Availability of Specific Remedies in Chinese Contract Law

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1 Introduction: Specific Performance–A Routine Remedy

The function of contractual remedies is to place a promisee, who has suffered the consequences of a contractual breach, in as good a position had the promisor performed, or to “make the victim of a breach whole”. Without appropriate remedies, a contract would have no value as a binding agreement between parties. This “performance interest” forms the very basis for a contract between parties. Therefore, it is no exaggeration to say that the essence of a contract lies in its performance, or that a contract is made to be performed. In turn, the essence of performance lies in the enforcement of remedies. In order to achieve this goal, there are two major types of remedies available: the first, requires the defaulting party to pay monetary compensation, either to enable the aggrieved party to purchase a substitute performance, or to compensate for the profits that the promised performance would otherwise have generated; the second, requires the defaulting party to render the actual performance as promised. The former is termed “damages” while the latter is referred to as “specific performance”. Specific performance means that when a party to a contract does not perform an agreed obligation, for example, delivering defective goods instead of goods of the specified quality, the other party can request for the party in breach to perform according to what the terms of the contract, i.e. demand actual performance under the contract. To be specific, the party in breach is required to undertake what he has actually promised in the contract, albeit often at a later point in time than originally agreed. This remedy aims to allow the aggrieved party to “obtain as nearly as possible the actual subject-matter of his bargain”, as opposed to purely monetary compensation, or damages.

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5 Being aware of the difficulty in having a consensual definition among different legal systems, this author attempts to provide this Chinese version, which hopefully is as understandable as possible for foreign scholars.
Under Chinese law, in the event that a party does not perform in accordance with the terms of a contract, or when this party fails to cure the defective performance within the requisite period of time, the aggrieved party will be entitled to two remedies:

- A claim for specific performance; or
- Cancellation of the contract; and
- In both of the aforementioned cases, damages.

In the common law world, the primary or standard remedy against breach of contract is an action for damages. Specific performance, which is an equitable remedy, is awarded at the discretion of the court, and is made available only in exceptional cases. Conversely, in many civil law systems, specific performance is regarded as the primary remedy. What is the Chinese position on this issue? Before exploring the Chinese position, a passage from Lord Hoffman’s judgment in *Co-operative Insurance Society Limited v. Argyll Stores* is worth quoting here:

“Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. … This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy. By contrast, in countries with legal systems based on civil law, such as France, Germany and Scotland, the plaintiff is prima facie entitled to specific performance. The cases in which he is confined to a claim for damages are regarded as the exceptions. In practice, however, there is less difference between common law and civilian systems than these general statements might lead one to suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but a priori I would expect that judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case.”

Particularly noteworthy here is Lord Hoffman’s statement on the convergence of the practical applications of specific performance between civil law and common law systems. Using his words, “there is less difference between common law and civilian systems than these general statements might lead one to suppose.”

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9 Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 ,11-12.
Contract Law, the statutory term used is “continue to perform” (继续履行),\(^{10}\) also known as “enforced performance” (强制履行) in academic discourse, as opposed to the term “specific performance”, which is more widely used in the common law world. The notion of enforced performance is broader in Chinese law than in English law. The former includes execution or performance of the contract by a third party at the expense of the creditor, provided there is a binding judicial order. This is due to China’s historical reception of Civil Law systems.\(^{11}\)

Under the holy banner of pactasuntservanda, parties are bound by obligations they have created. A logical conclusion from this principle is that a contracting party has a right (or a claim) to enforce performance of contractual obligations, and this may be considered a “right-based” legal theory.\(^{12}\) Chinese law accepts the right to enforce performance, and the accompanying claim for specific performance, as an integral part of their contract law system.\(^{13}\) The underlying philosophy is that a promise is binding, i.e. specific performance is considered a natural consequence of a breach of a defaulting party’s contractual obligations. The common term applied in Chinese law is “remedial right” (履行请求权) instead of “remedies” (救济).\(^{14}\) Theoretically, the right/entitlement to specific performance is available irrespective of the occurrence of a breach.\(^{15}\) Specific performance is not simply an ex post response to a breach and can be initiated even before the due date for performance. However, claiming specific performance before the breach is merely to confirm the right of a party to request performance. In practice, more often than not, the aggrieved party will only explicitly invoke the right to enforced performance if the defaulting party commits a breach of contract. Therefore, despite the conceptual and doctrinal difference, in this article, the terms “specific performance” and “remedy” have been used for the sake of convenience and ease of comparison. Historically, specific performance, in line with many other civilian legal systems such as Germany and France, has long been regarded as a standard remedy in Chinese law.\(^{16}\) Even before the enactment

\(^{10}\) Chinese Contract Law enacted in 1999, art. 107.


