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The Myth of Specific Performance in Civil Law Countries¹

By

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Abstract: It is a common belief that specific performance is the generally applied remedy for breach of contract in civil law countries. This article argues that when breach involves the non-performance of an action, i.e. when performance cannot be ensured by the handing over of an existing good, specific performance is largely a myth in the three civil law countries Denmark, France and Germany. We provide evidence which suggests that a claim for specific performance of an action is, roughly speaking, not enforced in Denmark, weakly enforced in France, and though enforced in Germany, only rarely sought. According to our evidence, specific performance is largely irrelevant as a remedy for the non-performance of an action in civil law countries. Furthermore, we argue that the non-use of specific performance can be ascribed to the costs and difficulties of forcing the breaching party to perform an action.

¹ We thank ,without implicating, Gerrit de Geest, Peter Møgelvang Hansen, Ole Lando, Ejan Mackaay, Thomas Ulen and participants at the 2003 EALE conference in Nancy.

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1. Introduction

In the debate on whether specific performance or damages should be the preferred remedy for breach of contract, proponents of specific performance have found support in the alleged use of specific performance in civil law countries. Thus, Ulen⁴ states (p. 361):

‘... It is worth noting that in the civil law countries specific performance is the routine contract remedy... This is a difficult situation to understand if there is really something to Professor Kronman's contention that confining equitable relief to the case of unique goods corresponds to what freely contracting parties would prefer. Perhaps the tastes of contracting parties in Western Europe are vastly different from those in the common law countries, but this is very doubtful...’

He then adds, in a footnote (note 117):

‘Alternatively, it may be argued that specific performance is not, in practice, the routine contract remedy in civil law countries. Some scholars note a trend toward convergence in contract remedies in the civil and common law countries. See A. Von Mehren & J. Gordley, *supra* note 116, at 1122-23. There is, however, a dearth of empirical evidence on this point.’

In this article, we present evidence suggesting that specific performance is rarely the remedy used in Denmark, Germany and France when performance requires actions to be taken. Most strongly, we show that specific performance is *de facto* not enforced in Denmark when performance requires actions to be taken. We also present some evidence that it is only reluctantly enforced in France, and we explain why these two countries seem to a large extent to have

⁴ Naturally, we quote Ulen here, not to spell him out for criticism, but because his statement of the case for specific performance together with Schwartz’ (1979) are the most well-known and worked out.

abandoned specific performance. In our view, these have to do with various costs of forcing the breaching party to perform actions. For Germany, we report a consensus among contract lawyers that while specific performance is enforced to a greater extent than in Denmark and France, it is very rarely sought by plaintiffs when actions must be performed. In the same vein, we provide evidence that plaintiffs in international disputes adjudicated under CISG-rules⁵ almost never claim specific performance, even though specific performance is, with some exceptions, available under CISG. Most surprisingly perhaps, in our case-material specific performance has never been granted in contracts adjudicated under CISG. These observations lead us to suggest that the demand for specific performance is low, while at the same time, specific performance is costly to supply for the authorities. This explains, in our view, that specific performance is used much less in the three civil law countries than commonly thought.

II. Structure

In the following section we define ‘specific performance’ and ‘duties to act’ as opposed to ‘duties to give’. Then we turn to the practices of the three countries, i.e. the execution of claims for specific performance, the granting of specific performance by the courts, and the demand for specific performance by plaintiffs. We also list the reasons given in Denmark for limiting the enforcement of specific performance. Finally, we interpret our observations.

III. Definition of ‘specific performance’ and ‘action breach’

Basically, when a party to a contract does not perform his part and the contract remedy is specific performance, the other party can claim performance in accordance with the contract. In the common law

countries the primary remedy is 'damages', and the aggrieved party can only claim specific performance in certain situations.

Breach may be due to late (including no) delivery of the goods contracted for, in which case specific performance simply means to have the goods delivered. Or it may be due to the delivery of defective goods, in which case the buyer's claim for specific performance is a claim for repair or replacement⁶.

