

Comparative Law Study on the Specific Performance in International Commercial Contracts from the Relief Route

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Abstract. With the methods of the historical, comparative and empirical analysis, the paper investigates the specific performance's institutional agreement and differences in the two legal systems. This research seeks to discuss the unification of specific performance from United Nations Convention on Contracts for the International Sale of Goods and Unidroit Principles for International Commercial Contracts. It is further analyzed that the specific performance of international commercial contracts can be achieved through enforcement, vicarious execution, indirect enforcement and remedy of defective performance. Meanwhile, the author points out that the claim subject and term of specific performance have distinctive nature. At last the researcher evaluates specific performance institution from the relief route, and also identifies the relationship between specific performance and other remedies by comparing domestic and international legal systems.

Keywords: the specific performance, application, relief, default, contract.

1. Introduction

With the extensive use of international commercial contracts, performance obstacles impede the realization of the contract purpose, and the sacred principle that contracts must be abided is being challenged, and the moral basis of contractual liability is being trampled on, and creditors' interests are not fully protected. Facing with this situation, specific performance is the best correction of distorted contract and another opportunity for contractual purpose. It is known to us that every country's provisions about the specific performance is different, and its function which should display in the entire relief system is different, and international treaties and practices hold conservative ground, respecting for domestic law. Therefore, specific performance cannot contend with other remedies, on the system design of flaw. The research has certain actual value, that can provide the legal basis for the prosecution of the contractual obligation, the protection of the vulnerable groups' interests, and the safeguard of contract order. Meanwhile, the research has certain theoretical value, the integration of the specific performance and contract practice process is not consistent from the perspective of comparative law, and revision in the law is too slow to coordinate the economic situation change. The study aims to perfect the specific performance system in the international commercial contracts by defining, allocating internal mechanism rationally, and analyzing associated theory systematically.

The specific performance as "execution en nature" in French and as "naturllherstellung" in german, refers that when one party breaches the contract, the other one is entitled to request to fulfill in accordance with the provisions.^[1] Two meanings are included, first, the specific performance is a claim right, and second, based on this claim, the defaulting party is required to fulfill the obligations by the non-defaulting party, but also the proceeding can be brought to the courts directly by the non-defaulting party. The various countries all have the specific performance legal provisions, such as *Uniform Commercial Code*, *the English Sale of Goods Act*, *Obligation Law of Germany*, *Japanese Civil Code* and *The Chinese Contract Law*, etc. In addition, *The United Nations Convention on International Sale of Goods* and *Principles of International Commercial Contracts* are trying to unifying the specific performance provisions.

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2. The Application of Specific Performance in International Commercial Contracts

2.1. Compulsory Performance

Article 46(1) in *The United Nations Convention on International Sale of Goods* is as follows, “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.” Article 62 in the convention is as follows, “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.” If international commercial contracts have been violated, for creditors the most direct approach is to ask the debtor to continue the implementation of the contract. The condition is proposed to the creditor, that the buyer may not resort to a remedy which is inconsistent with this requirement. For example, creditors have proposed to terminate the contract, then he can not also ask to continue to perform contracts. In the Article 7.2.1 and 7.2.2 of *The Principles of International Commercial Contracts*, performance claims for the monetary and non-monetary obligations are respectively provided. Moreover, there are similar provisions in *Germany bond law modernized*, *French Civil Code*, *Japanese Civil Code* and *Chinese Contract Law*.

Compulsory performance by the public authority is taken as the core of specific performance, furthermore, it is combined with the provisions of the national procedural law generally. In the UK, *Sale of Goods Act (SGA)* links whether to allow the buyer to specific performance to the transfer of goods title. If the ownership has not been transferred and the buyer defaults, the seller generally isn't allowed to bring money suit, but only claim damages; If the ownership has been transferred to buyer and he rejects to receive goods without appropriate reasons, the seller can request to compensate damages or bring money suit; If the buyer accepts goods but refuses to pay, the seller can only bring money suit. In *The United States Uniform Commercial Code*, the result that the seller is given to what kind of relief depends on whether the buyer accepts goods or not. Contracts are violated before acceptance of goods, the seller can choose not to delivery, to claim damages or bring money suit and so forth; Contracts are violated after acceptance of goods, the seller can bring money suit. To bring money suit is regarded as specific performance in the convention, however in Britain and the U.S. it is affiliated to the relief system of the common law.^[2]

