhart *Specific Performance* 2 ed (1996) 46. See also *Parker v Camden London Borough Council* [1986] Ch 162 175 178, referring to provisions contained in an ordinance, which enable the court, when an order is not being complied with, to appoint some other person to perform the order on behalf of the person who has failed to do so.

⁷⁴ See Peel *Treitel's Law of Contract* 1113-1114.

⁷⁵ [1973] AC 691 724.

⁷⁶ [1968] AC 58 91.

⁷⁷ “Specific relief for contract breach” in B J Reiter & J Swan (eds) *Studies in Contract Law* 123 147. See also J Beatson et al *Anson's Law of Contract* 29 ed (2010) 579.

system".⁷⁸ It is at this point that Lord Hoffmann draws the very important distinction between orders which require a defendant to carry on an activity, such as running a business and orders which require him to achieve or produce a particular result.⁷⁹ In his view “[t]he possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. He then adds that “[e]ven if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order”.⁸⁰ This distinction between orders to carry on activities and to achieve results explains why the courts have been prepared to order specific performance of building contracts and repairing covenants.⁸¹ And it is also on this basis that Lord Hoffmann managed to avoid the authority on “building cases” supporting the possibility of specific performance. The distinction, he said, was that in those decisions all the contractor was being ordered to do was to achieve a particular result.⁸² However, one could argue that supervision will still be required of execution of building works; even though these contracts are aimed at a finished product that can be judged according to the specifications of the contracts and do not involve the performance of a continuous duty, these types of contracts would take some time to be executed and involve several different detailed and complex obligations – the execution of which the court would similarly find difficult to supervise. Burrows therefore rightly questions “why the constant supervision objection should be thought valid in respect of orders to carry on activities but not orders to achieve results”.⁸³

⁷⁸ [1997] 2 WLR 898 904.

⁷⁹ [1997] 2 WLR 898 904. See also Burrows 1984 *Legal Studies* 107.

⁸⁰ [1997] 2 WLR 898 904.

⁸¹ Citing *Wolverhampton Corporation v Emmons* [1901] 1 QB 515 (building contract) and *Jeune v Queens Cross Properties Ltd* [1974] Ch 97 (repairing contract).

⁸² [1997] 2 WLR 898 904-905.

⁸³ Burrows *Remedies for Torts and Breach of Contract* 480.

To summarise, according to Lord Hoffmann, constant supervision is a concept that involves two more fundamental principles based on certainty. First, a person subject to a mandatory court order carrying the potential of punishment for contempt has a right to know with a considerable degree of precision what was expected of him.⁸⁴ A court will not be able to guarantee this with orders which require a defendant to carry on an activity over an extended period. Secondly, there was the possibility of the court being overwhelmed by numerous applications to commit for alleged contraventions of its specific performance order. This would involve lengthy argument as to whether the defendant was complying with the order, which in turn would result in a waste of judicial time and resources.

Finally, on the facts, Lord Hoffmann held that the obligation in the lease agreement requiring the store to remain open was not sufficiently precise to be capable of specific performance because it did not specify the level of trade, the area of the premises within which trade must be conducted, or even the kind of trade. He emphasised that “[t]he fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages ... does not necessarily mean that they will be sufficiently precise to be capable of being specifically performed”.⁸⁵ The terms in question were considered too vague to allow a clear order to be made.

⁸⁴ So in *Wolverhampton Corporation v Emmons* [1901] 1 QB 515, Romer LJ said that the first condition for specific enforcement of a building contract was that “the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance”. Similarly in *Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn stated (666) the following general principle for the grant of mandatory injunctions to carry out building works: “[T]he court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.”

⁸⁵ [1997] 2 WLR 898 905.

However, the argument based on the requirement of certain and precise formulation of the contractual obligation has been criticised. Burrows finds Lord Hoffmann's reasoning unconvincing for a number of reasons. In particular, he questions why the order could not be drawn up with sufficient precision.⁸⁶ He argues that courts are able to overcome the uncertainty problem by implying terms in cases of doubt. He refers to *Sudbrook Trading Estate Ltd v Eggleton*,⁸⁷ where the House of Lords held that if the agreed method for valuation fails in a contract for the sale of land, a court will determine the fair and reasonable price, thereby rendering the contract specifically enforceable.⁸⁸ Tettenborn, on the other hand, simply contends that the obligation in question is not so uncertain as to render it unenforceable. He argues that while there are some contractual obligations that are so imprecise that they could not be specifically enforced without leaving the defendant in the dark about just what was expected of him, an obligation to keep a shop open should not fall into this category. He argues that there is not a big difference between a builder being ordered to construct a building and a retailer being ordered to "keep the demised premises open for retail trade during the usual hours of business in the locality". According to Tettenborn, the defendant knew what had to be done: a shop is or is not open, in the same way as a house is or is not built or repairs are or are not done. He admits to the fact that the retailer's obligations in *Argyll* included further items which might not have been suitable for specific performance (in particular the clause which required that the windows be dressed "in a suitable manner in keeping with a good class parade of shops"). However, he argues that the same goes for a contract to build a house, which is specifically enforceable despite the fact that some terms of it (for example as to the quality of workmanship) are not, and the plaintiff could then acquire a limited specific performance order if he is satisfied to leave the

⁸⁶ Burrows *Remedies for Torts and Breach of Contract* 480.

⁸⁷ [1983] 1 AC 444.

⁸⁸ Burrows *Remedies for Torts and Breach of Contract* 494-495.

enforcement of other, less certain obligations, to future damages litigation. Ultimately, the argument turns on why the same principles cannot be applied in the retail context.⁸⁹

Both commentators make valid points: first, it may be argued that uncertainty should not have restricted awarding specific performance, because the defendant had complied with the obligations before he cancelled the agreement and knew what was expected of him in terms of the lease agreement.⁹⁰ Secondly, even if the court struggled to precisely formulate their order from the terms of the obligation, they could still apply common sense and imply terms to overcome the uncertainty objection. These views will be expanded on later in the discussion.⁹¹

(ii) The unjust enrichment argument

Lord Hoffmann also discussed a further objection to an order requiring the defendant to carry on a business, which was initially emphasised by Millett LJ in the Court of Appeal.⁹² This is that it may cause injustice by allowing the plaintiff to enrich himself at the defendant's expense. The loss which the defendant may suffer through having to comply with the order (for example, by running a business at a loss for an indefinite period) may be far greater than that which the plaintiff would suffer from the contract being breached.

⁸⁹ See Tettenborn 1998 Jan/Feb *Conveyancer and Property Lawyer* 29-30.

⁹⁰ The Court of Appeal treated the way the defendant previously conducted business as measuring the extent of his obligation to do so in future. However, in terms of Lord Hoffmann's approach, the obligation depends upon the language of the contract and not upon what the defendant has previously chosen to do: "It is in my view wrong for the courts to speculate about whether Argyll might voluntarily carry on business in a way which would relieve the court from having to construe its order. The question of certainty must be decided on the assumption that the court might have to enforce the order according to its terms." ([1997] 2 WLR 898 908).

⁹¹ See para 5 below.

⁹² [1996] Ch 286 305.

It is not clear how and why this disproportion between the parties' potential losses led Lord Hoffmann to an unjust enrichment inquiry since he even concedes that the defendant by his own breach of contract puts himself in such an unfortunate position. Yet according to him, "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance".⁹³ Lord Hoffmann refers⁹⁴ to an explanation provided by Sharpe: "In such circumstances, a specific decree in favour of the plaintiff will put him in a bargaining position vis-à-vis the defendant whereby the measure of what he will receive will be the value to the defendant of being released from performance. If the plaintiff bargains effectively, the amount he will set will exceed the value to him of performance and will approach the cost to the defendant to complete."⁹⁵ It is still uncertain how this relates to unjust enrichment.

It is accepted that there are situations where a court order may put the person who obtains it in an unacceptably strong bargaining position. As Lord Westbury put it in *Isenberg v East India House Estate Co Ltd*,⁹⁶ when asked to order the defendant to demolish part of a new building because it interfered, to a minor extent, with the plaintiff's light, he saw no reason to do so if the result would be to "deliver over the defendants to the plaintiff bound hand and foot in order to be made subject to any extortionate demand that he may by possibility make".⁹⁷

Not surprisingly, the relevance of this argument has been doubted.⁹⁸ One could argue that Lord Hoffmann should never have invoked this argument, based on the facts of the

⁹³ [1997] 2 WLR 898 906.

⁹⁴ 906.

⁹⁵ Sharpe "Specific remedies for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 129.

⁹⁶ (1863) 3 De GJ & S 263 273.

⁹⁷ Statement also referred to by Lord Hoffmann [1997] 2 WLR 898 906, and initially on appeal by Millet LJ [1996] Ch 286 304.

⁹⁸ See in particular D Friedmann "Economic aspects of damages and specific relief" in D Saidov & R Cunnington (eds) *Contract Damages: Domestic and International*

case. The facts did not present this difficulty at all: how can there be unjust enrichment if the plaintiff receives the performance to which he was rightly entitled to under a valid contract? Because English law does not recognise the *sine causa* requirement (at least not according to the dominant view),⁹⁹ his analysis is problematic from a civil-law perspective (and specifically South African law), whereby the plaintiff would only be receiving a benefit to which he is entitled to in terms of a valid contract, and nothing more.¹⁰⁰ Apparently, Lord Hoffmann's argument in *Argyll Stores* is more policy-based than technical in nature, and the criticism based on the *sine causa* requirement may therefore be less tenable from a common-law perspective.

(iii) The procedural argument

Finally, Lord Hoffmann raised the argument that, whatever the situation at the time, if an order for specific performance were to be granted, subsequent events might change matters by making its continued enforcement either oppressive or otherwise unacceptable. Counsel for the plaintiff raised the counter-argument that in such a case it would always be open to the defendant to apply for the order to be varied or discharged.¹⁰¹

Lord Hoffmann, however, did not accept this submission. He was of the opinion that any order made by the court would be a final order and there was no authority to the effect that once such an order had been made the defendant could return to court at a later stage and reopen the matter. Furthermore, even if there was such authority he regarded

Perspectives (2008) 65 81. See also Tettenborn 1998 *Conveyancer and Property Lawyer* 34-36.

⁹⁹ On *sine causa* or absence of basis in English law, see A S Burrows *The Law of Restitution* 3 ed (2011) 95 ff and C Mitchell et al (eds) *Goff & Jones The Law of Unjust Enrichment* 8 ed (2011) 8-9, which may be contrasted with P Birks *Unjust Enrichment* 2 ed (2005) 101 ff (where a more civil-law based approach is advocated).

¹⁰⁰ See J du Plessis *The South African Law of Unjustified Enrichment* (2012) 54.

¹⁰¹ [1997] 2 WLR 898 908.

it as difficult to formulate any criterion of what would amount to a sufficiently unexpected change of circumstances to warrant the discharge of the order.¹⁰² Tettenborn specifically questioned this aspect of the judgment, because if it is indeed true that an order of specific performance cannot be subsequently varied to take account of supervening events, it effectively means that a court has to refuse to make an order which in all probability will be enforceable, merely because (hypothetically) circumstances might arise which would make its continued enforcement oppressive.¹⁰³ According to Tettenborn, the difficulty with Lord Hoffmann's opinion is that, taken literally, it would rule out virtually any order to carry out particular works, including those where specific performance is available. Even in the case of building contracts, for example, the objection raised by Lord Hoffman will still be applicable: these types of contracts would naturally take some time to be executed, during which events could occur which makes further enforcement undesirable.¹⁰⁴ Therefore, Berryman and Carroll rightly conclude that

"it seems quite appropriate for a court to grant specific relief, where the problems with supervision remain hypothetical and constitute speculation, until such time as any difficulty is incurred by the parties. At that stage, the court could reassess its decision to persevere with the contract and bring the relationship to an end by requiring the plaintiff to crystallize its loss in damages. Where problems with supervision arise immediately (the inability to describe

¹⁰² [1997] 2 WLR 898 908-909.

¹⁰³ See also J Berryman & R Carroll "Coercive relief – reflections on supervision and enforcement constraints" unpublished draft paper prepared for Remedies Discussion Forum Prato, Italy June 2013 (copy on file with author) 12: "It also appears to be inconsistent with the House of Lords' own judgment in *Johnson v. Agnew* [1980] A.C. 367. There, the non-performance of a specific performance decree remained a continuing breach of the contract, conferring upon the plaintiff the right to bring an action in common law for breach and to seek damages."

¹⁰⁴ See Tettenborn 1998 *Conveyancer and Property Lawyer* 36. See also I C F Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 8 ed (2010) 113-119.

what has to be done would be one instance), the court should refuse the specific performance decree forthwith".¹⁰⁵

Ultimately, Lord Hoffmann concluded that these various reasons, none of which would necessarily be sufficient on its own, indicated that the refusal of specific performance was justified. He added that granting or refusing specific performance remains a matter for the judge's discretion and that "[t]here are no binding rules, but this does not mean that there cannot be settled principles, founded upon practical considerations of the kind which I have discussed, which do not have to be re-examined in every case, but which the courts will apply in all but exceptional circumstances".¹⁰⁶

Commentators¹⁰⁷ who favour Millet LJ's dissenting judgment (on appeal) criticise Lord Hoffmann's uncompromising confirmation of the settled practice, and maintain that every case requires a court to start from a clean slate, free of pre-conceived preferences. They prefer Millet LJ's more flexible proposition that "equitable relief will be granted where it is appropriate and not otherwise".¹⁰⁸ This accords with Megarry J's view in *Tito v Waddell (No 2)*¹⁰⁹ that equitable relief should be granted if it could achieve "more perfect and complete justice". However, it is similarly clear from Lord Hoffmann's judgment that the true test is one of "appropriateness of relief".¹¹⁰ Even though Lord Hoffmann confirmed the established practice, it is submitted that he did not do so

¹⁰⁵ Berryman & Carroll "Coercive relief – reflections on supervision and enforcement constraints" 12 (referring to S Rowan *Remedies for Breach of Contract* (2012) 57-58).

¹⁰⁶ Referring to the passage of Slade J in *Braddon Towers Ltd v International Stores Ltd* [1987] 1 EGLR 209 213: "Whether or not this may be properly described as a rule of law, I do not doubt that for many years practitioners have advised their clients that it is the settled and invariable practice of this court never to grant mandatory injunctions requiring persons to carry on business."

¹⁰⁷ See eg H Y Yeo "Specific performance: covenant to keep business running" 1998 May *Journal of Business Law* 254.

¹⁰⁸ [1996] Ch 286 304.

¹⁰⁹ [1977] Ch 106 322.

¹¹⁰ [1997] 2 WLR 898 903. See also para 5 2 (iv) below.

uncritically. His focus was always on the merits and the equities of the case before him. He awarded a remedy based on what he thought was the most appropriate in the circumstances. Both his finding and reasoning can indeed be criticised, but it cannot be said that he committed himself to a particular decision beforehand based on established practice.

(iv) Evaluation

As indicated above, the decision of the House of Lords has attracted substantial criticism,¹¹¹ especially regarding the manner in which the discretion to grant specific performance is exercised in English law and Lord Hoffman's reasoning for refusing the order for specific performance. It is questioned whether the supposed practical objections to specific performance advanced by him was in fact founded.

Admittedly, a number of the arguments that have been raised against Lord Hoffmann's reasoning are valid. As mentioned earlier, Dawson (who wrote long before Lord Hoffmann's judgment) convincingly argues that there are other possible means to ensure compliance with a court order, and every order should not be assumed to carry the threat of the serious consequences for being held in contempt.¹¹² Perhaps even more convincing is the point made by Burrows, that the serious and undesirable consequences of contempt proceedings (which forms a substantial part of Hoffmann's rationale) rarely realize in practice, since court orders are often obeyed without recalcitrance. And even so, this prospect alone should not influence a court to refuse

¹¹¹ Notably, Tettenborn 1998 *Conveyancer and Property Lawyer* 23; H Y Yeo 1998 *Journal of Business Law* 254-259; Phang 1998 *Modern Law Review* 421-432; F Cuncannon "The case for the specific performance as the primary remedy for breach of contract in New Zealand" 2004 *VUWLR* 659 671-675; Burrows *Remedies for Torts and Breach of Contract* 480 ff; Berryman & Carroll "Coercive relief – reflections on supervision and enforcement constraints".

¹¹² Dawson 1958 *Mich LR* 537-538.

the remedy especially where justice requires the plaintiff to be granted specific performance.¹¹³

However, it is submitted that the refusal of the remedy of specific performance in this particular case was ultimately justified, because Lord Hoffmann clearly states that the "cumulative effect"¹¹⁴ of the different factors indicated that it should not be ordered. As indicated, the difficulty of supervision was not the sole ground for his decision. He does not follow the settled practice of refusing orders for specific performance of an obligation to keep a business running slavishly. Instead, he evaluates the different underlying factors by which English courts are discouraged to grant specific performance of these types of obligations. He also provides a defensible rationale for the practice, where he could have simply referred to the practice without having any regard to the underlying reasons for maintaining it. He carefully analysed the interests at stake and determined that the plaintiff's interests, weighed against the many disadvantages of specific performance, would be adequately protected by a damages award. The argument is that when the problem of supervision is the only factor which stands in the way of granting the remedy, it should not discourage a court to grant the remedy, but in cases where a variety of other factors against making such an order are present, and where these outweigh the interest in performance, the refusal of the remedy is justified (as was the case in *Argyll*).¹¹⁵ This suggests that, on different facts, interests worthy of protection may be present which will not be protected unless the court grants an order of specific performance. Even though Burrows severely criticises Lord Hoffmann's reasoning, he states that this does not mean that the ultimate decision was incorrect.¹¹⁶ The decision can, according to Burrows, be explained on different, more convincing, grounds:

¹¹³ Burrows 1984 *Legal Studies* 107-110; *Remedies for Torts and Breach of Contract* 481, 485.

¹¹⁴ [1997] 2 WLR 898 907.

¹¹⁵ See Beale et al (eds) *Chitty on Contracts* 1924; Peel *Treitel's Law of Contract* 1114-1115.

¹¹⁶ Burrows *Remedies for Torts and Breach of Contract* 480.

"To force a defendant to carry on with business that is losing money may well fall foul of the severe hardship bar or a separate specific bar. But this should have been addressed separately than being confused with the constant supervision objection."¹¹⁷

It is suggested that undue hardship to the defendant may have been a more convincing reason for the decision. The loss which the defendant would have suffered through having to comply with the order by running a business at a loss for an indefinite period was greater than the plaintiff would suffer from the contract being breached. Economic hardship to the defendant evidently provides a better justification for the refusal. But even though the premise is rejected, the conclusion is supported here.

It should also not be overlooked that *Argyll* was decided in England – a jurisdiction less willing to engage coercive remedies. Specific performance is only exceptionally available.¹¹⁸ Therefore the statement by Berryman and Carroll that even within Great Britain, *Argyll Stores* is not followed in Scotland,¹¹⁹ is particularly problematic because specific performance, or specific implement as it is known in Scotland, is the primary right of the innocent party in cases of breach of contract in Scots law (a mixed legal system).¹²⁰ The authors refer to *Highland & Universal Properties Ltd v Safeway*

¹¹⁷ 480-481. In his concluding paragraph (at 504), Burrows also says that "while the decision in that case seems correct, their Lordships' support for the constant supervision objection was misplaced".

¹¹⁸ Neil Andrews also concludes that the House of Lords' refusal in *Argyll* "to overstretch specific performance in this context seems quite justified" because apart from agreements to transfer land, specific performance is not the primary remedy in English law (*Contract Law* (2011) 536-537).

¹¹⁹ Berryman & Carroll "Coercive relief – reflections on supervision and enforcement constraints" 13-14.

¹²⁰ E Clive & D Hutchison "Breach of contract" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 176 193; H L MacQueen & J Thomson *Contract Law in Scotland* 3 ed (2012) 233 § 6.6. MacQueen and Macgregor correctly observe that "If the two jurisdictions analyse the facts from standpoints which are diametrically opposed, then

Properties Ltd,¹²¹ a case decided after *Argyll Stores*, where the Court of Session ordered a defendant who wished to close its supermarket (as in *Argyll Stores*) to maintain operating its supermarket. But Scots law has always followed this practice as evidenced by the decision in *Retail Parks Investments Ltd v The Royal Bank of Scotland plc (No 2)*¹²² where an order was similarly granted to oblige a lessee in a shopping centre to continue conducting its business of retail banking from its shop in the centre.¹²³

different conclusions will be reached. This is the inevitable result of the different status of an order for performance in the Scottish and English jurisdictions.” (“Specific implement, interdict and contractual performance” 1999 *Edin LR* 239 243). See also M Chen-Wishart *Contract Law* 4 ed (2012) 553.

¹²¹ 2000 SLT 414.

¹²² 1996 SC 227.

¹²³ For discussion and further cases, see MacQueen & Thomson *Contract Law in Scotland* 233-237; H L MacQueen & L J Macgregor “Specific implement, interdict and contractual performance” 1999 *Edin LR* 239. See in particular *Co-operative Insurance Society Ltd v Halfords Ltd* 1998 SC 212, where specific performance of a continuous trading obligation was not granted because the terms of the lease were insufficiently clear to form the basis of such an order. The court also held that Lord Hoffmann’s decision in *Argyll Stores* was not binding but open to “respectful” consideration in Scotland (229). The court did not agree with Lord Hoffmann’s finding that the matters which courts may take into account in the exercise of their discretion in England and Scotland are the same, because “it does not appear to be consistent with logical analysis to ... postulate a similarity in effect where the rules, the major premise in any syllogistic analysis, differ” (229). See also *Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) (discussed fully in para 6 1 2 below), in which a South African court obliged an anchor shop to continue trading despite causing it to trade at a loss, since this fact did not deprive the lessor of its right to elect to hold the lessee to its obligations.

A study of subsequent academic literature clearly indicates that the difficulty of supervision, as a sole ground for refusing specific performance, has been discredited.¹²⁴ The supervision objection alone is not enough to justify a refusal of specific performance anymore. It cannot be said that as soon as any element of continuous services can be discerned in a contract the court will, without more, refuse specific performance. As we have seen earlier, Treitel, for example, asserts that “difficulty of supervision should not be exaggerated”, because ultimately the decision to grant or refuse the remedy depends on a balancing of all the relevant factors for and against ordering specific performance.¹²⁵ This is also well-illustrated by the *Argyll* decision, where Lord Hoffmann specifically considered other factors which weighed against an order for specific performance, together with the supervision objection. Treitel observes that the reliance by Lord Hoffmann on these other factors, suggests that a court “will not be deterred from granting such relief merely on the ground that it will require constant supervision. The outcome of each case will depend on the ‘cumulative effect’ of this factor together with any others which favour (or as in the *Co-operative Insurance* case) militate against specific relief”.¹²⁶ Clearly the variety of interests at stake precludes a strict rule that specific performance should never be available of contracts to be performed over time and hence requires supervision.

Burrows is particularly persuasive in advocating the total removal of the supervision bar:

¹²⁴ See eg Beatson et al *Anson's Law of Contract* 579: “At one time it was said that an order for specific performance would not be granted if the Court would be required constantly to supervise the execution of the contract.” The author cites *Shiloh Spinners Ltd v Harding* [1973] AC 691 724 (see text to n 75 para 5 2 (i) above) and *Posner v Scott-Lewis* [1987] Ch 25, where an undertaking to employ a resident porter was specifically enforced, in contrast to *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 (CA) (see text to n 38 para 5 2 above). See also G McMeel “Anchors away” 1998 *LQR* 43; Beale et al (eds) *Chitty on Contracts* 1924.

¹²⁵ Peel *Treitel's Law of Contract* 1113.

¹²⁶ 1114-115. See also Beale et al (eds) *Chitty on Contracts* 1925.

"Certainly it is unsatisfactory to deny justice on an unsubstantiated hunch about the costs of specific performance, and in any event, it has to be explained why this area should not be treated differently from, for example, family law, where the cost of continuing judicial involvement in supervising maintenance, access and custody orders is considered acceptable. In short, the policy justifications for the constant supervision objection to specific performance seem particularly weak and the attempts by some judges, but, alas, not the House of Lords, to remove this bar should therefore be supported."¹²⁷

Jones¹²⁸ in a case note published after *Argyll*,¹²⁹ notes that English courts have been more willing to grant specific performance and have not simply followed precedent which restricts their discretion to do so.¹³⁰ He refers to the development illustrated in case law whereby English courts have been considering the appropriateness of the remedy in the circumstances, rather than focusing on the adequacy of the remedy available in law.¹³¹ However, he expresses doubt as to the appropriateness of the remedy in the *Argyll* case, since it is doubtful whether Co-operative Insurance Society would have ever been able to prove what loss it suffered as a result of Argyll's breach.

However, in the light of the many factors militating against specific performance considered by Lord Hoffmann, the defendant's interests undoubtedly outweighed the aggrieved party's interest in specific performance. The largest part of the judgment indicated why specific performance was inappropriate (and damages appropriate) in the circumstances, because an award of damages "brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict heal" whereas an order for specific

¹²⁷ Burrows *Remedies for Torts and Breach of Contract* 481.

¹²⁸ Co-author of Jones and Goodhart's *Specific Performance* 2 ed (1996), first published in 1986.

¹²⁹ G Jones "Specific performance: a lessee's covenant to keep open a retail store" (1997) 56 *CLJ* 488.

¹³⁰ Jones cites *Sudbrook Trading Estate Ltd v Egerton* [1983] 1 AC 444 478 per Lord Diplock.

¹³¹ See ch 3 for a detailed discussion of the adequacy of damages rule (esp paras 3 2 & 3 4 1 above).

performance “prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors’ letters and affidavits”.¹³²

Therefore, according to Andrews, “[t]he last word on the proper scope of specific performance should go to Lord Hoffmann”.¹³³ Furthermore, Maddocks J (with whom Lord Hoffmann agreed) even conceded this point – he acknowledged that, while the assessment of damages might be difficult, it was the kind of exercise which the courts had done in the past and were prepared to undertake again.¹³⁴

Jones ultimately concludes that the House of Lords’ decision should be welcomed instead of being deplored, because there is much to be said for the cogent arguments made by Lord Hoffmann. He agrees that the difficulties of supervision, which include the prospect of further litigation and the “draconian” sanction of contempt, cannot be ignored. And that these, in conjunction with economic arguments (concerning the burdensome consequences of ordering Argyll to resume its business) clearly militate against ordering specific performance.¹³⁵ McMeel similarly commends Lord Hoffmann for elucidating the true basis of the constant supervision bar, which according to him “had received a rather overliteral interpretation in earlier cases”.¹³⁶ Undoubtedly, Jones, McMeel and Andrews are in the minority in providing support for Lord Hoffmann’s arguments. Despite the magnitude of valid criticism raised against Lord Hoffmann’s reasoning, especially by Burrows, it is suggested that it nevertheless provides valuable instruction for the development of our law towards a concretisation of the relevant factors that could guide our courts in exercising their discretion to refuse to order specific performance.

¹³² [1997] 2 WLR 898 906-907.

¹³³ Andrews *Contract Law* 537.

¹³⁴ [1997] 2 WLR 898 902. Cf text to n 53 para 5 2 above.

¹³⁵ Jones 1997 *CLJ* 490-491.

¹³⁶ McMeel 1998 *LQR* 45.

5 3 American law

American courts have also considered the practical difficulty of supervision in deciding whether to exercise their discretion to grant specific performance. They generally do not grant specific performance if they will be unable to enforce their order effectively.¹³⁷ Therefore the traditional rule was that court will refuse to grant an order for the specific performance of continuous acts.¹³⁸ However, in modern practice the prospect of extensive supervision will not necessarily influence a court to refuse specific performance in all cases.¹³⁹ This is apparent from § 366 of the American Law Institute's *Restatement (Second) of Contracts*, comment a:

“Granting specific performance may impose on the court heavy burdens of enforcement or supervision. Difficult questions may be raised as to the quality of the performance rendered under the decree. Supervision may be required for an extended period of time. Specific relief will not be granted if these burdens are disproportionate to the advantages to be gained from enforcement and the harm to be suffered from its denial. A court will not, however, shrink from assuming these burdens if the claimant's need is great or if a substantial public interest is involved. In such cases, for example, structures may be ordered to be built and facilities may be required to be maintained. Experience has shown that potential difficulties in enforcement or supervision are not always realized and the significance of this factor is peculiarly one for judicial discretion...”

As in English law, the principle is therefore flexible. A case can still be made for specific performance of a contract where the question of difficulty of supervision arises, if the

¹³⁷ This has long been maintained – see eg *Fleischer v James Drug Stores*, 62 A.2d 383 (1948); Perillo (ed) *Corbin on Contracts* § 1171.

¹³⁸ See *Beck v Allison* (1874) 56 N.Y. 366, 370 per Grover J: “It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not all cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country.” See also note published in 1925 *Colum LR* 348-353.

¹³⁹ E A Farnsworth *Contracts* 3 ed (1999) 781.

plaintiff proves that the harm to be suffered from refusing the remedy outweighs the advantages of doing so. Arguments in favour of specific performance will still be considered and may be upheld by the courts,¹⁴⁰ and a problem with supervision *per se* is not a conclusive argument against an order of specific performance.