It may be worth stressing, to avoid confusion with some other usages of the term specific performance, that our definition of the term will incorporate two distinct notions: first, the contract must as mentioned be performed as stipulated in the contract if the aggrieved party requires it, the good must be delivered in natura or be brought to conform with the contract. And, second, the performance must be carried out by the supplier as a party to the contract, and not by a third party. Thus, the aggrieved party's right to make a cover purchase (buy the good or the service somewhere else) and be compensated for the price difference by the party in breach does not constitute specific performance in our terminology, it is a right to damages⁷⁸.

We will distinguish, as is conventional, between duties to act and duties to give⁹. For example, we will argue that when a contract is breached and performance of the contract requires some actions to be undertaken, as when goods must be repaired or finished or produced, specific performance will not, as a practical matter, be available in Denmark. We will term these breaches 'action breaches'. This should be contrasted with the case where the goods already exist and only

⁶ If the seller cures the defect the buyer can then not require the price to be lowered or terminate the contract

⁷ It is worth noting that the term specific performance is sometimes used for the right to a cover purchase in civil law, which may partly account for the impression that specific performance is more widespread in civil law than in common law, see Beale.

⁸ Also, the restitution in natura known from tort claims will not fall under our analysis of specific performance; in these cases, performance is carried out by a third party, and the claim against the other party is monetary. On specific performance for tort claims, see Zervogianni.

⁹ although it can in some cases be difficult to know whether a given duty falls in one or the other category.

need to be handed over to the buyer. We do not claim that such claims are not enforceable, in fact they are: the enforcing authority (the bailiff) may enforce the right to have the goods handed over.

Let us now turn to the empirical part; our first observations concern the enforcement of specific performance in Denmark.

IV. The Enforcement of Specific Performance in Denmark

For action breaches, while contract law states that the plaintiff has the right to specific performance, the Danish Code of Civil Procedure virtually eliminates this right. Thus, there is in reality no enforcement of specific performance in Danish Law when actions need to be taken. Let us first briefly describe the provisions of contract law and then turn to the Code of Civil Procedure.

For commercial contracts, Danish contract law lays down that a party whose contractual rights have been violated may choose between specific performance and damages¹⁰.

For consumer contracts, a distinct set of rules applies, in accordance with a EU-directive. For example, in the case of seller-breach, which usually occurs when a good is defective, both the seller and the buyer have a right to specific performance: generally speaking, the seller has the right to cure the defect and the buyer to have it cured.

In summary, the impression one is given from reading the provisions of Danish contract law is that specific performance plays a dominant role, both for commercial and for consumer contracts.

However, on closer inspection the Code of Procedure greatly restricts the number of cases for which specific performance will be enforced by the legal system. If the court grants a claim for specific performance, and the defaulting party still does not perform, the other party may ask the enforcing authority (in Danish: 'the foged', similar to the bailiff

¹⁰ The non-breaching party may make a cover purchase and will often be recompensed under the damage measure.

in common law) to enforce the claim. What the enforcing authority must do is provided in the Code of Procedure¹¹, and here is the point: The Code of Procedure stipulates that except in a specified class of cases¹², 'the enforcing authority converts the plaintiff's claim into money damages' (Code of Procedure §533). The enforcing authority cannot, e.g. by imposing coercive fines, force the defendant to perform certain actions.

The specified set of cases §528-532 is the following:

§528: where objects (already produced goods) simply need to be handed over to the plaintiff, including where a person is to be given access to real estate.

§529: where a good can be procured from a third party; the enforcing authority can allow for a third party to perform and if the breaching party does not pay for this, the enforcing authority can seize his assets.

§ 530: where the only act to be performed is a signature on a document; the enforcing authority can sign for the defendant.

§ 531: where the act to be performed is the pledging of security; the enforcing authority can seize assets from the breaching party and pledge these as security.

