Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts

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A. Introduction

'Specific Performance and Damages' have re-emerged as a topic of discussion in the Germanic legal systems in the 20th century only by way of comparative law. However, in the 19th century this topic had already been the subject of much controversial debate.[1] Two sets of problems have to be distinguished that are not always kept properly separated in the literature.[2] First, there is the question whether the creditor may ask for specific performance, that is whether he or she can insist that the contract is performed correctly, and where necessary enforce this right to specific performance against the debtor, or whether he or she has to accept a sum of money as damages instead. Secondly, there is the question whether the creditor has to claim performance first or whether he or she may claim damages immediately.[3] In effect the latter question is whether or not the debtor has to attempt to cure initial non-performance and under what circumstances the contract can be avoided by the creditor. This second set of problems will not be discussed in this article. The subsequent analysis will be limited to the right of the creditor to enforce performance, respectively his or her duty to accept damages instead.

As the reader may be aware, the question whether or not a creditor has a right to and can enforce specific performance is dealt with rather differently in the different

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1 *See* Markus Müller-Chen, 'Der Erfüllungsanspruch – primärer Inhalt der Obligation' in *Armin* (Willingnam et al. (eds.)), (Jahrbuch Junger Zivilrechtswissenschaftler 1996, Stuttgart 1997) at pp. 23, 30; Reinhard Zimmermann *The Law of Obligations* (Cape Town 1992) at p. 770 et seq.

2 *See* Markus Müller-Chen *supra* note 1 at p. 9.

3 *See* Markus Müller-Chen *supra* note 1 at p. 32; Guenter H. Treitel, *Remedies for Breach of Contract* (Oxford 1988) at p. 47 et seq.

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national legal systems. The approaches taken in the different national legal systems have been discussed several times in recent literature.[4] Therefore, they will only be described very briefly here.

In the Germanic legal systems specific performance is the natural remedy. That was deemed so obvious that it is not even explicitly stated in the civil codes.[5] The claim to performance is the backbone of the obligation; damages are only granted as a secondary remedy.

The French legal system, like the *ius commune*,[6] distinguishes between obligations that are aimed at a *dare* (for example a payment of money or the transfer of property) and those that are aimed at a *facere*. Whereas the natural remedy for an obligation to convey (*obligation de donner*) is specific performance, it is excluded in case of an obligation to do or not to do (*obligation de faire ou de ne pas faire*) according to Article 1142 Civil Code (CC), because in the latter case the obligation is automatically transformed into an obligation to pay damages.[7] However, in the case of an *obligation de faire ou de ne pas faire* the French courts have found an indirect way to secure specific enforcement. The courts started to pronounce (at first *praeter legem*)[8] judicial penalties (*astreintes*), by which the debtor has to pay a fixed sum to the creditor for each day that he or she remains in default.[9]

The approach of the Anglo-American legal systems is very different from the one of the Germanic and the French legal systems. At law the creditor only had a right of specific enforcement in the case of the action of debt.[10] In all other cases he or she only had an action for damages. Specific performance could only be claimed in the courts of equity and only in cases where the action for damages under the common

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4 *See* Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (Tübingen 1996, 3rd ed.) at p. 67 et seq.; Markus Müller-Chen *supra* note 1 at p. 25 et seq.; Bernd Peukert, 'Erfüllungsanspruch und Erfüllungszwang im vertraglichen Schuldverhältnis des französischen und englischen Rechts' (Dissertation University of Saarbrücken 1977) at p. 40 et seq. and at p. 169 et seq.; Paul Neufang, 'Erfüllungszwang als "remedy" bei Nichterfüllung' (Baden-Baden 1998) at p. 35 et seq.; Louis J. Romero, 'Specific Performance of Contracts in Comparative Law: Some Preliminary Observations' in (1986) 27 *Les Cahiers de Droit*, at p. 785 et seq.; Michael Strathopoulos, 'Probleme der Vertragsbindung und Vertragslösung in rechtsvergleichender Betrachtung' in (1994) 194 *AcP*, at pp. 543, 554 et seq.; E. Allan Farnsworth, 'A Common Lawyer's View of his Civilian Colleagues' in (1996) 57 *LA. L. Rev.*, at pp. 227, 235 et seq.

5 *See* Guenter H. Treitel *supra* note 3 at p. 51; Konrad Zweigert and Hein Kötz *supra* note 4 at p. 469.

6 *See* Reinhard Zimmermann *supra* note 1 at p. 774.

7 *See* Konrad Zweigert and Hein Kötz *supra* note 4 at p. 472 et seq.; Guenter H. Treitel *supra* note 3 at p. 56.

8 *See* Oliver Remien, *Rechtsverwirklichung durch Zwangsgeld* (Tübingen 1992) at p. 33 et seq.; the existence and the legality of the *astreinte* are now confirmed in: Law No. 72-626 of 5 July 1972.

9 *See* Guenter H. Treitel *supra* note 3 at p. 59.