\(^{13}\) Liang Huixing, see note 3 supra at 24-26.

\(^{14}\) Han Shiyuan, Systemisation of Law of Defective Performance, Law Press, 2006, 234;


of the Chinese Contract Law in 1999, the Economic Contract Law ("ECL") had already stipulated that specific performance is a primary mode of contractual liability. 17

While China was operating under a socialist planned economy, specific performance remained the most characteristic and popular remedy, preferred over damages. This was due to the limitations imposed by China’s centrally planned economy. In a completely planned economy where there are only a limited number of goods available on the open market, monetary compensation is an inadequate remedy as there are a limited number of suppliers. As a consequence, the goals set by the central economic planners for an enterprise cannot be achieved if the enterprise receives money instead of the goods it needs for production. 18 Against this economic backdrop, actual performance is considered to be of paramount importance by every unit of the economy, including the courts. This principle of specific performance was accepted as the norm, as it was necessary in order to place the aggrieved party as far as possible in the position that he would have been had the contract been performed. Thus, even when contracting parties had expressly agreed that specific performance will be waived in favour of monetary compensation, such a term could be struck down by the Chinese courts. According to Art 35 of ECL, the defaulting party still needs to continue the performance under the contract even after damages have been paid, if so demanded by the aggrieved party. 19 This indicates that the payment of damages does not necessarily mean that the aggrieved party has waived the remedy of specific performance. 20 Monetary compensation is categorically stated to be a "last resort" when specific performance is virtually impossible. 21 Another feature of specific performance in the planned economy era is that where specific performance is possible, neither party may demand, offer or accept termination instead. 22 Specific performance is available regardless of the fault of the defaulting party. 23

However, when the Chinese Contract Law was drafted in the 1990s, economic and social conditions had changed dramatically. China had transformed its planned economy into a market economy. With the changes in China’s economy, commercial goods were no

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17 Art. 31 of the Economic Contract Law of 1981. During the period between the end of the Cultural Revolution and the enactment of the Chinese Contract Law of 1999, Chinese contract law adopted a model of “specific statutes on certain contracts”. In essence, all three of the following specific contract laws are statutes from a period of transition, namely, the Economic Contract Law of 1981, the Law on Economic Contracts Involving Foreign Interests of 1985, and Law on Technology Contracts of 1987.
longer in as short supply as before. It became possible to purchase substitute goods in the market. In view of these changes, when the Chinese Contract Law of 1999 was drafted, specific performance was considered to be one of the standard contractual remedies, and not the default (or sole) contractual remedy. That said there is no hierarchical difference between monetary compensation and specific performance as far as the statutory provisions are concerned. Put simply, unlike the common law system, Chinese contract law does not recognize a rule preferring damages over specific performance. It defines non-performance as the failure by a party to perform any of its contractual obligations, including defective performance or late performance. Within this comprehensive definition of non-performance, the delivery of defective goods is considered as a special case of breach by Chinese scholars, and this view is underpinned by Article 155 of the Chinese Contract Law, i.e. a provision which refers to the general rules governing breach of contract. More specifically, Article 107 of the Chinese Contract Law includes both specific performance and damages as remedies available to the aggrieved party in the event of breach. Article 107 reads:

Where a party fails to perform the contractual obligation or where the performance is not in conformity with the agreement, he or she shall bear liability for breach of contract by continuing the performance, taking remedial measure, paying damages and so forth.