§ 532: where the breaching party must be restrained from performing certain acts that are harmful to the other party.

Thus, the cases where the enforcing authority can enforce a claim for specific performance do not include those where actions need to be performed. This is reflected in practice. As a Danish enforcing agent said: "As soon as some act needs to be performed by the defendant, we convert" ¹³.

One exception to the conclusion that actions (other than handing over objects, etc.) are not specifically enforceable is worth mentioning. If the judge has granted specific performance, and the defendant does

¹¹ Law no. 469 (3. june 1993).

¹² The law states the enforcement in natura as the main rule, and conversion as the exception but this is only a matter of definition.

¹³ This interview was carried out by Ulrik Esbjørn, a student at Copenhagen Business School.

not comply, the plaintiff may file a private, criminal suit against the defendant (according to §535 in the Code of Civil Procedure). Fines or even imprisonment may thereby be imposed on the defendant. However, in recent times there seems to have been only one case of such a criminal suit (U 1991.239.SH), and in that case the plaintiff did not prevail. To understand why such suits are virtually never filed, the important fact is that such a suit is not without cost to the individual plaintiff (even though if he wins the case some of his observable costs will be paid by the defendant). Since he is not awarded the fine, the incentive to file such suits is therefore limited. Furthermore, if the plaintiff prevails in a criminal suit, the defendant can only be sanctioned once for not performing (§535, footnote 3), so even if the defendant is sanctioned, he does not after the verdict have an incentive to perform. However, it cannot be concluded without a more thorough analysis, that the aggrieved party will never be rational to file a criminal suit for filing suit may make it optimal for the defendant to perform before the verdict is rendered. If he performs, the criminal trial must be stopped (§535,2). This reaction by the defendant may in turn make it optimal for the plaintiff to file suit in the first place. However, if the defendant thinks he will prevail in the criminal trial, or simply is stubborn, the suit is likely to have a negative present value to the plaintiff, since the fine is not paid to him and does not in itself induce performance.

To conclude, the questionable incentive to file a criminal law suit and the virtual absence of such suits in actual fact, suggest in combination that such suits are not a realistic possibility. Thus, despite the theoretical possibility of a private, criminal law suit, we can conclude that specific performance is not in reality enforced against the will of the breaching party when actions need to be undertaken.

This raises the question whether claims for specific performance are nevertheless filed in front of the courts, despite the lack of ultimate enforcement.

V. The Granting of Specific Performance by Danish Courts

In fact, the answer is that parties very rarely seek specific performance and that courts even more rarely grant it. There are, however, some exceptions that are worth addressing.

Let us first take the case of commercial contracts and then look at consumer contracts.

For commercial contracts we have found very little use of specific performance. We investigated a database covering cases reported in the Danish Weekly Law Report (Ugeskrift for Retsvæsen, hereinafter UfR) from 1950 till April 2000. UfR contains most of the important published cases but no arbitration awards most of which are not published. In UfR we found only a couple of published cases within the last five decades of a commercial contract where the buyer claimed specific performance in a case concerning the sale of goods¹⁴, and in no instance was the claim granted by the court. In one case¹⁵, the court specifically referred to the lack of enforcement according to the above-mentioned §533 of the Code of Civil Procedure.

For consumer contracts, however, specific performance does occur, even as a routine matter. Rights to have defects cured and to cure defects are respected in very many cases, although, as follows from what was noted above, this cannot be due to the ultimate enforcement by the enforcing authority of specific performance¹⁶. The reason is that if one party does not respect the other's claim to specific performance, his own (monetary) rights are diminished. Thus, if the seller does not cure the defect, the buyer obtains the right to a cover purchase (and to have the purchase price of the cover purchase reimbursed by the breaching seller) or to a reduction in price, or the right to terminate

¹⁴ UfR 1989.1039H.

¹⁵ UfR 1976.972V.