Nevertheless, numerous cases exist where courts have refused specific performance on the ground that the performance required is of a continuous nature and its enforcement would require continued supervision by the court.¹⁴¹ For example, courts have refused specific performance of contracts to operate a mine over a long period,¹⁴² to cut timber and saw it into lumber,¹⁴³ and to provide a long term elevator service.¹⁴⁴ However, experience has shown that potential difficulties in enforcement or supervision are not always realized; courts are able to formulate their orders so as to put effective pressure on the defendant, for example, by requiring periodical reports relating to the standard of the performance rendered.¹⁴⁵ The New York Court of Appeals has even stated that “[m]odern writers think that the ‘difficulty of enforcement’ idea is exaggerated and that the trend is toward specific performance ...”¹⁴⁶

The decision in *Metropolitan Sports Facilities Commission v Minnesota Twins Partnership*¹⁴⁷ illustrates this trend toward greater flexibility in awarding specific

¹⁴⁰ See eg *Metropolitan Sports Facilities Commission v Minnesota Twins Partnership* 638 N.W. 2d 214 (Minn. Ct. App. 2002) discussed below.

¹⁴¹ See eg Perillo (ed) *Corbin on Contracts* § 1171 n 76.

¹⁴² *Stanton v Singleton* 59 P. 146 (1899).

¹⁴³ *Bomer v Canady* 30 So. 638 (1901).

¹⁴⁴ *Nakdimen v Atkinson Improvement Co* 233 S.W. 694 (1921).

¹⁴⁵ See eg *Dells Paper & Pulp Co v Willow River Lumber Co* 173 N.W. 317 (1919); *Kahn v Wausau Abrasives Co* 129 A. 374 (1925).

¹⁴⁶ *Grayson-Robinson Stores v Iris Construction Corporation* 168 N.E.2d 377, 379 (N.Y. 1960), confirming an order directing specific performance of a construction contract. See also J M Perillo *Calamari and Perillo on Contracts* 6 ed (2009) § 16.10.

¹⁴⁷ 638 N.W. 2d 214 (Minn. Ct. App. 2002).

performance of contracts that potentially involve difficulties of supervision. Here the Minnesota Court of Appeal confirmed the trial court's decision to award a temporary injunction requiring the Minnesota Twins baseball team to continue playing its home games in the city-owned public stadium, thereby compelling them to honour the terms of their lease agreement with the sports facilities commission. The stadium lease was not a typical commercial lease, as the commission did not receive rent from the team, but rather benefited by the team's promise to play games in the stadium. Furthermore, the lease actually identified specific performance as a potential remedy for a breach of contract.¹⁴⁸

The court first pointed out that, in a specific performance suit it was required to balance the equities of the case in determining whether the equitable remedy is appropriate. It found that specific performance was the most appropriate remedy on the facts due to the lack of evidence provided by the Twins team indicating significant burdens that would be imposed by granting a temporary injunction forcing the team to play its games in the stadium, as opposed to the adverse effect that withdrawal from the stadium would have on the community and associated commercial activities. The court took judicial notice of the importance of professional sports in citizens' social lives, the entertainment and recreational purposes the stadium would serve, the jobs the stadium would provide and the anticipated benefits to nearby businesses.¹⁴⁹ Damages was also found to be insufficient to compensate for the harm suffered by the community for the loss of a professional sports team, because money could not compensate the people for immeasurable, indirect and intangible losses.¹⁵⁰ According to Toussaint CJ "the possibility of irreparable harm to the commission and the public outweighed the potential harm shown by the Twins and Major League Baseball".¹⁵¹

¹⁴⁸ It authorised any remedy allowed by law or equity, including but not limited to injunctive relief and specific performance in the event of breach.

¹⁴⁹ 638 N.W. 2d 214 (Minn. Ct. App. 2002) para [16].

¹⁵⁰ Para [16].

¹⁵¹ Para [17].

In discussing the administrative burdens involved in judicial supervision and enforcement of the injunction (as brought up by the Twins team), the court confirmed the trial court's determination that granting the relief would not impose significant administrative burdens. A significant burden would ensue if the franchise had already left town. The order would then require a massive restructuring of the *status quo* that could entail administrative and supervisory costs significant enough to dissuade a court from issuing an injunction. But here, the *status quo* is merely preserved by the injunction. From a comparative standpoint, this opinion provides support for the finding in *Argyll Stores*, where the equipment and fittings were already removed from the store. An award of specific performance would have required a massive restructuring of the *status quo*, a point specifically underlined by Lord Hoffmann.¹⁵²

The court also rejected the Twins' reliance on case law; specifically *Hamilton West Development Ltd v Hills Stores Company*¹⁵³ as authority to substantiate their argument that there was a hard and fast rule that specific performance was not available to enforce continuous obligations in commercial leases.¹⁵⁴ However, *Hamilton* does not support the proposition that equitable remedies are always prohibited in commercial-lease disputes; on the contrary the court found that in *Hamilton*, where the issue was whether a shopping-center developer could obtain a permanent injunction to prevent a store from ceasing operations in breach of the continuous operation obligations imposed by the lease, the federal court actually expressed the view that Ohio state courts would reject an inflexible rule against specific performance in all cases, but would narrowly interpret such clauses.¹⁵⁵ It follows that there is no general rule against specific performance of agreements to be performed over time and hence requiring supervision, as it was once thought. The courts merely look with disfavour on specific performance of these agreements and exercise great caution in enforcing these agreements due to

¹⁵² See para 5 2 above.

¹⁵³ 959 F.Supp. 434 (N.D.Ohio 1997).

¹⁵⁴ 638 N.W. 2d 214 (Minn. Ct. App. 2002) para [13].

¹⁵⁵ 959 F.Supp. 434, 439-440 (N.D.Ohio 1997).

the danger of constant disputes and the possible burden of continued supervision. But it cannot be assumed that if an element of continuous services can be discerned in a contract that would therefore require supervision, the court will, without more, refuse specific performance.

Even though experience has indicated that this factor is not as relevant as it once was and there is no strict rule against specific performance of continuous obligations that require constant supervision, it is still maintained that constant and continued supervision may justify the refusal of the remedy under American law. However, US courts often (like their English counterparts)¹⁵⁶ advance difficulty of supervision as a reason for refusing specific performance when the difficulty arises from the vagueness or uncertainty of the terms of the contract,¹⁵⁷ instead of referring to their inability actually to supervise the enforcement of the contract.¹⁵⁸

¹⁵⁶ Apart from *Argyll Stores* where Lord Hoffmann regarded an obligation to "run a supermarket" as too uncertain to enforce, see *Mosely v Virgin* 30 ER 959 (1796) (obligation to "lay out £1000 in building"); *Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279 (obligation to "erect a station"); *Joseph v National Magazine Co Ltd* [1959] Ch 14 (obligation to publish an "article on jade"). See also n 84 para 5 2 (i) above; Pound 1920 *Harv LR* 433-434; Beale et al (eds) *Chitty on Contracts* 1925, 1933; Chen-Wishart *Contract Law* 547; M P Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 16 ed (2012) 802-803.

¹⁵⁷ See Farnsworth *Contracts* 778-779; R A Lord *Williston on Contracts* 4 ed (2004) vol 25 § 67:97; Perillo *Calamari and Perillo on Contracts* § 16.8. According to § 362 of the American Law Institute's *Restatement (Second) of Contracts*: "Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order."

¹⁵⁸ See eg *Bomer v Canady* 30 So. 638 (1901); *Park v Minneapolis Railway Co* 189 N.W. 532 (1902); *Plantation Land Co v Bradshaw* 207 S.E.2d 49 (Ga. 1974); *Bethlehem Engineering Export Co v Christie* 105 F.2d 933, 934 (2d Cir. 1939) *per* Hand J: "This contract is so obscure, and, strictly taken, so incoherent, that nobody can be sure of its meaning ... Arguendo, we shall assume that these promises created a valid contract

At present, American courts are willing to grant specific performance if the plaintiff's need is great or if a substantial public interest is involved. In such cases, for example, structures may be ordered to be built and facilities may be required to be maintained.¹⁵⁹ According to Corbin¹⁶⁰ "[t]he greater the hardship of the plaintiff's case, the clearer the inadequacy of damages as a remedy, and the greater the extent of the public interest, the more likely it is that specific performance will be decreed".¹⁶¹

It may be concluded then that neither English nor American courts will necessarily refuse specific performance when the question of difficulty of supervision arises. Sharpe even maintains that "there has never been an absolute refusal to award the remedy in cases which might require supervision where the plaintiff is able to demonstrate sufficient need for it. In fact, the principle is a flexible one".¹⁶² According to Megarry J "the matter is one of the balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually lie on one

which could be enforced at law like any other, but it does not follow that equitable remedies would also be available."

¹⁵⁹ Perillo (ed) *Corbin on Contracts* § 1172.

¹⁶⁰ § 1172.

¹⁶¹ See also the authoritative extract from *Standard Fashion Co v Siegel-Cooper Co* 157 N.Y. 60 (1898), cited by Corbin § 1172 n 88: "Contracts which require the performance of varied and continuous acts, of the exercise of special skill, taste and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty. An exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute, and promote the general welfare. When the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail."

¹⁶² R J Sharpe *Injunctions and Specific Performance* (1983) 286.

side does not turn this probability into a rule".¹⁶³ The advantages of refusing specific performance will always be weighed against the harm to be suffered (by both the plaintiff and the wider public) from its refusal (i.e. their interest in performance). And the courts will most likely order specific performance of a continuous obligation, if the harm to be suffered from refusing the remedy outweighs the advantages of doing so.¹⁶⁴

As we have seen in both English and American law, the inability of the courts actually to supervise performance in accordance with its order/the contract is not the real issue. The problem is the lack of certainty of performance and the possible burden or hardship (that may be assumed by the defendant or the court) inherent in the enforcement of such performance. Again, to quote Megarry VC, in another case: "[while] it was at one time said that an order for specific performance of the contract would not be made if there would be difficulty in the courts supervising its execution ... The real question is whether there is a sufficient definition of what has to be done in order to comply with the order of the court".¹⁶⁵ Sharpe similarly maintains that the appropriate concern of courts in modern times is not so much for difficulties in ensuring compliance with specific performance orders "but rather a desire for finality to litigation and conservation of judicial resources"¹⁶⁶ because "20th century regulatory experience indicates that so long as there is sufficient definition of the obligation, enforcement machinery is available to ensure compliance".¹⁶⁷

¹⁶³ *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 318, quoted with approval in *Price v Strange* [1978] Ch 337 359-360.

¹⁶⁴ Notably, Lord Hoffmann, in deciding whether or not specific performance should be granted, was also concerned with the interest of the public, which according to him, would not be served by wasting resources and maintaining an already hostile relationship ([1997] 2 WLR 898 906). For comment on this view, see Phang 1998 *Modern Law Review* 430-432.

¹⁶⁵ *Tito v Waddell (No 2)* [1977] Ch 106 321-322.

¹⁶⁶ "Specific relief for contract breach" in Reiter & Swan (eds) *Studies in Contract Law* 145.

¹⁶⁷ 144.

The argument here is therefore essentially that if a court specifically enforces imprecisely-defined obligations, it could operate harshly on the defendant since he would not know what is expected of him and face being held in contempt. Furthermore, courts will be overwhelmed by numerous applications to determine the adequacy of the defendant's compliance. It may also be difficult to assess the adequacy of the defendant's performance if the nature of the required performance was not properly defined in the first place. Such subsequent litigation would lead to a waste of judicial time and resources. Thus, the difficulties with a contract to be performed over time are essentially the possible cost of increased judicial effort and the possible harm to the defendant (if the obligation is not sufficiently defined which is often the case with continuous obligations), and not literal supervision by the courts.¹⁶⁸

5 4 German law, Dutch law and the international instruments

Problems with supervision are not discernable as impediments to a creditor's right to specific performance in German law, Dutch law or the international instruments under review. Therefore, these systems and instruments will only be discussed to the extent that they address concerns related to the supervision objection, and more specifically the certainty and hardship issues.

In German law a plaintiff's right to specific performance is subject to some limitations. One situation where this right will be denied is where the requirement of certainty of performance is not met. So, a court will refuse enforcement if the creditor's application under §§ 887, 888 or 890 of the German Code of Civil Procedure (ZPO) is not sufficiently certain.¹⁶⁹

¹⁶⁸ For this reason, Sharpe advises that in deciding whether or not to grant specific performance, courts have to examine "not only the nature of the obligation, but also the extent of its definition" (*Injunctions and Specific Performance* 295).

¹⁶⁹ Beale et al *Cases, Materials and Text on Contract Law* 881.

As indicated earlier, specific performance is a concept of substantive law.¹⁷⁰ The practice of refusing specific performance in cases where the contractual obligations are uncertain can presumably be traced back to the idea that in German law the concept of specific performance is directly inferred from the principle of *pacta sunt servanda*. This means that the creditor's claim for specific performance flows naturally from a valid contract and specific performance does not presuppose a breach of contract, but is the consequence of the contract's existence: the parties are under an obligation to fulfil their contractual promises.¹⁷¹ Thus, where the obligations in the contract itself are not sufficiently certain and defined, so that they would be capable of being specifically enforced, it is understandable that the creditor's claim (flowing from the contract itself) cannot be maintained. Problems with supervision are not discernable as a defined exception to the right to specific performance in German law. However, as indicated above, English and American courts often advance difficulty of supervision as a reason for refusing specific performance when the difficulty arises from the vagueness or uncertainty of the terms of the contract (even though the vagueness or uncertainty is not so substantial that it results in voidness).¹⁷² Beale, in his comparative treatise, also discusses the German position by referring to certainty of performance under the heading of supervision.¹⁷³ No express link is, however, detectable between the supervision issue and hardship in German law.

A creditor's right to specific performance under Dutch law is similarly not unrestricted.¹⁷⁴ Notwithstanding the primary position of specific performance in the Dutch legal system, Article 3:296(1) of the Dutch Civil Code or *Burgerlijk Wetboek* (BW) makes it clear that specific performance cannot be claimed if the law, the nature of the obligation, or a

¹⁷⁰ See para 2 3 1 1 above; and see F Faust & V Wiese "Specific performance – a German perspective" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 47 49-50.

¹⁷¹ See para 2 3 1 1 above.

¹⁷² See text to n 85 para 5 2 (i) above.

¹⁷³ Beale et al *Cases, Materials and Text on Contract Law* 877, 881.

¹⁷⁴ See para 2 3 1 2 above.

juridical act, determines otherwise. Apart from these limitations listed in the BW, the availability of specific performance has also been limited through developments in the case law. These developments include limitations on grounds of reasonableness and equity.¹⁷⁵ The development of the concepts of reasonableness and equity, even though codified in Articles 6:2 and 6:248(2) BW,¹⁷⁶ also depends on the courts, as these concepts encompass a rather wide range of possible limitations. The *Hoge Raad* has held that the parties in a legal relationship must act in accordance with the requirements of reasonableness and equity and, accordingly, have to act not only in their own interests, but also in the interests of the other party/parties involved.¹⁷⁷ More recently, the *Hoge Raad* also reaffirmed and emphasised the need to balance the interests of the parties concerned.¹⁷⁸ Accordingly, a court can refuse specific performance if the debtor has a substantial interest in such refusal.¹⁷⁹ Furthermore, Article 3:13 BW prohibits the abuse of a right. The exercise of any right, including the right to specific performance afforded by Article 3:296, will be regarded as an abuse “when it is exercised with no other purpose than to damage another person or with another purpose than for which it is granted or when the use of it, given the disparity between the interests which are served by its effectuation and the interests which are damaged as a result thereof, in all reason has to be stopped or postponed” (Article 3:13(2)). Based on these provisions it has been argued that a creditor may not claim specific performance if it would

¹⁷⁵ D Haas & C Jansen “Specific performance in Dutch law” in J Smits, D Haas & G Hesen (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 11 17.

¹⁷⁶ See para 2 3 1 2 above & para 6 3 below.

¹⁷⁷ See HR 15 November 1957, NJ 1958, 67 (Baris/Riezenkamp). See also D Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) 355 (commentary by M B M Loos).

¹⁷⁸ See HR 5 January 2001, NJ 2001, 79 (Multi Vastgoed/Nethou) discussed in para 6 3 below.

¹⁷⁹ Haas & Jansen “Specific performance in Dutch law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 20, 26.

unreasonably burden the debtor.¹⁸⁰ This may be the case if, for example, specific performance is sought in respect of imprecisely defined contractual obligations. However, problems with supervision and certainty of performance are not discernable as defined exceptions to a creditor's right to specific performance in Dutch law.

Difficulties of supervision and related problems of uncertainty are equally not recognised as defined exceptions to the right to specific performance in the international instruments under consideration. There are indications in these instruments that reasonableness will be considered in deciding whether to acknowledge the plaintiff's right to specific performance,¹⁸¹ but none specifically deal with problems of supervision or the related certainty issue.¹⁸² Neither is listed under the defined limitations to the right to specific performance.¹⁸³

¹⁸⁰ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 355 (by Loos).

¹⁸¹ See generally Arts 46(3) CISG; 9:102(2)(b) PECL; 7.2.2(b) UNIDROIT PICC; 3:302(3)(b) DCFR; 110(3)(b) CESL.

¹⁸² Cf text to n 180 para 6 4 2 below.

¹⁸³ However, the instruments all contain an overriding requirement of good faith and fair dealing (see para 6 4 2 below); it follows that a party "would not be entitled to exercise a remedy if doing so is of no benefit to him and his only purpose is to harm the other party" (O Lando & H Beale (eds) *Principles of European Contract Law: Parts I and II* (2000) 115). Moreover, as Clive and Hutchison maintain, in discussing the limitations under the PECL ("Breach of contract" in Zimmermann et al (eds) *Mixed Legal Systems in Comparative Perspective* 195), basic human rights are always in the background. Accordingly, it may be argued that no court, irrespective the jurisdiction, would grant an order for specific performance in such vague terms that the defendant could be arbitrarily imprisoned for contempt. And, the principle of good faith possibly leaves some scope for taking into account problems of supervision and related certainty issues.

5 5 Evaluative remarks and conclusions

At the beginning of this chapter, it was shown that South African courts have traditionally expressed some support for refusing specific performance of certain obligations (especially *obligationes faciendi*) where it would be difficult to supervise the execution of such an order.¹⁸⁴

Unsurprisingly, this position attracted a great deal of criticism in our law. The primary (and by now familiar) basis of the criticism is that, in most cases, it is not necessary for the court itself to oversee the work and it is unlikely that problems will arise in the enforcement of the court's order.¹⁸⁵ The court is equipped to deal with a recalcitrant defendant.¹⁸⁶ If, after being ordered to effect the necessary repairs, the lessor fails to do so, the lessee may once again approach the court for relief.¹⁸⁷ Our courts have, in recent years, also criticised the previous position, and recognised that specific performance may be the only viable remedy to many lessees in South Africa.¹⁸⁸

*Mpange v Sithole*¹⁸⁹ was the first reported decision in our law where a court was prepared to grant specific performance of a lessor's obligation to maintain the leased

¹⁸⁴ See eg *Barker v Beckett & Co Ltd* 1911 TPD 151 164; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311 331; *Marais v Cloete* 1945 EDL 238 242; *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W) 249; *Lottering v Lombaard* 1971 (3) SA 270 (T) 272.

¹⁸⁵ See De Wet & Van Wyk *Kontraktereg* 210-211; Cooper *The South African Law of Landlord and Tenant* 89.

¹⁸⁶ See eg *PL v YL* 2013 (6) SA 28 (ECG) para [10]: the court "has the inherent power or authority to ensure compliance with its own orders".

¹⁸⁷ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 137.

¹⁸⁸ Bradfield & Lehmann *Principles of the Law of Sale and Lease* 146. See also T Naudé "The law of lease" 2007 ASSAL 872-873.

¹⁸⁹ 2007 (6) SA 578 (W). The applicants were lessees of an inner city building which their lessor, the respondent, had failed to maintain in a safe and proper condition. They were

property.¹⁹⁰ Here Satchwell J criticised the earlier reluctance of the courts to grant specific performance in these circumstances. She pointed out that the supervision objection had become untenable in view of subsequent decisions such as *Benson v SA Mutual Life Assurance Society*,¹⁹¹ and *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*.¹⁹² These decisions emphasised that a contracting party was in principle entitled to specific performance, and criticised earlier cases in which this right was limited. These limitations, which derived from English practice, included the limitation that specific performance would generally not be granted where it would be difficult for the court to enforce its order. Satchwell J took direct cognisance of English law and then correctly observed that this limitation had fallen out of favour even in England.¹⁹³ She also agreed with academic writers¹⁹⁴ who criticised the reluctance to refuse specific performance of the lessor's obligation to maintain the leased premises¹⁹⁵ and confirmed the dictum in *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd*,¹⁹⁶ that there was no authority for casting the tendency not to order specific performance where it would be difficult for a court to enforce the order of specific performance as an absolute rule.¹⁹⁷ Apart from being correct in her assessment of English law, Satchwell J also accurately described the current status of the supervision objection in our law.

living in "slum" conditions, which included lack of privacy, absence of sufficient lavatories, one water tap for some 500 occupants, and illegal and dangerous provision of electricity.

¹⁹⁰ See Naudé 2007 ASSAL 872-874.

¹⁹¹ 1986 (1) SA 776 (A).

¹⁹² 1981 (4) SA 1 (A).

¹⁹³ *Mpange v Sithole* 2007 (6) SA 578 (W) para [42], quoting Jansen JA in *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) 5C.

¹⁹⁴ Also referring to Cooper *The South African Law of Landlord and Tenant* 89.

¹⁹⁵ *Mpange v Sithole* 2007 (6) SA 578 (W) paras [43]-[44].

¹⁹⁶ 1953 (1) SA 246 (W) 249B-250A.

¹⁹⁷ *Mpange v Sithole* 2007 (6) SA 578 (W) para [40]. Cf para 5 1 n 19 above.

Ultimately, the court did not order specific performance as the lessor was not the owner of the building and the registered owner had not been joined as a party to the case, whilst such an order would inevitably affect his interests.¹⁹⁸ The court concluded that it would have required more “details as to the priorities for renovation and repair, expertise with regard to such endeavours, the costs thereof, the time periods involved, the disruption to current inhabitants in their occupation whilst such renovations endure [and] possible alternative accommodation for the duration of such renovation”.¹⁹⁹ Therefore, the court ordered a reduction in rental.²⁰⁰

The difficulty of supervision is also advanced in support of a refusal to enforce building contracts in our law.²⁰¹ However, this reasoning was challenged by Coetzee J in *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*.²⁰² The court rejected the rule which stated that courts would not award specific performance of building contracts. It found that the underlying justification for refusing specific performance of such contracts, i.e. the difficulty of supervision of its order, is “over-emphasised” in our law since courts never really supervise fulfilment of their orders in practice.²⁰³ The court, in support of this view, pointed out that the order which it granted did not replace the contract and therefore did not introduce any new difficulties in deciding whether the work had been performed properly. According to Coetzee J, difficulty of supervision does not provide a valid justification for refusing an order. The judge provides us with valuable and convincing practical considerations which can be

¹⁹⁸ Paras [60]-[63], [82]. See also Naudé 2007 ASSAL 873.

¹⁹⁹ Para [77].

²⁰⁰ Para [87]. See further Naudé 2007 ASSAL 873-874.

²⁰¹ See text to n 22 para 5 1 above.

²⁰² 1984 (3) SA 861 (W) 880-881.

²⁰³ 880H. In this regard, Coetzee J’s view resembles Treitel’s view on the objection in English law (see para 5 2 above).

said to discredit the supervision argument (see Coetze J's dictum quoted in chapter 4).²⁰⁴

According to Jansen JA in *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*,²⁰⁵ the reluctance of the courts to order specific performance "where it would be difficult for the Court to enforce its decree" is "a limitation derived from the English practice, and not consonant with our law".²⁰⁶

It is clear that this limitation ("derived from English practice") is no longer applicable in South African law. As in English law, the supervision problem is over-emphasised and there are many examples in the case law where the courts specifically enforce contracts to build or repair,²⁰⁷ as well as contracts to perform a specific task.²⁰⁸ And it is almost certain that the difficulty of supervision will not be regarded as a sufficient ground for refusing this remedy in the future. Therefore, it should not be assumed that courts will,

²⁰⁴ See text to n 175 para 4 2 2 above. This dictum was followed in *Raik v Raik* 1993 (2) SA 617 (W) 626, where the court held an embittered recalcitrant husband to an agreement to grant his wife a "get" or Jewish Ecclesiastical bill of divorce in order to dissolve their Jewish marriage.

²⁰⁵ 1981 (4) SA 1 (A) 5.

²⁰⁶ As confirmed in *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) 158; *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 (W) 880-881; *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C) 85. See also D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 323.

²⁰⁷ See eg *Mink v Vryheid Coal & Iron Co* (1912) 33 NPD 182 (contract to build a house); *Industrial & Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W) (contract to install refrigeration equipment); *Sandton Town Council v Original Homes (Pty) Ltd* 1975 (4) SA 150 (W) (contract to "form grade and maintain" certain roads).

²⁰⁸ See eg *Johannesburg Stock Exchange v Northern Transvaal (Messina) Copper Exploration Co* 1945 AD 529 (restoration of a company's shares to the official list of shares quoted on the stock exchange); *Maw v Grant* 1966 (4) SA 83 (C) (inscription of an architect's name on a board at a building site).

without more, refuse specific performance where there is the prospect of constant supervision.

The Civil Codes of both Germany and the Netherlands, though providing a more streamlined regime as far as exclusion of specific performance is concerned, do not recognise problems with supervision as a possible ground for such exclusion. It is also evident that this regime is broadly consistent with the approaches adopted in the international instruments discussed above. As indicated above, the right to specific performance is recognised, but restricted by principles of reasonableness. However, none of the instruments under review explicitly refer to administrative burdens involved in judicial supervision as a possible indication of such unreasonableness.

English and American law, on the other hand, provide us with more instructive insights. The English and American courts have traditionally not ordered specific performance where such an order would require constant supervision. However, as we have seen, more recently this objection has been rejected by English and American courts; they will not be deterred from granting specific performance merely because it will require constant supervision. Instead, as Lord Hoffmann has indicated, their decision will depend on the “cumulative effect” of this factor together with any other relevant factors which favour or militate against specific performance. The courts currently focus on the true merits and the equities of the case at hand and not on established principles or pre-conceived preferences. Although English and American law have rejected the difficulty of the courts to supervise the performance of a continuous obligation as a reason for refusing specific performance, they will still avoid giving specific performance orders if the obligation sought to be enforced is not sufficiently defined to allow a clear order to be made.

Evidently the relevant issue in our law is also not whether the court will be able to supervise or enforce its order. It clearly is not a court’s function to supervise the execution of the orders it makes. The more relevant objection is the imprecision of these obligations. As in other jurisdictions, our courts will similarly not specifically

enforce vague and uncertain terms even if they are not void for vagueness.²⁰⁹ This has long been maintained.²¹⁰ According to Christie, for example, “it is on the ground of imprecision that orders of specific performance of contracts to form syndicates or companies and contracts to repair or insure buildings have been refused”.²¹¹ So in *Barker v Beckett & Co Ltd*²¹² the court refused to order specific performance of a stipulation to insure because it was too indefinite; the amount for which the buildings should be insured was not stated in the contract, and hence, if the court ordered the defendant to “insure the buildings”, there would be no contempt of court if they were insured for a “wholly inadequate amount”.²¹³

The difficulty with the enforcement of these obligations is that it may lead to further disputes to test the defendant’s compliance, which would lead to a waste of judicial time and resources.²¹⁴ Moreover, it is not fair to the defendant that he does not know precisely what he has to do to comply with the order to avoid being held in contempt.²¹⁵

²⁰⁹ Christie & Bradfield *Christie’s The Law of Contract in South Africa* 552.

²¹⁰ See eg Wessels *The Law of Contract in South Africa* §§ 3117-3118, and the authority cited there. See also n 213 below.

²¹¹ Christie’s *The Law of Contract in South Africa* 552. See also Wessels *The Law of Contract in South Africa* §§ 3117 ff.

²¹² 1911 TPD 151.

²¹³ 165 *per* De Villiers JP (Smith J concurring). Specific performance was also refused on the ground of imprecision in *Douglas v Baynes* 1908 TS 1207 (PC); *Ingle Colonial Broom Co Ltd v Hocking* 1914 CPD 495; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311, and *Marais v Cloete* 1945 EDL 238.

²¹⁴ In Christie’s words: “Without necessarily being void for vagueness a contractual obligation may be of such a nature that a defendant who has been ordered specifically to perform it might genuinely claim to have done so but the plaintiff might equally genuinely claim that he has not. The fact that such a dispute could be decided by the court after hearing evidence does not necessarily mean that specific performance should be granted, as it is obviously undesirable that the court should issue an order the likely result of which will be

It is therefore suggested that even though the continuous nature of the obligation and the fact that it would require constant judicial supervision is not a bar to specific performance in our law, the extent of its definition or rather the lack thereof should dissuade our courts to enforce such obligations *in specie*. In discussing Christie's observation, Lubbe & Murray conclude that

"Here it is not the question of the ability of the court to supervise work that is important but (and this is in essence the same issue approached from a different angle) the question whether fair evaluation of the work and, consequently satisfactory fulfilment of the contract, is possible. This suggests that if a contract provides for evaluation by an independent party, an engineer or architect for example, the problem falls away ..."²¹⁶

It is submitted that this approach is correct. In the past unduly restrictive statements were occasionally made that our courts will not enforce contracts the execution of which would require continued supervision by the courts. Accordingly, it was often held that the courts will not enforce specific performance of continuous obligations. However, the courts have moved away from this unduly inflexible approach and have ordered specific performance of such obligations. The issue remaining in our law is whether, taking into account the uncertain definition of an obligation, enforcement of the contract is likely to place an unreasonable burden on the defendant or the court's time and resources (as some Common and German lawyers have recognised).

to precipitate a lengthy dispute over whether it has been obeyed." – *Christie's The Law of Contract in South Africa* 552.