10 *See* Paul Neufang *supra* note 4 at p. 36 et seq.; concerning replevin ibid. at p. 42 et seq.; Dan B. Dobbs, *Law of Remedies* (St. Paul/Minn. 1993, 2nd ed.) at § 4.2(2)) p. 384 et seq.

law was inadequate because it could not provide satisfactory relief.[11] This principle was originally adopted to minimize conflict between courts of equity and courts of common law.[12] The separate administration of common law and equity no longer exists today, but the relationship between specific performance and damages has essentially remained the same.

Even though the approach taken in these legal systems is obviously very different, the differences in practice are smaller than one would suppose.[13] On the one hand, in the Germanic legal systems the right to specific performance under substantive law is sometimes counteracted by procedural law, which has no coercive means to enforce performance for certain claims.[14] On the other hand, the Anglo-American legal systems (especially the United States) acknowledge actions of specific performance more and more. The necessities of commercial trade blur the distinction further. No reasonable creditor in the Germanic legal systems will choose the costly and time consuming action for specific enforcement if he or she can obtain the promisor's performance from someone else on the market. He or she will therefore give the debtor a notice requiring him or her to perform within a fixed time. If the debtor does not perform within that time he or she will proceed to a covering transaction and liquidate the arising costs by way of damages. Therefore, specific performance is generally only of interest to the creditor where the debtor alone is capable to perform. In those cases, however, the Anglo-American legal systems also grant an action for specific performance.[15]

Keeping this background in mind it is interesting to examine how the Principles of International Commercial Contracts, 1994 Unidroit (the UNIDROIT Principles) see the relationship between specific performance and damages and how the different dogmatic points of view are kept in balance in order to make the Principles acceptable for lawyers from all over the world.

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[11] *See* Guenter H. Treitel *supra* note 3 at p. 64; Dan B. Dobbs *supra* note 10 at § 12.8(2) p. 808; E. Allan Farnsworth, *Contracts* (Boston/Mass. 1990, 2nd ed.) at p. 857 et seq.; Bernd Peukert *supra* note 4 at p. 182 et seq.

[12] *See* Guenter H. Treitel *supra* note 3 at p. 62.

[13] *See* Guenter H. Treitel *supra* note 3 at p. 71.; Michael P. Furmston, 'Breach of Contract' in (1992) 40 *Am. J. Comp. L.*, at pp. 671, 674; Alejandro M. Garro, 'The Gap-filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG' in (1995) 69 *Tul. L. Rev.*, at pp. 1149, 1186.

[14] *See* Konrad Zweigert and Hein Kötz *supra* note 4 at p. 471 et seq.; Adolf Baumbach, Wolfgang Lauterbach and Peter Hartmann, *Zivilprozessordnung* (München 1996, 54th ed.) at §§ 887/888 No. 1 et seq.

[15] *See* Dan B. Dobbs *supra* note 10 at § 12.8(2), at p. 808; E. Allan Farnsworth *supra* note 11 at p. 860.

B. Unidroit Principles

I. General Principle

Following the principle pacta sunt servanda and its interpretation in the Civilian tradition, the UNIDROIT Principles provide for a right to performance. This right applies not only to monetary obligations[16] but also to other obligations. In the latter case, though, the right to require performance is restricted by various exceptions which demonstrates that the spirit of the Anglo-American law has also been taken into account.[17]

Where the UNIDROIT Principles provide a right to require performance it is not in the discretion of the court to grant that remedy or not.[18] This is in sharp contrast not only to Anglo-American legal thinking, where specific performance is considered to be a discretionary remedy[19] but also, and above all, to the United Nations Convention on Contracts for the International Sale of Goods, 1980 (the CISG). The CISG, like the UNIDROIT Principles, contains a general claim to performance. However, similar to the Hague Sales Convention (ULIS, Uniform Law on the International Sale of Goods 1964), Article 28 CISG restricts the possibilities to enforce claims to specific performance, which would as such be recognized under the CISG, by a reference to the domestic rules of the forum. Under the CISG, a court is not bound to deliver a judgment for specific performance unless that court would do so under its own law in similar cases as well.[20]

It is doubtful whether a common law court would accept a restriction of its discretion concerning the granting of specific performance and follow the UNIDROIT Principles on this point.[21] However, arbitral tribunals are not bound by that restriction. In fact there are a number of American cases where arbitral decisions concerning specific performance were enforced by domestic courts even though specific performance would not have been adequate according to the lex

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[16] *See infra* B II 'Monetary Obligations'.

[17] *see infra* B III 'Obligations to Deliver Goods or Render Services – Exceptions'.

[18] *See* Art. 7.2.2 Comment 2.

[19] *See* Treitel *supra* note 3 at p. 63; Gareth Jones and William Goodhart, *Specific Performance* (London 1996, 2nd ed.) at p. 1 et seq.; Konrad Zweigert and Hein Kötz *supra* note 4 at p. 478.