Some scholars argue that specific performance takes precedence in the hierarchy of remedies as it was spelled out first in the provision. Others maintain that there is no hierarchical difference between damages and specific performance given the fact that both appear in the same sentence. While specific performance is not expressly stated to be a primary remedy in China, it is, as a matter of principle, generally available as an option for aggrieved parties. Nonetheless, this does not necessarily mean that Chinese courts readily issue judicial orders for specific performance. Quite on the contrary, albeit in the absence of clear empirical evidence, this article speculates that in China’s judicial practice, granting specific performance is rare, compared to the widespread use of damages. Consequently, there is a perceived trend towards convergence with respect to contractual remedies in Civil and Common law jurisdictions that awarding damages is

27 This approach has been adopted even before the 1999 Contract Law. The GPCL and the other two pieces of pre-1999 contract legislation had made such a choice. Art 111 GPCL; FECL art 18; TCL art 17 (1).
28 To the best of this author’s knowledge, there is no empirical survey on this topic so far on Chinese law.
more attractive as a remedy than ordering specific performance. This article investigates the application of specific performance in Chinese law. More specifically, the following questions are addressed: What are the justifications for Chinese courts to grant the remedy of specific performance? Under what circumstances will the remedy of specific performance be made available, and under what circumstances will its use be restricted? Put simply, to what extent will courts uphold the parties’ choice of remedies?

In answering these questions, this article is organized into four parts. The first part provides a concept of specific performance in the Chinese context. The second part describes the position of Chinese law in circumstances where specific performance is available, and the limitations on specific performance’s scope of application. Subsequently, in the third part, the underlying reasons for and against the availability of specific performance will be elaborated upon in order to demonstrate the extent that the parties’ performance interest is protected in Chinese contract law. The fourth part concludes with an outlook on the possible direction of future reform on the availability of specific performance as a remedy.

2 Sources of Law

The primary legislative source of Chinese contract law is the General Principles of Civil Law of 1986 (the “GPCL”) and the Chinese Contract Law of 1999 (the “CCL”). The GPCL, albeit sketchy, broadly covers property rights, contractual obligations, intellectual property rights, marital rights, unjustified enrichment, tort liability, and legal remedies. The CCL is the most comprehensive and specific statute on Contract in China. In practice, since the statutes are abstract and incomplete, the GPCL and the CCL was supplemented with governmental regulations and SPC’s judicial interpretations. The courts, in particular the Supreme People’s Court (the “SPC”), play an influential role in spelling out concrete rules concerning contractual disputes. Judicial decisions, which come in the form of judicial interpretations, serve as the “most important and active interpretation authority” in PRC. The judicial interpretations issued by the SPC, though not directly binding upon the courts, is sometimes referred to as “quasi-legislation”.

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29According to Article 58 of the PRC Constitution, the NPC and its Standing Committee exercise the legislative power of the state in China.
31Bing Ling, Contract Law in China (Hong Kong: Sweet and Maxwell Asia, 2002) 32.
As far as the CCL is concerned, there are two judicial interpretations issued by the SPC, namely, the Interpretation No. 1 32 and the Interpretation No. 2. 33 These judicial interpretations set the standards for the application of the CCL and clarify how the law should be applied in any given circumstances. To be specific, Interpretation No. 1 provides the details on dealing with issues such as the limitation of actions, validity of contracts, subrogation, revocation, protection of third party to the transfer of contract and the concurrent claims. Interpretation No. 2 deals with validity, performance, breach of contracts, and the “change of circumstance” to exempt parties from continued performance of contract. In summary, these two SPC judicial interpretations serve as an integral part of Chinese contract law and are directly referred to when courts hear cases.

It is notable that judicial decisions are generally not considered to be sources of Chinese contract law. However, the decisions published in the Gazette of the SPC, 34 form part of the secondary sources of law. Although the judges sitting in People’s Courts at different levels have been instructed not to directly quote these judicial decisions when deciding cases, such previous judicial decisions may have influential effect on subsequent decisions. In addition to publishing judicial interpretations, the SPC passed the regulation on establishing a case law guidance system, the Provisions on Case Guidance (“关于案例指导工作的规定”). It has been commonly accepted that China is a civil law country and does not recognize judicial precedents. Nevertheless, the function of selected model cases would seem revolutionary. But since it is a relatively new system, it is too early to assess its effect.