²¹⁵ Again, to quote Christie 547: "The courts in their discretion will naturally not subject a defendant to the danger of contempt of court in cases where compliance with the order would be impossible, unduly onerous, difficult to enforce or insufficiently clear-cut, so that opinions might legitimately differ on whether there had been performance." This statement was quoted with approval by Van Zyl J in *Vrystaat Cheetahs (Edms) Bpk v Mapoe* unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court (see paras [113]-[114]).

²¹⁶ Cf para 4 2 2 n 172 above.

The harm the defendant or the court might suffer as a result of enforcing an insufficiently defined obligation, and the extent to which this should dissuade a court from ordering specific performance, will be discussed in the following chapter, as this is rather an issue which merits further investigation under the theme of hardship.²¹⁷ The following chapter and the concluding chapter will explore the most appropriate route for South African law to follow in order to address these and related concerns.

²¹⁷ See para 6 5 3 (esp n 217) below.

CHAPTER 6: UNDUE HARDSHIP

6 1 Introduction

Having dealt with the relevance of supervision of performance in awarding specific performance in the preceding chapter, we now turn to hardship, which also encompasses difficulties with enforcement and supervision, but has a wider application. According to the majority of commentators, it is settled law that South African courts will, in the exercise of their discretion, refuse to order specific performance if it would cause undue hardship to the defaulting party or to third parties.¹ According to De Wet, for example,

“[speak dit] egter vanself dat ‘n onbeperkte aanspraak op reële eksekusie in geen regstelsel geduld kan word nie, want gevalle kan voorkom waar die nadele verbonde aan reële eksekusie dermate buite verhouding staan met die nadeel wat die skuldeiser gaan ly by weiering daarvan, dat dit strydig sou wees met gesonde beleid om die skuldeiser sy sin te gee”.²

¹ See J W Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3119; D J Joubert *General Principles of The Law of Contract* (1987) 225; A J Kerr *The Principles of The Law of Contract* 6 ed (2002) 680; T Naudé “Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Iggesund*” 2003 SALJ 269 279; S Eiselen “Specific performance and special damages” in H L MacQueen & R Zimmermann *European Contract Law: Scots and South African Perspectives* (2006) 249 257; F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 873; R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 547-548; D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 323; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 330; A D J van Rensburg, J G Lotz & T van Rijn (R D Sharrock) “Contract” in W A Joubert & J A Faris (eds) *LAWSA 5(1)* 2 ed (2010) paras 495-496.

² J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 15 ed (1992) 210 translated: “However, it is obvious that an unlimited claim to specific enforcement cannot be tolerated in any legal system, because situations could arise where the

The discussion will commence with an introductory overview of South African law in order to determine how this position was established in our law and why commentators and courts alike in effect came to accept that in the case of undue hardship to the defendant or third parties, the remedy should be denied as a general rule, as opposed to merely regarding the existence of hardship as a guiding principle in the exercise of the courts' discretion to refuse specific performance.

The rest of the chapter deals with the treatment of the hardship issue by different legal systems and international instruments with the aim of determining what principles they have adopted to address the enforcement of contracts that have become excessively burdensome (but not impossible) for the defendant to perform, and what considerations underlie these principles. The chapter concludes with an evaluative discussion, which takes into account the different approaches revealed by the comparative analysis. Finally, some suggestions will be made for the future development of our law.

6 1 1 The undue hardship principle in South African law: the locus classicus of *Haynes v Kingwilliamstown Municipality*

The familiar case of *Haynes v Kingwilliamstown Municipality*³ is generally cited as authority for the widely-held view that courts will, in the exercise of their discretion, refuse to order specific performance where it would cause undue hardship to the defaulting party or to third parties.⁴ This case involved a contract in terms of which the municipality agreed to provide 250 000 gallons (almost a million litres) of water per day

disadvantages of specific enforcement are so disproportionate to the disadvantage that the creditor will suffer from refusing it, that it would be inconsistent with sound policy to let the creditor have his way."

³ 1951 (2) SA 371 (A). See also *Manasewitz v Oosthuizen* 1914 CPD 328; *Rex v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 873-874, and *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 (4) SA 650 (D) 655.

⁴ See eg De Wet & Van Wyk *Kontraktereg en Handelsreg* 210; Lubbe & Murray *Contract* 542-543, and more recently A Cockrell "Breach of contract" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 329.

to Haynes, who owned certain land situated on the Buffalo River upstream from Kingwilliamstown. In a time of severe drought, the defendant refused to comply with its obligation under the agreement, claiming that to do so would severely prejudice the residents of Kingwilliamstown. The plaintiff consequently sought an order for specific performance of the contract, which the court refused on the grounds that it "would have worked very great hardship not only to the respondent but to the citizens of Kingwilliamstown to whom the respondent owed a public duty to render an adequate supply of water".⁵ Evidently, the court's discretion to refuse the remedy in cases of hardship was derived from English Equity.⁶ It emphasised that the discretion afforded to our courts is based on equitable considerations.⁷

Before we continue with whether an order for specific performance was an appropriate remedy based on the municipality's breach, it is necessary to deal briefly with the question whether the municipality was in fact at all in breach. This concerns the application of two sets of principles, namely those relating to supervening impossibility of performance, and those relating to implied terms.

According to some commentators, *Haynes* may actually have been a case of supervening impossibility, which extinguished or temporarily suspended this obligation because performance was legally impossible, since the interest which would have to be sacrificed to bring about performance by far outweighed the interest which the creditor had in receiving performance.⁸

⁵ 1951 (2) SA 371 (A) 381C.

⁶ See A Beck "The coming of age of specific performance" 1987 *CILSA* 190 197-198. See also G Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 99-101.

⁷ 1951 (2) SA 371 (A) 377-379. See also Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 321.

⁸ See Sharrock "Contract" in Joubert & Faris *LAWSA* 5(1) 2 ed para 496 n 19.

This brings us to the South African law on supervening impossibility or cases in which performance has become impossible due to a change of circumstances, as opposed to cases in which performance has become excessively onerous due to a change of circumstances. Here, performance by the municipality became excessively burdensome and fell short of what traditionally is required for avoidance under the doctrine of supervening impossibility. It is important to stress at this juncture that supervening change of circumstances is a separate problem, which falls beyond the scope of this chapter. The present section will consequently only provide a brief outline of the applicable law.⁹

Our legal system supports the doctrine of *pacta sunt servanda*;¹⁰ accordingly, the parties to the contract should honour its terms even if the circumstances that existed when they concluded the contract have changed. It is only if the change in circumstances amounts to supervening impossibility that parties would be released from contractual liability.¹¹ If the circumstances have changed only to the extent that performance has become excessively burdensome, but not impossible, the contract is considered valid. This means that a party's failure to perform could amount to breach of contract.¹² However, the non-performing party could still defeat a claim for specific

⁹ For a general comparative account of the effect of supervening events, see See K Zweigert & H Kötz *Introduction to Comparative Law* (tr T Weir) 3 ed (1998) 517-537, and H Unberath & E Kendrick "Supervening events" in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 562-580.

¹⁰ See eg *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras [36] ff.

¹¹ See *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427. See also para 7 2 2 below.

¹² See *Hersman v Shapiro & Co* 1926 TPD 367. See too in this regard, De Wet & Van Wyk *Kontraktereg en Handelsreg* 210 n 61: "Mens het hier natuurlik te doen met gevalle waar die skuldenaar in weerwil daarvan dat hy nie kan presteer nie, tog gebonde is. Waar hy

performance arising from breach if awarding such a claim would cause undue hardship.¹³ The other party would then have to resort to either cancellation or contractual damages or both.

We can now return to *Haynes*. Van Rensburg et al have argued that it was perhaps not even necessary to resort to remedies for breach in this case, because non-performance could have been excused temporarily due to objective impossibility of performance. This argument is convincing if a more generous view is adopted of what amounts to supervening impossibility. This type of approach is, for example, supported by Van der Merwe et al:

“While an absolute ‘physical’ impossibility will satisfy the test [for objective excusing impossibility], a performance that might conceivably be rendered will nevertheless be impossible if insistence on its performance would be unreasonable in the circumstances ... [and while] it is usually said that mere difficulty in performing amounts at most to subjective impossibility and not to objective impossibility ..., performance may be so difficult and lead to

deur onmoontlikwording van prestasie bevry is, is daar natuurlik glad nie meer ‘n verbintenis nie.”

¹³ See G Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 52 78: “n Beslissing soos in die *Haynes*-saak toon aan dat die engheid van die leerstuk ondervang word deur middel van die ontseggeling van daadwerklike afdwining van die ooreenkoms in gepaste omstandighede. Daadwerklike vervulling sal nie gelas word waar dit gaan om aanvanklike of later ingetrede omstandighede wat neerkom op subjektiewe onmoontlikheid van prestasie (*difficultas praestandi* of te wel ‘hardship’), of selfs bloot die verydeling van kontraksoogmerk inhou nie.” See also *Van Rooyen v Baumer Investments (Pty) Ltd* 1947 (1) SA 113 (W) 120-121, where Ettlinger AJ expressed the view that “where the ability of the debtor to perform is raised [by the debtor] and left in doubt”, specific performance should be refused.

such economic or other hardship that it will be regarded as objectively impossible in terms of the applicable standard.”¹⁴

However, this approach was not adopted in *Haynes*. Neither was there support for a second potential ground for escaping the finding of breach, namely an implied term excusing the Municipality from temporarily not releasing the stipulated amount water, if there was not sufficient water in the dam to ensure an adequate supply for the residents of Kingwilliamstown.¹⁵ This argument was given short shrift by the trial court. It held that no term could be implied to the effect that the release of 250,000 gallons water a day was conditional on there being sufficient water in the dam for the needs of the residents of Kingwilliamstown.¹⁶ According to Gardner JP “the parties at the time of the making of the contract, never contemplated a shortage of water”.¹⁷ The Appellate Division, in confirming the trial court’s refusal to order specific performance, unfortunately also did

¹⁴ Van der Merwe et al *Contract: General Principles* 162 (see esp n 18: “Factors such as practical and economic expediency and fairness play a role. Thus, if an object which must be delivered by ship falls into the ocean, it will normally be regarded as objectively (ie for all practical and reasonable purposes) impossible of performance, even though it could be physically retrieved and delivered, but at unreasonably high cost compared to its commercial value.”).

¹⁵ See heads of argument by Back KC (1951 (2) SA 371 (A) 373-374, especially 373D-F: “The fact that the 250,000 gallons of water *per diem* was to come from a particular dam, shows that this supply could never have been contemplated by the parties if the dam was empty; cf. *Wessels*, *supra* sec. 2693. The agreement comes under the class of agreement to which the rule in *Taylor v Caldwell*, 8 L.T. 356, applies i.e. the law imports an implied condition in the agreement to the effect that its performance should be objectively possible, i.e. both parties contracted subject to the continued existence in the dam, of sufficient water to enable it lawfully to continue the supply of the 250,000 gallons daily; cf. *Peters Flaman & Co v Kokstad Municipality*, 1919 AD 427; *Wessels*, *supra* secs. 2712 - 3. 2639 - 41, 2646, 2648, 2651 - 3, 2656, 2693; Mackeurtan *The Law of Sale of Goods in South Africa* (3rd ed., pp. 389 - 92) ...”).

¹⁶ 377F-G.

¹⁷ 378A.

not shed light on the reasons for the trial court's rejection of the respondent's impossibility argument. De Villiers AJA simply concluded that

"no ground has been shown to justify us in interfering with the discretion exercised by the Court *a quo*. This finding makes it unnecessary to consider whether the Court below was correct in rejecting the respondent's contention that the undertaking to release 250,000 gallons of water a day was subject to an implied term that there should be sufficient water in the dam to ensure an adequate supply for the inhabitants of Kingwilliamstown".¹⁸

Given that it was accepted that the Municipality was in breach, how then did the court deal with the question whether Haynes should be awarded specific performance? The *Haynes* case illustrates that our law had not decisively moved away from the familiar categories of English law, despite the Appellate Division's efforts to remove them.¹⁹ De Villiers AJA initially pointed out in *Haynes* that

"The discretion which a court enjoys although it must be exercised judicially is not confined to specific cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."²⁰

However, De Villiers AJA then proceeded to list specific examples of grounds on which courts have in the past exercised their discretion to refuse specific performance. These grounds, which reflect a strong English influence, are: (1) where it would be difficult for the court to supervise the execution of its order, (2) where damages would adequately compensate the plaintiff, (3) where the performance could readily be obtained

¹⁸ 381E-G.

¹⁹ See eg *Shill v Milner* 1937 AD 101, which concerned a breach of a contractual obligation by the defendant, who purchased maize from the plaintiff, to transfer certain export quota certificates (certifying the due export on plaintiff's behalf of a certain amount of maize) to the plaintiff, a maize trader. The AD confirmed the trial court's decision to order specific performance of the obligation despite the defendant's contention that the court should have refused the claim, because it was an obligation to deliver an unspecified and freely marketable commodity.

²⁰ 1951 (2) SA 371 (A) 378G.

elsewhere, (4) where specific performance would entail rendering personal services, (5) where it would cause unreasonable hardship to the defendant, (6) where the agreement giving rise to the claim is unreasonable, or (7) where the order would produce injustice, or would be inequitable under all the circumstances.²¹

De Villiers AJA did emphasise, though, that these were mere examples and not a closed list.²² Thus, he did not, as some commentators have suggested, contradict his statement that the court's discretion is not confined to specific cases and each case must be decided on its own facts. He merely particularised it by giving some examples where courts have exercised, and therefore could exercise, their discretion to refuse the remedy.²³

Having said that, the court still clearly relied on English law to give content to its discretion, and under the influence of the English approach that an order for specific performance is an exceptional remedy, the court nonetheless exercised its discretion in such a way that it appeared as if an order for specific performance would always be

²¹ 1951 (2) SA 371 (A) 378H-379A.

²² 1951 (2) SA 371 (A) 379D-F. See also *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 4 SA 650 (D) 655B per Didcott J.

²³ The decision was interpreted correctly by some authors – see eg Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 56: “In die uitspraak in die Haynes beslissing word inderdaad vyf omstandighede vermeld waaronder vervullingsbevel denkbaar geweier sou kon word” and shortly thereafter the author adds that “[d]ie sinspeling is dan dat die Appèlhof in *Benson* nie in beginsel gekant was teen die identifikasie van normatief relevante faktore nie, maar wou beklemtoon dat daar nie ‘n geslote lys van sodanige faktore is nie. Verder blyk dit dat die kardinale vraag juis was hoe hierdie en ander relevante oorwegings by die uitoefening van die diskresie gehanteer moet word. Hiermee kom die mees problematiese aspek van die Suid-Afrikaanse benadering na vore.” See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 210-211, cited by Foxcroft J in *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) 82F-G: “Some of the textbook writers did not slavishly follow this approach ...”

refused if the above-listed circumstances were present.²⁴ This had the unfortunate consequence that some textbook writers and courts commenting on this case suggested unfairly that the court's treatment of these examples amounted to making them circumstances where specific performance should always be denied.²⁵

According to Van der Merwe et al, for example, “[t]his rigid approach to exercising the discretion of the courts tended to elevate the particular circumstances to general rules and obscured the fact that, according to South African law, an order for specific performance should be refused only in exceptional circumstances”.²⁶ The concern was that the Roman-Dutch right to specific performance, affirmed as part of modern South African law, was contradicted by the courts' endorsement of these crystallised circumstances in which specific performance should be denied.²⁷

However, the court in *Haynes* expressly stated that they are mere examples of grounds on which courts have exercised their discretion to refuse the remedy and not circumstances in which specific performance should always be denied. From the outset the court indicated that there are no “rigid rules” regulating the courts’ discretion to refuse specific performance apart from the fact that it must be exercised judicially.²⁸

²⁴ See De Wet & Van Wyk *Kontraktereg en Handelsreg* 210-211; Lubbe & Murray *Contract* 542-543; Van der Merwe et al *Contract: General Principles* 330.

²⁵ See eg *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C) 86B per Foxcroft J: “The authors [in Wille and Millin’s *Mercantile Law of South Africa* 18 ed (1984) 119] state the same view that other textbook writers do, namely that the true position is that the Court has to exercise its discretion on the particular facts and will refuse to order specific performance in the circumstances set out in *Haynes*’s case.” See further M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 127 ff.

²⁶ Van der Merwe et al *Contract: General Principles* 330.

²⁷ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 784C.

²⁸ Lambiris (*Orders of Specific Performance and Restitutio in Integrum in South African Law* 128) expresses similar views: “Taking advantage of the hindsight provided by *Benson v SA Mutual Life Assurance Society* one can question whether the Appellate Division in

There are only, as Christie also subsequently pointed out, certain “guiding principles” based on earlier decisions where specific performance is likely to be refused.²⁹ The court’s referral in *Haynes* to examples of grounds on which the courts have exercised their discretion in refusing to order specific performance should not be taken to mean that they are circumstances where specific performance must be denied. It is submitted here that the court by no means attempted to establish a general rule that specific performance will be refused if undue hardship to the defendant or to third parties is proved. The examples should have been interpreted as practical considerations or guidelines for exercising the discretion, not as legal rules.

Lubbe & Murray correctly point out that certain later cases, such as *Isep* and *Benson* indicate that the examples of grounds on which courts might refuse to order specific performance listed in *Haynes* were frequently and incorrectly treated as general rules on when the remedy should be denied.³⁰ It is to the later case law that we now turn.

6 1 2 Subsequent developments on the undue hardship principle in South African law

The matter of the exercise of the discretion was only revisited by the Appellate Division 30 years later in *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*.³¹ Here Jansen JA rejected the (supposedly) restrictive approach promoted in *Haynes* and reiterated that every plaintiff is entitled to specific performance subject

Haynes v Kingwilliamstown Municipality ever really intended to lay down this sort of approach. The major point in *Haynes*’ case I suggest, was that the court’s discretion to refuse an order of specific performance must be free and unfettered and that each case should be judged individually in the light of its own circumstances.”

²⁹ See Christie & Bradfield *Christie’s The Law of Contract in South Africa* 546. See also Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 128-134; Sharrock “Contract” in Joubert & Faris (eds) *LAWSA* 5(1) 2 ed para 496; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 323.

³⁰ Lubbe & Murray *Contract* 542-543.

³¹ 1981 (4) SA 1 (A).

only to the court's discretion to refuse the remedy. He did, however, cite with approval the passage from *Haynes* to the effect that in the exercise of its discretion a court will refuse an order for specific performance "where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances".³² In commenting on this decision, Beck concludes that even though "this discourse on the nature of specific performance was unnecessary for the decision and is therefore *obiter*, it is nevertheless indicative of the tendency to move away from a rigid formulation".³³

Again, at about the same time *Issep* was decided, the Appellate Division confirmed the court's discretion in claims for specific performance in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*.³⁴ Here Miller JA agreed with the trial court that hardship to the defendant and "the general unfairness of the agreement in regard to its execution and operation" were valid factors for the court to take in account in the exercise of this discretion.³⁵

The Appellate Division in *Benson v SA Mutual Life Assurance Society*³⁶ restated the law in more specific terms.³⁷ As shown earlier, the court reaffirmed that every plaintiff has a right according to South African law to demand performance *in specie*, and that there is "neither need nor reason" to continue to follow the English rules of equity as to when

³² 5.

³³ 1987 *CILSA* 200. The issue in *Issep Structural Engineering* was whether our law recognises a claim for the objective value of the performance as an alternative remedy to specific performance, and not whether the case was suitable for specific performance. Cf para 1 1 4 above.

³⁴ 1982 (1) SA 398 (A).

³⁵ 441A-C.

³⁶ 1986 (1) SA 776 (A).

³⁷ See again paras 1 1 & 3 3 above.

specific performance should be denied.³⁸ Despite rejecting the traditional English rules to the effect that specific performance should be refused where damages would adequately compensate the plaintiff, or where ordinary goods or chattels, or shares which are readily available on the open market are sold,³⁹ Hefer JA confirmed that there remains an important principle on when specific performance should be refused, namely where it would produce an unjust result.⁴⁰

The more recent decision in *Santos Professional Football Club (Pty) Ltd v Iggesund*⁴¹ is important due to its reference to both *Haynes* and *Benson*, and its attempt to consolidate and apply the two cases. Here the Full Bench, relying on *Benson*, confirmed that every plaintiff has a right to specific performance, subject only to the court's discretion to refuse it.⁴² It also went on to confirm the principles relevant to the exercise of this discretion that were set out in *Haynes*:⁴³

"Those principles were that specific performance will be refused only if it will operate 'unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances'."

Accordingly, the court emphasised that "Courts should be slow and cautious in not enforcing contracts. They should, in a specific performance situation, only refuse performance where a recognised hardship to the defaulting party is proved".⁴⁴ On the

³⁸ 785F. See also G Lubbe "Contractual derogation and the discretion to refuse an order for specific performance" in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 77 80 ff (reproduced with minor changes in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 95-120).

³⁹ 1986 (1) SA 776 (A) 784B-C. Cf para 1 1 3 1 above.

⁴⁰ 783D.

⁴¹ 2003 (5) SA 73 (C).

⁴² 80I-81B.

⁴³ 86B-C.

⁴⁴ 86H.

facts of the case, the court found that there would not be undue hardship in compelling the coach to fulfil his obligations in terms of the contract with his original club, which he entered into freely and voluntarily and had repudiated in order to earn more money as a coach for another club in the same soccer league.⁴⁵ But, as indicated above,⁴⁶ the court unfairly suggested that the court in *Haynes* made it a rule that specific performance should always be refused if undue hardship to the defendant is present, whereas the court in *Haynes* actually only listed it as an example where the remedy has been refused.

According to Naudé, the court, in stating that hardship to the defaulting party was the only basis on which the remedy could be refused, is not “totally correct”.⁴⁷ She refers to *Benson* where the court actually held that

“the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order would operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy”.⁴⁸

This indicates that undue hardship to the defaulting party is not the only example or manifestation of injustice; courts should also take into account whether ordering specific performance would be contrary to public good and exercise their discretion to refuse the remedy accordingly, *for example*, if it would cause undue hardship to third parties (as it would have in *Haynes*).⁴⁹ Thus, the interests of other parties not specifically involved in

⁴⁵ 86.

⁴⁶ See n 25 para 6 1 1 above.

⁴⁷ T Naudé “Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Iggesund*” 2003 SALJ 269 279.

⁴⁸ 1986 (1) SA 776 (A) 783D.

⁴⁹ Apart from the *Haynes* case, see *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 (4) SA 650 (D), and *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C).

the litigation are also relevant in deciding whether the order would result in undue hardship.

The court in *Santos* interpreted the *Benson* decision too narrowly in stating that the remedy should only be refused where a recognised hardship to the defaulting party is proved. But it would appear that the discourse on the interests of third parties was not necessary for the decision because third-party interests were not in question. Any remarks in this regard would therefore in any event have been *obiter*. What is settled is that the courts should not solely consider the effect of such an order on the defendant and whether the effort or cost of performance to him considerably exceeds the benefit which the innocent party will derive from specific performance; they should also consider whether it would endanger or cause undue hardship to third parties. Didcott J affirmed this in *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd*:⁵⁰

“The [Haynes] decision ... established quite plainly that, in assessing any harm the decree might do, the Court could and when appropriate should look beyond its effect on the litigants and take account of its impact on outsiders.”

In this case, a mortgagee claimed specific performance under a clause entitling it to demand possession of the mortgaged property in the event that it felt its interests under the bond to be imperilled. Didcott J considered the hardship not only to the mortgagor but to the mortgagor’s creditors:

“There is much to be said, I believe, for the view that specific performance would ‘operate unreasonably hardly’ on the respondents, that it would be ‘inequitable under all the

⁵⁰ 1982 (4) SA 650 (D) 655E.

circumstances' to them and their other creditors, and that a bond authorising it is indeed 'unreasonable', to quote DE VILLIERS AJA on all counts."⁵¹

Currently (upon the correct interpretation of *Haynes*) in the exercise of their discretion, our courts may consider whether specific performance would cause undue hardship to the defendant or to third parties, even based on events that occurred after the contract was entered into, and refuse the remedy accordingly.⁵² Relevant to this exercise is whether the benefit which the plaintiff will derive from specific performance is minimal in comparison to the disadvantage which the defendant will suffer as a result of having to perform *in specie*.⁵³

In *Industrial & Mercantile Corporation v Anastassiou Brothers*⁵⁴ it was held that inconvenience and "some financial loss" on the part of the defendant were not sufficient reason for the refusal of an order for specific performance. Here the defendant repudiated its contract with the plaintiff whereby the latter would install equipment used for food refrigeration on the defendant's premises. The defendant almost immediately

⁵¹ 658G-H. See also *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C) 87B-E, on the relevance of third-party interests for the decision whether to enforce a similar term of a registered notarial bond.

⁵² This brings us to the matter of when the court should make this assessment. In *Haynes* De Villiers AJA made an important statement regarding when the court should consider the result of its order (1951 (2) SA 371 (A) 381A): "I have found no case in our Courts where it is even suggested that the time when the contract was entered into is the crucial time to take into consideration in determining whether specific performance should be decreed or not. Nor can I see any logical reason why the time when performance is claimed should not be the time when the judge *ex aequo et bono* should consider the result of such an order and the alternative remedy open to the plaintiff." (Quoted with approval by Hatting J in *Klimax Manufacturing Ltd v Van Rensburg* 2005 (4) SA 445 (O) para [14]). In stating this, De Villiers AJA rightly distanced himself from the English author Fry (cf n 87 below).

⁵³ Sharrock "Contract" in Joubert & Faris (eds) *LAWSA 5(1)* 2 ed para 496.

⁵⁴ 1973 (2) SA 601 (W) 609. Cf para 3 3 above.

thereafter engaged another person to supply the same services for him. The court held that although an order of specific performance whereby the defendant would have to pay the plaintiff, against performance by the plaintiff of his duties, would cause the defendant some hardship in conducting its business,⁵⁵ courts should “avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform”.⁵⁶ Clearly, the court rejected any notion of “efficient breach”.⁵⁷ In this case the defendant’s defiant, arrogant attitude in repudiating the contract played a significant role in the court’s decision to grant specific performance.⁵⁸

The by now familiar case of *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*,⁵⁹ is an important decision that also illustrates our courts’ discontent with creditors who are under the misconception that they are entitled to withdraw unilaterally from a contract, i.e. without having obtained the right to resile.⁶⁰

⁵⁵ There was evidence to the effect that the installation could take a period of a week or possibly a month or more to complete, and that the defendant’s shop would have to be emptied of its refrigerated goods and that the equipment would have to be removed, which would have caused the defendant some considerable loss and discomfort.

⁵⁶ 1973 (2) SA 601 (W) 609A.

⁵⁷ See B J Van Heerden “An exploratory introduction to the economic analysis of law” 1981 *Respona Meridiana* 147 156: “Posner would probably regard the decision as giving rise to an inefficient allocation of resources.”

⁵⁸ See n 79 below. See also Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 63.

⁵⁹ 1984 (3) SA 861 (W) 880-881.

⁶⁰ See esp 881C-G per Coetzee J: “If LMG commits any breach of contract which entitles Ranch to resile, it is still free to do so at any time in the future and, thereupon, to take appropriate action. The so-called impasse on which Ranch relies is unimpressive. If it does not pay LMG, as is threatened, that is the latter’s problem to deal with in its own way. If it refuses to give LMG instructions, also as is threatened, without having a *locus poenitentiae*, it will leave itself open to an action for damages by both LMG and Fluor. If it

Here the court, in discussing building contracts in general, held that the client (creditor) does not have a unilateral right of stoppage of his duty to cooperate with the builder in order to enable the latter to fulfil his obligations, i.e. the creditor cannot simply walk away from the contract. And if the creditor fails in performing this duty he may be compelled *in forma specifica* to cooperate with the builder. Again, there is no question of allowing “efficient breach”.