[20] *See* Peter Schlechtriem, *Internationales UN-Kaufrecht* (Tübingen 1996) at No. 118 et seq.; John Honnold, *Uniform Law for International Sales* (Deventer/Boston 1991, 2nd ed.) at p. 194 et seq.; Jianming Shen, 'The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules' in (1996) 13 *Ariz. J. Int'l & Comp. L.*, at pp. 253, 267 et seq.; Amy Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' in (1988) 63 *Wash. L. Rev.*, at pp. 607, 625 et seq.

[21] *See* Joseph M Perillo, 'Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review' in (1994) 43 *Fordham L. Rev.*, at pp. 281, 305; Roy Goode, 'International Restatements of Contract and English Contract Law' in (1997) II *U.L.R.*, at pp. 231, 241.

fori.[22] That means that, at least in regard to arbitration, uniformity may be promoted to some extent provided that the UNIDROIT Principles contain universally acceptable solutions. Whether this is the case will be subsequently discussed in regard to the different types of obligations.

II. Monetary Obligations

Article 7.2.1 of the UNIDROIT Principles only states: 'Where a party who is obliged to pay money does not do so, the other may require payment.' This rule contains no exceptions to enforced performance.

At first sight this rule seems reasonable. The constellations which require an exception concerning all the other obligations are of no practical relevance to monetary obligations. Monetary obligations are hardly impossible in law or in fact, nor is performance or enforcement unreasonably burdensome or expensive, nor is obtaining performance from another source an option, and, last but not least, performance of monetary obligations is never of an exclusively personal character. At first sight comparative law also seems to be of that opinion since even old English law acknowledged the right to performance in its action of debt.[23] Thus, what could reasonably be said against a right to performance concerning monetary obligations?

Contracts in commercial trade are usually reciprocal. For reciprocal contracts, the right to performance of the creditor of the monetary obligation is only justified if he or she has already fully performed his or her own obligation to deliver goods or to do some work. In such a case there is practically no difference between the right to performance and the right to claim damages. However, that is not the case, if the creditor of the monetary obligation has not fully performed yet. In that case the granting of the right to performance compels the creditor of the obligation to deliver to fulfil the contract without taking into account whether the disadvantages that arise for him or her are justified by any advantages of the creditor of the monetary obligation. The example of a contract for works or services can illustrate this point. Before the contractor has started with the work, the employer realizes that he or she will not be able to use the work according to his or her initial expectations and wants to free himself or herself from the contract. Should the contractor be able to insist on the fulfilment of the contract by way of demanding specific performance, even though he or she is able to use his or her material and working power in another profitable way?

A look at national law shows that the question can only be answered in the negative.

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[22] *See Staklinski v. Pyramid Electronic Co.* (1995) 160 N.E. 2d 78, 80, N.Y.

[23] *See* Konrad Zweigert and Hein Kötz *supra* note 4 at p. 553; Paul Neufang *supra* note 4 at p. 9 et seq.

According to Anglo-American law the contractor would generally be confined to damages in such a case.[24] For sales contracts section 2-709 paragraph 1 of the Uniform Commercial Code (UCC) also states that the seller only has an action for the price if he or she has either delivered the goods or the risk of their loss has passed to the buyer or if he or she is unable to resell the goods identified to the contract at a reasonable price.[25] According to the revised draft of the UCC of August 1997[26] the seller shall generally, at the discretion of the court, have a right to the agreed performance of the party in breach. However, there is an express exception to this rule for cases where the sole obligation is the payment of money. In those cases the court shall not enter a decree of specific performance.

Equally, under Civil law, in the above-mentioned situation, a contractor could not compel the employer by way of specific performance to fulfil the contract. According to German,[27] Swiss[28] and French[29] law the employer has the opportunity to cancel the contract before the work is completed. In that case the contractor keeps the right to be compensated for his or her work. However, his or her compensation is reduced by what he or she saves due to the cancellation of the contract and by what he or she gains or maliciously omits to gain by investing his or her working power to another source.[30] Similar rules can be found in civil law codes concerning mandates[31] and contracts for personal services.[32] A corresponding general rule is contained in § 324 *Bürgerliches Gesetzbuch* (BGB) for the case where the creditor, that is the debtor of the monetary obligation, is responsible for the impossibility of the non-monetary obligation or where such an impossibility occurs during the time in which the creditor is in default with his or her obligation. The latter is especially important for obligations that have to be performed by a certain time. The right to compensation of the debtor of the non-monetary obligation is sometimes seen as a

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[24] For the law of the United States *see* Dan B. Dobbs *supra* note 10 at § 12.20(1) p. 848 et seq.; the English law seems to grant specific performance to the contractor in certain cases: *see Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. However, this approach has been criticized by the doctrine: *see* Gareth Jones and William Goodhart *supra* note 13 at p. 187.

[25] Similar s. 2-822(a) UCC Draft 1997. The action for the price is granted more easily according to s. 49 of the Sale of Goods Act 1994 (SGA) though. The literature however, is very critical concerning this section, *see* Patrick Selim Atiyah, *The Sale of Goods* (London 1990, 8th ed.) at p. 471 et seq.

[26] *See* s. 2-807(a) UCC Draft 1997.