2.2. Vicarious Execution

As a reference to article 228 of *Chinese Civil Procedure Law*, to the specified behavior by judgment or verdict and other legal instruments, if debtor hadn't carry out accordance with the notification, people's court should have consign relevant units and others to complete, and debtors should have beared expenses. Two legal systems have different understandings of the vicarious execution. In France and Japan as the representative of civil law countries, the vicarious execution isn't individually proposed, but is incorporated into the specific performance. Whereas, in Britain and the U.S. the vicarious execution is attributed to compensation for damage, and the costs borne by the debtor are required to achieve a certain measure.^[3] Many countries also distinguish between different vicarious executions according to different natures of the debts. For example, article 414(2) of *Japanese Civil Code* is as follows, “If debts are not suitable for the specific performance and the positive action is the subject of debt, the creditor may request the judgment of the court that the third person will complete the obligations payed by the debtor.” Mentioned above is typical. The article further provides that “But if legal actions are the subject of debts, the debtors' intention can be replaced by judgements.” This provision is about so-called “Judgment vicarious”, which belongs to the generalized vicarious execution. Article 414(3) of *Japanese Civil Code* is as follows, “If the negative action is the subject of debt, the debtor may be requested to pay to eliminate his actions.”^[4]

2.3. Indirect Enforcement

Indirect enforcement is relative to the direct one, to force the debtor not directly but indirectly by limiting the debtor's freedom, making a negative evaluation on its reputation, suffering their economic interests and so on. Among them, the most important one is a fine system, which is the judicial threat to the debtor and extremely effective to ensure the fulfillment of contractual obligations. Article 229 of *Chinese Civil Procedure Law* and the Article 7.2.4 of *The Principles of International Commercial Contracts*, are

involved in the fine provisions. In addition to the fine, various countries also have national conditions and characteristics indirect enforcement, for example, to prohibit leaving, to announce informations of contract breach, etc.

2.4. Remedy of Defective Performance

Theoretically, repairing, re-making and replacing are normalized forms for manifestations of the specific performance.^[5] In *Germany bond law modernized*, the claim of continuing to fulfill is proposed, and the claim means that if there are flaws in the subject the buyer expects to get the repairing or exchange, rather than immediately rescind contracts.^[6] In article 111 of *Chinese Contract Law*, “another performance claim” is proposed which allows the injured party to require the repairing, replacement, re-making, returning, to reducing the price or remuneration, etc.^[7]

3. Dimensions of Specific Performance in International Commercial Contracts

3.1. Subject of Claim

The subject of the claim is who has the right to claim the actual performance of the other party. It involves two aspects, first, in Japanese and German law the subjects of the claim are described as “the creditor” and “debtor”, and in Chinese, Italian law and *the Principles* the subjects of the claim are described as “party” and “the other party”, then in *the Convention* the subjects of the claim are described as “seller party and the buyer party”. Second, from the perspective of breach of contract, if one party defaults, the other has the claim of specific performance of course. If two parties default, in civil law countries the non-defaulting party’s claim is asserted, then in common law countries the relief of specific performance will be only given to the plaintiff of no fault who prosecutes to a chancery court.^[8]

3.2. Performance Term

The specific performance system involve many terms. For example, many states ask the creditor to claim within a reasonable period which depends on the nature of contracts and evaluation, etc.^[9] Another period related is that when contracts are violated the non-defaulting party can give some additional time to defaulting party to fulfill their obligations. Article 281(1) of *Germany bond law modernized* is as follows, when the creditors for the debtors specify an appropriate payment period, but the debtors don’t carry out, creditors may request the payment of damages. In article 94 of *Chinese Contract Law*, it is prescribed that one party delays performance of its main debt and has still not fulfilled after receiving the demand, the contract is relieved. Similar provisions are proposed by *the Principles* and *the Convention*. Performance term has important significance. First, it aims to force the defaulting party to implement contracts and to provide another opportunity to fulfill contracts. The term is generally not required but can be selected depending on the nature of the contract. Some countries even directly warn instead of giving grace period. Second, the term should be very clear, and such words as “immediately” or “as soon as possible” are not allowed. After the grace period expires, the non-defaulting party can claim damages or ask to terminate the contract. The extra time given prevents the non-defaulting party from making the contract invalid.^[10]

4. Specific Performance’s Status on the Obstacles Theory of Performance

4.1. Relief Based on the Obstacles of the Contract Performance

Obstacles of contractual performance is from “Leistungsstoerungen” of German law, and it means that debtors fail to fulfill obligations according to the contract. The theory includes the obstacle and relief, and the specific performance is attached to the relief. In contract law, remedies of the nonperformance or obligation breach under the debt can be sorted into three points, performance claim remedies designed to achieve the purpose of the contract, monetary compensation and contractual cancellation. The specific performance is a kind of claim remedy designed to achieve the purpose of the contract. The internal system and external system are included in the obstacle system of the specific performance, and intrinsic system refers to the spiritual connotation of the legal system, and the external system aims to clarify the legal fact and concept. Different internal systems determine different remedies of performance barriers. For example, the relief system of the Anglo-American contract law is not in favor of forcing the debtor to perform specifically, but encourages creditors to claim damages, and Germany and other civil law countries usually pay the utmost attention to give priority to the specific performance. Another example is that, in China the

inherent system of the contractual obstacles is not clear, and the specific performance, damages are placed in the same position.