3 General Availability and Circumstantial Restrictions

3.1 Justifications for its General Availability

Given the civil law tradition in Chinese law, Chinese law shares many reasons on the general availability of specific performance with other civil law jurisdictions:

32 The Interpretation No.1 of the SPC on Several Issues Concerning the Application of the Contract Law was adopted on December 1, 1999.
33 The Interpretation No. 2 of the SPC on Several Issues Concerning the Application of the Contract Law (Interpretation No.2), was adopted on February 9, 2009.
34 Gazette of the SPC of the People’s Republic of China, Available at http://www.court.gov.cn/qwfb/zgrmfygb/
The availability of specific performance is justified from a moral point of view. If the view taken is that people ought to keep their promises, the law should hold the defaulting party to his promise. The defaulting party did not promise to pay the aggrieved party damages. Rather, he promised to perform the contract as agreed. Thus, the courts ought to award specific performance as a matter of principle.

As mentioned earlier, under Chinese law, specific performance is a right, rather than a remedy. It follows that as a matter of principle, the parties to a contract are entitled to enforce specific performance if requested in a timely manner. However, a question arises as to whether this Kantian right-based theory, which has long been adopted in Civil law systems, supports the protection of performance interest through actual enforcement of what has been agreed upon. From the Chinese law perspective, the answer appears to be no. If understood properly, the Kantian theory essentially focuses on the negative duty of individual rights, which emphasizes that contractual obligations must not infringe upon individual rights. This does not guarantee a positive entitlement to performance. That said, if the performance interest can be protected by other effective means, such as damages, this right-based theory should not refrain judges from awarding damages instead of ordering specific performance.

In many cases, damages are actually under-compensatory. This is particularly true in consumer sale where a monetary compensation is not always the solution if the goods are defective. Even some sufferings are not compensated when a contract is breached. For example, breach of contract can cause anger, stress, and a loss of time.

The availability of specific performance may enhance efficiency and reflect the intention of parties as the aggrieved party is provided the option of choosing the most suitable remedies in the event of breach.

3.2 Restrictions in Its Scope of Application

It remains that as a starting point, the Chinese Contract Law distinguishes between monetary obligations, i.e. paying a sum of money and non-monetary obligations. With regard to monetary obligations, Article 109 stipulates that “where a party fails to pay the price or remuneration, the other party may demand him to pay the price or remuneration.” This is in line with the approaches in the CISG and UNIDROIT Principles, which

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36 Contract Law art. 109.
37 Contract Law art. 110.
are quite straightforward. Specific performance of monetary obligations is available in accordance with the terms of the contract, irrespective of the actual loss of the aggrieved party.\(^\text{38}\) Certainly, the right to claim specific performance for monetary obligations is not available in cases in which the non-defaulting party has not yet performed the reciprocal obligation for which payment is due, and it becomes obvious that the non-defaulting party will be unwilling to accept such performance.\(^\text{39}\)

For non-monetary obligations, the parties to a contract are entitled to enforce specific performance of a non-monetary obligation if requested in a timely manner.\(^\text{40}\) There is a general availability of specific performance as a right in Chinese law, and Chinese courts are able to grant specific performance as a matter of principle. For example, contracts for the sale of goods are always specifically enforceable save for the following exceptions. The exceptions are based on three general grounds. They are impossibility, disproportionality and good faith, which are described in detail in Article 110 of the Contract Law: (1) performance would be legally or objectively (practically) impossible; (2) the subject matter of the obligation is unsuitable for enforced performance or performance would be unreasonably expensive; or (3) the aggrieved party fails to enforce specific performance within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

Firstly, impossibility of performance would stave off any order for specific performance. It is axiomatic that an order of specific performance will not be ordered if performance is physically impossible, since it would be pointless to force the defaulting party to attempt to do something beyond his power.\(^\text{41}\) A typical example is where title to the subject-matter of the contract has been transferred to a bona fide third party. While it is generally agreed that the exception applies only to “objective impossibility”, which means that performance cannot be done by anyone in the defaulting party’s position, a commentator has suggested that a “subjective impossibility” test, where performance is impossible for that particular defaulting party, would be more appropriate in commercial reality.\(^\text{42}\) If a particular defaulting party cannot perform its obligations in a given situation, it makes no sense to further ask whether others in the same position would objectively be able to perform. With this subjective impossibility test, specific performance would be excluded as long as the court is satisfied that a specific defaulting party cannot perform regardless of whether another defaulting party in the same position is able to perform.