A modern illustration of a court considering a defence based on hardship (and the concomitant argument that a debtor is entitled to commit “efficient breach” or walk away from a so-called “bad bargain”) is provided by the decision of Eksteen J in *Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd*.⁶¹ Here, the respondent lessee entered into a lease agreement with the applicant lessor, which provided that it would trade at full capacity for the full period of lease as one of two anchor shops at a shopping centre owned by the applicant lessor. However, when it appeared that the lease was not as profitable as the lessee had anticipated, it threatened to stop trading unless it was granted a 50% reduction in its rental. It even argued that the lessor was not entitled to an order for specific performance, as it would force the lessee to trade at a loss, and that the lessor should claim damages instead. Eksteen J dealt with this argument in the following way:

“[T]he right to elect whether to claim performance or damages belonged to Edrei, not Dis-Chem. If Dis-Chem were to breach the lease by vacating the premises other tenants would follow, causing irreparable harm to Edrei’s business, and the fact that it could in due course recover damages from Dis-Chem did not detract from this, since Edrei would have great

consciously seeks to achieve this result that is its affair. This kind of dog in the manger attitude however strikes me as childish and not worthy of serious consideration as a so-called impasse. I have therefore come to the conclusion that there is no reason why Ranch’s duty to cooperate should not be enforced *in forma specifica* ...”

⁶¹ 2012 (2) SA 553 (ECP). Compare para 5 2 (iv), esp n 123 and its related text above & para 5 3 esp treatment of *Hamilton West* case by Minnesota Court of Appeal in *Metropolitan Sports Facilities Commission v Minnesota Partnership* in text to nn 153 ff.

difficulty in replacing Dis-Chem with a desirable tenant. It was clear that Edrei had no alternative remedy to satisfy its operational requirements other than by interdict. The fact that Dis-Chem had concluded a lease that was not as lucrative as anticipated did not entitle it to walk away from its obligations, nor did the fact that it was trading at a loss deprive Edrei of its right to elect to hold Dis-Chem to its obligations.”⁶²

In contrast to this rather strict approach, the court in *York Timbers Ltd v Minister of Water Affairs and Forestry*⁶³ exercised its discretion to refuse specific performance by applying the undue hardship principle, i.e. on the ground that to grant specific performance would have resulted in undue hardship to the defendant. Here the applicant claimed specific performance of a contract in terms of which the respondents, on behalf of the Department of Water Affairs and Forestry, undertook to sell softwood sawlogs to the applicant. The contract also imposed certain conditions upon the Department regarding the management of the plantations. In particular, the Department warranted and undertook that the plantations from which the sawlogs were supplied would always be exclusively devoted to softwood afforestation. The respondents contended that the Department had failed to ensure that the plantations were exclusively devoted to softwood afforestation because they no longer conducted normal silvicultural operations in the plantations, but had commenced clear felling⁶⁴ the plantations with a view that they become part of a conservation area.

The court found that precise performance of the obligation to devote the plantations to softwood afforestation would cause excessive inconvenience and expense to the Department since clear felling has supposedly been carried out for at least a year and could not be reversed without enormous inconvenience and expenditure for the Department. It held that even though clear felling was not the normal silvicultural practice contemplated by the agreement, it appeared to be common cause that the plantations had become so run down that the Department could not supply the volume

⁶² 553F-H.

⁶³ 2003 (4) SA 477 (T).

⁶⁴ This is the practice of uniformly cutting down all the trees in an area.

of sawlogs stipulated by the contract. And by clear felling the plantations the Department will be able to deliver the volumes of sawlogs stipulated by the contract, but that will mean that the plantations will no longer be exclusively devoted to softwood afforestation. So, the court ordered specific performance by the Department to the extent of delivering the volume of timber contracted for, but the court refused to order compliance with the conditions regarding the management of the plantations.

Another good example of the exercise of the discretion to refuse specific performance by applying the undue hardship principle is *Klimax Manufacturing Ltd v Van Rensburg*,⁶⁵ where Hattingh J refused to order the first respondent to comply with the contractual provisions of a tacit franchise agreement and the restraint provisions set out therein on the ground that: "To interdict Van Rensburg for a few months for what he has been doing, with apparent unconcern on the part of applicants for 16 months, would operate unreasonably harshly and inequitable under all the circumstances."⁶⁶ The court found that because the applicants were well aware of their rights in terms of the clause in restraint of trade⁶⁷ some 16 months before they instituted the proceedings, they cannot contend that the respondents were causing them grievous financial harm.⁶⁸

The preceding section has indicated that although the courts at times formally only regard undue hardship as a relevant factor influencing (or circumstance affecting) the exercise of their unfettered discretion, it appears that actual judicial practice is to refuse specific performance whenever undue hardship to the defendant or third parties is present; this means that the discretion to award specific performance is in effect

⁶⁵ 2005 (4) SA 445 (O).

⁶⁶ Para [18].

⁶⁷ The clause provided that the franchisee (represented by Van Rensburg) "shall not for a period of two years thereafter and within the territory, directly or indirectly in any capacity whatsoever be engaged, concerned or interested in the business which competes, indirectly or directly, with or is similar in nature to this business" (para [6]).

⁶⁸ Para [15].

irrelevant. It also seems that commentators have known this for a long time, but the consequences have not been fully worked out.

It therefore appears that our law faces a choice. It could continue with its purportedly flexible discretionary approach whereby hardship is a relevant factor in the exercise of the court's discretion, or it could expressly adopt a rule whereby specific performance is restricted if it would cause undue hardship to the defendant or to third parties.⁶⁹ The purpose of the following comparative overview is to assist in determining the most appropriate option for South African law.

In the comparative overview we will first turn to Anglo-American law, which initially steered our law in the direction of an exception-based approach, and despite the rejection of such an approach, significantly and dramatically influenced our courts' approach to specific performance. As noted above, the origin of specific performance in the English courts of equity has influenced the factors our courts may take into account in exercising their discretion to refuse the remedy.⁷⁰ This is especially apparent in the discretionary power given to our courts to refuse the remedy if it would cause injustice.⁷¹

⁶⁹ See esp in this regard, statement by Lubbe quoted in text to n 226 below.

⁷⁰ See eg paras 1 1 3, 3 3, 4 2 1 & 6 1 1 above. See also Lubbe "Contractual derogation and the discretion to refuse an order for specific performance" in Glover (ed) *Essays in Honour of AJ Kerr* 83.

⁷¹ Compare, eg, the speech of Sir John Romilly in *Haywood v Cope* (1858) 25 Beav 140 151-152, with that of Hefer JA in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 1986 (1) SA 776 (A) 783A-E, to the same effect. See also G H Treitel *Remedies for Breach of Contract: A Comparative Account* (1988) 65-66. For US authority, see *Knott v Cutler* 31 S.E.2d 359, 361 (1944) per Denny J: "It is said in 49 Am.Jur., Sec. 8, p. 13: 'Assuming that the contract in question in an action for specific performance is one of the class of contracts of which specific performance may be granted because of inadequacy of the remedy at law, the granting of the decree of specific performance is not a matter of absolute right. As the rule is usually stated, the granting of relief by a decree requiring specific performance of a contract rests in the sound discretion of the court before whom the application is made, which discretion is to be exercised upon a

The common law therefore requires further evaluation, even though its reception has proven to be problematic in this area of our law.

6 2 Undue hardship as a bar to specific performance in common law: England and America

Undue or “severe” hardship (as it is known in England) to the defendant is regarded as a ground for refusing specific performance at common law, represented here by English⁷² and American law.⁷³ As indicated from the outset, the starting point of English and American contract law is that monetary damages are sufficient and thus the primary remedy for breach of contract. Specific performance is only awarded when damages are inadequate, and is therefore the secondary remedy for breach of contract.⁷⁴ But, even if damages are inadequate, specific performance will be refused where it would cause the defendant severe hardship, far exceeding the loss the plaintiff would suffer as

consideration of all of the circumstances of the case, with a view of subserving ends of justice. This discretion of a court of equity to grant or withhold specific performance of a contract is not an arbitrary or capricious one, but is a judicial discretion to be exercised in accordance with settled rules and principles of equity, and with regard to facts and circumstances of the particular case. The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case, and no positive rule can be laid down by which the action of the court can be determined in all cases.”

⁷² Jones & Goodhart *Specific Performance* 117; A S Burrows *Remedies for Torts and Breach of Contract* 3 ed (2004) 498; Spry *The Principles of Equitable Remedies* 196; J Beatson et al *Anson's Law of Contract* 29 ed (2010) 580; Peel *Treitel's Law of Contract* 1106-1107; H G Beale et al (eds) *Chitty on Contracts I: General Principles* 31 ed (2012) 1926-1927; M Chen-Wishart *Contract Law* 4 ed (2012) 546; M P Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 16 ed (2012) 798.

⁷³ J M Perillo (ed) *Corbin on Contracts 12: Restitution, Specific Performance and Election of Remedies* Interim ed (2002) §§ 1162, 1164; J M Perillo *Calamari and Perillo on Contracts* 6 ed (2009) § 16.14; G Klass *Contract Law in the USA* (2010) 215.

⁷⁴ Spry *The Principles of Equitable Remedies* 198; para 2 3 2 above.

a result of the breach.⁷⁵ For example, in *Patel v Ali*⁷⁶ the plaintiff sought specific performance of a sale agreement of a house four years after its conclusion. By that time the seller fell seriously ill, had borne two more children, and her husband was declared insolvent. The court therefore found that an order forcing her to move would cause a "hardship amounting to injustice" as she spoke little English and relied on nearby friends and family for support.⁷⁷ It follows that English law will, as a general rule, restrict the availability of specific performance where performance has become onerous due to a change of circumstances. As stated by Goulding J:

"Equitable relief may ... be refused because of an unforeseen change of circumstances not amounting to legal frustration, just as it may on the ground of mistake insufficient to avoid a contract at law."⁷⁸

⁷⁵ See eg *Denne v Light* (1857) 8 De GM & G 774 (where the court refused to order specific performance against a purchaser of farming land which he would have been unable to enjoy because of the absence of any right of access); *Haywood v Cope* (1858) 25 Beav 140 145 (n 82 below). This is confirmed in J N Pomeroy Jr *Pomeroy's Equity Jurisprudence and Equitable Remedies VI* 3 ed (1905) § 796: "Specific performance not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given. The disproportion between the burden upon the defendant and the gain to the plaintiff makes performance inequitable."

⁷⁶ [1984] Ch 283. See also *Gould v Kemp* (1834) 39 ER 959 961 *per* Brougham LC: "any circumstance of hardship in the Defendant's situation will incline the Court not to interfere, but to leave the party to his legal remedy in damages", and *Wroth v Tyler* [1974] Ch 30, where specific performance of a contract for the sale of land was refused because it would give rise to uncertain and difficult litigation between members of the defendant's family and a possible consequence of the order would be to split up their family.

⁷⁷ [1984] Ch 283 288, *per* Goulding J, using a phrase originally employed by James LJ, in *Tamplin v James* (1880) 15 ChD 215 221. For further information see eg E McKendrick *Contract Law: Text, Cases and Materials* 2 ed (2005) 1147.

⁷⁸ [1984] Ch 283 288.

However, as in the *Anastassiou Brothers* case,⁷⁹ Goulding J, also stressed that “mere pecuniary difficulties” are insufficient to offer an excuse from performance of a contract:

“[O]nly in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property. A person of full capacity who sells or buys a house takes the risk of hardship to himself and his dependants, whether arising from existing facts or unexpectedly supervening in the interval before completion ...”⁸⁰

It follows that a contract which was fair at its conclusion may be specifically enforced even though subsequent events turned it into a bad bargain.⁸¹ And specific performance will be ordered even if a purchaser contracted to buy property of a speculative or doubtful character and it turns out to be worthless.⁸² Thus, the court will always balance the hardship which the defendant would suffer if ordered to perform against any

⁷⁹ 1973 (2) SA 601 (W) 609B-C *per* Davidson J: “That it would be inconvenient [for the defendant if he were compelled to accept performance by the plaintiff to install equipment in his premises] is likely, that he will suffer some financial loss is likely, but that he has brought on himself by an arrogant denial of his commitments and I do not believe he should earn particular sympathy for that.”

⁸⁰ [1984] Ch 283 288. See also *Francis v Cowcliffe* (1977) 33 P & CR 368 (ChD); Jones & Goodhart *Specific Performance* 119; Burrows *Remedies for Torts and Breach of Contract* 499; Beatson *Anson's Law of Contract* 580; Perillo (ed) *Corbin on Contracts* 275-276.

⁸¹ For American authority in support of this principle, see *Simpson v Green* 231 S.W. 375, 380-381 (Tex. Comm'n App. 1921); *Knott v Cutler* 31 S.E.2d 359, 361 (1944); *Cities Service Oil Co v Viering* 89 N.E.2d 392, 401 (1949); *De Caro v De Caro* 97 A.2d 658, 662 (1953); *Clardy v Bodolosky* 679 S.E.2d 527, 531 (Ct. App. 2009). See also Perillo (ed) *Corbin on Contracts* 275-276.

⁸² So, in *Haywood v Cope* (1858) 25 Beav 140, it was held that the defendant who contracted for the lease of a mine could not resist its performance because the collieries turned out to be less profitable than he anticipated. See also Northcote *A Treatise on the Specific Performance of Contracts by Sir Edward Fry* § 427.

hardship to the plaintiff if the order is refused.⁸³ And the order will only be refused if the detriment to the defendant is entirely out of proportion to the benefit which the plaintiff will derive from performance. In *Co-operative Insurance Society Ltd v Argyll Stores Holdings Ltd*,⁸⁴ Millet LJ (dissenting), concluded that

“To compel a defendant for an indefinite period to carry on a business which he considers is not viable, or which for his own commercial reasons he has decided to close down, is to expose him to potentially large, unquantifiable and unlimited losses which may be out of all proportion to the loss which his breach of contract has caused to the plaintiff.”⁸⁵

Thus, even though the scope of the hardship restriction is limited and courts should not refuse to order specific performance based on mere financial difficulties, the “objection may extend to economic considerations on a more objective basis, i.e. independent from the particular position of the seller”⁸⁶ as it did in *Argyll Stores*, where the remedy was refused, *inter alia*, because it would have forced the defendant to continue trading at a loss.

⁸³ For example, in *O'Neill v Ryan (No 3)* [1992] 1 IR 166, the plaintiff was granted specific performance because the hardship to the defendant was outweighed by the hardship the plaintiff would have suffered from the refusal of the order as he would have been left holding shares in a company engaged in business in a highly volatile industry. See also *Watson v Marston* (1853) 4 De Gex, M & G 230 238 *per* Turner LJ.

⁸⁴ [1996] Ch 286, 304-306 (AC).

⁸⁵ The House of Lords, in its refusal of an order of specific performance of a keep-open clause, also regarded the loss which the defendant may suffer through having to comply with the order by running a business at a loss for an indefinite period as greater than that which the plaintiff would suffer from the contract being breached. See para 5 2 (ii) above.

⁸⁶ V Mak *Performance-Oriented Remedies in European Sale of Goods Law* (2009) 98: “For example, there are circumstances in which the court can presume that performance would become too onerous on any party, regardless of the financial position that they find themselves in.”

In determining whether to grant the discretionary remedy of specific performance the courts (of both England and the US) will also consider the effect of such an order⁸⁷ on third parties.⁸⁸ According to Corbin “[t]he interests of individuals not parties to the contract and of the public at large will be considered by the court and in some cases will be decisive in determining whether to grant or to refuse a decree for specific

⁸⁷ According to Fry “[t]he question of the hardship of a contract is generally to be judged of at the time at which it is entered into...” (G R Northcote *A Treatise on the Specific Performance of Contracts by Sir Edward Fry* 6 ed (1921) 199 § 418). Spry, however, distanced himself from Fry’s proposition, and stated that the cases Fry relied on did not support this view (I C F Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* 8 ed (2010) 196-197). Fry’s view is not tenable because, as Spry correctly argues, questions of hardship might not arise at the stage of contract conclusion but subsequent events might occur that render performance more onerous for the defendant. Fry, however, did qualify his statement in a subsequent section, by referring to cases in which the courts refused specific performance based on events that occurred after the conclusion of the contract (Northcote § 421). For example, in *The City of London v Nash* (1747) 26 ER 1095, where a party agreed to re-build several houses, but eventually only built two new houses and repaired the others, the Court of Chancery held that ordering specific performance at that stage would result in too great a loss and hardship to the defendant, and would in any event be useless to the plaintiff. Jones and Goodhart also confirm that “there is no logical justification for entirely ignoring hardship to the defendant which has arisen from events occurring after the date of the contract, and in fact in several of the cases in which specific performance has been refused on grounds of hardship to the defendant the hardship arose from [subsequent] events” (*Specific Performance* 2 ed (1996) 123). See also E Peel *Treitel’s Law of Contract* 13 ed (2011) 1107).

⁸⁸ See J N Pomeroy Jr *A Treatise on the Specific Performance of Contracts* 3 ed (1926) § 181a: “Where the rights of innocent third persons, not parties to the contract, will be affected, the court may properly consider whether specific performance would be fair and just to them, and withhold the remedy accordingly. The court may also consider the public inconvenience which would result from the enforcement of a contract.” See more recently, Jones & Goodhart *Specific Performance* 121.

performance".⁸⁹ Analogous to *Haynes*, a Pennsylvania court accordingly refused to order specific performance of an electricity supplier's obligation to supply a sufficient flow of water to a company to generate electricity for manufacturing paper on the ground that it "would result in paralysis of the Power Company, and in disabling it, not only to furnish water power to the Paper Company, but to furnish electric light and power through a wide and thickly settled region of country".⁹⁰

Thus, the discretionary nature of this equitable remedy permits its refusal when a variety of factors combine to make the specific enforcement of a contract unfair. This is apparent from § 364 of the American Law Institute's *Restatement (Second) of Contracts*.⁹¹ It lists certain circumstances in which a court might consider specific performance unfair and for that reason refuse to order specific performance; it also envisages a balancing of competing interests in order to determine whether specific performance would be fair. One of the grounds for refusal is where "the relief would cause unreasonable hardship or loss to the party in breach or to third persons".⁹² § 364 (2), on the other hand, protects the plaintiff's (and third persons') interest(s) in performance. It provides that specific performance will be granted if its denial would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons. Thus, in deciding whether to grant or refuse the remedy, courts consider not only the hardship such an order might impose on the parties themselves, but also the hardship it might impose on or benefits it might provide third parties or the

⁸⁹ Perillo (ed) *Corbin on Contracts* § 1169. See also Pomeroy Jr *Pomeroy's Equity Jurisprudence and Equitable Remedies* §§ 794-795; Klass *Contract Law in the USA* 215, and for English authority, Spry *The Principles of Equitable Remedies* 201-203; Jones & Goodhart *Specific Performance* 121-122.

⁹⁰ *York Haven Water & Power Co v York Haven Paper Co* 201 F. 270, 279 (C.C.A.3d, 1912).

⁹¹ Addendum A 384.

⁹² § 364(1)(b). In terms of this section a court may also refuse to order specific performance where "the contract was induced by mistake or unfair practices", or where "the exchange is grossly inadequate or the terms of the contract are otherwise unfair" (§§ 364(1)(a) & 364(1)(c) respectively).

public at large. A court may therefore refuse specific performance on the ground that it would be unfair considering the hardship it might cause the contractual parties or third parties, yet afford the aggrieved party damages or other relief.⁹³

The comments to § 364 contain examples of its application. The comments suggest that the section applies to those situations where impracticability of performance or frustration that fall short of what is required for relief under those doctrines, are involved.⁹⁴ The position in South African law is somewhat similar: although specific performance is the default remedy for breach of contract, the courts will also consider the hardship its order might cause the defendant in the exercise of their discretion, and may refuse to order specific performance if performance becomes excessively burdensome but falls short of what is required for avoidance under the doctrine of supervening impossibility.⁹⁵

As is the case with considerations of fairness (recognised in § 364 of the *Second Restatement*), considerations of public policy might also preclude an order for specific

⁹³ Klass *Contract Law in the USA* 215.

⁹⁴ See n 123 below.

⁹⁵ See text to nn 10 ff para 6 1 1 above. See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 1986 (1) SA 776 (A) 783E-F per Hefer JA: “Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all.” (The judge relies on De Wet & Van Wyk *Kontraktereg en Handelsreg* (1978) 4 ed 189 n 61 and the cases cited there, and also *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 441-443, where Miller JA states that “it may be that in certain cases evidence falling short of proof of impossibility might nevertheless justify a Court in refusing to decree specific performance” (443B)).

performance.⁹⁶ According to § 365 of the *Second Restatement*, specific performance will not be granted “if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy”. Thus, in *Rockhill Tennis Club of Kansas City v Volker*,⁹⁷ the Supreme Court of Missouri refused to order specific performance of a contract for the sale of land located near a public art museum, because the buyer’s planned use of the land might “seriously mar and hamper the plan of development of this gallery of art as a thing of beauty”.⁹⁸ Public interest may, however, weigh in favour of specific performance. For example, in *Wilson v Sandstrom*,⁹⁹ the Supreme Court of Florida confirmed a specific performance order requiring the provision of greyhounds to a racetrack on the basis of the loss in tax revenue that would follow from the suspension of racing.

These sections might preclude specific performance, but this does not necessarily excuse the debtor from liability. Even though specific performance may be refused, a judgment for damages may be granted to protect the creditor’s expectation interest.¹⁰⁰ The debtor is thus liable, albeit not to perform *in specie*. Thus, in *Rockhill Tennis Club* the club was permitted to recover damages.¹⁰¹ This largely corresponds with our law, where the basic principle is that courts should refuse to order specific performance if it would produce an unjust result, but if a court decides to refuse the remedy on this

⁹⁶ In *Seaboard Air Line Railway Co v Atlanta B & C R Co* 35 F. (2d) 609, 610 (1929) the court said: “In the exercise of its discretion, a court of equity may refuse specific enforcement of a valid contract where, by granting that relief, a paramount public interest will or may be interfered with”.

⁹⁷ 56 S.W.2d 9 (Mo. 1932).

⁹⁸ 56 S.W.2d 9, 20 (Mo. 1932).

⁹⁹ 317 So.2d 732 (Fla. 1975).

¹⁰⁰ See § 365, cmt a.

¹⁰¹ 56 S.W.2d 9, 21 (Mo. 1932). Similarly, in *Patel v Ali* [1984] Ch 283, the defendant remained liable for damages. See further G H Treitel *Frustration and Force Majeure* 2 ed (2004) 301-302.

ground, the creditor will still be able to claim his *id quod interest*, by way of a claim for damages.¹⁰²

The preceding section has indicated that Anglo-American law recognises severe or undue hardship as a ground for refusing specific performance, but the scope of the hardship restriction is limited by the fact that it does not extend to subjective economic considerations, i.e. the court will not be dissuaded from ordering specific performance based on the particular financial interest of the debtor.¹⁰³

The aim of the following sections will be to examine the relevance of hardship in certain civil-law systems and international instruments. It should be borne in mind that they, in contrast to Anglo-American law, recognise specific performance as their primary or default remedy for breach of contract and generally do not accord the courts any discretion in granting it. Instead, they grant the creditor a right to specific performance, subject to certain exceptions.¹⁰⁴

6 3 Unreasonable effort or expense as a bar to specific performance in civil law: Germany and the Netherlands

Hardship is recognised as a bar to specific performance in German law to the extent that § 275(2) of the German Civil Code or *Bürgerliches Gesetzbuch* (BGB)¹⁰⁵

¹⁰² See again text to nn 10 ff para 6 1 1 above.

¹⁰³ See eg Mak *Performance-Oriented Remedies in European Sale of Goods Law* 98: “As to economic hardship, the scope appears narrow. Specific performance will not be refused simply because the defendant is in financial difficulties.”

¹⁰⁴ See paras 2 3 1 & 2 3 3 above.

¹⁰⁵ On a procedural level, § 765a of the ZPO (Addendum A 395) applies to the execution of court orders and gives the court (of execution) the power to revoke, prohibit or temporarily suspend either completely or in part, a measure of execution, on application of the debtor, if, in full consideration of the creditor’s need for protection, the measure would lead to hardship that due to very special circumstances is immoral (*contra bonos mores*). In commenting on this section, Beale et al note that it will only prevent execution in “drastic

determines that the debtor may refuse to perform insofar as such performance would require an effort which would be grossly disproportionate to the interest of the creditor in receiving performance, taking into account the content of the obligation and the requirements of good faith. Note however, that § 275(2), dealing with hardship (in contrast to § 275(1) dealing with impossibility),¹⁰⁶ does not exclude the creditor's right to specific performance, but merely gives the debtor the right to refuse to perform if the performance would involve unreasonable efforts or expense.¹⁰⁷ This provision essentially codifies an approach followed by the German Supreme Court, the *Bundesgerichtshof (BGH)*.¹⁰⁸

In the leading case¹⁰⁹ the defendant built flats on a plot of land, part of which was to be transferred to the plaintiffs under an agreement of sale. On the remaining land the defendant built an underground car park, which, by mistake extended to and covered about 20 square meters of land purchased by the plaintiffs. This meant that the defendant could not transfer the part of land contracted for. The plaintiffs therefore

and exceptional circumstances", in absence of which, the creditor's interest in having the judgment enforced will prevail (*Cases, Materials and Text on Contract Law* 2 ed (2010) 882).

¹⁰⁶ See n 114 below.

¹⁰⁷ § 275(3) on force majeure, similarly gives the debtor the right to refuse performance, i.e. only the *duty* of performance is excluded and it remains open to the creditor to claim performance and the debtor to render performance in spite of the obstacle to his performance (Addendum A 389). See R Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 45 (text to nn 115-116 below), and C Brunner *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (2009) 83 ff.

¹⁰⁸ Mak *Performance-Oriented Remedies in European Sale of Goods Law* 100-101. See also B Markesinis, H Unberath & A Johnston *The German Law of Contract: A Comparative Treatise* 2 ed (2006) 414: "Paragraph 275 II BGB was not meant to change the law but rather to encapsulate the *rationes* of two decisions of the BGH dealing with the exclusion of the main obligation of performance due to disproportionate outlays."

¹⁰⁹ BGH, BGHZ 62, 388 (21.6.1974).

demanded the removal of the encroachment to achieve specific performance of the contract. The *BGH* refused the plaintiffs' claim for the removal on the ground that it would be unreasonable to order the defendants to reconstruct the car park considering the expense involved in such a reconstruction.

Another relevant authority¹¹⁰ concerned the sale by the defendant of a part of land which the defendant held in trust for the plaintiff. The plaintiff demanded that the defendant transfer the property back to him, but the third-party purchaser, having obtained a stronger proprietary interest, was only willing to renounce his right if the defendant bought it back at thirty times its estimated value. The *BGH* referred to the principle of good faith and accordingly held that the defendant could not be reasonably expected to buy the land back at thirty times its value; therefore he was released from his obligation to transfer the land back to the plaintiff. These decisions also illustrate that the provision envisages a balancing exercise, and the duty of performance will only be excluded where the disadvantage to the defendant outweighs the plaintiff's interest in performance. According to Zimmermann this provision is designed to take account of what was previously termed "practical impossibility" (*praktische Unmöglichkeit*)¹¹¹ and this is why the effort required to perform is measured against the interest of the creditor in receiving performance.¹¹²

Compared to our law,¹¹³ it is particularly noteworthy that initial objective impossibility does not affect the validity of the contract in modern German contract law.¹¹⁴ However,

¹¹⁰ *BGH*, NJW 1988, 799. Referred to by Markesinis et al *German Law of Contract* 414, and Mak *Performance-Oriented Remedies in European Sale of Goods Law* 101.

¹¹¹ See further, on the nature of this type of impossibility, Ernst W "§ 275" in Krüger W (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch 2 Allgemeiner Teil: §§ 241-432* 6 ed (2012) para 37.

¹¹² Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* 45.

¹¹³ See para 6 1 1 above & para 7 2 2 below.

as far as the exclusion of the right to specific performance is concerned, according to Zimmermann, § 275(2) BGB necessitates a further distinction because it “provides for a different legal consequence from the one concerning factual impossibility: the debtor’s obligation does not automatically fall way, but the debtor is merely granted a right to refuse performance”. The implication is that the law “wants to leave it open for the debtor to render performance in spite of the unreasonable effort which this may involve”.¹¹⁵ (While, according to § 275(1) the debtor is released from his obligation of performance, as the claim for performance is excluded.) Thus, § 275(2) BGB excludes the debtor’s duty of performance but not the creditor’s claim to the performance.¹¹⁶ But if the debtor refuses to perform according to § 275(2) BGB, a judgment for damages will still be granted to protect the plaintiff’s expectation interest.¹¹⁷ This is stated expressly in § 283 BGB, which determines that a claim for damages (in lieu of performance) is not affected where the duty of performance is excluded under § 275.

Treitel, in his comparative treatise on force majeure and frustration, observes that

“Recent developments in German law show considerable convergence between civil and common law approaches to this topic. Before the coming into force in 2002 of amendments

¹¹⁴ § 311a(1) BGB; Markesinis et al *German Law of Contract* 408; Zimmermann *The New German Law of Obligations* 44: “§ 275 I BGB, as its wording makes it clear, applies to all types of impossibility: objective impossibility (nobody can perform) subjective impossibility (a specific debtor cannot perform), initial impossibility (performance was already impossible when the contract had been concluded), subsequent impossibility (performance has become impossible after conclusion of the contract), partial impossibility, and total impossibility. Exclusion of the right to specific performance does not depend on whether the debtor was responsible for the impossibility or not.”

¹¹⁵ Zimmermann *The New German Law of Obligations* 47. See also F Faust & V Wiese “Specific performance – a German perspective” in J Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 47 51.

¹¹⁶ See text to n 107 above.