[27] *See* § 649, sentence 1 BGB.

[28] *See* Art. 377 OR (Bundesgesetz über das Obligationenrecht).

[29] *See* Art. 1794 CC.

[30] *See* Germany: § 649, sentence 2 BGB; Switzerland: Gaudenz G. Zindel and Urs Pulver, *Basler Kommentar, Obligationenrecht I* (Basel 1996, 2nd ed.) Art. 377 OR No. 15; France: Paris, 23 May 1961, Gaz. Pal. (La Gazette du Palais) 1961.2.283.

[31] *See* Switzerland: Art. 404 OR, *see* Rolf H. Weber, *Basler Kommentar, Obligationenrecht I* (Basel 1996, 2nd ed.) Art. 404 OR No. 17; France: Art. 2004 CC, see Cass.Civ.3e, 27 April 1988, D. 1989.351.

[32] *See* § 615 BGB.

right to performance.[33] However, this right is really an action for damages, an argument which is supported by the fact that compensation is reduced by investments which can be saved, and that there is a duty to mitigate.

In short, there can be no doubt that a claim to unlimited performance of the monetary obligation can lead to unjustified results in cases where the delivery of the goods has not yet been made or where the work or service has not yet been completed. These results are not supported by the national laws. Consequently the draft of the European Principles of Contract Law (the European Principles)[34] states that the creditor of the monetary obligation can only proceed with the performance of his or her own obligation and enforce the performance of the monetary obligation, when he or she cannot make a cover transaction or where the performance would not be unreasonable under the circumstances.

But how can these thoughts be harmonized with the unlimited right to performance (of the creditor) of the monetary obligation as stated in Article 7.2.1 of the UNIDROIT Principles? A first possible interpretation would seek to apply the duty to mitigate as stated in Article 7.4.8 paragraph 1 of the UNIDROIT Principles to the right to performance as well. However, in that context there are dogmatic hurdles which cannot be easily overcome. Virtually all legal systems apply the duty to mitigate only to damages but not to the right of performance.[35] Similarly, in the UNIDROIT Principles the duty to mitigate is found in the section on 'Damages' and not in the section on 'Non-Performance in General'. Hardly any national judge would therefore limit the right to performance by a duty to mitigate. The only solution is to apply a usage (Art. 1. 8 UNIDROIT Principles), which requires the seller to resell goods which are neither accepted nor paid for by the buyer.[36] Last but not least, recourse could be taken to the general principle of good faith (Art. 1.7 para. 1 UNIDROIT Principles).[37] Given the vagueness of these principles, there will certainly be differences in their interpretation caused by the different backgrounds of the national lawyers. Therefore, in that respect, no uniformity can be reached by the UNIDROIT Principles.

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[33] Above all by the German law, *see* Othmar Jauernig and Peter Schlechtriem, *Bürgerliches Gesetzbuch* (München 1994, 7th ed.) at § 649 comment 3b.

[34] *See* Art. 9.101 of the European Principles.

[35] *See* Guenter H. Treitel *supra* note 3 at p. 179 et seq.; for the German law: Frank Peters, 'Der Einwand des Mitverschuldens gegenüber Erfüllungsansprüchen' in (1995) *JZ* at p. 754 et seq.; for the CISG: Amy Kasteley *supra* note 20 at p. 621 et seq.

[36] As it is explicitly stated in the comment concerning Art. 7.2.1.

[37] Only in rare exceptions where hardship is given, the debtor of the monetary obligation can be freed of his actual obligation, that is not only of his obligation to perform, *see* Art. 6.2.2 et seq. UNIDROIT Principles.

III. Obligations to Deliver Goods or Render Services

1. General Principle

For non-monetary obligations the UNIDROIT Principles again provide in their Article 7.2.2 as a general rule the right to require performance. Thereby they follow the civilian tradition. However, this principle is considerably limited by a number of exceptions.

2. Exceptions

(A) IMPOSSIBILITY

The first exception is obvious and common to all legal systems. Performance cannot be required where it is impossible in law or in fact. It is thereby made clear that the validity of the contractual obligation is not affected by the impossibility in fact, irrespective of whether the latter is initial or subsequent, or due to the debtor's fault or not.[38] Whether the debtor has to pay damages or not depends on the existence of a legitimate excuse (Art. 7.1.7 UNIDROIT Principles). Concerning the impossibility in law, for example the refusal of a public permission, a distinction must be made between cases where the validity of the contract is affected (and therefore the obligation itself does not come to exist) and cases where it is solely the right to performance that is affected.

(B) UNREASONABLE BURDEN

Performance is not required where it is unreasonably burdensome or unduly expensive for the debtor. The Commentary[39] refers to cases, where the surrounding circumstances have changed so drastically that requiring performance would run counter to the general principle of good faith and fair dealing. According to Article 6.2.3 paragraph 4 of the UNIDROIT Principles, the contract can be terminated in the exceptional case of hardship. In that case it is the obligation as a whole, including eventual damages, and not only its enforced performance that comes to an end. The question now is how these two articles can be kept apart.