¹⁶ Although conceivably, the right to have the good exchanged (replaced by a new) could theoretically be specifically enforced. But this would hardly occur in reality, the forces at work seem to be those about to be mentioned.

the contract (which implies a right to be paid back the purchase price and a right to have losses covered that are the result of the seller's breach). Similarly, if the consumer does not allow the seller to cure the defect when that is reasonable, the consumer's right to compensation is limited to the claim that would remain after the seller's cure. Thus, the essential point is that specific performance is enforced by monetary sanctions, and not enforced as such by the enforcing authority, at least not when actions need to be performed. And we suspect that this is not very different from what occurs in the US under common law, where e.g. the duty to mitigate losses would tend to produce the same kind of behavior, although not stated as a rule of specific performance. Thus, also for consumer contracts¹⁷, there seems to be no substantial difference between civil and common law and in both cases, monetary sanctions in the end determine behavior, rather than the threat of ultimate execution of claims for specific performance.

Another exception should also be mentioned. For construction contracts, specific performance has in fact been granted and carried out by the breaching party. However, as a study by Lehmann Nielsen has revealed for the case of Denmark, in all such cases both parties to the contract preferred specific performance to a cover transaction (p.178). The following case is an example¹⁸: a group of entrepreneurs had agreed in a contract to repair in a specified fashion some houses which they had built and which suffered from defects that might in the future prove costly. After signing the contract, the entrepreneurs realized that the cost of repair was out of proportion to the gain. Experts confirmed in court that the probability of future loss was very small in comparison to the expense of repair. Still, the Supreme Court voted by 3 to 2 to grant specific performance. This verdict could possibly have been enforced by the enforcing authority, since he could

¹⁷ When a consumer good that has been produced must be handed over to the buyer, there may be specific enforcement but in such cases, the consumer makes a cover purchase, and so also for such situations, the difference between civil law and common law is negligible.

¹⁸ It is actually published in UfR (1989, page 1039. It is the only such case in UfR.

have granted the buyers the right to contract for a third party to do the repair. This possibility is confirmed by the fact that the repairs actually were carried out by the entrepreneurs¹⁹; they probably preferred this to a 'cover purchase'²⁰. Thus, this case illustrates the same situation as that mentioned for consumer contracts: sometimes specific performance is carried out under the threat of monetary sanctions, in this case the threat of a cover purchase (that leads to a monetary claim against the breaching seller).

Our conclusion is that specific performance of actions is either simply not a relevant remedy or when it is relevant, as for consumer contracts and some construction contracts, the rule of specific performance yields the same result as that achieved by a damage rule under common law. The parties operate under what is in fact a damage regime, since only damages are ultimately enforced (while the threat of a private, criminal suit is not credible).

This being said, it should be stressed that for breaches other than action breaches, specific performance can be ultimately enforced and used in practice. For example, real estate sales are specifically enforced; if e.g. a seller of a house regrets the sale, the sale will generally be enforced if the buyer insists. Also, child custody cases are enforced. And there are cases where contractual obligations not to perform certain acts have been enforced, such as when a person violates a competition clause by leaving a firm to work for a competitor. In such cases the enforcing authority has sometimes issued an injunction. Thus, specific performance is in some circumstances an available remedy, but our concern here lies with action breaches, which are the kinds of breaches mainly (although not exclusively) addressed in the economic literature on efficient breach.

VI. The Enforcement of Specific Performance in Germany and France

¹⁹ Our source for this information is the parties' lawyers.

²⁰ Compare this with the swimming pool cases from France and England mentioned by Beale p. 689 and 691.

As in the case of Denmark, in both Germany and France the non-breaching party generally has the right to choose between specific performance and damages. In this respect, the three countries are similar. The question to be raised here is whether specific performance, if granted by the courts, will ultimately be executed in Germany and France.