¹¹⁷ Markesinis et al *German Law of Contract* 408-409. See also G H Treitel *Frustration and Force Majeure* 2 ed (2004) 3-4.

to the Civil Code (BGB), that Code provided that a contract for an impossible performance was null (*nichtig*).¹¹⁸ This provision has been repealed so that antecedent impossibility is no longer a ground for invalidity.¹¹⁹ Instead, impossibility is a bar to a claim for (specific) performance¹²⁰ but not to one for damages ...”¹²¹

The convergence he refers to relates to the fact that most common law jurisdictions do not follow the *impossibilium nulla obligatio est* principle.¹²² As a general rule, the maxim *pacta sunt servanda* commands that contracts should be performed absolutely (albeit by means of monetary compensation). US courts have continually repeated this theme.¹²³

¹¹⁸ Referring to former § 306 BGB.

¹¹⁹ Referring to § 311a(1) BGB.

¹²⁰ Referring to § 275(1) BGB.

¹²¹ *Frustration and Force Majeure* 3-4.

¹²² 1 ff.

¹²³ See eg *Cook v Deltona Corporation* 753 F.2d 1552, 1557 (11th Cir. 1985); and see P Walter “Commercial impracticability in contracts” (1987) 61 *St John’s Law Review* 225. However, in case of frustration of contract – i.e. when the contract is rendered useless by the change of circumstances – an exception is granted to this general rule. The modern trend in the US is to allow the defence of impossibility when performance is impracticable because of excessive and unreasonable difficulty or expense. The *Second Restatement* § 261 states the general principle under which a party’s duty of performance may be discharged due to impracticability: where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged ...”. This means that he may be excused from that duty if performance has unexpectedly become impracticable as a result of a supervening event. Where contracts for the sale of goods are concerned, UCC § 2-615 contains a similar rule. Thus, in the US, the doctrine of changed circumstances is identified as the doctrine of commercial impracticability. Similarly, in England, the doctrine of changed circumstances was used to explain and develop a doctrine of frustration of purpose, which excuses non-performance when the purpose or foundation of the contract has disappeared. These

The *impossibilium nulla obligatio est* principle has also been rejected in English law.¹²⁴ These systems recognise that parties can effectively enter into a contract requiring one of them to do the impossible, because in common law, the primary remedy for breach of contract is damages, and performance of an obligation to pay money is never considered to be impossible.¹²⁵ According to Treitel, the recognition of specific performance as the primary remedy for breach of contract by civil-law systems explains why these systems experience “conceptual difficulty about the actual enforceability of the impossible obligation” and instead hold the party responsible for the impossibility liable for compensation.¹²⁶

A creditor’s right to specific performance under Dutch law is restricted in a similar way.¹²⁷ Article 3:296(1) of the *Burgerlijk Wetboek* (BW) makes it clear that specific performance cannot be claimed if the law, the nature of the obligation, or a juridical act, determines otherwise.¹²⁸ It follows that a claim for specific performance may be restricted on the basis of (i) legal provisions to be found in the BW itself, (ii) the nature

doctrines excuse performance that fall short of the standard of objective impossibility. See further on the legal consequences of these doctrines, E A Farnsworth *Contracts* 3 ed (1999) 637 ff; Treitel *Frustration and Force Majeure* 546 ff. Cf text to n 94 above.

¹²⁴ See eg *Thornborow v Whitacre* (1705) 2 Ld Raym 1164 1165 *per* Holt CJ “where a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages”. See also *Jones v St John’s College* (1870) LR 6 QB 115 127; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 163; *Eurico SpA v Philipp Bros (The Epaphus)* [1987] 2 Lloyd’s Rep 215 218. See further A Burrows (ed) *English Private Law* 3 ed (2013) 601-602.

¹²⁵ Evidenced by Holmes’ famous words on contractual liability (see para 3 2 above). See also Markesinis et al *German Law of Contract* 407: “The question as to the extent to which impossibility releases the debtor from the obligation of performance does not arise directly in Anglo-American law. Since specific performance is the exception, it is not necessary to deal with impossibility as a defence to a claim for performance.”

¹²⁶ Treitel *Frustration and Force Majeure* 2-3.

¹²⁷ See text to n 117 para 2 3 1 2 above.

¹²⁸ Asser/Hartkamp & Sieburgh 6-II *De Verbintenis in het Algemeen* (2009) nr 344.

of the debtor's obligation, and (iii) a juridical act, for example where the parties to the contract agree that the remedy is not available to either one of them, or even that no remedies can be exercised in the case of non-performance.¹²⁹ And, a debtor would be able to raise a defence on the basis of Article 3:13 BW to the effect that the creditor has abused his right (contained in Article 3:296(1)) in claiming specific performance. This will be the case when it is established that the creditor cannot reasonably resort to his right to claim specific performance, having regard to the disproportionality between his interest in exercising that right and the interest of the debtor that will be harmed as a result of such exercise. It may be concluded then that this defence will be available to defendants in hardship cases. Article 3:12 BW also provides that the substantial interests of third parties can be taken into account in considering whether such disproportionality exists.¹³⁰

Apart from these limitations listed in the BW, the availability of specific performance has also been limited through developments in the case law. These developments include impossibility of performance, and more recently, limitations on grounds of reasonableness and equity.¹³¹

Let us first consider the limitation of impossibility (*onmogelijkheid*), to the extent that it relates to the arguments advanced here. Dutch courts will not grant specific performance in relation to an obligation which turns out to be impossible to perform.¹³² The BW, however, does not define the concept of impossibility,¹³³ and its development

¹²⁹ D Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) 349 (section by M B M Loos).

¹³⁰ See generally D Haas & C Jansen "Specific performance in Dutch law" in J Smits, D Haas & G Hesen (eds) *Specific Performance in Contract Law: National and Other Perspectives* (2008) 11 15-20.

¹³¹ 17.

¹³² A S Hartkamp et al *Contract Law in the Netherlands* 2 rev ed (2011) 145.

¹³³ Busch et al (eds) *The Principles of European Contract Law: A Commentary* 193 (section by M M van Rossum).

was therefore also left to the courts. It is of particular relevance that impossibility does not only refer to situations where performance has become absolutely impossible (for example where the object of a sale agreement is physically destroyed before delivery), but also situations where performance is considered relatively impossible, since it would cause unreasonable inconvenience to the debtor. The concept of relative impossibility includes cases of practical impossibility, i.e. cases where factually performance is still possible, but it would be inconceivable to expect the debtor to perform considering the circumstances of the case. And if performance has become practically impossible, an order for specific performance may not be granted.¹³⁴ The *Hoge Raad* (Dutch Supreme Court) also authoritatively held that courts should not grant specific performance “when the debtor would only be able to perform his obligations by making sacrifices that cannot be required from him considering all circumstances of the case”.¹³⁵

This position clearly corresponds with the German position and the limitation recognised in the BGB. In contrast to our law, impossibility (albeit relative or absolute) does not affect the validity of the contract in both German and Dutch contract law. These systems do, however, recognise that impossibility excludes the remedy of specific performance of the obligation.¹³⁶ Thus, they hold the debtor who cannot perform due to impossibility liable for damages. It can be concluded then that the notion of impossibility appears to be much wider in German and Dutch contract law, in that it includes the situation where performance is possible but it would be unreasonable to expect the debtor to perform.

¹³⁴ 356 (section by M B M Loos).

¹³⁵ HR 21 May 1976, NJ 1977, 73 (Oosterhuis/Unigro). See also HR 9 May 1969, NJ 1969, 338 (Van der Pol/De Jong), and HR 27 June 1997, NJ 1997, 641 (Budde/Toa Moa Cruising Ltd).

¹³⁶ See G J P de Vries “Are the Principles Of European Contract Law better than Dutch contract law?” in M W Hesselink & G J P de Vries *Principles of European Contract Law* (2001) 107 130 346; Busch et al (eds) *The Principles of European Contract Law: A Commentary* 193 (section by M M van Rossum). See also J du Plessis “Possibility and certainty” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 206.

The bottom line is that this situation nevertheless constitutes an impediment in claiming specific performance in our law. To that extent, the consequences for the debtor's counter-performance if his performance requires unreasonable efforts in these systems are the same as the consequences in our law; the contract remains valid but specific performance of the obligation is excluded. Whether it is fair to still hold the debtor liable for damages is, however, open to doubt.¹³⁷

It follows that Dutch courts may also refuse to enforce a contract where the contract will be extremely disadvantageous and unreasonable to the debtor. They may deny the remedy on the basis of reasonableness and equity, and award damages instead. Accordingly, a court has refused to enforce a contract in terms of which a former wife and husband agreed on the financial division of the family house, because it would have left the woman and her children homeless.¹³⁸

It is of note that German law, in contrast to Dutch law, expressly links the disproportionality restriction to the general principle of good faith: § 275(2) BGB provides that the debtor may refuse performance (*Leistung*) to the extent that "performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the

¹³⁷ For discourse on whether there is a more satisfactory solution to the problem of hardship (falling short of the impossibility standard) as a result of changed circumstances, see Lubbe "Contractual derogation and the discretion to refuse an order for specific performance" in Glover (ed) *Essays in Honour of AJ Kerr 95-98* (consider esp authority cited in n 122, regarding the recognition of the doctrine of frustration in our law); A Hutchison "Change of circumstances in contract law: the *clausula rebus sic stantibus*" 2009 *THRHR* 60; "Gap filling to address changed circumstances in contract law – when it comes to losses and gains, sharing is the fair solution" 2010 *Stell LR* 414; "The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law" 2010 *SALJ* 84; J Coetze "The case for economic hardship in South Africa: Lessons to be learnt from international practice and economic theory" (2011) 36(2) *Journal for Juridical Science* 8.

¹³⁸ See HR 16 January 1981, NJ 1981, 312 (X/Y).

interest in performance of the creditor". However, Mak convincingly argues that the "disproportionality restriction in Dutch law may be brought under a similar heading of good faith" if one considers certain provisions of the BW referring to the requirements of reasonableness and fairness.¹³⁹ First, Article 6:2(2) BW provides that "a rule in force between a creditor and his debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness". Secondly, Article 6:248(2) BW similarly provides that "a rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness".¹⁴⁰

The development of the concepts of reasonableness and equity, even though codified in Articles 6:2 and 6:248(2) BW, also depends on the courts, as these concepts encompass a rather wide range of possible limitations. And an analysis of Dutch case law illustrates that the principle of good faith must be observed by parties and courts in maintaining the rights granted to parties in having their contracts specifically performed. In this regard the *Hoge Raad* held in 2001¹⁴¹ that it is in the courts' discretion to refuse specific performance on the basis of reasonableness and equity. This case concerned the design and construction of an office building in the centre of Rotterdam. After completion and delivery of the building, the aluminum sheets applied to the building's exterior to make it weather-proof started to corrode. The plaintiff claimed replacement of all this siding on the basis of non-performance of an obligation arising from a guarantee in the contract. However, the defendant argued that such an order should not be made because it would be economically severely detrimental to him. He proposed an alternative solution that would be less detrimental and maintained that it would be more

¹³⁹ Mak *Performance-Oriented Remedies in European Sale of Goods Law* 99.

¹⁴⁰ Cf paras 2 3 1 2 & 5 4 above.

¹⁴¹ HR 5 January 2001, NJ 2001, 79 (Multi Vastgoed/Nethou). For further discussion, see Mak *Performance-Oriented Remedies in European Sale of Goods Law* 101, and M Smits *Efficient Breach and the Enforcement of Specific Performance* LLM thesis Amsterdam Law School (2014) 19 ff.

convenient to simply repair the defects by treating the siding of the building with an additional chemical substance which would protect it against further corrosion. He also contended that this would adequately serve the interests of the plaintiff. Even though the *Hoge Raad* did not accept his arguments, it emphasised that deciding a claim for specific performance requires a balancing of the mutual interests of the parties. It summarised the position as follows:

“The general principle is that the creditor may either choose specific performance, to the extent that performance is still possible (...), or damages of any kind. When making his choice, however, the creditor is not entirely free, given that he will be bound by the requirements of reasonableness and equity, taking into consideration the reasonable interests of his counterpart as well.”¹⁴²

While the *Hoge Raad* confirmed that the requirements of good faith and fair dealing, including the justified interests of the debtor, may stand in the way of an order for specific performance, they upheld the order of the *Gerechtsof* (Court of Appeal) that the defendant was bound to effect replacement, on the ground that the balancing of the parties’ interests did not reveal disparity between the interests which are served by ordering specific performance and the interests which are damaged as a result thereof.

The scope of the disproportionality restriction in civil-law systems is thus broader than it is in Anglo-American law, which, as indicated above, limits the application of the restriction in cases of economic hardship to the debtor. However, the principle of good faith leaves “some scope” for taking into account economic hardship to the debtor.¹⁴³ The cases decided by the German Supreme Court¹⁴⁴ lay down limitations to the availability of specific performance based on good faith. In both cases the court refused to order specific performance based on the reasonable interests of the party against

¹⁴² HR 5 January 2001, NJ 2001, 79 (Multi Vastgoed/Nethou) 505. This quotation appears in Haas & Jansen “Specific performance in Dutch law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 20.

¹⁴³ Mak *Performance-Oriented Remedies in European Sale of Goods Law* 100.

¹⁴⁴ See text to nn 109-110 above.

whom the order was sought. As these cases indicate, the interests are likely to be of an economic nature. In *Multi Vastgoed/Nethou*¹⁴⁵ the Dutch Supreme Court similarly took into account the possible economic detriment to the debtor if they ordered him to perform *in specie*.¹⁴⁶

What becomes increasingly clear is that the civil-law systems under review recognise fewer restrictions to specific performance than the common-law systems do. This can be ascribed to the fact that Anglo-American law recognises specific performance as an exceptional remedy and courts have a discretion to grant the remedy. Bars to specific performance do not arise directly in Anglo-American law, since specific performance is the exception.¹⁴⁷ However, as indicated above (and throughout this thesis) Anglo-American law recognises discretionary reasons for refusing specific performance. The purpose of recognising these reasons is to circumscribe the discretion the courts have to grant the remedy, in order to ensure legal certainty, i.e. to enable practitioners to advise their clients on the likely outcome of claims for specific performance. But, to ensure that the right to specific performance is not compromised, the duty of performance is only excluded in limited circumstances by the civil-law systems.¹⁴⁸ The question now is how international instruments, which are aimed at harmonising these

¹⁴⁵ HR 5 January 2001, NJ 2001, 79 (discussed above).

¹⁴⁶ Mak *Performance-Oriented Remedies in European Sale of Goods Law* 101-102; Smits *Efficient Breach and the Enforcement of Specific Performance* 19, observing that "High costs are what brought the Dutch Hoge Raad to introduce guidelines to what extent specific performance can be demanded".

¹⁴⁷ See n 125 above.

¹⁴⁸ See in relation to South African law, Lubbe "Contractual derogation and the discretion to refuse an order for specific performance in South African Law" in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 110: "From this perspective the denial of the existence of rules governing the exercise of the discretion in *Benson v. SA Mutual* becomes understandable. It derives from an apprehension that the development of a separate system of rules at the remedial level would erode the right of a creditor to a performance contracted for according to the rules of substantive law."

traditions, deal with the problem of hardship. It is to these instruments that we will now turn.

6 4 Unreasonable effort or expense as a bar to specific performance in international instruments: CISG, PECL, PICC, DCFR, CESL

As indicated in chapter 2, various international instruments that aim to promote greater uniformity in contract law contain provisions granting the creditor a substantive right to specific performance, subject to certain exceptions.¹⁴⁹ The UNIDROIT Principles of International Commercial Contracts (PICC),¹⁵⁰ the Principles of European Contract Law (PECL),¹⁵¹ the Draft Common Frame of Reference (DCFR),¹⁵² the Common European Sales Law (CESL),¹⁵³ and the UN Convention on Contracts for the International Sale of Goods (CISG)¹⁵⁴ regard specific performance as the primary remedy for breach of contract, but restrict the availability of this remedy based on considerations of reasonableness and practicability.

6 4 1 The CISG

As stated previously, the CISG follows a predominantly civilian approach in that specific performance is regarded as the primary remedy and inadequacy of damages is not required.¹⁵⁵ However, there are indications in the CISG that reasonableness will be considered in deciding whether to acknowledge the buyer's right to specific performance. These indications specifically relate to the buyer's right to require repairs under Article 46(3) of delivered but defective goods. According to this provision, the buyer will have a general right to require the seller to cure any form of lack of conformity

¹⁴⁹ See para 2 3 3 above.

¹⁵⁰ Art 7.2.1 & Art 7.2.2 PICC. See also para 2 3 3 2 above.

¹⁵¹ Art 9:101 & Art 9:102 PECL. See also para 2 3 3 3 above.

¹⁵² Art III-3:302. See also para 2 3 3 4 above.

¹⁵³ Art 110 (buyer's right) & Art 132 (seller's right). See also para 2 3 3 5 above.

¹⁵⁴ Art 46 (buyer's right) & Art 62 (seller's right). See also para 2 3 3 1 above.

¹⁵⁵ See para 2 3 3 1 above.

by way of repair “unless this is unreasonable, having regard to all the circumstances”. Reasonableness of the buyer’s demand is determined according to the circumstances surrounding the contract and the interests of both parties. When determining what is unreasonable, both the seller’s and the buyer’s interests must be considered. For example, the costs that the seller would have to incur as a result of the repair would be taken into account. And if the repair is considered unreasonable in the circumstance, the buyer will be entitled to damages or a reduction in price. This reflects the CISG’s concern for not causing unreasonable inconvenience or hardship to the contracting parties.¹⁵⁶

Article 46(3) must be considered in conjunction with Article 28, which states that a court is not bound to make an order for specific performance unless it would do so under its own law.¹⁵⁷ This means that in many systems a creditor may not be able to claim specific performance because the main restrictions on specific performance in sale of goods cases, namely impossibility and severe hardship, feature in all of the national systems under review.¹⁵⁸

¹⁵⁶ Similarly, in terms of Art 48, the seller may, even after the date of delivery, remedy at his own expense any failure to perform its obligations, if it can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. See L Chengwei *Remedies for Non-performance – Perspectives from CISG, UNIDROIT Principles and PECL* (2007) 75. Available online at <http://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upic_c_and_pecl.chengwei_liu/landscape.a5.pdf>. See also S Eiselen “A comparison of the remedies for breach of contract under the CISG and South African law” in J Basedow et al (eds) *Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht* (2001).

¹⁵⁷ See again para 2 3 3 1 above.

¹⁵⁸ See para 6 5 1 below.

6 4 2 The PICC, PECL, DCFR and the CESL

Despite the fact that these instruments adopted the general principle of specific performance, the PICC, the PECL the DCFR, and the CESL also contain certain defined exceptions to the principle of specific performance. These include when performance is impossible (hereafter the first exception) or unreasonably burdensome (hereafter the second exception). For the sake of convenience these instruments will be discussed together, since they similarly consider impossibility and impracticability as impediments to a creditor's right to specific performance.

The PICC, the PECL, the DCFR and the CESL also sought to reach some kind of a compromise between civil-law and common-law jurisdictions, since a claim for performance is admitted in general but excluded in several situations. It follows that the right to specific performance is recognised in accordance with the civil-law tradition, but the inclusion of numerous exceptions which effectively limit this right, resembles the restrictive approach of the common-law tradition.¹⁵⁹ These were designed to accommodate the common-law systems.¹⁶⁰ Only some of these exceptions are relevant for purposes of this chapter.¹⁶¹

¹⁵⁹ See Chengwei *Remedies for Non-performance* 60; C von Bar & E Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) I* (2009) 829; S Vogenauer & J Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts* (PICC) (2009) 125 (section by Kleinheisterkamp).

¹⁶⁰ But still (in contrast to South African law) these instruments "do not mix up rights and discretion. There is an entitlement to specific performance, subject to defined exceptions. A court does not have a general discretion to refuse the remedy". See E Clive & D Hutchison "Breach of contract" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 176 195 (commenting on the PECL in particular).

¹⁶¹ Arts 7.2.2(c) PICC; 9: 102(2)(d) PECL; III-3:302(5) DCFR, excluding the remedy where performance may reasonably be obtained from another source, is discussed in ch 3.

The first relevant exception is impossibility of performance. Specific performance cannot be obtained if, according to:

- PICC 7.2.2(a): “performance is impossible in law or in fact”;
- PECL 9: 102(2)(a): “performance would be unlawful or impossible”;
- DCFR III–3:302(3)(a): “performance would be unlawful or impossible”;
- CESL 110(3)(a): “performance would be impossible or has become unlawful”.

Thus, according to these rules there is no right to claim performance if it is impossible. The concept of impossibility refers to objective and subjective impossibility, and in both cases the creditor will have to resort to a claim for either damages or termination or both.¹⁶² It follows that impossibility does not nullify the contract: these rules only state that there can be no specific enforcement of the contract; other remedies are still available to the creditor.¹⁶³ This clearly corresponds with the civil-law concept of impossibility.¹⁶⁴ If performance is factually impossible, for example, a particular painting by Picasso or the entire load of a named ship was destroyed before delivery, ordering specific performance would be useless. Similarly, specific performance will not be

Whereas Arts 7.2.2(d) PICC; 9: 102(2)(c) PECL; III–3:302(3)(c) DCFR, excluding the remedy where performance is of such a personal character that it would be unreasonable to enforce it, is discussed in ch 4.

¹⁶² See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 352 (section by Loos). See also Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 266.

¹⁶³ See cmt 3(a) on Art 7.2.2 PICC; cmt E on Art 9:102 PECL (reproduced in cmt E on III–3:302 DCFR).

¹⁶⁴ See 2 3 1 1 & 6 3 above. However, cases of moral impossibility known in German and Dutch law are excluded by these provisions. See R Zimmermann “Remedies for non-performance: the revised German law of obligations, viewed against the background of the Principles of European Contract Law” (2002) 6 *Edin LR* 271 285; Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 266.

ordered where the defaulting party has already delivered the goods to a third party, who obtains priority over the plaintiff to the subject matter of the contract. Of course, the creditor is also not entitled to specific performance where performance is prohibited by law, as illegal contracts will never be enforced.¹⁶⁵

The second exception is that specific performance cannot be claimed if performance is unreasonably burdensome or expensive. More specifically, specific performance cannot be obtained if, according to:

- PICC 7.2.2(b): “performance or, where relevant, enforcement is unreasonably burdensome or expensive”;
- PECL 9:102(2)(b): “performance would cause the debtor unreasonable effort or expense”;
- DCFR III–3:302(3)(b): “performance would be unreasonably burdensome or expensive”;
- CESL 110(3)(b): “the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain”.

This exception covers the wider notion of impracticability (as opposed to impossibility), recognised by the civil-law systems, and cases of practical impossibility need to be dealt with under this exception.¹⁶⁶ Thus, the unreasonable burden of performing an obligation

¹⁶⁵ See cmt 3(a) on Art 7.2.2 PICC; cmt E on Art 9:102 PECL (reproduced in cmt E on Art III–3:302 DCFR); Chengwei *Remedies for Non-performance* 97-98; Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts* (PICC) 788 (section by H Schelhaas).

¹⁶⁶ See Busch et al (eds) *The Principles of European Contract Law and Dutch Law: A Commentary* 352 (section by Loos); Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 266. Similar to the civil-law systems reviewed above, the instruments discussed here do not consider initial impossibility as affecting the validity of the contract. It does not exempt the debtor from liability. Specific performance will not be available but the debtor will be liable for damages for non-performance. See eg Arts 3.1.3 PICC; 4:102

is closely linked to practical impossibility.¹⁶⁷ It has been suggested that this second exception covers the classic example where the debtor has to deliver goods which have not been destroyed, but are inaccessible because the goods sank to the bottom of the ocean. To retrieve it would be so costly that the debtor can invoke unreasonable burden in order to escape specific performance.¹⁶⁸ This exception is of particular importance, as it addresses similar concerns to those raised in relation to the South African approach.¹⁶⁹

The CESL takes a slightly different approach in terms of wording the limitation, specifically by employing the term “disproportionate” as opposed to “unreasonable” but it is suggested here that both terms denote excessiveness and can be used interchangeably.¹⁷⁰ The commentaries on these exceptions suggest that there is no stated rule for when effort or expense would be considered “unreasonable” or

PECL; II-7:102 DCFR (not reproduced in the CESL – see J Cartwright & M Schmidt-Kessel “Defects in consent: mistake, fraud, threats, unfair exploitation” in G Dannemann & S Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 373 416 n 325).

¹⁶⁷ See A Jakutytė-Sungailienė “The application of specific performance in contractual relations” (2010) 2(6) *Social Sciences Studies* 227 232. Available online at <www.mruni.eu/lt/mokslo_darbai/sms/archyvas/dwn.php?id=257440>.

¹⁶⁸ See Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* 45.

¹⁶⁹ See para 6 1 1 above.

¹⁷⁰ See eg Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* I 831 (commenting on III-3:302(3)(b) DCFR): “Burdensome does not mean financially burdensome. It is wider than that. It could cover something which involved a disproportionate effort or even something which was liable to cause great distress, vexation or inconvenience.”

“disproportionate”.¹⁷¹ It follows that different factors could indicate such unreasonableness/disproportionality.¹⁷²

It is certain, however, that considerations as to the reasonableness of the transaction or of the appropriateness of the counter-performance will not be taken into account in this determination.¹⁷³ Essentially, this exception of unreasonable effort or expense is aimed at addressing those situations where, under the specific circumstances, it would be unreasonable to require the debtor to perform. This exception covers situations where performance is in itself possible and allowed, but would result in unreasonable effort or expense. Practically speaking this would most often occur when there has been a drastic change in circumstance after the conclusion of the contract, and performance although still possible, may have become so onerous that it would be contrary to the general principle of good faith and fair dealing to require it.¹⁷⁴ This is interesting from a South African perspective, since we do not have judicial consideration of whether obligations, in such circumstances, have become frustrated.¹⁷⁵

¹⁷¹ See eg O Lando & H Beale *The Principles of European Contract Law Parts I & II* (2000) 396; Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* I 831; R Schulze (ed) *Common European Sales Law (CESL) – Commentary* (2012) 506-507 (by Zoll).

¹⁷² L Meyer *Non-Performance and Remedies under International Contract Law Principles and Indian Contract Law: A Comparative Survey of the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and Indian Statutory Contract Law* (2010) 112.

¹⁷³ See Chengwei *Remedies for Non-performance* 98; Von Bar & Clive (eds) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* I 831, cmt F.

¹⁷⁴ See cmt 3(b) on Art 7.2.2 PICC; cmt F on Art 9:102 PECL, which also clarifies that paragraph (2) sub-paragraph (b) includes but is not limited to supervening event cases covered by Art 6:111 PECL.

¹⁷⁵ See text to nn 10 ff para 6 1 1 above.

It follows that this category of exceptions goes hand in hand with the instruments' rules on hardship as a result of a change of circumstances.¹⁷⁶ If performance would be so onerous or impracticable that compelling the debtor to perform would constitute hardship, Articles 6.2.1-6.2.3 PICC; 6:111 PECL; III–1:110 DCFR; 89 CESL¹⁷⁷ provide for party renegotiation or judicial adaptation of the contract.¹⁷⁸ Thus, if the goods contracted for sink to the bottom of the ocean before delivery and can only be retrieved

¹⁷⁶ See eg Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts* (PICC) 791 § 30 by H Schelhaas: "The distinction between performance which has become unreasonably burdensome or expensive and a drastic change of circumstances (hardship, Art 6.2.1) is a delicate one, and the concepts usually overlap. If an event fundamentally alters the equilibrium of the contract (Art 6.2.2), either because the cost of performance has increased or the value of the performance a party receives has diminished, performance will usually also be considered as unreasonably burdensome or expensive."

¹⁷⁷ The Art 79 CISG contains a similar provision: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." See further, for commentary and comparative analysis, I Schwenzer "*Force majeure and hardship in international sales contracts*" (2008) 39 *VUWLR* 709.

¹⁷⁸ Thus, in contrast to our law, the examined instruments make specific provision for variation or termination by courts in case of a change of circumstances commonly referred to as hardship. Note that they do not contain the words "supervening event" but "synonyms can be detected and references to 'supervening events' appear in some of the comments and explanatory notes which accompany these texts" (Unberath & McKendrick "Supervening events" in Dannemann & Vogenauer (eds) *The Common European Sales Law in Context: Interactions with English and German Law* 563). In Dutch and German law the courts may also refuse specific performance in such cases and grant damages instead or change the contents of the contract (Art 6:258 BW; § 313 BGB) – see Mak *Performance-Oriented Remedies in European Sale of Goods Law* 100, and Brunner *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* 405 ff.

at a cost that far exceeds the value of the goods, the parties cannot claim specific performance of that contract and must either rely on other remedies or renegotiate the terms of the contract.¹⁷⁹ Other circumstances that could indicate impracticability include, for example, whether the defendant's obligations are stated in general terms leaving scope for disagreement, and whether the court will be able to define the contractual obligation in its order.¹⁸⁰ The relevance of this factor in connection with the supervision objection was discussed in the previous chapter.¹⁸¹ The following section explores, *inter alia*, to what extent it¹⁸² should dissuade our courts from ordering specific performance.