According to Anglo-American legal thinking and under the UNIDROIT Principles, the requirements for the exclusion of the right to performance should not be as high as those for hardship.[40] In addition to that, the right to performance should be excluded in cases where the equilibrium of the contract has been fundamentally altered by events that were not beyond the control of the debtor and where, therefore, an adaptation of the contract is out of question. It makes sense in

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[38] *See* Art. 3.3 UNIDROIT Principles.
[39] *See* Art. 7.2.2 Comment 3.b.
[40] *See* Gareth Jones and William Goodhart *supra* note 19 at p. 15 para. 4.

this case to discharge the debtor from his or her duty to perform, but nevertheless have him or her pay damages.

The fact that the enforcement of performance is excluded where it is unreasonably burdensome can only be understood in the light of Anglo-American legal thinking. In Anglo-American law, specific performance is often denied for long-term contracts not aiming at the achievement of a certain result.[41] As recently as May 1997, the House of Lords dismissed an action for specific performance in a case where the respondent had explicitly bound himself in a contract with a shopping centre to run his Safeway store in the usual manner during the 35 years of the lease but then decided to shut it down because of heavy losses.[42] The reason for the dismissal of the action of specific performance in such cases is the concern that a right to performance forcing somebody to carry on a business will presumably lead to never-ending disputes between the parties. This, in turn, will be an unnecessary burden to the legal system. By merely awarding damages, the litigation between the parties can be resolved once and for all.

Such thoughts are not completely unfamiliar to the civil lawyer and, therefore, will not be immediately rejected. Swiss law states, for example, that an employee who has been unfairly dismissed has no right to further employment but only a right to claim damages.[43]

(C) COVER

In practice, the most important case of performance exclusion refers to the situation where the creditor can reasonably obtain performance from another source, that is make a cover transaction.

This is the case in fungible goods or standard services. If the creditor is able to obtain performance through another source, his or her interests are sufficiently protected by an award for damages. It is typical for Anglo-American law to deny specific performance in such cases.[44] However, even Continental law regulates those cases in a particular manner. As a rule, the obligee can be authorized by the court to effect performance to the expense of the obligor in the case of fungible goods or standard services.[45] Even though effecting performance to the expense of the obligor

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[41] *See* Gareth Jones and William Goodhart *supra* note 19 at p. 44 et seq.; Dan B. Dobbs *supra* note 10 at § 12.8(3), p. 809.

[42] *Co-operative Insurance Society Limited v. Argyll Stores*, [1997] WLR 895 (House of Lords).

[43] *See* Art. 336a OR.

[44] Gareth Jones and William Goodhart *supra* note 19 at p. 32; Guenter H. Treitel *supra* note 3 at p. 64; E. Allan Farnsworth *supra* note 11 at p. 860; Dan B. Dobbs *supra* note 10 at §12.8(2), p. 808; Steven Walt, 'For Specific Performance Under the United Nations Sales Convention' in (1991) 26 *Tex. Int'l LJ*, at pp. 211, 224 et seq.

[45] Germany: § 887, para. 1 Zivilprozessordnung (ZPO) for fungible goods or standard services; Austria: § 353, para. 1 Exekutionsverordnung concerning standard services; Switzerland: Art. 98, para. 1 OR; France: Art. 1144 CC.

is mostly seen as enforced performance, it is in its function comparable to an award for damages. In certain cases, Swiss law goes even further. According to the Code of Civil Procedure of Basle (§ 251), the enforcement procedure automatically transforms the right to performance of a certain quantity of fungible goods into an award of money.

Article 7.2.2 lit. c of the UNIDROIT Principles generally does not rule out specific performance when it is possible to make a cover transaction, but only when such a transaction is reasonable. To clarify in which cases of fungible goods specific performance can be obtained, analysis of the rich case law of the United States can be particularly useful. In particular, cases where there is a shortage in the market[46] or cases involving requirements contracts,[47] in which a supplier has bound himself or herself to cover the need of a producer with raw materials and other goods, have to be mentioned here. A cover transaction is also usually unreasonable for the creditor who has already performed his or her part. Accordingly, the draft of the UCC of 1997[48] grants the buyer specific performance of goods identified to the contract if he or she has already paid the price.

This rule is reasonable from an economic point of view and, as such, will be accepted both by Anglo-American and civil lawyers. However, one point must not be overlooked. If property is transferred on conclusion of the contract or on identification of goods, as it is especially the case in French law,[49] then the recovery of these goods is not an enforced performance but a property claim.[50] It is doubtful whether the courts in those countries accept the limitation of the right to performance by simply awarding damages to the creditor.

(D) PERFORMANCE OF AN EXCLUSIVELY PERSONAL CHARACTER

The UNIDROIT Principles (Art. 7.2.2 lit. d) exclude the right to performance in cases where performance is of an exclusively personal character. The ratio of this rule is, on the one hand, the protection of the personal freedom of the obligor and, on the other hand, the fact that enforcement of performance of an exclusively personal character often leads to disputes concerning the quality of this performance.[51]

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[46] *See* Dan B. Dobbs *supra* note 10 at § 12.8(2), p. 808; example: *Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd.* [1974] 1 WLR 576 (Chancery Division).