In the case of Germany, when it comes to the execution of claims of specific performance, as in Danish (and French, see below²¹) law, a basic distinction is drawn between the situation where the seller should take some positive action and where he just has to hand over the goods (see Zweigert & Kötz 1998, pp. 470). In the latter case, there will be enforcement if it can be done by the bailiff, if necessary with the help of the police, taking possession of the goods. In the former case, a further distinction is made as to whether the act could equally well be performed by someone else (i.e. is 'vertretbar', see § 887 in the Code of Civil Procedure, Zivilprozessordnung, ZPO). If substitute performance is available (at reasonable cost), a claim for specific performance will not be executed, but the plaintiff may make the cover purchase and the bailiff (the Gerichtsvollzieher) will then execute the monetary claim in value equal to the cover purchase. Thus, when substitute performance is available, the claim is ultimately, if not already at the court-level²², converted to a money claim. However, if substitute performance is not available, the breaching party can for such acts be threatened with a fine or imprisonment if he refuses to deliver (§ 888 in ZPO). This is a major difference to Danish law; this was the element of the Danish Code of Civil Procedure that was changed in 1916. There are, however, further exceptions in the German law: performance must not depend on the seller's inspiration

²¹ It is a distinction which goes back to Roman law, see Dawson (1959).

²² The most likely outcome is that the non-breaching party makes a cover purchase and sues for damages in the amount of the cover purchase which is then granted in accordance with the rule of expectations damages.

or special effort²³ but rather must have a more routine character. Furthermore, § 888 describes some other situations where the penal pressure is also not available, notably in employment contracts²⁴.

For the case of France, although the Code Civil provides the right to claim specific performance, this principle is modified in Art. II42, that prohibits any judgment obliging the seller to act in a particular way. The idea behind Art. II42 is that citizens are 'free' and should not be forced into a certain course of action by the State, unless important public interests are at stake. However, according to Zweigert & Kötz (1998, p. 475), how far this principle is carried in practice is unclear. As mentioned above, the French Code Civil makes a basic distinction between an 'obligation de faire' (to do) and an 'obligation de donner' (to give), as do the German and the Danish. The case of 'donner' (giving) follows the same rules as in Denmark and Germany. For the case of 'faire' the rules are formally also quite similar to the Danish and German rules. Thus, the bailiff can execute a money claim arising from a cover purchase. There is, however, a difference in that French courts administer a special system of fines (*astreintes*) that are paid from the breaching party to the conforming party, if the breaching party chooses not to perform. However, the enforcement of the system of '*astreintes*' is not strong. Zweigert & Kötz put it in the following terms (p.475): 'We may sum up by saying that French law generally admits the issuance of judgments for performance in kind but enforces them in a very grudging manner'.²⁵

VII. On the Use of Specific Performance in Germany and France

²³ This is often mentioned but according to Dawson no cases of this nature exist.

²⁴ We have been unable to find out the extent to which the German bailiffs will actually use coercive fines in such cases but we suppose that they will do so if the plaintiff requires it, since the law is quite clear on this matter.

²⁵ Dawson (1959) criticized the ineffectiveness of the use of '*astreintes*' and called the whole French system non-sensical due to the lack of effective enforcement, see p. 524-525. However, changes have occurred since Dawson wrote. We are grateful to Gerrit de Geest for pointing these changes out to us.

For the case of Germany and France, no databases were available to us; we rely instead on the accounts by legal experts. We will emphasize that one finds a consensus in the comparative literature on contract breach that damages is by far the dominant form of relief for actions breaches in both Germany and France.

Actually, this is not a new insight. Ernst Rabel stated in 'Recht des Warenkaufs' (1936) that the difference between common law and civil law is small in practice (see volume 1, p 375 ff.).

Also, writing in 1959, Dawson (1959), while stressing the difference between enforcement in Germany and France, noted that for the case of Germany (p.530): 'despite formal limitations (on the right to sue for damages, ed.) the damage remedy is in fact resorted to, by the choice of the litigants, in a high percentage of cases, especially in sales of goods and other commercial transactions'.