6 5 Evaluative remarks and conclusions

6 5 1 Introduction

As indicated throughout this chapter, specific performance is a potentially onerous remedy. Although this remedy gives effect to or reinforces the sanctity of validly-concluded contracts, it has the disadvantage of enabling the plaintiff to insist on performance even though it might cause undue hardship to the defendant and even the public at large. For this reason, all of the legal systems (both common and civilian) and

¹⁷⁹ Meyer *Non-Performance and Remedies under International Contract Law Principles* 112-113. According to Schelhaas (Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 792 § 31): "if the provisions for hardship and performance being unreasonably burdensome or expensive apply to the same facts, it is not certain which provision takes precedence. Neither the PICC nor the Official Comment considers this issue. It might be argued that the doctrine of hardship, being the more specific rule, prevails over the doctrine relating to performance as 'unreasonably burdensome' or expensive (*lex specialis derogat legi generali*). It is, however, preferable to let the aggrieved party choose which of the two provisions it wants to rely on."

¹⁸⁰ Vogenauer & Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 792 § 32 (by H Schelhaas).

¹⁸¹ See para 5 4 above.

¹⁸² Cf n 217 below.

model instruments under consideration restrict the availability of specific performance where some form of “severe”, “unreasonable” or “undue” hardship is involved. This then forms a second, main restriction on specific performance, apart from impossibility. As indicated, this restriction usually relates to undue hardship to the defendant, but undue hardship to third parties may also defeat a claim for specific performance.¹⁸³ While the basis for the restriction may take a different form in each system (the civilian systems and model instruments¹⁸⁴ recognise it under the principle of good faith,¹⁸⁵ while the common-law systems recognise it based on the requirement of equity),¹⁸⁶ the underlying rule appears to be the same: the availability of specific performance is always restricted if it would cause undue hardship to the defendant or to third parties.

¹⁸³ See eg text to nn 88 ff above.

¹⁸⁴ Each of the comparator texts contains express reference to the obligation of observing good faith: see Articles 1.7 PICC; 1:201 PECL; III–1:103 DCFR; 2 CESL; 7 CISG (Addendum A).

¹⁸⁵ See Mak *Performance-Oriented Remedies in European Sale of Goods Law* 108. In relation to specific performance in English law, Mak says that “the only hint at a principle of good faith is given by the requirement of equity that the claimant comes to court ‘with clean hands’, which requires among things that he shall have acted in good faith” (107). She refers to R Goode *The Concept of Good Faith in English Law* (1992) 5, as authority for this view.

¹⁸⁶ See eg *Gould v Kemp* (1834) 39 ER 959 961; *Patel v Ali* [1984] Ch 283. See also Northcote *A Treatise on the Specific Performance of Contracts by Sir Edward Fry* 199 ff §§ 417 ff. For US authority, see *De Caro v De Caro*, 97 A.2d 658 (1953): “Where inadequacy of consideration is so gross as to shock the conscience, court will decline to enforce the agreement, and denial of specific performance in such case may be rested upon the ground that the remedy is discretionary and that harsh and unfair contracts will not be enforced.”

6 5 2 The proposal for reform: undue hardship as exception to specific performance

We now turn to the proposed development for South African law. It has already been shown above that our law rejects any notion of relief for changed circumstances that do not amount to supervening impossibility.¹⁸⁷ However, as in Anglo-American law, our law restricts the availability of specific performance where performance becomes excessively burdensome but falls short of what is required for avoidance under the doctrine of supervening impossibility.

Our courts have often indicated when specific performance would probably be refused.¹⁸⁸ For instance, as we have seen in *Santos*, Foxcroft J held that courts should "refuse performance where a recognised hardship to the defaulting party is proved".¹⁸⁹ Apart from the cases discussed in paragraph 6 1 above, the course of recent authority also confirms this. For example, the court in *Vrystaat Cheetahs (Edms) Beperk v Mapoe*¹⁹⁰ dealt with the *Benson* decision, as well as the *Haynes* decision, especially regarding the matters of undue hardship to the respondent, a rugby player, if he were to be compelled to comply with his contractual obligations. It is on the ground of undue

¹⁸⁷ This accords with English law – see Treitel *Frustration and Force Majeure* 280 ff §§ 6-020 ff; Mak *Performance-Oriented Remedies in European Sale of Goods Law* 97; A Hutchison "Gap filling to address changed circumstances in contract law – when it comes to losses and gains, sharing is the fair solution" 2010 *Stell LR* 414 420.

¹⁸⁸ See Joubert *General Principles of the Law of Contract* 225; Sharrock "Contract" in Joubert & Faris *LAWSA 5(1)* 2 ed para 496; Christie & Bradfield *Christie's The Law of Contract in South Africa* 548-549; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 323. See eg *Nationwide Airlines (Pty) Ltd v Roediger* 2008 (1) SA 293 (W) para [17].

¹⁸⁹ *Santos Professional Football Club (Pty) Ltd v Iglesund* 2003 (5) SA 73 (C) 86H.

¹⁹⁰ Unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court (copy on file with author).

hardship to the defaulting party that Van Zyl J refused to grant the main relief sought,¹⁹¹ particularly the possibility of him being held in contempt for not playing “good” rugby.¹⁹²

Also noteworthy is the recent decision in *Botha v Rich NO*,¹⁹³ in which the Constitutional Court exercised its discretion to refuse specific performance so as to avoid undue hardship to the defendants.¹⁹⁴ Here, the plaintiff had concluded an instalment sale agreement to buy immovable property from a trust. After she began to default on the instalments, the trust cancelled the agreement and successfully sued for eviction in accordance with a cancellation clause which stated that breach by the plaintiff would entitle the trust to cancel the agreement and retain the payments made in terms of the instalment sale. However, having paid three-quarters of the purchase price, the plaintiff demanded transfer of the property into her name; relying on section 27(1) of the Alienation of Land Act. The court found, that even though she was in principle entitled to

¹⁹¹ In prayer 3 of the notice of motion: “Dat eerste respondent gelas word om onmiddelik vir diens aan te meld ter nakoming van sy kontraktuele verpligte uiteengesit in klousule 17 van sy spelerskontrak met applikant en wel te applikant se besigheidsplek, Vodacom park, Bloemfontein ...”

¹⁹² Paras [113]-[115]. However, the judge did grant the alternative relief sought, namely that he immediately reports for service (“dat eerste respondent gelas word om onmiddelik by applikant te Vodacom park vir diens aan te meld”), but is the necessary implication of an order requiring the player to “immediately report for service” not that he has to comply with his contractual duties as set out in his player’s contract? Surely the second, alternative, prayer is also open to different interpretations which would similarly expose the respondent to the danger of being held in contempt for not complying with the specific performance order. This should have prevented the court from ordering specific performance. See para 4 8 4 above, for further discussion on why the case was not suitable for specific performance.

¹⁹³ 2014 (4) SA 124 (CC).

¹⁹⁴ After confirming the principle that where a purchaser has paid more than 50% of the purchase price under an instalment sale, he may claim transfer of the immovable property as provided for in s 27(1) of the Alienation of Land Act 68 of 1981, by registering a bond in favour of the seller for the balance, despite being in arrears with instalment payments.

specific performance to compel the trustees to register the property and sign all the documents necessary for transferring the property into her name, it would be disproportionate and unfair towards the defendant trustees to allow registration of transfer if the arrears had still not been paid. Therefore, the court made the registration conditional upon payment of the arrears and the amounts she owed in municipal rates, taxes and service fees.¹⁹⁵

It is clear that despite our courts' reluctance to engage in the development of rules governing the exercise of the discretion;¹⁹⁶ they will refuse specific performance if it would cause undue hardship to the defendant or to third parties. It therefore appears that Eiselen is correct in his finding that

"The point of departure is the principle of *pacta sunt servanda* and courts will only very hesitantly use their discretion to refuse the remedy. There are no defined categories of cases other than impossibility and insolvency. The English exceptions of imprecision of the obligation, obligations for personal services, damages as a sufficient alternative, or the inability of the court to enforce its order, all seem largely to have fallen by the wayside. The only real exception remaining seems to be undue hardship."¹⁹⁷

As indicated elsewhere, there are two recognised exceptions where the discretion is actually illusory or absent, namely impossibility of performance¹⁹⁸ and the debtor's

¹⁹⁵ See para [49] esp n 70.

¹⁹⁶ See paras 1 1 3 4 & 4 8 3 above. See also Lubbe "Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie" in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 51 57 ff.

¹⁹⁷ "Specific performance and special damages" in MacQueen & Zimmermann *European Contract Law: Scots and South African Perspectives* 260.

¹⁹⁸ See eg *Van Rooyen v Baumer Investments (Pty) Ltd* 1947 (1) SA 113 (W) 120, per Ettlinger AJ: "It is clear that there can be no order for specific performance of an obligation where the debtor cannot perform. That is clearly laid down in the cases of which *Farmers' Co-operative Society v Berry* (1912. AD 343) and *Shill v Milner* (1937 AD 101) are examples."

insolvency.¹⁹⁹ It is proposed here that this list of exceptions be expanded to accommodate the reality that the judicial discretion is invariably exercised to refuse specific performance in cases where specific performance would cause undue hardship to the defendant or to third parties.²⁰⁰

While such an approach may at first sound rigid, the proposed exception actually, and inevitably has a discretionary component built into it. The “undue” element relates to a discretion insofar that if specific performance is sought by the plaintiff and this defence is raised,²⁰¹ the court should only refuse the remedy if the hardship to the defendant and/or to third parties is excessive or disproportionate, i.e. if there is disparity between the advantages to be gained (by the plaintiff or others) and the harm to be suffered from ordering specific performance (by the defendant or others).²⁰² In other words, the limitation contains and depends on a proportionality assessment.

6 5 3 The operation of the proposed exception

In applying the proposed exception, a number of considerations are relevant.

First, the exception should clearly require taking into account third-party interests. That our courts have considered the interests of the defaulting party as well as those of third parties in the refusal of the order is beyond doubt.²⁰³ For example, the rejection of specific performance by the trial court in *Haynes* was upheld for reasons which included the hardship the public would have suffered in the circumstances of the case from the

¹⁹⁹ See para 4 8 3 above & para 7 2 2 below. See also Lubbe & Murray *Contract* 542, and the cases cited there.

²⁰⁰ See cases noted in nn 204 & 207 below.

²⁰¹ The onus to raise such an impediment to an order for specific performance rests on the defaulting party who wants to avert specific enforcement of the contract (see para 4 8 4 above). See also *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 442-443 (para 7 2 2 below).

²⁰² Cf para 6 5 3 below.

²⁰³ Lubbe & Murray *Contract* 543.

municipality's obedience to the order, had one been granted.²⁰⁴ This may explain why academic commentators merely refer to "undue hardship", i.e. undue hardship in general. Christie, for example, refers to the "undue hardship principle"²⁰⁵ and Eiselen concludes that "[t]he only real exception remaining seems to be undue hardship".²⁰⁶ The undue hardship defence usually implies undue hardship to the defendant,²⁰⁷ since it is he who raises and argues the defence, but undue hardship to third parties can also defeat a claim for specific performance. This was confirmed by decisions such as *Haynes and Barclays National Bank*,²⁰⁸ and also by authors such as Hutchison and Du Bois.²⁰⁹ It is accordingly suggested here that the authors who interpreted *Haynes* as

²⁰⁴ De Villiers AJA 1951 (2) SA 371 (A) 381C-E: "There can to my mind be no doubt that in the present case to have ordered the respondent to release 250,000 gallons of water a day from their storage dam while the unprecedented drought continued and the water in the dam had sunk dangerously low would have worked very great hardship not only to the respondent but to the citizens of Kingwilliamstown to whom the respondent owed a public duty to render an adequate supply of water. As far as the inhabitants, who already suffered under severe water restrictions, were concerned, the order would not only have resulted in great hardship, but in positive danger to the health of the community and might have disrupted the life of the town. On the other hand, as pointed out above, there is no indication on the papers that the appellant suffered any damage. I come to the conclusion, therefore, that no ground has been shown to justify us in interfering with the discretion exercised by the Court *a quo*." See also *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 (4) SA 650 (D) 655 per Didcott J, and *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C) 87B-E per Grosskopf J.

²⁰⁵ Christie's *The Law of Contract in South Africa* 549.

²⁰⁶ See text to n 197 above.

²⁰⁷ See eg *Vrystaat Cheetahs (Edms) Beperk v Mapoe* (unreported judgment with case no 4587/2010 delivered on 29 Sep 2010 by the Free State Provincial Division of the High Court), and *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T).

²⁰⁸ See also *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C) 87.

²⁰⁹ D Hutchison & F du Bois "Contracts in general" in Du Bois (ed) *Wille's Principles of South African Law* 733 873. See also S Eiselen "Remedies for breach" in Hutchison & Pretorius

support for a rule that specific performance may never be awarded if it would cause undue hardship to the defendant or to third parties (which rule is also followed by the systems discussed above), were incorrect in their interpretation, because *Haynes* does not explicitly support such a restrictive approach, but correct in their ultimate position. The rule deserves support even though *Haynes* did not state it as a rule. The right to specific performance should be restricted where to enforce it would cause undue hardship to the defendant or to third parties.

Secondly, in deciding whether the interests of the defendant and/or third parties would be unduly affected by ordering specific performance, and hence give rise to undue hardship, requires a balancing exercise of competing interests. Thus, the amount of effort and/or expense performance would require from the defendant is but one of the considerations the court should take into account in its decision to uphold or reject the undue hardship defence.²¹⁰ The interests of the plaintiff or the public in having the contract performed *in specie* may outweigh the harm or disadvantage to the defendant and/or third parties in which case their hardship should not be considered to be "undue"

(eds) *The Law of Contract in South Africa* 323: "for the sake of consistency and certainty in the law, the courts tend to follow certain guidelines when deciding whether or not to order specific performance, and this has resulted in the recognition of a number of exceptional circumstances where specific performance is likely to be refused. The circumstances affecting the court's discretion include whether undue hardship and personal services are involved ... Courts will refuse to order specific performance where to do so would cause undue hardship to the defaulting party or to third parties."

²¹⁰ See *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) 5E-G: "An example of such a case would be 'where the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff and the latter can equally well be compensated by an award of damages' (*Haynes v Kingwilliamstown Municipality (supra* at 380B)".

and the remedy awarded.²¹¹ Lubbe & Murray make an important observation in this regard:

"The fifth example in *Haynes* – that specific performance will be refused where it will operate unreasonably harshly on the defendant or involves unreasonableness or injustice – is an example ... [which] requires a consideration of the role of contract law and, as we see in the *Haynes* case, might raise questions of asserting one obligation (the obligation to provide water to the inhabitants of King William's Town) over another (the obligation to fulfil the contract concluded with *Haynes*)."²¹²

Apart from the public service/*Haynes* example,²¹³ this point can also be illustrated with reference to a more common personal service contract. For example, if a builder, who contracted to build an olympic-size swimming pool for a university, fails to build a swimming pool according to contractual specifications that set out the dimensions of olympic pools, for example if it is only 49 m and not 50 m in length, he should not be able to raise this defence successfully. If a specific performance order is sought by the university, its interests as well as those of the public in having an olympic-size swimming pool by far outweighs the burden such an order would place on the defendant. The university will not be able to claim that their pool meets olympic standards and will not be able to host long course swimming competitions, and the students will also not be able to train and prepare properly for long course events. An order requiring the builder to remove the current structure and rebuild the swimming pool according to the contract's specifications would be justified/due even though the order would naturally require a large amount of effort and expense from the defendant.

However, if a builder is supposed to build a regular leisure swimming pool which is 2 metres deep, but builds one which is only 1, 9 metres deep, there may be greater scope for successfully raising this defense. An order requiring him to remove the current

²¹¹ See again passage from De Wet & Van Wyk's *Kontraktereg en Handelsreg* quoted in n 2 para 6 1 above.

²¹² *Contract* 543.

²¹³ See also decision by Pennsylvania court discussed in text to n 90 para 6 2 above.

structure and dig a deeper hole in order to comply with the contractual specifications, could be disproportionately onerous in terms of cost and effort, because the fact that the pool is 0,1 metres shallower could potentially have a very limited impact on the client's use and enjoyment thereof.²¹⁴ This difference in depth (in contrast to the olympic pool example) will not make the pool unsuitable for its purpose. In discussing a French case,²¹⁵ Beale et al similarly contend that to order correction of the defect, i.e. specific performance of the initial agreement, where the difference/defect is so insignificant would be "rather extreme" and "[i]t could be wise to take into account a cost-benefit analysis".²¹⁶

²¹⁴ For discourse on alternative remedies available to the aggrieved party, see J du Plessis *The South African Law of Unjustified Enrichment* (2012) 370-371.

²¹⁵ Cass civ 3, 11 May 2005, pourvoi no 03-21136, RTD civ 2005, 596. In this case the building was 0,33 m too low and this did not make the building unsuitable for its purpose, and it was also not an "essential or determining element of the contract". The *Cour de cassation* nevertheless ruled that "a party owned an obligation which has not been performed may force the other to perform whenever performance is possible". Beale et al also refer to an unreported French decision, Cass civ, 17 November 1984, where the court similarly ordered specific performance of a contract for a swimming pool which required that it be fitted with four steps but it was built with only three. The court ordered the correction of this defect even though it had not been shown that having only three steps would cause the plaintiff any inconvenience. See *Cases, Materials and Text on Contract Law* 856-857.

²¹⁶ The position in French law is thus that specific performance should not be refused simply because the inconvenience caused to the creditor by the non-performance is slight. French courts will order correction of the defect in spite of the harsh consequences for the debtor, and will only refuse to order correction if it is impossible (see eg Y Laithier "Comparative reflections on the French law of remedies for breach of contract" in N Cohen & E McKendrick (eds) *Comparative Remedies for Breach of Contract* (2005) 103). However, the cost-benefit analysis (as an expression of the notion of impracticability) suggested by Beale et al undoubtedly provides a more equitable and economically efficient solution. It is accordingly suggested here that if the defect would cause slight

The operation of the exception (or the success of the defence) will thus depend on a balancing of interests or advantage and disadvantage.²¹⁷ Specific performance will only be refused if it would cause the defendant or third parties *undue* hardship. The undue criterion also accommodates the interests of the plaintiff and third parties in having the contract performed,²¹⁸ because the order will only be refused if the detriment/hardship to the defendant/third parties is entirely out of proportion to the benefit which the plaintiff and/or third parties will derive from performance. For example, in *Haynes*, the plaintiff claimed specific performance in spite of a severe drought and a shortage of water, and

inconvenience to the creditor, while correcting it can only be done at an excessive and unreasonable cost (which would certainly be the case if corresponding with the contractual specifications means rebuilding an entire swimming pool), the creditor should rely on other remedies. Refusing specific performance may encourage him to rely on the concomitant defence of *exceptio non adimpleti contractus* (if the non-performing party claims counter-performance) for example. If the pool is used by the owner creditor though, a South African court may exercise its discretion to prevent unfairness and relax the principle of reciprocity by awarding a reduced contract price to the builder, a result which is mutually beneficial and still serves reciprocity. See in this regard G Lubbe & J du Plessis "Law of contract" in C G van der Merwe & J E du Plessis (eds) *Introduction to the Law of South Africa* (2004) 243 263-264; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 316-321; A Hutchison "Reciprocity in contract law" 2013 *Stell LR* 3; BK Tooling (Edms) *Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A); *Botha v Rich NO* 2014 (4) SA 124 (CC) para [43].

²¹⁷ The extent to which an obligation is defined, and the burden an insufficiently defined specific performance order might place on the defendant and the court could thus influence a court to refuse the remedy in terms of the proposed exception. Courts may refuse to order specific performance on the ground that it would burden itself excessively if it ordered specific performance (in view of possible further applications to clarify the parties' obligations or to determine whether imprecisely defined obligations have been properly performed) or else that it would burden the defendant excessively if it ordered him to perform insufficiently defined obligations in breach of which he might find himself liable for contempt (cf text to n 217 para 5 5 above).

²¹⁸ Compare American approach: text to n 93 para 6 2 above.

even though she did not need the water.²¹⁹ The court's refusal to order specific performance was therefore justified, because the hardship the defendant and the town's residents would have suffered if specific performance was ordered outweighed the hardship to the plaintiff if the order was refused.

This corresponds with the disproportionality restriction recognised by the civil-law systems and international instruments examined above. The proposed approach also reflects the limitations which Articles 7.2.2(b) PICC, 9:102(2)(b) PECL, III–3:302(3)(b) DCFR, and 110(3)(b) CESL place on the enforcement of non-monetary obligations. It is evident that all of the instruments under review depart from exactly the same position, and that specific performance is recognised as the primary remedy for breach of contract (both relating to monetary and non-monetary obligations). This point of departure clearly resembles the civil-law tradition. However, based on the principle of good faith, certain exceptions to the general principle of specific performance have been recognised. And in this respect, the instruments resemble both the common- and civil-law traditions.

It may then be concluded that, as far as exclusion of specific performance is concerned, the approach adopted by the PICC, the PECL, the DCFR, and the CESL, provides a more refined solution which is more conducive to legal certainty. It is submitted that this approach provides a valuable model for the proposed reform of the South African law.²²⁰

²¹⁹ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378A, 381D.

²²⁰ However, the model instruments and the continental legal systems under consideration specifically refer to the debtor's interests, and maintain that the remedy will not be granted if it would be unreasonable to require the debtor to perform, i.e. if performance would require unreasonable effort and/or expense from the debtor. Since the proposed exception also excludes a claim for specific performance if it would cause undue hardship to third parties, it corresponds (to a greater degree) with the approach adopted by common-law courts, who also consider the effect of a specific performance order on third

6 5 4 The basis of the proposed exception

This brings us to the possible basis for the proposed development for South African law. As indicated throughout this chapter, the courts have not explicitly recognised a rule whereby specific performance is restricted if it would cause undue hardship to the defendant or to third parties.²²¹ However, as pointed out earlier²²² analyses of the case law show that when undue hardship (to the defendant and/or to third parties) is present, there is in effect no discretion; the remedy is invariably refused.

This proposed exception can thus be inferred from South African judicial practice.²²³ It is also consistent with the views of certain academic commentators.²²⁴ For example, as mentioned earlier in chapter 4, Lubbe similarly submits that the adoption of a *Fallgruppen* approach, that is the recognition of certain *Fallgruppen* or case groups in which the remedy should be denied, might lead to “the denial of the remedy in cases of impossibility falling short of the existing substantive doctrine”.²²⁵ Against this

parties, and refuse the remedy if it would cause severe hardship to third parties. See text to nn 88 ff para 6 2 above.

²²¹ As indicated from the outset, the court in *Haynes* did not make it a rule that the remedy should always be denied if it would cause undue hardship to the defendant or to third parties, they actually only listed it as an example of where specific performance has been and may be refused, in the exercise of the courts’ discretion (cf para 6 1 1 above).

²²² See again nn 204 & 207 above.

²²³ See again *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378H-379A; *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 (4) SA 650 (D) 658G-H; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783D, and *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C) 86H.

²²⁴ See esp Naudé (text to nn 47-49 para 6 1 2 above) and Eiselen “Specific performance and special damages” in MacQueen & Zimmermann *European Contract Law: Scots and South African Perspectives* 260. See further para 7 3 below.

²²⁵ See “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National*

background it may be argued that there is some scope for an approach which takes into account the harsh effects of specific enforcement. Moreover, Lubbe maintains that

“[Since] South African law prides itself on its inherent equity and its dynamic and adaptable nature which manifests itself primarily in the developmental decisions of its judges ..., it should be accepted that judicial practice in respect of the specific performance discretion may establish guidelines capable of being absorbed into the substantive law as rules determining when an agreement gives rise to a duty to perform and when such a duty becomes enforceable.”²²⁶

As in English law,²²⁷ the role of good faith remains controversial in our law of contract. Good faith may, however, be a catalyst for the development of new rules,²²⁸ but it is not

and Other Perspectives 111-113, where Lubbe correctly observes that our law “regarding impossibility as a substantive doctrine is outmoded, and its development has not kept up with developments in other jurisdictions” (111). See also para 4 8 3 above.

²²⁶ See “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 115.

²²⁷ *Mak Performance-Oriented Remedies in European Sale of Goods Law* 106-108.

²²⁸ See eg R Zimmermann “Good faith and equity” in Zimmermann & Visser (eds) *Southern Cross* 240-241; Hutchison “Non-variation clauses in contract: any escape from the *Shifren* straitjacket?” 2001 *SALJ* 720 743-744; Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 74-75; “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 114 ff; L F van Huyssteen & S van der Merwe “Good faith in contract: proper behaviour amidst changing circumstances” 1990 *Stell LR* 244 248-249: “In a system of contracts based on *bona fides*, a contractant should be entitled to proper conduct on the part of his co-contractant. ... A change in circumstances surrounding a contract could then result in a refusal to enforce the contract or a specific term if insistence on its enforcement in spite of the changed circumstances is objectively not in good faith when the relationship between the contractants is considered.”

a “free-floating” principle, justifying judicial discretions to refuse to enforce contracts.²²⁹ Although it has been decided that it cannot serve as an independent basis for not enforcing contracts, the concept of good faith may inform the development of the proposed rule.²³⁰

6 5 5 Conclusion

This chapter also (as in chapter 4 on personal service contracts) raises issues relating to the divergence between the theory and practice of our law governing the availability of specific performance. It has been shown that to state that there is an open-ended discretion to refuse specific performance is misleading, because our courts inevitably and invariably exercise their discretion to refuse specific performance in cases where specific performance would cause undue hardship to the defendant or to third parties. It may be illogical to maintain this open-ended discretion, while the courts at the same time clearly follow this practice. It is suggested that a concrete rule may be preferable to reflect this reality, and to ensure that our law on the availability of specific performance is more coherent. If specific performance would cause undue hardship to the defendant or to third parties, the aggrieved party’s right to specific performance should be restricted.²³¹

²²⁹ See eg the statements of the majority of the SCA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras [22]-[24] (confirmed in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and referred to in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA)), to the effect that good faith cannot operate as an open norm on a doctrinal level; rather, it constitutes a foundational principle that underlies contract law and finds expression in the specific rules and principles thereof. F D J Brand, while not denying that good faith may inform the development of new rules; rejects good faith as basis for “free-floating” equitable discretions (“The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the constitution” 2009 *SALJ* 71 89-90).

²³⁰ See again text to n 136 para 1 1 3 4 above.

²³¹ Particularly where damages would place the aggrieved party in as good a position as he would have been in had the contract been performed – see paras 3 4 3 & 3 4 4 above.

CHAPTER 7: CONCLUSIONS

7 1 Introduction

"A potential conflict of principle exists when, on the one hand it is stated that a plaintiff is generally entitled to choose his remedy, including an order of specific performance, while on the other hand it is said that the courts have a discretion to refuse to issue an order of specific performance. Where does the plaintiff's right to enforce specific performance end and the court's right to refuse an order begin?"¹

"Bear in mind that those modern continental jurisdictions which endorse a right to specific performance ... admit 'exceptions' to specific enforceability, but do not usually retain the sort of freewheeling *discretion* to refuse specific performance which is affirmed in *Benson*. How is one to take seriously the claim that a plaintiff has a right to specific performance, if that right can be trumped by competing considerations of social policy within the overriding discretion of the court? The underlying difficulty is that the discretion (essentially the English law artefact) still seems to cut the ground from beneath the right (which is the Roman-Dutch artefact)."²

As these quotes from Lambiris and Cockrell indicate, the current state of South African law regarding the availability of specific performance is not satisfactory.³ This can be traced to the fact that our approach to the availability of specific performance is based on two divergent approaches: the first approach, that of a judicial discretion (received from English law) to refuse specific performance, conflicts with the second approach, namely the right to specific performance (received from Roman-Dutch law).⁴ It was

¹ M A Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 126.

² A Cockrell "Breach of contract" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303 330. See again para 1 1 above.

³ See also para 1 1 above.

⁴ 330. See also G Lubbe "Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie" in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 51 65, 71.

indicated at the outset that maintaining a discretion, which was occasioned by a fusion of two clearly incompatible approaches, causes unnecessary complications.⁵

The central objective of the study was to explore the desirability and possibility of a more “concrete” approach, i.e. one which recognises more clearly-defined rules or principles with regard to when specific performance should be refused. Such an approach could either take the form of (a) the recognition of clearly-identified principles to guide courts in the exercise of a discretion to refuse specific performance,⁶ or (b) the complete removal of the discretion and acceptance of certain defined exceptions to a general right to claim this remedy.⁷

The present chapter will now seek to outline the results achieved. After summarising the findings of the research, it will conclude with a consideration of the future of the South African approach.

It was shown that courts continue to express great concern for the preservation of the discretion to refuse specific performance;⁸ they have made it abundantly clear that the refusal to order specific performance is a matter for a court’s own discretion and the courts will not allow this discretion to be circumscribed by rules.⁹

⁵ See para 1 1 above.

⁶ See para 7 2 1 below.

⁷ See para 7 2 2 below.

⁸ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 134; and see paras 1 1 1 (esp n 41) & 4 8 3 (esp n 354) above.