[47] *See* E. Allan Farnsworth *supra* note 11 at p. 859; example: *Laclede Gas Co. v. Amoco Oil Co.* 522 F. 2d 33 (8th Cir. 1975).

[48] *See* s. 2-824(a) UCC Draft 1997, that goes further than the actual law, cf. s. 2-502(1) UCC, that grants specific performance only in the case of insolvency of the seller.

[49] France: *see* Art. 1583 CC; concerning this article: Philippe Malaurie and Laurent Aynès, *Cours de droit civil, Vol. VIII, Des contrats spéciaux* (Paris 1994, 8th ed.) at p. 171; Great Britain: see s. 18 r. 1 SGA, concerning this rule *see* Patrick Selim Atiyah *supra* note 25 at p. 288 et seq.

[50] Concerning replevin in the law of the United States see Paul Neufang *supra* note 4 at p. 108 et seq.; Dan B. Dobbs *supra* note 10 at § 5.17(2), p. 583 et seq.

[51] *See* Art. 7.2.2 comment 3.d.

The question is, however, how 'performance of an exclusively personal character' is interpreted. The national legal systems diverge considerably on this issue. In Anglo-American law specific performance is generally denied in relation to services,[52] irrespective of the nature of the services, i.e. whether they are standard services or not. The Germanic legal systems, however, grant specific performance even to non-generic obligations. German law denies specific enforcement only with respect to non-generic obligations out of a service contract.[53] A similar position prevails in French law. Obligations 'to do' which are of a personal character can be enforced indirectly with the aid of the astreinte, unless they are of a scientific or artistic nature.[54] The authors of the UNIDROIT Principles seem to follow this narrow Continental opinion. However, it seems doubtful whether this point of view will also be supported by Anglo-American lawyers.

(E) REQUEST WITHIN REASONABLE TIME

The last exception to specific performance concerns the failure to request performance within a reasonable time. According to Article 7.2.2 lit. e of the UNIDROIT Principles the obligee loses his or her right to require performance if he or she does not require performance within a reasonable period of time after he or she has, or ought to have, become aware of the non-performance.

This exception is mainly familiar to Anglo-American law (theory of laches).[55] Some elements of it, albeit not with the same rigor, can also be found in other legal systems. Under CISG law, seller and buyer cannot require performance if they have resorted to a remedy which is inconsistent with this requirement.[56] The buyer has to request either delivery of substitute goods or repair within a reasonable time after notice for lack of conformity is given.[57] Under German law, if the obligee has set a time limit for subsequent performance including a waiver of performance in case of default, he or she cannot require performance after the expiry of this limit.[58] Under all Germanic legal systems, in commercial trade where performance is due on a fixed date, specific performance has to be claimed immediately. Otherwise it is excluded.[59] Thus, in the various national legal systems the exclusion of specific performance after a reasonable period of time is generally accepted, and any differences appear as a mere matter of detail.

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[52] *See* Dan B. Dobbs *supra* note 10 at § 12.8(3), p. 808 et seq.; Gareth Jones and William Goodhart *supra* note 19 at p. 169 et seq.

[53] *See* § 888 Abs. 2 ZPO.

[54] *See* Juris Classeur civil (J. Cl. civil) Arts. 1136–1145, Fasc. 10, No. 115.

[55] *See* Dan B. Dobbs *supra* note 10 at § 2.4(4), p. 75 et seq.; Gareth Jones and William Goodhart *supra* note 19 at p. 109 et seq.

[56] *See* Art. 46 paras. 1, 62 CISG.

[57] *See* Art. 46 paras. 2, 3 CISG.

[58] *See* § 326 para. 1, 1st sentence BGB.

[59] Germany and Austria: § 376, para. 1, 2nd sentence HGB (Handelsgesetzbuch); Switzerland: Art. 190, para. 2 OR.

3. Open Questions

The general rule and its exceptions according to Article 7.2.2 of the UNIDROIT Principles leaves open a number of questions of practical relevance concerning obligations to deliver and obligations to do. Several of them shall be mentioned here.

First, the rule is primarily intended to cover obligations that are essential to the contract. Whether it is also suitable for ancillary obligations is more than doubtful, as even in Continental law specific performance is often excluded in these cases, while the obligee can only claim damages in case of default.