The Principles of European Contract Law contains a section called 'practical convergence' (p. 400) where it is plainly stated that: 'The basic differences between common law and Civil law are of theoretical rather than practical importance'.

The only view to the contrary that we have been able to find is in 'Rechtsverwirklung durch Zwangsgeld'²⁶, by Oliver Remien (1992) who discusses the German case-material. He writes (our translation)²⁷:

'Fines are used as a means of coercion in many areas where substitute performance is not possible'.

However, some of the cases that he mentions do not involve (complex) actions to be taken, such as where a company is forced to render its accounts (p. 134, a case from 1933). However, Remien does mention cases that involve actions (as opposed to the handing over of objects or children). One case from 1897 concerns the delivery of electricity to a hotel, and another case from 1985 concerns the reparation of a

²⁶ 'Enforcement of claims through fines'.

²⁷ "Das Zwangsgeld findet bei unvertretbaren Handlungen ein weites und vielfältiges Anwendungsgebiet".

computer by the deliverer. Still, the impression remains that specific performance is rarely used, especially in commercial transactions, and this is also the conclusion reached by Kötz and Zweigert (p. 484):

'In Germany... where the claim to performance is regarded as the primary legal remedy, it does not in practice have anything like the significance originally attached to it, since whenever the failure to receive the promised performance can be made good by the payment of money, commercial men prefer to claim damages rather than risk wasting time and money on a claim for performance whose execution may not produce satisfactory results'.

We do not want to overstate our case: As in common law, specific performance is sometimes sought, granted and executed also in Germany and France. Thus, in Beale's account of the French and the German systems, one finds cases from both Germany and France where specific performance is applied, particularly for construction contracts and for the delivery of already existing goods (see Beale, p. 683-685). For construction contracts, the possibility of a cover purchase may, as in Denmark, induce specific performance, and when a cover purchases is possible, the difference to common law may not be large, since cover purchases may also be made for construction contracts in common law (see Beale, p. 685).

For the delivery of existing goods, however, it is conceivable that a real difference exists. In England, enforcement *in natura* is only carried out for unique or unobtainable goods²⁸, while specific performance is generally available in France and Germany (and Denmark). We do not know whether this difference matters in practice²⁹.

VIII. Specific Performance in Cases Adjudicated under CISG

²⁸ Beale, p. 684.

²⁹ For one thing, one suspects that cases are relatively rare where cover purchases cannot be made.

The CISG (United Nations Convention for the International Sale of Goods) was the first major international sales law accepted by a large number of nations. CISG is now ratified by more than 55 countries around the world including leading trade nations.

Article 46 (1) provides that the buyer may require performance by the seller of his obligations³⁰. However under article 28, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale. This means that the courts of the common law countries such as USA, Canada, and Australia are not bound to grant specific performance. Still, to the extent that specific performance is available in civil law countries we would expect to find some cases of contracts adjudicated under CISG, that involve specific performance.

To see whether such cases exist we obtained data from the private UNILEX database and the following databases available on the internet; <http://www.cisg.law.pace.edu/cisg/database.html> and www.jura.uni.freiburg.de These databases contain a large collection of cases involving CISG from all over the world, including both cases decided by national courts and arbitration awards. Almost all the industrialized countries are represented in the data³¹.

We found 200 cases where the question of specific performance vs. damages is present. Of these 200 cases, only one case mentions a buyer who claimed specific performance³². A Russian enterprise had sold raw aluminum to a group of buyers located in Argentina and Hungary. After the enterprise was privatized in December 1994, the new owners stopped delivery in February 1995 and the case was subsequently submitted to arbitration in Switzerland. Concerning the buyer's request for specific performance the tribunal found that it had no legal support but the reasoning of the tribunal on this point is not

³⁰ CISG gives both the seller and the buyer the right to claim damages instead of specific performance.

³¹ An exception is Japan that has not yet ratified the convention.