⁹ According to Lambiris at 126: “courts have been consistently anxious to reserve an unfettered discretion ..., and have often spoken of their refusal to be bound by rigid and strictly stated rules” (referring to *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378G; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 433; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 440). In addition to the authority cited by the author, see *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A); *National Union of Textile*

This is especially apparent from the locus classicus, *Benson v SA Mutual Life Assurance Society*.¹⁰ As the extensive discussion in chapter 3 in particular indicates, this case evidences an acceptance of the widest possible discretion, restricted only by the demands of justice in the particular case – and not by rigid rules.¹¹

The court, in reasserting the unfettered discretion to refuse the remedy, unambiguously rejected English influence, but in doing so, failed to appreciate that there are practical and policy considerations which necessarily intrude and make literal enforcement undesirable.¹² So, authors such as Lubbe convincingly argue that

“Despite the endeavours of the Supreme Court of Appeal, the need at the level of everyday practicalities to reduce the matter of specific performance to ‘rules of thumb’ brings with it the risk that the discretionary approach will be reduced to a hollow formalism.”¹³

It was accordingly contended that this discretionary approach does not offer a sound solution, at least not in South African contract law. Specific performance is regarded as the principal remedy in our remedial scheme, and contracting parties must be able to know with some confidence whether and when they are entitled to it.¹⁴ It was argued

Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151 (T), and Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in Smits & Lubbe (eds) *Remedies in Zuid-Afrika en Europa* 57 ff.

¹⁰ 1986 (1) SA 776 (A).

¹¹ See paras 3 3 & 3 4 3 above.

¹² See further Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111-112.

¹³ “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 111.

¹⁴ See in this regard too C M Venter *An Assessment of the South African Law Governing Breach of Contract* master’s dissertation Stellenbosch University (2004) 2, and S P Stuart-

that the discretionary approach is to be discouraged because it undermines doctrinal certainty and predictability of the law.

7 2 Recommendations for reform

7 2 1 A discretion to refuse to order specific performance governed by certain principles

Having considered the inadequacies and limitations of the current approach and having established the need for reform, it is now essential to consider the way forward.

Returning to the hypothesis posed at the beginning of this study (and this chapter), it is now possible to state that it may be preferable for South African courts to follow a more concrete approach.

We will first consider the solution¹⁵ proposed by Lambiris. He recommends that courts should retain a wide discretionary power to refuse specific performance, but that it must be exercised in accordance with broad but well recognised principles.¹⁶ According to Lambiris such an approach would not only preserve the objectives of freedom of discretion, but also assure consistency in the decisions of our courts in specific performance matters.¹⁷ It is doubtful, though, whether this will properly address the fundamental tension outlined above.¹⁸

Steer “Reconsidering an understanding of damages as a surrogate of specific performance in South African law of contract” 2013 *Responsa Meridiana* 65 96.

¹⁵ As stated in para 7 1 above. See also para 6 1 2 (esp text to n 69) above.

¹⁶ He sets out three general principles which he derives from *Benson*: an order of specific performance must not have the effect of producing an injustice or inequity, it must not be contrary to legal or public policy, and it must not require the performance of an act which is impossible (*Orders of Specific Performance and Restitutio in Integrum in South African Law* 132-133). See also para 3 4 3 (esp text to n 229) above.

¹⁷ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 131-132.

First, Lambiris' suggestion still undermines the South African contract law doctrine that the plaintiff has a right to specific performance. And, even if this inconsistency can somehow be overlooked, the broad nature of the guiding principles causes concern. The availability of the remedy will still be regulated by open-ended norms.¹⁹ The suggested "guideline approach" though it preserves the courts' freedom of discretion, is still too wide to ensure legal certainty.

This is evident from the fact that Lambiris also considers "cases which do not fall within the general principles".²⁰ Reference to this separate category (to which the author devotes an entire subheading) demonstrates that the outcome in specific performance matters will still be unpredictable and inconsistent. He points out that there are certain cases "which do not appear to have been decided on the basis of the truly applicable principles, and which therefore cannot be explained in terms thereof".²¹ In this regard he discusses two illustrative cases. The most noteworthy of these is *Mohr v Kriek*,²² in which an undertaking, contained in a deed of dissolution of partnership, to sign and

¹⁸ See the reference to Lambiris & Cockrell in para 7 1 and the related text to nn 1-3 above.

¹⁹ See reference to Lubbe in para 1 1 1 (n 48) and the related text to n 48.

²⁰ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 141.

²¹ 141.

²² 1953 (3) SA 600 (SR). The other example he refers to is *Coronation Syndicate Ltd v Lillienfeld and the New Fortuna Co Ltd* 1903 TS 489, where an undertaking by a company director to vote in support of a particular resolution at a meeting was held to be unenforceable by means of specific performance because performance of this undertaking to the third party conflicted with his fiduciary duties to the company. However, the case did not warrant reference by Lambiris under the particular subheading, because it could in fact be explained in terms of the general principles, as illegal contracts will never be enforced, even though the court did not explicitly state that it was the basis for the refusal of the order of specific performance. Wessels uses the (now discredited) supervision rationale – see *The Law of Contract in South Africa* 2 ed (1951) vol 2 § 3126: "the court cannot order a person in terms of his contract to vote in a certain way at a company meeting, for the court has no means to ensure his doing so".

deliver a promissory note and stop order was held to be unenforceable by means of specific performance. The reasons provided were that performance of the undertaking could not actually be enforced even if ordered, since it consisted of a positive act which according to Quènet J “could not, as in the case of a valid negative obligation, be enforced”, furthermore the judge reasoned, it consisted of an act which only the defendant could carry out and no appropriate official could be authorised to sign the document if he refused to comply with the order.²³

Clearly, this finding was based on two incorrect assumptions of the applicable law, as Lambiris also correctly points out. The court drew a distinction between positive and negative obligations and took the view that only negative obligations are enforceable by means of specific performance. Lambiris, however, strongly disagrees, since “[o]rders *ad factum praestandum* are made all the time”²⁴ and so “there is no substance in a distinction between positive and negative obligations in relation to ordering specific performance”.²⁵ He also disagrees with the court’s view that the obligation is not enforceable as it is incapable of being delegated to a third party. This is obviously not an accurate account of our law, since there are cases in which performance by means of appointing someone else to act is not possible, i.e. where only the particular debtor can perform the stipulated act. In such cases compliance would depend on the threat of

²³ 1953 (3) SA 600 (SR) 601C-D.

²⁴ Citing *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 850 (W) 880I. See also J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 15 ed (1992) 211 n 75; A D J van Rensburg, J G Lotz & T van Rijn (R D Sharrock) “Contract” in W A Joubert & J A Faris (eds) *LAWSA* 5(1) 2 ed (2010) para 495.

²⁵ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 141-142. See further De Wet & Van Wyk *Kontraktereg en Handelsreg* 211: “Hiervoor is in ons gemene reg geen steun te vind nie. Ook in ons praktyk is vir hierdie stelling nie voldoende steun aan te wys nie. In baie gevalle het ons howe al reële eksekusie toegestaan by ‘n verpligting om iets te doen...”, and para 114 n 145 above.

other measures, for example, the prospect of being held in contempt of court if the debtor fails to perform the act.²⁶

Ultimately, Lambiris' proposals may give rise to only more inconsistencies. His overriding discretion, no matter how it is defined, will always compete with the plaintiff's right or general entitlement to specific performance as his remedy, and his broad "guiding" principles could inevitably lead to legal uncertainty. We can now proceed to the alternative of the complete removal of the discretionary power.

7 2 2 A general right to specific performance subject to certain exceptions

Under the second approach, the general starting point in our law remains the same: the parties to a contract, as a matter of course, are entitled to demand performance of their respective obligations *in specie*. However, this right to choose specific performance is not absolute, but subject to certain exceptions – and it is not subject to a judicial discretion that is influenced by certain factors.²⁷

As noted in earlier chapters, there are already two recognised exceptions where the discretion is absent, namely impossibility of performance and the debtor's insolvency.²⁸

²⁶ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 142.

²⁷ See again paras 4 8 2, 6 1 1 & 6 1 2 above.

²⁸ See D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 322: "The reason for the first exception is that the courts will not order something that cannot be done, even if such impossibility is only subjective – that is, only relates to the debtor personally. For example, if a party has sold the same thing to two different persons, and delivered it to one of them, the courts will not order specific performance ... The reason for the second exception is to be found in the need to treat all the concurrent creditors of an insolvent estate equally. Since there are insufficient assets in an insolvent estate to discharge all the liabilities of the insolvent, an order of specific performance in favour of one creditor would necessarily result in that creditor's claim being preferred to that of the other creditors." The second exception is related to the first, according to Lubbe

The first obvious exception is (and remains) that a claim for specific performance is excluded as far as such performance is objectively or subjectively impossible.²⁹ This rule is not unfamiliar to our law: it derives from the Roman principle *impossibilium nulla obligatio est* (“impossibility of performance prevents the creation of obligations”).³⁰ It corresponds to the moral principle that “ought implies can”.³¹ Of course, the debtor cannot be compelled to do that which cannot be done.³² According to this principle, a contract is void if at the time of its conclusion its performance is objectively impossible; so also where a contract has become impossible to perform after it had been entered into. Here the general rule is that the position is the same as if it had been impossible from the beginning.³³ And if the contract is regarded as void *ab initio*, specific performance is naturally precluded, because there is no obligation in respect of that performance.³⁴ Thus “refusal to order specific performance is not really the result of an

“Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 51 54. See further paras 3 2 3 (esp n 139) & 4 8 3 above.

²⁹ See generally Van der Merwe et al *Contract: General Principles* 465: “If performance in terms of an existing contractual obligation becomes subjectively or relatively impossible, the obligations are not affected ... If performance becomes objectively or absolutely impossible, the obligation is extinguished and the duty to perform and the corresponding right to claim performance fall away ...” (citing *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W)).

³⁰ Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 205.

³¹ 206.

³² See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [75].

³³ See *Peters Flaman and Co v Kokstad Municipality* 1919 AD 427, 434.

³⁴ See De Wet & Van Wyk *Kontraktereg en Handelsreg* 210 n 61; “Waar [die skuldenaar] deur onmoontlikwording van prestasie bevry is is daar natuurlik glad nie meer ‘n verbintenis nie.” See also G Lubbe “Daadwerklike vervulling in die Suid-Afrikaanse reg: die implikasies van die uitoefening van die regterlike diskresie” in J Smits & G Lubbe (eds) *Remedies in Zuid-Afrika en Europa* (2003) 51 54, both referring to *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783.

exercise of judicial discretion against making the order but a direct consequence of the impossibility of performance. If contractual obligations are rendered void by impossibility there is obviously no need for a court to rely on its discretionary power to refuse an order of specific performance".³⁵ One could argue that technically it is not really an exception to specific performance, because there is no obligation at all, but that it could practically be treated as an exception, especially since subjective impossibility "does not prevent the creation of an obligation" and hence "if the debtor eventually does not perform, he may be liable for breach of contract" though "specific performance would not be granted".³⁶

This study proposes that the list of exceptions or defences to a claim for specific performance be expanded. It will be recalled that chapter 4 on personal service contracts and chapter 6 on undue hardship raised issues relating to the divergence between the theory and practice of our law governing the availability of specific performance. One of the more significant findings to emerge from this study was that to pretend that there is an open-ended discretion to refuse specific performance is misleading in two circumstances.

It is undesirable to maintain this open-ended discretion, while the courts at the same time clearly follow certain practices. This view is supported by Lubbe, who writes:

"The Benson judgment itself recognises that factors that in the past have served as reasons to deny specific performance remain relevant to the exercise of the discretion. The need to preserve legal certainty and the fact that some of these factors may in particular circumstances reflect more or less mandatory considerations of public policy, may very well result in past patterns regarding the exercise of the discretion being repeated in the future. Practitioners who have to advise clients on the likely outcome of claims for specific performance will tend to base their opinions on previous decisions, so it is inevitable that perceptions about when decrees are likely to be made and when not, will develop. The

³⁵ Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 134.

³⁶ Van der Merwe et al *Contract: General Principles* 163, 329-330, 465.

concern to treat like cases alike and to differentiate between situations that are different will further encourage the development of informal perceptions about when specific performance is appropriate or confirm such perceptions that still exist. Guidelines will once again crystallise at a practical level.”³⁷

It was accordingly argued that the law could be discredited if this reality is not reflected in legal doctrine.³⁸ The study suggests that a limited right to be awarded specific performance may be preferable to a right to specific performance which is subject to an open-ended discretion to refuse it. Such an approach, it is suggested, is more logical in a system which traditionally does not regard specific performance as an exceptional remedy.³⁹ Whereas the discretionary approach is more suitable to and appropriate in England and America, because they recognise damages as the default remedy for breach of contract; only in exceptional circumstances, if damages will not provide adequate relief to the aggrieved party, will courts exercise their discretion *in favour of* specific performance.⁴⁰

Therefore, the alternative proposal for reform advocated in this thesis is to concretise our courts’ approach to the remedy of specific performance by recognising certain defined exceptions to the right to specific performance. This proposal requires that our courts move away from the wide unrestricted (and historically contentious) discretion and engage in the development of concrete rules aimed at narrowing the boundaries of the right to specific performance as currently drawn by the law. These recommendations therefore advocate the (wider) restriction of the plaintiff’s right to

³⁷ “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 110-111.

³⁸ See the reference to Lubbe in n 67 below.

³⁹ See again *Santos Professional Football Club (Pty) Ltd v Iggesund* 2003 (5) SA 73 (C) 84I, where Foxcroft J proclaims “[i]n our law, specific performance is a primary remedy and not a supplementary remedy”.

⁴⁰ See paras 1 1 2 & 2 3 2 1 above.

specific performance. The circumstances under which this right may be limited are revealed in certain key chapters.

The first of these circumstances is contractual obligations for personal services, which were considered in chapter 4. There the possibility of adopting a more concrete approach to enforcing personal service contracts by way of an order of specific performance was considered. It was argued that the personal character of the contractual relationship *per se* does not justify the exclusion of an order for specific performance. It was furthermore argued that the classic argument that an order for specific performance of a contractual relationship of a personal service would infringe upon the personal freedom of the debtor should be nuanced.

Drawing on certain international instruments and legal systems for inspiration and as a frame of reference, it was shown that the right should be limited where performance consists of such personal obligations that it would be unreasonable to enforce it. Thus, we are not dealing with an exception which is identical to the impossibility and insolvency cases; for it cannot be said that specific performance of all types of service contracts has to be refused. According to Kerr “[t]he different kinds of contracts of service, including contracts of employment, need to be distinguished when orders of specific performance are under consideration” and “it is clear that no general rule can be made for all contracts of service”.⁴¹ This is apparent from our courts’ enforcement of employment contracts against employers, in terms of statute and of the hybrid *Igesund*-type contract cases.⁴² It was accordingly argued that we do not have to follow the broad approach of some instruments which provide that all personal service contracts are unenforceable.⁴³

⁴¹ A J Kerr *The Principles of the Law of Contract* 6 ed (2002) 681.

⁴² See text to n 50 para 4 2 1, text to nn 107, 122 & 137 para 4 2 1 2 & compare text to n 322 para 4 7 above. See also Naudé’s constitutional argument in text to n 133 para 4 2 1 2 above.

⁴³ See paras 4 7 & 4 8 3 & 4 8 4 above.

The second of these considerations is undue hardship. In chapter 6 it was proposed that courts refuse the remedy if it would cause undue hardship to the defendant or third parties (*Haynes* being the classic example). The research reveals that this is already a circumstance affecting the exercise of the courts' discretion. According to the current law (i.e. the discretionary approach) courts should exercise their discretion to refuse the order if this will cause undue or disproportionate hardship to the defendant. This is an aspect of the equitable nature of the discretion, which requires the court always to have in mind the need to avoid injustice. Undue hardship to the defendant, as manifestation of an injustice, was specifically mentioned in *Benson*.⁴⁴ This study indicates that even straightforward financial hardship, if sufficiently severe, may be enough, particularly if the plaintiff can equally well be compensated by an award of damages.⁴⁵

The third consideration is the need for constant or on-going supervision. Chapter 5 indicates that this consideration on its own does not provide sufficient justification for refusing specific performance, but that it may be a factor to be weighed by the courts when deciding whether to refuse specific performance under the exceptions. Thus, as informed by experiences in the common law, supervision may be relevant, but not conclusive. The relaxation of the traditional restriction of constant supervision on the availability of the remedy in common law is apparent from cases and other common-law authorities.⁴⁶ This development has long been favoured by academic commentators. For example, in his a comparative study, Dawson examined all the various doctrines of the common law which restrict claims for specific performance and concluded that the

⁴⁴ See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783D-F *per Hefer JA.*

⁴⁵ See para 6 5 3 above. See also reference to Lubbe & Murray in text to n 50 below.

⁴⁶ See *Posner v Scott-Lewis* [1987] Ch 25, where a landlord was compelled to comply with an undertaking to employ a resident porter – see further paras 5 2 (iv) & 5 5 above. In the American context, see discussion of *Metropolitan Sports Facilities Commission v Minnesota Twins Partnership* in para 5 3 above.

wide-ranging discretion the Anglo-American judges exercise is regrettable.⁴⁷ Supervision is accordingly rejected as a singular ground upon which courts can refuse to order specific performance. Instead, it becomes one of the relevant underlying considerations which can lead to the refusal of the remedy in terms of the broader exception of hardship.⁴⁸

Finally, there is the consideration of adequacy of damages, considered in chapter 3. This chapter points out that the right to claim specific performance under our law does not and should not depend on whether damages is inadequate as an alternative remedy. However, the possibility that the plaintiff would be adequately compensated by damages may be a factor to be weighed by the courts when determining whether such an order would give rise to injustice or oppression in the form of undue hardship.⁴⁹ Note that in *Benson*, the court mentions undue hardship to the defendant, as an instance of an injustice. Lubbe and Murray, however, rightly question whether “the financial loss that the guilty party might suffer” should “be one of the circumstances in which, in the words of Hefer JA in the *Benson* case, ‘the order will operate unduly harshly on the defendant’?”⁵⁰

The proposal is thus for a simplified yet more refined approach which can be achieved by recognising a restricted right to specific performance. In this regard it recommends that two exceptions (apart from impossibility and insolvency already recognised) to specific performance should be recognised. These are the following: firstly, if the contract sought to be enforced is of such a personal character that it would be unreasonable to enforce it, and secondly, if specific performance would cause undue hardship to the defendant or to third parties. This would be a matter for consideration on the facts of each case. The proposed exceptions to the right would operate strictly. This

⁴⁷ J P Dawson “Specific performance in France and Germany” (1958) 57 *Mich LR* 495.533. He evidently favoured a more refined approach as exemplified by civil-law systems.

⁴⁸ See para 5 5 above. See also para 6 5 3 (esp n 217) above.

⁴⁹ See paras 3 4 3 & 3 4 4 above.

⁵⁰ Lubbe & Murray *Contract* 547.

means that if none of the exceptions are present, the court would not have a residual discretion to refuse the remedy.⁵¹ Conversely, if one of the exceptions is present, the court must refuse the remedy. The practical effect of the operation of one of these exceptions is that the aggrieved party would have to be satisfied with the other remedies available for breach of contract, i.e. either cancellation or damages or both.⁵²

One final aspect relating to the proposal of a more concrete, exception-based approach needs to be considered. This is the question of allocating the onus of proof in regard to the proposed defences. In this regard the following statement by Kerr is relevant:

“The discretion to refuse to order specific performance being the court’s, the court is entitled to arrive at its decision without being bound by any rules relating to the onus of proof. It would be wise, however, for a defendant who wishes to persuade a court not to grant specific performance to lead evidence of the relevant circumstances.”⁵³

⁵¹ Much like the PECL, the PICC, the DCFR & the CESL (see paras 2 3 3 2 - 2 3 3 5 above), and the civil-law systems under review (see text to n 246 para 3 4 3 above). See also para 6 4 2 n 160 above.

⁵² Of course, it is advisable for a plaintiff to ask for alternative remedies when he brings his first action. The court in any event has the power to grant damages as an alternative for specific performance of a contract, even when there is no alternative prayer for damages (*National Butchery Co v African Merchants Ltd* (1907) 21 EDC 57). See further Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 167 ff; Van der Merwe et al *Contract: General Principles* 333 ff, esp 334 & 347 for a discussion of the so-called “double-barrelled procedure”. On the tenability of the view that damages as a surrogate for specific performance could be an alternative remedy, see again para 1 1 4 above; Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 316; Van der Merwe et al *Contract: General Principles* 329, and esp Stuart-Steer 2013 *Responsa Meridiana* 65-97. See also D J Joubert *General Principles of the Law of Contract* (1987) 228; Lubbe & Murray *Contract* 538, and the authority cited there.

⁵³ *The Principles of the Law of Contract* 682. See also Lubbe “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” in Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 100.

According to the current approach, the defendant does not bear a full onus to prove grounds for refusing an order for specific performance, as this would limit the discretion of the court.⁵⁴ This is apparent from the following dictum in *Tamarillo (Pty) Ltd v BN Aitkin (Pty) Ltd per Miller JA*.⁵⁵

"In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case, the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely as not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharge the *onus* of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion."

Analogously, under the proposed approach, the defendant would not bear a full onus to prove circumstances which would justify the limitation of the plaintiff's right. Instead, the defendant would rather bear a burden of rebuttal, of raising or drawing the court's attention to these circumstances. The defendant only has to present evidence of the relevant circumstances to prevent the plaintiff from succeeding with his claim, or as Van

⁵⁴ See A Beck "The coming of age of specific performance" 1987 *CILSA* 190 201; S van der Merwe et al *Contract: General Principles* 4 ed (2012) 330 n 25. According to Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 144, if the onus did rest on the defendant "it must follow that, should a defendant fail to raise and prove the appropriate circumstances, the court will not be in a position to exercise its judicial discretion against issuing an order of specific performance".

⁵⁵ 1982 (1) SA 398 (A) 443C-E. See Eiselen "Specific performance and special damages" in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 256.

der Merwe et al state “[a] defendant would probably at least have to adduce some evidence which would support his contention that an order should not be granted”.⁵⁶

7 3 Concluding remarks

The proposed development inevitably militates against the decision in *Benson*, as it entails the removal of the discretion of the court in order to achieve greater clarity in the law.

The continued primacy of the remedy, evidenced by each plaintiff's right to choose this remedy, is also strongly recommended for the additional certainty it provides regarding the purpose of our contract law and the enforceability of obligations in general.

A general right to require specific performance of obligations has certain advantages. Through specific performance, the creditor obtains as far as possible what is due to him and so the binding force of obligations is maintained, which is a principle applied at the highest level in our law.⁵⁷ Furthermore, difficulties in assessing damages are avoided and it saves the costs of a judicial assessment of damages.

The approach confirms that specific performance should remain the ordinary remedy to which a party to a contract is entitled. However, a fully contextualised study of the research problem and comparative research into different legal systems demonstrates that the creditor's entitlement to require specific performance must not be boundless; it should be restricted in terms of defined exceptions.

It was contended that the practice of the courts provides the basis for such a development.⁵⁸ If one examines the practice rather than the remarks of the courts, a

⁵⁶ *Contract: General Principles* 330 n 25. See also Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* 145; R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 547.

⁵⁷ See para 4 8 2 n 340 above.

⁵⁸ See paras 4 8 3 & 6 5 4 above.

restrictive approach to specific performance emerges from the decisions. It is clear from the decided cases that in certain instances, there is in effect no discretion; the remedy is invariably refused.⁵⁹

Although it has been the practice of the courts, they have hesitated to acknowledge this. It also seems that commentators have known this for a long time, but the consequences have not been fully worked out. It is suggested that it is time for the courts to bring coherence to this unduly complex area of the law by clarifying when the remedy will not be available. The proposed new exception-based approach could be developed judicially as part of South African common law doctrine. It provides a theoretically sound construction or solution,⁶⁰ based on past practice. The courts therefore have sufficient reason to overrule statements on the need for the retention of the widest possible discretion.

The approach can also be related to certain statements made by Lubbe and Cockrell.⁶¹ Lubbe, for example, considers the comparable option of recognising certain *Fallgruppen* or case groups in which the remedy should be denied.⁶² According to the author, the adoption of this methodology might lead to the denial of the remedy in cases of hardship.⁶³ He also suggests that “a rule that specific performance generally will not be granted as against an employee might develop from the practice of our courts in such cases”.⁶⁴ Lubbe thereby confirms that the practice of the courts in specific performance

⁵⁹ See paras 4 8 3 & 6 5 2 above.

⁶⁰ Contract cases like *Santos* and *Nationwide Airlines*, that have been notoriously hard to defend and explain, as it was indicated, can be explained in terms thereof (see paras 4 2 1 2 & 4 8 4 above).

⁶¹ See reference to Cockrell in para 4 8 2 (n 346) above.

⁶² See “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives*.

⁶³ 112-113. See also para 6 5 4 above.

⁶⁴ 113. See also para 4 8 3 above.

matters has possibly opened the way for the development of a more restrictive approach in future decisions.⁶⁵

Finally, it is accepted that there may be some reluctance on the side of the judiciary⁶⁶ and commentators⁶⁷ to embrace the proposed reform.⁶⁸ However, the truth of the matter is simply that if courts do not engage in reform our law will remain uncertain and internally incoherent or contradictory.

⁶⁵ See further Eiselen “Specific performance and special damages” in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* 257-260, 266, 269-270. See esp reference to Eiselen in text to n 197 para 6 5 2 above.

⁶⁶ See cases noted in n 9 para 7 1 above; and again paras 1 1 1 (esp n 41) & 4 8 3 (esp n 354) above.

⁶⁷ See eg Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 131 n 29: “Whatever arguments have been adduced in the past in support of defining specific circumstances or cases in which an order of specific performance will be refused, this approach is no longer tenable in the light of *Benson*’s case.” But see valuable statement/s by Lubbe (2008) in text to n 13 para 7 1 & text to n 37 para 7 2 2 above, which continues as follows: “Questions can therefore be raised about the stability of the position adopted in the *Benson* case. The possibility that the *Benson* decision may suffer the same fate as that of *Haynes*, and that the case law may oscillate between a purely discretionary and a rule based approach cannot be excluded. It is submitted that the law will ultimately be discredited if, for instance, a subliminal understanding that specific performance will ordinarily not be granted against an employee in respect of a contract of service is not reflected in legal doctrine.”

⁶⁸ Lubbe also acknowledges that “[t]here is very little recognition of such a possibility at present”, but goes on to say that “[a]n approach which reconsiders the objections to a rule based approach to the granting of the remedy is preferable to one which denies the substantive implications of the denial of the remedy” (in “Contractual derogation and the discretion to refuse an order for specific performance in South African Law” Smits et al (eds) *Specific Performance in Contract Law: National and Other Perspectives* 114-115). See again paras 1 1 1, 4 8 3 & 6 5 4 above.

ADDENDUM A

1. American Law Institute's *Restatement (Second) of Contracts*
2. United States Uniform Commercial Code (UCC)
3. German Civil Code (BGB)
4. German Code of Civil Procedure (ZPO)
5. Dutch Civil Code (BW)
6. UN Convention on Contracts for the International Sale of Goods (CISG)
7. UNIDROIT Principles of International Commercial Contracts (PICC)
8. Principles of European Contract Law (PECL)
9. Draft Common Frame of Reference (DCFR)
10. Common European Sales Law (CESL)

1. American Law Institute's *Restatement (Second) of Contracts*

§ 261 Discharge by supervening impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 357 Availability of specific performance and injunction

(1) Subject to the rules stated in §§ 359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.

(2) Subject to the rules stated in §§ 359-69, an injunction against breach of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty if

(a) the duty is one of forbearance, or

(b) the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

§ 358 Form of order and other relief

(1) An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.

(2) If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.

(3) In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

§ 359 Effect of adequacy of damages

(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

(2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.

(3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in § 357.

§ 360 Factors affecting adequacy of damages

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

- (a) the difficulty of proving damages with reasonable certainty,
- (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and
- (c) the likelihood that an award of damages could not be collected.

§ 362 Effect of uncertainty of terms

Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.

§ 363 Effect of insecurity as to the agreed exchange

Specific performance or an injunction may be refused if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court.

§ 364 Effect of unfairness

- (1) Specific performance or an injunction will be refused if such relief would be unfair because
 - (a) the contract was induced by mistake or by unfair practices,
 - (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or
 - (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.
- (2) Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.

§ 365 Effect of public policy

Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.

§ 366 Effect of difficulty in enforcement or supervision

A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

§ 367 Contracts for personal service or supervision

- (1) A promise to render personal service will not be specifically enforced.
- (2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

2. United States Uniform Commercial Code (UCC)

Article 2 – Sales (as amended in 2003)

§ 2-614 Substituted performance

- (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
- (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer

provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

§ 2-615 Excuse by failure of presupposed conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

§ 2-709 Action for the price

(1) If the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental or consequential damages under section 2-710, the price:

- (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) If the seller sues for the price, the seller must hold for the buyer any goods that have been identified to the contract and are still in the seller's control. However, if resale becomes possible, the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer, and payment of the judgment entitles the buyer to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 2-610), a seller that is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under section 2-708.

§ 2-712 “Cover”; buyer’s procurement of substitute goods

(1) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) A buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages under Section 2-715, but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar the buyer from any other remedy.

§ 2-716 Specific performance; buyer’s right to replevin

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties

agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin or similar remedy for goods identified for the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(4) The buyer's right under subsection (3) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

3. German Civil Code (BGB)

§ 241 Duties arising from an obligation

(1) By virtue of an obligation an obligee [creditor] is entitled to claim performance from the obligor [debtor]. The performance may also consist in forbearance.