\(^{38}\) Ling Bing, Contract Law in China, Sweet & Maxwell, 2010, 419-420.

\(^{39}\) Contract Law art. 68.

\(^{40}\) Contract Law art. 110.


\(^{42}\) Ling Bing, Contract Law in China, 421.
Secondly, there is an “unsuitability” limitation on specific performance, in Chinese law. It mainly refers to situations where performance is of such a personal character that it would be unreasonable to enforce it, e.g. contracts involving personal services. In this case, the subject matter of the obligation principally involves the personal character and distinctive skills of the promisor. For example, specific performance is unavailable where a novelist defaults on his obligation to write a book or an artist fails to paint a picture. This exception derives from the fundamental need to uphold the human dignity, liberty and freedom of the defaulting party, who is protected from being forced to perform personal duty.  

At a practical level, to enforce specific performance, the court must ensure that the stipulated performance is achieved. This compels the court to ascertain the quality of performance. However, it would be difficult for the court to determine whether an opera singer performed up to her usual standards, or whether an artist has painted a picture to the best of his ability. In these situations, specific performance should not be available as a remedy. As a result, courts will not order specific performance for non-delegable personal services, as such an order would risk violating liberty and personal freedom.

Thirdly, Chinese courts would not order specific performance when the costs incidental to actual performance of an agreed obligation would be disproportionate to the benefits to be received by the defaulting party. This disproportionality limitation is a manifestation of the principle of good faith. When the cost of performance is excessively high as compared to the performance interest of the aggrieved party, the defaulting party is allowed to avoid specific performance. For example, when a seller has to import special machinery to repair the defective goods which it delivered, and such a cost would excessively outweigh the profit the seller would have made from the sale, specific performance would not be ordered. Damages would be a more appropriate remedy in this case. Another example would be a sale of a motorcycle, where a minor painting defect is discovered by the buyer. Returning the motorcycle to the seller for repainting in conformity with the agreed standard would cost RMB 1,000, including the cost of two-way transportation. However, the painting defect is so insignificant that it would only cost the buyer RMB 100 to fix it with self-help. In such a situation, actual performance should not be ordered as a price reduction (a special kind of the payment of monetary compensation) is a more efficient way to allocate resources between the parties. In this case, the buyer cannot unreasonably insist on specific performance in circumstances where there is a reasonable alternative remedy.

Liang Huixing, Professor Liang on Law of Contract, Internal trial guidance by the High Court of Sichuan Province, 138.
Fourthly, a claim of specific performance must be made within a reasonable period of time. This is a sensible requirement supported by many domestic laws and international instruments, as it prevents undue prejudice to the defaulting party. The right to claim specific performance would be lost should the aggrieved party fail to demand a claim of actual performance within a reasonable period of time. An issue remains as to the definition of “a reasonable period of time”. Strictly, such a limitation period is not a time bar from the perspective of civil procedure law, and there is no definite rule as to its length. In practice, it seems that judges have the discretion to take the particular circumstances of each case into consideration.

Apart from the above-mentioned statutory exceptions, the general availability of specific performance is also curtailed by change of circumstances that is inherent in the civil law system. As the size of this paper is limited, controversies arising from its nature and scope of application will not be dealt with here. However, it is worth noting that although there is no specific provision in the Chinese Contract Law concerning “change of circumstances”, this principle is recognized, albeit implicitly, by the Chinese judiciary. This is evidenced by a Judicial Interpretation to accept this principle, which was issued by the Supreme People’s Court. The doctrine means that if the circumstances under which the contract was concluded have altered dramatically later so that the actual performance by strict adherence to the concluded terms deviates greatly from the original purpose of the contract, the court is entitled to exonerate the parties from the performance of the contract. The court may amend its terms or simply terminate it because these circumstances were unforeseeable and none of the parties assumed the risk for their occurrence. If the principle of change of circumstances is accepted in Chinese law, it would further restrict the aggrieved party’s right to claim specific performance. Common lawyers may instinctively think of the doctrine of frustration, which also primarily deals with the impossibility of performance. The doctrine of frustration also includes the “impossibility of purpose” situation. The major difference between English and Chinese law seems to be that when a contract is said to be frustrated, a contract is always discharged while under Chinese law the priority is always given to amendment/adjustment rather than termination. It is worth noting, however, that Chinese courts are very cautious to apply the doctrine of change of circumstances in practice. The SPC issued a circular to all level of Chinese courts that change of circumstances must be circumspectly applied and all cases which reason on this doctrine must report to high courts at the provincial level for approval and to the SPC for recordation.