³² C.f. Zürich Chamber of Commerce Arbitration Award ZHK 273/95 of 31 May 1996.
<http://cisgw3.law.pace.edu/cases/960531s1.html>

clear³³. The tribunal further stated that even if CISG was applied the tribunal “fails to see how specific performance could be an appropriate remedy for buyers in this case”. The tribunal pointed to the problems associated with the ultimate enforcement of specific performance of contracts in Russia for the next eight or ten years.

The conclusion is clear. Even though specific performance is a remedy available in many of the CISG-cases we have studied, it is virtually never claimed and in our material literally never granted³⁴.

We will now turn to answering the question why specific performance is either not enforced, or reluctantly enforced, or if enforced, rarely claimed for action breaches in the countries we have investigated. The hypotheses, which we will try to substantiate in the following, is that specific enforcement is more costly for the authorities to enforce than damages, and that plaintiffs generally do not demand this remedy. Together, these hypotheses can explain why the authorities have not found it worthwhile to enforce specific performance and why, even when specific performance is enforced, it is not in demand, as seems to come out of the study of the situation in Germany.

First let us inquire directly into the reasons provided by decision-makers and experts for not enforcing specific performance, and let us concentrate here mainly on the case of Denmark.

IX. Why Was Specific Performance of Actions Abandoned in Denmark?

The law of 1842 prescribed that if the breaching party did not perform according to a court-decree stating specific performance, he could be sanctioned to periodic fines or imprisonment. These sanctions were abandoned as a means of coercion in 1916 when the Code of Civil Procedure was established. Since then, specific performance of actions

³³ See reference to the case in footnote above.

³⁴ In many cases, cover purchases are made and reimbursed under a rule of expectation damages.

has not been enforced in Denmark. In 1989 an expert committee investigated the need for reintroducing the enforcement of specific performance (in order to bring the Civil Code into better conformity with the provisions of contract law). What interests us here are the rationales given in 1916 for amending the law and the rationale given in 1989 by the expert committee for not reintroducing specific performance.

In 1916, the main rationale³⁵ behind this change was the perceived need to avoid in the final instance incarcerating a person in consequence of his breach of a commercial contractual obligation³⁶. It was argued that this would violate a principle of proportionality and therefore be in conflict with fundamental principles of modern jurisprudence. Finally, it was stressed that conversion of claims (into monetary claims) was administratively much easier. This is true both at the level of execution and at the level of the judge. For one thing, specific performance requires the judge to specify exactly what performance means (one reason for this requirement is that non-performance may be sanctioned, even criminally), and this can be difficult and costly for the judge, especially if she is not knowledgeable in the field. And for the bailiff it is clearly much easier to enforce a monetary claim than to apply coercive fines, which involves complex legal processes. For example, when applying coercive fines, in the case where the breaching party claims to have performed according to the verdict, the legal authority must make a judgment about whether this is in fact so. This may lead to repeated trials.

In 1989, these arguments were repeated, although the committee acknowledged that the system of coercive fines can be employed without resorting to imprisonment if fines are not paid. The committee's main argument for not re-introducing specific performance and for not putting into place again a costly system of

³⁵ Based on a Parliamentary Report from 1899, see for references the Parliamentary Report (Betænkning) No. 1170 1989.

³⁶ see Parliamentary Report (Betænkning) No. 1170 1989

sanctions, and costly procedures, was the low demand for specific performance among business people. The committee stated it as follows (p.31 in their Report):³⁷

‘The fact that there has been no criticism (of the lack of specific performance, ed) and that the need for stricter enforcement in this area has not been expressed, has been decisive for the committee...’.

One may wonder how the committee knew that demand was low when specific performance was in fact not available in Denmark (this would explain the low demand), but the committee also noted the absence of complaints about the lack of enforcement.