(2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

§ 249 Nature and extent of damages

(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.

(2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.

§ 250 Damages in money after the specification of a period of time

The obligee may specify a reasonable period of time for the person liable in damages to undertake restoration and declare that he will reject restoration after the period of time ends. After the end of the period of time the obligee may demand damages in money, if restoration does not occur in good time; the claim to restoration is excluded.

§ 251 Damages in money without the specification of a period of time

- (1) To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damages must compensate the obligee in money.
- (2) The person liable in damages may compensate the obligee in money if restoration is only possible with disproportionate expenses. Expenses incurred as a result of the curative treatment of an injured animal are not disproportionate merely because they significantly exceed the value of the animal.

§ 275 Exclusion of the duty of performance

- (1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.
- (2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.
- (3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.

§ 280 Damages for breach of duty

(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.

§ 281 Damages in lieu of performance for nonperformance or failure to render performance as owed

(1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280 (1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure. If the obligor has performed only in part, the obligee may demand damages in lieu of complete performance only if he has no interest in the part performance. If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.

(2) Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The claim for performance is excluded as soon as the obligee has demanded damages in lieu of performance.

(5) If the obligee demands damages in lieu of complete performance, the obligor is entitled to claim the return of his performance under sections 346 to 348.

§ 282 Damages in lieu of performance for breach of a duty under section 241 (2)

If the obligor breaches a duty under section 241 (2), the obligee may, if the requirements of section 280 (1) are satisfied, demand damages in lieu of performance, if he can no longer reasonably be expected to accept performance by the obligor.

§ 283 Damages in lieu of performance where the duty of performance is excluded

If, under section 275 (1) to (3), the obligor is not obliged to perform, the obligee may, if the requirements of section 280 (1) are satisfied, demand damages in lieu of performance. Section 281 (1) sentences 2 and 3 and (5) apply with the necessary modifications.

§ 284 Reimbursement of futile expenses

In place of damages in lieu of performance, the obligee may demand reimbursement of the expenses which he has made and in all fairness was entitled to make in reliance on receiving performance, unless the purpose of the expenses would not have been achieved, even if the obligor had not breached his duty.

§ 285 Return of reimbursement

(1) If the obligor, as a result of the circumstance by reason of which, under § 275 (1) to (3), he has no duty of performance, obtains reimbursement or a claim to reimbursement for the object owed, the obligee may demand return of what has been received in reimbursement or an assignment of the claim to reimbursement.

(2) If the obligee may demand damages in lieu of performance, then, if he exercises the right stipulated in (1) above, the damages are reduced by the value of the reimbursement or the claim to reimbursement he has obtained.

§ 311a Obstacle to performance when contract is entered into

(1) A contract is not prevented from being effective by the fact that under section 275 (1) to (3) the obligor does not need to perform and the obstacle to performance already exists when the contract is entered into.

(2) The obligee may, at his option, demand damages in lieu of performance or reimbursement of his expenses in the extent specified in section 284. This does not apply if the obligor was not aware of the obstacle to performance when entering into the contract and is also not responsible for his lack of awareness. Section 281 (1) sentences 2 and 3 and (5) apply with the necessary modifications.

§ 611 Typical contractual duties in a service contract

(1) By means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration.

(2) Services of any type may be the subject matter of service contracts.

§ 612 Remuneration

(1) Remuneration is deemed to have been tacitly agreed if in the circumstances it is to be expected that the services are rendered only for remuneration.

(2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.

§ 613 Non-transferability

The party under a duty of service must in case of doubt render the services in person. The claim to services is, in case of doubt, not transferable.

§ 631 Typical contractual duties in a contract to produce a work

- (1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration.
- (2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service.

§ 632 Remuneration

- (1) Remuneration for work is deemed to be tacitly agreed if the production of the work, in the circumstances, is to be expected only in return for remuneration.
- (2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.
- (3) In case of doubt, remuneration is not to be paid for a cost estimate.

§ 633 Material defects and legal defects

- (1) The contractor must procure the work for the customer free of material defects and legal defects.
- (2) The work is free of material defects if it is of the agreed quality. To the extent that the quality has not been agreed, the work is free from material defects
 1. if it is suitable for the use envisaged in the contract, or else

2. if it is suitable for the customary use and is of a quality that is customary in works of the same type and that the customer may expect in view of the type of work.

It is equivalent to a material defect if the contractor produces a work that is different from the work ordered or too small an amount of the work.

- (3) The work is free of legal defects if third parties, with regard to the work, either cannot assert any rights against the customer or can assert only such rights as are taken over under the contract.

§ 634 Rights of the customer in the case of defects

If the work is defective, the customer, if the requirements of the following provisions are met and to the extent not otherwise specified, may

1. under section 635, demand cure,
2. under section 637, remedy the defect himself and demand reimbursement for required expenses,
3. under sections 636, 323 and 326 (5), revoke the contract or under section 638, reduce payment, and
4. under sections 636, 280, 281, 283 and 311a, demand damages, or under section 284, demand reimbursement of futile expenditure.

4. German Code of Civil Procedure (ZPO)

§ 510b Judgment requiring a party to take specific action

Should a party be sentenced to take specific action, the defendant may concurrently be sentenced, upon corresponding application being made by the plaintiff, to pay compensation for the case that the action is not taken within the period to be determined; the court is to assess such compensation at its sole discretion.

§ 765 Orders issued by the execution court where performance is to be made concurrently

If the enforcement depends on concurrent performance by the creditor to the debtor, the court responsible for execution may only direct enforcement activities if:

1. Proof is provided, by submitting public records or documents, or records or documents that have been publicly certified, and a copy of such records or documents has already been served, that the debtor has been satisfied or is defaulting on acceptance; no service need be made if the court-appointed enforcement officer had already commenced compulsory enforcement pursuant to section 756 (1) and such proof is provided by the record prepared by the court-appointed enforcement officer; or
2. The court-appointed enforcement officer has effected an enforcement measure pursuant to section 756 (2) and this is proven by the record prepared by the court-appointed enforcement officer.

§ 765a Protection from execution

(1) Upon a corresponding petition being filed by the debtor, the court responsible for execution may reverse a measure of compulsory enforcement in its entirety or in part, may prohibit it, or may temporarily stay such measure if, upon comprehensively assessing the creditor's justified interest in protection, the court finds that the measure entails a hardship that due to very special circumstances is immoral (*contra bonos mores*). The execution court is authorised to deliver the orders designated in section 732 (2). Should the measure concern an animal, the execution court is to consider, in weighing the matter, the responsibility that the person has for the animal.

(2) The court-appointed enforcement officer may delay a measure serving to obtain the surrender of objects until the court responsible for execution delivers a decision, but may not so delay it for longer than one (1) week, if the prerequisites set out in subsection (1), first sentence, are demonstrated to his satisfaction and if it was not possible for the debtor to refer the matter to the execution court.

(3) In matters pertaining to the vacation of premises, the petition pursuant to subsection (1) is to be filed at the latest within two (2) weeks prior to the date set for the vacation of the premises, unless the grounds on which the petition is based came about only after this time or the debtor was prevented from filing the petition in due time through no fault of his own.

(4) The execution court shall reverse its order, upon a corresponding petition being filed, or shall modify it, if this is mandated with a view to the change of the overall factual situation.

(5) Enforcement activities may be abrogated in the cases provided for by subsection (1), first sentence, and subsection (4) only once the order has become final and binding.

§ 883 Surrender of specific movable objects

(1) If the debtor is to surrender a movable asset or a number of specific movable objects, the court-appointed enforcement officer is to take them away from the debtor and to physically submit them to the creditor.

(2) Where the object to be surrendered is not found, the debtor is under obligation – upon the creditor having filed a corresponding petition – to declare for the records of the court, in lieu of an oath, that he is not in possession of the object and that he does not know where it is located. The court-appointed enforcement officer competent pursuant to section 802e shall summon the debtor to administer the statutory declaration in lieu of an oath. The stipulations of sections 478 to 480, of section 483, 802f (4), sections 802g through 802i and of section 802j subsections (1) and (2) shall apply mutatis mutandis.

(3) The court may decide to change the statutory declaration in lieu of an oath to reflect the overall factual situation.

§ 884 Provision of a specific amount of fungible things

Should the debtor have to provide a specific number or amount of fungible things that in business dealings are customarily specified by number, measure, or weight, or should

the debtor have to provide securities, the rule set out in section 883 (1) shall apply mutatis mutandis.

§ 885 Surrender of plots of real estate or ships

(1) Insofar as the debtor is to surrender an immovable property or a ship entered in the register of ships, or a ship under construction so entered in the register; or insofar as he is to grant permission to use such property, ship, or ship under construction; or insofar as he is to vacate them, the court-appointed enforcement officer is to remove the debtor from possession and is to put the creditor into possession. The court-appointed enforcement officer is to demand that the debtor provide an address at which documents may be served, or that he name an authorised recipient.

(2) The court-appointed enforcement officer shall remove any movable objects that are not the subject of compulsory enforcement and shall physically submit them, or make them available, to the debtor or, if the debtor is absent, to an attorney-in-fact of the debtor, an adult family member, a person employed by the family, or to an adult permanent cohabitant.

(3) Where neither the debtor nor one of the persons designated is present, or where acceptance is refused, the court-appointed enforcement officer is to take the objects designated in subsection (2) to the storage office for attached objects, or is to ensure their safekeeping in another way, doing so at the costs of the debtor. Movable objects in the safekeeping of which there is manifestly no interest are to be destroyed without undue delay.

(4) Should the debtor fail to redeem the objects within a period of one (1) month following the vacation, the court-appointed enforcement officer shall dispose of them and shall lodge the proceeds. The court-appointed enforcement officer shall dispose of the objects and lodge the proceeds also in those cases in which the debtor has demanded return of the objects within a period of one (1) month without paying for the costs within a period of two (2) months following the vacation. Sections 806, 814 and 817 shall apply mutatis mutandis. Objects that cannot be realised shall be destroyed.

(5) Objects exempted from attachment, and those objects for which it is not to be expected that their realisation will generate any proceeds, are to be surrendered at any time at the demand of the debtor without any further requirements needing to be met.

§ 885a Limited enforcement instructions

(1) The enforcement instructions may be limited to the measures pursuant to section 885 (1).

(2) The court-appointed enforcement officer is to document in the record (section 762) the movable objects that are obviously perceptible when he takes the enforcement action. In preparing the documentation, he may create images in electronic format.

(3) The creditor may at any time remove those of the movable objects that are not the subject of compulsory enforcement and is to keep them safe. He may at any time destroy movable objects in the safekeeping of which there is manifestly no interest. The creditor shall accept responsibility regarding the measures set out in the first and second sentences only insofar as wilful misconduct and gross negligence are involved.

(4) Should the debtor fail to redeem the objects from the creditor within a period of one (1) month after the creditor has been put into possession, the creditor may realise the objects. Sections 372 through 380, 382, 383 and 385 of the Civil Code (Bürgerliches Gesetzbuch) are to be applied mutatis mutandis. No warning shall be issued that the objects may be sold at auction. Objects that cannot be realised may be destroyed.

(5) Objects exempted from attachment, and those objects for which it is not to be expected that their realisation will generate any proceeds, are to be surrendered at any time at the demand of the debtor without any further requirements needing to be met.

(6) Along with giving notice of the date set for the vacation of the premises, the court-appointed enforcement officer shall indicate to the creditor and to the debtor the stipulations made in subsections (2) through (5).

(7) The costs pursuant to subsections (3) and (4) shall be deemed costs of the compulsory enforcement.

§ 886 Surrender in the case of a third party having custody and control

If an object to be surrendered is in the custody and control of a third party, the claim of the debtor to surrender of the object is to be transferred to the creditor, upon his having filed the corresponding petition, in accordance with the provisions governing the attachment and transfer of a monetary claim.

§ 887 Actions that may be taken by others

(1) Should the debtor fail to meet his obligation to take an action, where such action can be taken by a third party, the creditor is to be authorised by the court of first instance hearing the case, upon his having filed a corresponding petition, to have this action taken by a third party at the costs of the debtor.

(2) Concurrently, the creditor may file the petition that the court sentence the debtor to make advance payment of the costs that will result from having a third party so take the action, notwithstanding the right to any supplementary claim.

(3) The above rules are not to be applied to any compulsory enforcement serving to obtain the surrender or provision of objects.

§ 888 Actions that may not be taken by others

(1) Where an action that depends exclusively on the will of the debtor cannot be taken by a third party, and where a corresponding petition has been filed, the court of first instance hearing the case is to urge the debtor to take the action in its ruling by levying a coercive penalty payment and, for the case that such payment cannot be obtained, by coercive punitive detention, or by directly sentencing him to coercive punitive detention. The individual coercive penalty payment may not be levied in an amount in excess of 25,000 euros. The stipulations of Chapter 2 regarding detention shall apply mutatis mutandis to coercive punitive detention.

- (2) No warning shall be issued regarding the coercive measures.
- (3) These rules shall not be applied in those cases in which a person is sentenced to provide services under a service agreement.

§ 890 Forcing the debtor to cease and desist from actions, or to tolerate actions

- (1) Should the debtor violate his obligation to cease and desist from actions, or to tolerate actions to be taken, the court of first instance hearing the case is to sentence him for each count of the violation, upon the creditor filing a corresponding petition, to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention or coercive detention of up to six (6) months. The individual coercive fine may not be levied in an amount in excess of 250,000 euros, and the coercive detention may not be longer than a total of two (2) years.
- (2) The sentence must be preceded by a corresponding warning that is to be issued by the court of first instance hearing the case, upon corresponding application being made, unless it is set out in the judgment providing for the obligation.
- (3) Moreover, upon the creditor having filed a corresponding petition, the debtor may be sentenced to creating a security for any damages that may arise as a result of future violations, such security being created for a specific period of time.

§ 893 Action brought for performance of the equivalent in money

- (1) The stipulations of the present Chapter do not affect the right of the creditor to demand performance of the equivalent in money.
- (2) The creditor is to enforce his claim to performance of the equivalent in money by filing a corresponding court action with the court of first instance hearing the case.

§ 894 Fiction of a declaration of intent having been made

Where the debtor has been sentenced to make a declaration of intent, such declaration shall be deemed to have been made as soon as the judgment has attained legal force. Where the declaration of intent depends on counter-performance being made, this effect shall occur as soon as an enforceable execution copy of the final and binding judgment has been issued in accordance with the stipulations of sections 726 and 730.

5. Dutch Civil Code (BW)

Article 3:11 Good faith

A person has not acted in 'good faith' as a condition for a certain legal effect if he knew or in the circumstances reasonably ought to have known the facts or rights from which his good faith depends. The impossibility to conduct an inquiry does not prevent that a person, who had good reason to doubt, is regarded as someone who ought to have known the relevant facts or rights.

Article 3:12 The principle of reasonableness and fairness

At determining what the principle of 'reasonableness and fairness' demands in a specific situation, one has to take into account the general accepted legal principles, the fundamental conceptions of law in the Netherlands and the relevant social and personal interests which are involved in the given situation.

Article 3:13 Abuse of right

(1) A person to whom a right belongs may not exercise the powers vested in it as far as this would mean that he abuses these powers.

(2) A right may be abused, among others, when it is exercised with no other purpose than to damage another person or with another purpose than for which it is granted or when the use of it, given the disparity between the interests which are served by its

effectuation and the interests which are damaged as a result thereof, in all reason has to be stopped or postponed.

(3) The nature of a right may implicate that it cannot be abused.

Article 3:296 Legal action to claim specific performance

(1) Where a person is legally obliged towards another person to give, to do or not to do something, the court shall order him, upon a request or claim of the entitled person, to carry out this specific performance, unless something else results from law, the nature of the obligation or a juridical act.

(2) Where a person is legally obliged to perform something under an effective date or expiration date or under a condition precedent or subsequent, the court may order him to do so with observance of that time stipulation or condition.

Article 3:297 Consequence of a court decision to carry out a specific performance

If a performance is obtained through the enforcement of a judicial decision or another executory title, then this has the same legal effect as that of a voluntary performance of the obligation that exists according to that judicial decision or executory title.

Article 3:299 A specific performance to do or not to do something

(1) When someone fails to do what he is legally obliged to do, the court may, upon a legal claim of the person towards whom this obligation exists, authorise this last person to effectuate himself what would have resulted from that obligation if it would have been performed properly.

(2) In the same way a person towards whom another person is legally obliged to refrain from doing something, may be authorised to undo what is performed in violation of that obligation.

(3) The costs necessary for the implementation of an authorisation as meant in the previous paragraphs, are chargeable to the person who did not observe his obligation. The judicial decision in which the authorisation is granted, may order as well the payment of these costs at display of certain documents mentioned to this end in the decision of the court.

Article 3:300 A specific performance to complete a juridical act

(1) Where someone is legally obliged towards another person to perform a juridical act, the court may order, upon a legal claim of the entitled person, that its judicial decision shall have the same force as a deed that should have been drawn up in accordance with all legal formalities by the person who is obliged to perform this juridical act or that a representative of this person, appointed by the court, shall perform this juridical act in his name, unless this is incompatible with the nature of the to be performed juridical act. When the court appoints a representative, it may order as well that the juridical act that has to be performed by this representative needs its approval in advance.

(2) Where the defendant is legally obliged to draw up a deed with the plaintiff, the court may order that its judicial decision shall take the place of the deed or of a part of it.

Article 6:2 Reasonableness and fairness within the relationship between the creditor and debtor

(1) The creditor and debtor must behave themselves towards each other in accordance with the standards of reasonableness and fairness.

(2) A rule in force between a creditor and his debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness.

Article 6:3 Natural obligations

(1) A natural obligation is a legally not enforceable obligation.

(2) A natural obligation exists:

- a. when the law or a juridical act denies its enforceability;
- b. when someone has a pressing moral duty of such nature towards another person that compliance with it, although legally not enforceable, has to be regarded by social standards (common opinion) as the fulfilment of a performance to which this other person is entitled.

Article 6:74 Requirements for a compensation for damages

(1) Every imperfection in the compliance with an obligation is a non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance is not attributable to the debtor.

(2) As far as it is not yet permanently impossible to accomplish the indebted performance, paragraph 1 of this Article only applies with due observance of what is regulated in Subsection 2 for a debtor who is in default.

Article 6:75 Legal excuse for a non-performance (force majeure)

A non-performance cannot be attributed to the debtor if it does not result from his fault and if he cannot be held accountable for it by virtue of law, a juridical act or generally accepted principles (common opinion).

Article 6:87 Alternative compensation for damages

(1) When the debtor is in default and the creditor has notified him in writing that he demands the payment of damages instead of the original performance, the non-performed obligation is converted into an obligation to pay for alternative damages, unless it already was (or had become) permanently impossible to accomplish the original performance.

(2) The original obligation shall not be converted in an obligation to pay for alternative damages when this is not justified in view of the fact that the non-performance is of minor importance.

Article 6:248 Legal effects arising from law, usage or the standards of reasonableness and fairness

(1) An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness.

(2) A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.

Article 6:265 Rescission of a mutual agreement for a breach of contract

(1) Every failure of a party in the performance of one of his obligations, gives the opposite party the right to rescind the mutual agreement in full or in part, unless the failure, given its specific nature or minor importance, does not justify this rescission and its legal effects.

(2) As far as performance is not permanently or temporarily impossible, the right to rescind the mutual agreement only arises when the debtor is in default.

Article 7:21 Non-performance because of a lack of conformity

(1) If the object is not in conformity with the sale agreement, then the buyer may demand that the seller:

a. supplies what is still missing;

b. repairs the supplied object, provided that the seller is reasonably able to comply with this demand;

c. replaces the supplied object, unless the deviation from what has been agreed upon is too insignificant to justify such a replacement or unless the object, after the moment on which the buyer reasonably should have taken into account that the received performance may have to be undone, has been destroyed or damaged because the buyer has not ensured its preservation as a prudent debtor should have done.

(2) The costs of compliance with the obligations referred to in paragraph 1 cannot be charged to the buyer.

(3) The seller must perform the obligations referred to in paragraph 1 within a reasonable time and without any significant inconvenience to the buyer, taking into account, among other facts, the nature of the object and the particular use that the buyer intends to make of it as provided for in the agreement.

(4) In the event of a consumer sale agreement the buyer may, contrary to paragraph 1, only then not demand the repair or the replacement of the supplied object if such a repair or replacement is impossible or cannot be expected from the seller.

(5) In the event of a consumer sale agreement, a repair or replacement of the supplied object cannot be expected from the seller if it imposes costs on him which are disproportional in comparison with the costs of exercising an alternative legal right (action) or legal remedy at the disposal of the buyer, taken into account the value of the object if it would be in conformity with the agreement, the significance of the lack of conformity and whether the alternative legal right (action) or legal remedy could be completed without significant inconvenience to the buyer.

(6) If, in the event of a consumer sale agreement, the seller has not performed his obligation to repair the supplied object within a reasonable time after he has been urged to do so by means of a letter of formal notice to perform from the buyer, then the buyer is entitled to have the object repaired by a third person and to recover the costs thereof from the seller.

Article 7:759 Repair of construction defects

(1) If construction defects, for which the constructor is liable, come to light after the delivery of the completed construction, then the principal must give the constructor the opportunity to repair these defects within a reasonable period, unless this cannot be expected of the principal in view of the circumstances, all without prejudice to the constructor's liability for damages resulting from a poor completion and delivery.

(2) The principal may claim that the constructor repairs the construction defects within a reasonable period, unless the costs of repair would be in no proportion to the importance of these repairs for the principal in comparison to his interests in receiving a financial compensation for damages.

6. UN Convention on Contracts for the International Sale of Goods (CISG)

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 28

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.

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

7. UNIDROIT Principles of International Commercial Contracts (PICC)

Article 1.1 Freedom of contract

The parties are free to enter into a contract and to determine its content.

Article 1.2 No form required

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

Article 1.3 Binding character of contract

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

Article 1.4 Mandatory rules

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

Article 1.5 Exclusion or modification by the parties

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

Article 1.6 Interpretation and supplementation of the Principles

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

Article 1.7 Good faith and fair dealing

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

Article 1.8 Inconsistent behaviour

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

Article 1.9 Usages and practices

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

Article 6.2.1 Contract to be observed

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 Definition of hardship

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 Effects of hardship

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed, or
 - (b) adapt the contract with a view to restoring its equilibrium.

Article 7.1.1 Non-performance defined

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Article 7.1.2 Interference by the other party

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

Article 7.1.3 Withholding performance

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Article 7.1.4 Cure by non-performing party

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Article 7.1.5 Additional period for performance

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

Article 7.1.6 Exemption clauses

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

Article 7.1.7 Force majeure

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Article 7.2.1 Performance of monetary obligation

Where a party who is obliged to pay money does not do so, the other party may require payment.

Article 7.2.2 Performance of non-monetary obligation

Where 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.

Article 7.2.3 Repair and replacement of defective performance

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Article 7.2.4 Judicial penalty

- (1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.
- (2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

Article 7.2.5 Change of remedy

- (1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.
- (2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

Article 7.3.1 Right to terminate the contract

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

Article 7.4.1 Right to damages

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the nonperformance is excused under these Principles.

8. Principles of European Contract Law (PECL)

Article 1:101 Application of the Principles

- (1) These Principles are intended to be applied as general rules of contract law in the European Union.
- (2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
- (3) These Principles may be applied when the parties:
 - (a) have agreed that their contract is to be governed by “general principles of law”, the “lex mercatoria” or the like; or
 - (b) have not chosen any system or rules of law to govern their contract.
- (4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

Article 1:102 Freedom of contract

- (1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.
- (2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

Article 1:201 Good faith and fair dealing

- (1) Each party must act in accordance with good faith and fair dealing.
- (2) The parties may not exclude or limit this duty.

Article 1:301 Meaning of terms

In these Principles, except where the context otherwise requires:

- (1) 'act' includes omission;
- (2) 'court' includes arbitral tribunal;
- (3) an 'intentional' act includes an act done recklessly;
- (4) 'non-performance' denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract.
- (5) a matter is 'material' if it is one which a reasonable person in the same situation as one party ought to have known would influence the other party in its decision whether to contract on the proposed terms or to contract at all;
- (6) 'written' statements include communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides

Article 1:302 Reasonableness

Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.

Article 6:111 Change of circumstances

- (1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

- (a) the change of circumstances occurred after the time of conclusion of the contract,
- (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
- (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

- (a) end the contract at a date and on terms to be determined by the court ; or
- (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

Article 7:102 Time of performance

A party has to effect its performance:

- (1) if a time is fixed by or determinable from the contract, at that time;
- (2) if a period of time is fixed by or determinable from the contract, at any time within that period unless the circumstances of the case indicate that the other party is to choose the time;
- (3) in any other case, within a reasonable time after the conclusion of the contract.

Article 9:101 Monetary obligations

- (1) The creditor is entitled to recover money which is due.
- (2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:
 - (a) it could have made a reasonable substitute transaction without significant effort or expense; or
 - (b) performance would be unreasonable in the circumstances.

Article 9:102 Non-monetary obligations

- (1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
- (2) Specific performance cannot, however, be obtained where:
 - (a) performance would be unlawful or impossible; or
 - (b) performance would cause the debtor unreasonable effort or expense; or
 - (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
 - (d) the aggrieved party may reasonably obtain performance from another source.
- (3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

Article 9:103 Damages not precluded

The fact that a right to performance is excluded under this Section does not preclude a claim for damages.

9. Draft Common Frame of Reference (DCFR)

III. – 1:103: Good faith and fair dealing

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract or other juridical act.

(3) Breach of the duty does not give rise directly to the remedies for nonperformance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

III. – 1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

- (a) the change of circumstances occurred after the time when the obligation was incurred;
- (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;
- (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and
- (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

III. – 3:104: Excuse due to an impediment

- (1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.
- (2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.
- (3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.
- (4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

(5) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

III. – 3:301: Enforcement of monetary obligations

- (1) The creditor is entitled to recover money payment of which is due.
- (2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:
 - (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or
 - (b) performance would be unreasonable in the circumstances.

III. – 3:302: Enforcement of non-monetary obligations

- (1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.
- (2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.
- (3) Specific performance cannot, however, be enforced where:
 - (a) performance would be unlawful or impossible;
 - (b) performance would be unreasonably burdensome or expensive; or
 - (c) performance would be of such a personal character that it would be unreasonable to enforce it.

(4) The creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

(5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

III. – 3:303: Damages not precluded

The fact that a right to enforce specific performance is excluded under the preceding Article does not preclude a claim for damages.

10. Common European Sales Law (CESL)

Article 1 Freedom of contract

1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.
2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 2 Good faith and fair dealing

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.

3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 89 Change of circumstances

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:

(a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or

(b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

3. Paragraphs 1 and 2 apply only if:

(a) the change of circumstances occurred after the time when the contract was concluded;

(b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and

(c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.

Article 106 Overview of buyer's remedies

1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:

- (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;
- (b) withhold the buyer's own performance under Section 4 of this Chapter;
- (c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;
- (d) reduce the price under Section 6 of this Chapter; and
- (e) claim damages under Chapter 16.

2. If the buyer is a trader:

- (a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and
- (b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.

3. If the buyer is a consumer:

- (a) the buyer's rights are not subject to cure by the seller; and
- (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.

4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.

5. The buyer may not resort to any of the remedies referred to in paragraph 1 to the extent that the buyer caused the seller's non-performance.

6. Remedies which are not incompatible may be cumulated.

Article 107 Limitation of remedies for digital content not supplied in exchange for a price

Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1). The buyer may only claim damages under point (c) of Article 106 (1) for loss or damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.

Article 108 Mandatory nature

In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader's attention by the consumer.

Article 109 Cure by the seller

1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.

2. In cases not covered by paragraph 1 a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.

3. An offer to cure is not precluded by notice of termination.

4. The buyer may refuse an offer to cure only if:

- (a) cure cannot be effected promptly and without significant inconvenience to the buyer;
- (b) the buyer has reason to believe that the seller's future performance cannot be relied on; or
- (c) delay in performance would amount to a fundamental non-performance.

5. The seller has a reasonable period of time to effect cure.
6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Article 110 Requiring performance of seller's obligations

1. The buyer is entitled to require performance of the seller's obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
 - (a) performance would be impossible or has become unlawful; or
 - (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Article 111 Consumer's choice between repair and replacement

1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to

the other option available, would impose costs on the seller that would be disproportionate taking into account:

- (a) the value the goods would have if there were no lack of conformity;
 - (b) the significance of the lack of conformity; and
 - (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.

Article 112 Return of replaced item

- 1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.
- 2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

Article 113 Right to withhold performance

- 1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.
- 2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues.

3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.

Article 131 Overview of seller's remedies

1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:

- (a) require performance under Section 2 of this Chapter;
- (b) withhold the seller's own performance under Section 3 of this Chapter;
- (c) terminate the contract under Section 4 of this Chapter; and
- (d) claim interest on the price or damages under Chapter 16.

2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.

3. The seller may not resort to any of the remedies referred to in paragraph 1 to the extent that the seller caused the buyer's non-performance.

4. Remedies which are not incompatible may be cumulated.

Article 132 Requiring performance of buyer's obligations

1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.

2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless

require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.

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