Difficult questions arise with respect to 'performance of an exclusively personal character'. A lot of types of performance, such as for example giving information, rendering accounts, making testimonials covering performance and conduct of an employee etc., are of an exclusively personal character in the sense that they can only be fulfilled by the obligor in person. Simply awarding damages to the obligee would frequently leave him or her unprotected because the amount of damages cannot be proven. This is true in particular for obligations to abstain from doing something, such as agreements in restraint of trade, where enforced performance is acknowledged not only in Continental but also in Anglo-American law. If specific performance is acknowledged in the latter case,[60] then the relation to cases where specific performance is excluded because of its exclusively personal character has to be made clear. Should, for example, a singer be compelled to abstain from singing in a theatre other than the one of the obligee, if the singer cannot be compelled to sing in the obligee's theatre, on the basis of the exclusively personal character of the performance?[61] The answer to this question is very different depending on the national legal system to be applied.[62]

What is undoubtedly not covered, is the right to a legally relevant manifestation of intent which is replaced in a lot of legal systems either by a judgment of the court,[63] or by performance of the court itself where a party fails to perform, such as when it does not appoint a valuer.[64]

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[60] Apparently in that sense Art. 7.2.2 Comment 3.d.

[61] *See Lumley v. Wagner* (Ch. 1852) 42 Eng. Rep. 687.

[62] In the affirmative France: cf. J.Cl. civil, Arts. 1136–1145, Fasc. 10, No. 152; apparently Switzerland: *see* Manfred Rehbinder; *Berner Kommentar Vol. VI* (Bern 1992) Art. 321e OR No. 7; in the negative Germany: cf Reinhard Richardi, *Staudinger Kommentar zum Bürgerlichen Gesetzbuch Schuldrecht, Zweites Buch, Recht der Schuldverhältnisse, §§ 611-619* (Berlin 1993) at § 611, No. 308; s*ee* Rudi Müller-Glöge, *Münchner Kommentar zum Bürgerlichen Gesetzbuch Schuldrecht Vol. 4 §§ 607–704* (München 1997, 3rd ed.) at § 611 No. 421; differentiating the Anglo-American law: cf. Günter Treitel, *International Encyclopaedia* (Mouton/The Hague/Tübingen 1976) at Vol. VII, Ch. 16, Nos. 16–33.

[63] *See* Germany: § 1894 ZPO; Switzerland: s*ee* Adrian Stähelin and Thomas Sutter, *Zivilprozessrecht* (Zürich 1992) at § 25 No. 2, p. 332; France: *see* J. Cl. civil, Arts. 1136–1145, Fasc. 10, No. 133.

[64] *See Sudbrook Trading Estate Ltd. v. Eggleton* [1983] 1 AC 444.

IV. Repair and Replacement

The rules concerning the right to performance of monetary and non-monetary obligations also apply to defective performance, that is to the right to require repair and replacement or other remedy (Art. 7.2.3 of the UNIDROIT Principles).

This rule also applies to the defective performance of monetary obligations. In cases where the debtor of a monetary obligation, for example, pays in the wrong currency or to a wrong account, the creditor shall have the unlimited right to require performance under Article 7.2.1 of the UNIDROIT Principles and not only the right to compensation in money for the additional costs that arise due to the defective performance of the monetary obligation.[65] It is doubtful, however, whether such a solution is reasonable from an economic point of view. Therefore, the European Principles refer to the remedy of a defective performance only in the context of non-monetary obligations.[66]

The right to remedy a defective performance is mostly relevant to obligations 'to deliver' or obligations 'to do'. The remedy can consist of replacement, repair, or any other measure, such as a court order terminating the property right of a third party on a certain object.

Continental law offers a colourful picture with respect to the right to remedy defective performance. Whereas replacement can be demanded without any exceptions in a contract of sale involving generic goods,[67] because of historic reasons, there is no right of repair for goods that are not generic. The worker in a contract for work and services is bound to repair, if in doing so no undue costs arise.[68] The CISG also takes into account whether a remedy is reasonable under the circumstances.[69] Opinions differ with respect to the existence of a right to remedy for obligations 'to do'.[70]

Since the UNIDROIT Principles, like the Anglo-American law, apply the same rules to original performance and the right of cure, satisfying solutions can be found in most cases. The limitations of the right to remedy will be of practical relevance in cases where there is an unreasonable burden for the debtor. The choice between different remedies cannot be made by the creditor alone, but has to be made on the basis of 'reasonableness' for both parties. This means that the creditor has to be satisfied with the repair and the compensation of any devaluation when replacement

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[65] *See* Art. 7.2.3 UNIDROIT Principles Comment 2.

[66] *See* Art. 9.102(1) European Principles 1997.

[67] *See* Germany: § 480 para. 1 BGB; Switzerland: Art. 206, para. 1 OR; France: Art. 1184, para 2 CC, *see* Jacques Ghestin and Jerôme Huet, *Traité de droit civil, les principaux contrats spéciaux* (Paris 1996) at No. 11365 et seq., p. 291 et seq.

[68] *See* Germany: § 633, para. 2 BGB; Switzerland: Art. 368, para. 2 OR; France: *see* Murad Ferid and Hans Jürgen Sonnenberger, *Das französische Zivilrecht, Vol. 2, Schuldrecht: Die einzelnen Schuldverhältnisse, Sachenrecht* (Heidelberg 1986, 2nd ed.) at No. 2K 127 p. 289.

[69] *See* Art. 46, para. 2,3 CISG.