4.2. Application of the Specific Performance in the Composition and effect Approaches

Two approaches are proposed to resolve contractual obstacles. One is “fact approach”, which is established in obstacle shapes of nonperformance and debtor’s delay. *German Civil Code* is built on this approach, for the impossible payment, article 325 of the code provides for damages and the contractual cancellation, for the performance delay, article 326 of the code provides for specific performance. The other approach, “legal effect approach” is proposed in order to overcome flaws and shortcomings of the “fact approach”. This approach summarizes the objective constitute of payment barriers to cover all possible payment obstacles.^[11] *Germany bond law modernized* is in the framework of the obligation breach, to set the impossible payment, payment delay and defective payment of three parts. Simultaneously, the specific performance, damage and contractual cancellation are provided for remedies, and performance is seen as a priority claim. Article 1:301 of *European Contract Law* regards nonperformance as a connection to summarize all the obstacle shapes of the contract performance. If the contract is broken essentially, non-defaulting party may terminate the contract and ask for damages; If not, non-defaulting party cannot terminate the contract but ask for damages.^[12]

5. Specific Performance and Other Remedies

The remedies of the contract are the specific methods taken by two parties when dispute occurs. The remedies can be divided into national relief and private relief, agreed relief and legal relief, and mainly in the form of specific performance, damages, penalty, low price and so on.

Damages and the specific performance is closely related. Damages of Anglo-American law system are binded with the common law, and are as the basic relief based on the respect to efficient breach theory of contract. On the contrary, the specific performance is secondary, exceptional relief. The specific performance of civil law system is looked as the main relief based on the recognition of the moral disapproval of contractual obligations. Specifically, German law takes the specific performance to be the main relief, and in France, whether the creditors can ask for the specific performance depends on a positive action or payment of property as a debt. Article 45 and 61 of *the Convention* involve in a variety of remedies that buyers and sellers can take, and the specific performance and damages are of the same status. Countries will make the judgment of the specific performance or not depends on the domestic laws.

The contract cancellation with the specific performance repels one another. The effect of the contract termination is to eliminate contractual relationship from the beginning or to the future, namely, original rights provided in contracts are converted into damages claims, so two remedies can’t be applied at the same time. Specifically, in Roman law the specific performance is the first priority relief, but termination of the contract is the exception. When processing violation responsibility, accordance with *French Civil Code* either the specific performance is requested, and either the contract is relieved and compensation is requested. After the modification of *the German Civil Code*, the specific performance is weakened, which is prepared for rescinding the contract. In Anglo-American law countries, generally only substantial breach of contract will apply to the termination of the contract, that is to say, the severity of contractual breach is the decisive factor. In *the Convention*, in the case of non-fundamental breach of contracts only the specific performance can be directly applied. Similarly, the Article 7.3.5 of *The Principles* indicates that once the creditor makes the notice of termination, he is not able to choose between the specific performance and the termination of the contract again.^[13]

There are differences in their applications of the penalty and the specific performance. When the performance of the contract has become impossible, the performance claims is to be eliminated. Unless liquidated damages are agreed, creditors can ask for them. When the debtor refuses to honor the contract and fulfill it tardily, the claims of the specific performance and liquidated damages can co-exist. When the contract is fulfilled partly, creditors can ask for both the specific performance and liquidated damages.

6. Conclusion

In sum, whether it is in a civil-law country, or common-law country, jurists have more and more awareness of the application of the specific performance. Fortunately, the integration trend about the institution is demonstrated. I think that this integration is manifested in the following aspects, first, the international legal regulations present consistency. Although the request to the specific performance in different countries may get different results, and which reflects the inequality of the regional legal culture,

the Convention and *the Principles* have provided regulatory support for the global integration of the specific performance. Second, the constitution of the specific performance unifies gradually. Throughout the world, the specific performance of countries gradually approach the same in the application, the liability subject and the relation with other remedies, moreover the specific performance is applied in wider fields, in diverse and scientific methods. Third, the specific performance can promote other remedies and be coordinated with them. The efficiency breach of contract created in the common-law countries has been gradually accepted by the other countries. The point created in civil-law countries that breach of contract should be disapprove morally, no longer is resisted. In the complex international trade, damages alone can not prop up the entire system, the damage compensate of high efficiency, low-cost and specific performance in honor of contractual order are both in need. Constructions of the specific performance system have achieved gratifying results but more endeavors are still needed.

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8. References

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