45 Han Shiyuan, Damages chapter in this volume.
46 This interpretation formalized the “change of circumstance” to exempt parties from continued performance of contract, a term first mentioned in China in the case of Wuhan Gas Co v Chongqing Detection Instrument Plant way back in 1992.
47 2009年4月27日最高人民法院《关于正确使用<中华人民共和国合同法>若干问题的解释(二)服务党和国家的工作大局的通知》（法【2009】165号）
In addition, Chinese law introduced the aggrieved party’s duty to mitigate the loss, as stated in the General Principles of Civil Law (“GPCL”). The relation between mitigation principle and specific performance claim deserves discussion. Generally, under Chinese law, failure to mitigate the loss does not exclude the aggrieved party’s right to demand specific performance. This is because the mitigation principle is only applicable when calculating the actionable loss of the aggrieved party. In other words, the duty of mitigation relates only to remedy of damages and does not affect a claim of specific performance. However, since specific performance is a routine remedy in China, it would be argued that an aggrieved party might try to sidestep the mitigation duty by insisting upon the debtor’s performance as a right. However, it is difficult to rely on this argument, as there is an overriding duty of good faith that would deter the courts from ordering specific performance, if the refusal to mitigate losses appeared unreasonable. Certainly, a determined aggrieved party might try to demand specific performance, but Chinese courts could find a way to fend off such a demand. After being rejected, the aggrieved party could well find that the passage of time has made mitigation more difficult and expensive than it would have been in the first place if the defaulting party had acted promptly after notice of the default.

Therefore, despite the Chinese Contract Law drafters' preference for specific performance, they seem to have created a tension between the mitigation principle and the performance-oriented remedy.

Interestingly, although the Chinese Contract Law does not address the issue of substitute transaction, it has been generally acknowledged in the Chinese academic community and courts that specific performance cannot be claimed if a substitute transaction can be reasonably obtained. A substitute transaction provides a straightforward measure of calculating monetary compensation to fulfill the aggrieved party’s expectation interest. It should be noted, however, that finding a substitute transaction is not mandatory but at the aggrieved party’s option, unless the mitigation rule applies to compel the aggrieved party to do so. As a result, rigidly insisting on specific performance in circumstances where a reasonable substitute transaction could be obtained, without exceptional effort or expense, would be draconian.


\[48\] GPCL art.114 and Contract Law art.119(1) enunciate the rule of mitigation. This rule stipulates that the aggrieved party shall take prompt and reasonable measures to prevent further losses. If the measures are not taken, the aggrieved party is not entitled to request compensation for any further loss.

\[49\] CCL, art. 119 (1)


\[51\] Though an aggrieved party’s duty to mitigate the loss and the mitigation duty limits the defaulting party’s claim for damages, it should not preclude the right to demand specific performance or other remedies besides damages.


In English law, the existence of a substitute transaction would point towards the adequacy of damages as a remedy, thus preventing an order for specific performance. However, under Chinese law, it seems that the mere existence of a substitute does not necessarily mean the creditor has to opt for it. The term “reasonable” is essential, but it seems that there is no settled view on this point in Chinese law. This article will not go into an in-depth exploration of this question, and it suffices to state that firstly, a substitute transaction is a bar to the availability of specific performance as a remedy, and secondly, Chinese law does not statutorily specify the criteria as to what qualifies as a “reasonable” substitute transaction.

4 Repair and Replacement

Article 111 of the Chinese Contract Law, which adopted the approaches in the CISG and the UNIDROIT Principles, provides an array of remedial measures, which facilitate the actual performance of contractual obligations, when defective performance is rendered. These include the following five remedial measures, namely, repair, replacement, redoing, return of goods and price/remuneration reduction. If the delivered goods fail to meet the specified quality under the contract, the buyer is entitled to either demand that the seller bears the cost of curing the defect, or replace the goods. The buyer may also return the goods for a full refund or ask for a reduction in price. Clearly, among these five, return of goods is a remedy arising from the rescission of the contract and price reduction is a separate remedy which deserves further discussion beyond the scope of this paper. The former three measures give aggrieved parties, or buyers in cases of sale of goods contracts, a right to demand proper performance, which has been provided in the GPCL.