[70] In the negative Switzerland, cf. Manfred Rehbinder *supra* note 62 at Art. 321e OR No. 12.

would cause disproportionately high costs to the debtor and the creditor can use the object of the contract as intended after the repair.

V. *Enforcement of Performance*

While specific performance is part of substantive law, the issue of the manner of its enforcement is generally part of procedural law and therefore governed by the *lex fori*. Each state regulates enforcement according to its own law.[71] The means of enforcing performance vary considerably from one state to another. As a rule, one may distinguish between enforcement of monetary obligations, enforcement involving an action to hand over something and enforcement of obligations to do or to abstain from doing. A judicial penalty or even, under certain circumstances, coercive detention is usually only considered in the latter case.

In Article 7.2.4, the UNIDROIT Principles introduce the possibility to order a party to pay a judicial penalty, which is independent of eventual damages, when the debtor does not comply with the order of specific performance. The judicial penalty is a copy of the astreinte of French law. Therefore, it is to be paid to the creditor unless the law of the forum provides otherwise.

This rule gives rise to considerable criticism.[72] The fact that a procedural provision is included in principles of substantive law has yet to be overcome. Within the scope of application of the Brussels and Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, foreign orders aimed at the payment of a judicial penalty could also be enforced within the enforcement state (Art. 43, Brussels/Lugano Convention). It is doubtful, however, whether a judicial penalty pronounced by an arbitral tribunal would be recognized and enforced.[73]

The fact that the penalty has to be paid to the creditor, and is therefore some kind of private fine, gives rise to even greater criticism. This concept is completely unknown to the German and Anglo-American legal systems. In these legal systems penalties are to be paid to the state. Even in France criticism unfavourable to the *astreinte* has not diminished, even though the *astreinte* is now explicitly regulated by statute.[74]

The main objection concerns the generally undifferentiated possibility to pronounce a judicial penalty. By doing that, the UNIDROIT Principles go much further than the *astreinte* of the French law. If one takes a look at the French court decisions, it is clear that the *astreinte*, like the judicial penalty of other legal systems, serves primarily the enforcement of obligations to do or to abstain from doing. Cases where the *astreinte* has been pronounced in order to secure monetary obligations or obligations to deliver something are rare exceptions from which general rules cannot

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[71] *See* Schack, *Internationales Zivilverfahrensrecht* (Munich 1996, 2nd ed.) at No. 957.
[72] The European Principles do not contain such a rule.
[73] *See* 7.2.4 UNIDROIT Principles Comment 6.
[74] Jean Carbonnier, *Obligations* (Paris 1994, 18th ed.) 4 *Droit civil,* at p. 587.

be derived.[75] In contrast to this, the UNIDROIT Principles admit judicial penalties indiscriminately in order to secure all kinds of obligations. On top of that, the UNIDROIT Principles contain no criteria for the calculation of the penalty. Here French law differentiates much more. It distinguishes between the *astreinte provisoire* which is only a provisional penalty and the *astreinte définitive*. In the latter case, it is mainly the conduct of the debtor that has to be taken into account in order to make a final evaluation.[76] A corresponding rule for the protection of the debtor is completely unknown to the UNIDROIT Principles.

Thus, the rule of the judicial penalty, as it is contained in the UNIDROIT Principles, has to be rejected and one cannot expect that it will be followed outside the French legal systems.

C. Final Remarks

The relationship between damages and specific performance as stated by the UNIDROIT Principles creates mixed feelings. It is certainly positive that a first attempt has been made to harmonize the various approaches of the national legal systems into a common denominator. As stated above, the CISG has not dared take that step yet, but follows the tradition of Continental law by stating a general right to require performance while leaving possible exceptions to the *lex fori*.[77]

From an economic point of view there can be no doubt that the general priority of the right to require performance is not justified, at least concerning international settings.[78] The right to require performance has to be excluded where the creditor's interests can be sufficiently safeguarded through the award of damages. This position is supported by the fact that an award of damages is a much more flexible instrument than the right to require performance. Specific performance follows the principle of 'all or nothing'. Damages, by contrast, allow results that are suitable in view of the specific circumstances of each particular case, since the judge has a certain discretion to assess the amount of damages and there exists a duty to mitigate damages.

As the above analysis has shown, it is doubtful whether the UNIDROIT Principles have found a great deal of acceptable solutions. Therefore, chances to reach more uniformity via the Principles must not be overestimated in this sector. The European Principles, which contain more appropriate solutions for certain specific questions, may one day help to overcome the concerns pointed out above.

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[75] *See* Tribunal de Commerce de la Seine 16 December 1919, D.H. 1920.33 and Cour d'Appel Besançon, 1re, 4 December 1946, Gaz. Pal. 1947.20.

[76] *See* Art. 36 Statute Nr. 91-650 of 9 July 1991.

[77] *See* Art. 46, 62 CISG, Art. 28 CISG.

[78] *See* E. Allan Farnsworth, 'Damages and Specific Relief' in (1979) 27 *Am. J. Comp. L.*, at pp. 247, 249 et seq.