To briefly sum up, specific performance has some unattractive features: it entails using the public monopoly on the use of force to make people undertake certain actions, it involves the risk of hold-up against the breaching party, and it is administratively expensive. These costs have been judged not to be worth the benefits, that have seemed not to be large in view of the small demand for specific performance on the part of plaintiffs.

It is interesting to note that the exact same reasons have been given by common law judges for only enforcing specific performance under certain circumstances, see e.g. Beale pp. 710-713.

Naturally, we have not made the case that these arguments are valid or convincing; we have only pointed out what considerations have in fact been instrumental in abolishing the enforcement of specific performance when actions need to be undertaken for performance to occur.

X. Why Do Plaintiffs Seem to Prefer Damages?

The above discussion raises the question why specific performance seems to be in low demand among plaintiffs. In itself, this is surprising, for it is well documented, at least for the case of

³⁷ Betænkning nr. 1170.

Denmark³⁸, that damages are often inadequate, presumably especially when goods have subjective value. However, it falls outside the scope of this article to go deeply into this question. We will restrict ourselves to pointing to the following two factors that seem important.

1. When substitute performance is available it is often easier for the non-breaching party to claim damages that can pay for substitute performance than to claim specific performance.
2. The time that passes may be long from the moment of breach to the point after an arbitration or court verdict, to the point where the contract is ultimately performed. Furthermore, the breaching party can prolong it in several ways, e.g. by under-performing more than once. This strengthens the bargaining power of the breaching party, since he is not generally required to fully compensate the other party for the costs thereby incurred.

XI. Final Remarks

1. The view that common law should reintroduce specific performance as a routine remedy is sometimes put forward by law and economics scholars and by legal scholars. When the counter-arguments are made that this would involve various kinds of extra administrative expense involved in enforcing actions to be performed, the unnecessary use of State force to induce people into performing certain acts where often monetary claims can do as well, and lead to the potential for hold-up by the aggrieved party of the breaching party, it has been argued that these costs cannot be that important since specific performance is the routine remedy in civil law. This article has argued that Denmark, France and Germany have largely abandoned specific performance for action breaches for those same reasons.

³⁸ See Torsten Iversen (2000)

2. We have also noted that specific performance seems generally speaking not to be an attractive remedy for plaintiffs; usually a cover purchase is the more attractive remedy.
3. On the other hand, we have not shown that specific performance could not be made to function. Naturally, the low demand for specific performance is relative to the way specific performance is enforced. If it were very strongly enforced such that breaching parties would fear the remedy and therefore immediately would perform the contract if the other party (rightly) required it, then demand for it might be high on the part of plaintiffs, and the advantages claimed for the remedy might then be realized. We have not shown this argument to be incorrect. Our suspicion is that it would be quite costly to run a system of coercive fines that would grant the non-breaching enough bargaining power during the stages of enforcement to make specific performance an attractive remedy compared with damages.
4. Our observations suggest that the cover purchase is empirically more relevant than specific performance; cover purchases are routinely enforced and sought by plaintiffs in all of the three countries, and also under CISG. Also, cover purchases involve some of the same efficiency issues as specific performance when the seller has made specific investments and can supply the good at lower cost than alternative suppliers. A theoretical discussion of the extent to which cover purchases are allowed³⁹ would hence seem more relevant than a continued discussion concerning specific performance.
5. Finally, we think the empirical observations of this article have some implications for part of the contract literature. In the analysis of contract breach remedies, it is important to study not only what the judge will state but also what the bailiff will eventually do. In general, enforcement seems to be more difficult

³⁹ The cover purchase is introduced theoretically by Edlin (1997) in his paper on Breach Remedies.

in practice than envisaged both in the literature on breach remedies and in the literature on renegotiation design⁴⁰; enforcement is a mechanism in itself and the remedy of specific performance is not well defined unless the mechanism of enforcement is specified.

⁴⁰ Such as Aghion et. al (1994), or Maskin and Tirole (1999) on incomplete contracting and elaborate mechanisms for renegotiation.

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