The remedy of “repair” refers to situations where a seller is requested to fix defective/non-conforming goods, which have already been delivered to a buyer, in accordance with the contract’s specifications. Replacement, in short, means that non-conforming goods are replaced in their entirety. In this situation, a delivery of defective goods is remedied by a subsequent delivery of replaced goods that conform to the terms of the contract. It is notable that both repair and replacement are general remedies and therefore apply to both consumer and commercial sales contracts. However, the remedies

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54 上海春申汽配市场有限公司与上海华克斯实业有限公司买卖合同纠纷上诉案 http://www.a-court.gov.cn/platformData/infoplat/pub/no1court_2802/docs/200712/d_499027.html
55 CISG art 46 (2) (3); UNIDROIT Principles art. 7.2.3.
56 Art. 134 (1) GPCL.
of repair and replacement are frequently offered by sellers on a voluntary basis in order to maintain consumer relations.\(^{57}\)

Repair and replacement, as remedial measures, serve to provide the buyer with the performance that he contracted for. Put in another way, repair and replacement will give the aggrieved party full protection of his performance interest. What then, is the relationship between these remedies and specific performance? In Chinese law, repair and replacement are regarded as sub-forms of the general right of specific performance. In some contract law textbooks, repair and replacement are put on par with continued performance as supplementary performance methods, under the heading of “concrete forms of specific performance”. Therefore, the scope of application of repair and replacement should be the same as that of specific performance, namely that of general availability, subject to exceptions. In other words, the aggrieved party is entitled to either of these remedies as of right, upon the defaulting party’s breach of his obligation to deliver goods which are in accordance with the contractual terms. Furthermore, the buyer has a free choice between repair and replacement, and can select the remedy that best suits his interests. For example, if repair cannot make the delivered goods as good as new, replacement would be a more appropriate remedy.

In what circumstances is the offer to repair and replace by the defaulting party appropriate? There is no easy answer to this, and Chinese courts take many factors into consideration when deciding this issue, including \textit{inter alia}, whether the selection of the remedy of repair is made within a reasonable time, whether the selected remedy causes unreasonable inconvenience for the defaulting party, and more importantly, whether the aggrieved party has also turned to other remedies inconsistent with repair and replacement, such as price reduction.

Some scholars have drawn a distinction between a primary obligation and a secondary obligation. The obligation to perform, which arises from the contract itself, is a primary obligation, as opposed to a secondary obligation, which is triggered by a breach of a primary obligation. That said, with this distinction, specific performance is regarded as a primary obligation and repair and replacement as secondary obligations, following the English position.\(^{58}\) However, it is argued that it is artificial to have such a distinction, as this does not necessarily mean that repair and replacement are separate remedies. They are a sub-set of the remedy of specific performance, and they should be applied as the aggrieved party deems fit.


Why is Specific Performance perceived as an unattractive remedy?

Despite being considered a routine contractual remedy, specific performance does not appear to be appealing and is therefore rarely awarded in practice. In Europe and US, there have been strong arguments in favour of the increasing availability of specific performance as a remedy in all contracts. The rationale is that specific performance is more efficient than damages because it achieves the goal of compensation better and reduces transaction costs in the negotiation and performance of contracts. However, it seems that Chinese jurisprudence is inconclusive as to whether there should be increased availability of specific performance as a remedy.

In the absence of available empirical surveys on the practical application of specific performance in China, this paper speculate that the awards of specific performance as a remedy are less frequent than commonly assumed. There is little practical difference between the application of specific performance in the common law world as compared to the civil law world. Studies reveal that demands for specific performance are rarely made in Chinese courts, and such demands are usually only granted in situations where a common law court would do the same. This does not imply that there is no longer any divergence between Chinese law and common law systems. Requests for specific performance are still granted in China in cases where they may be rejected under common law systems. The reasons for the appearance of convergence in the two systems are not doctrinal, but rather operational or practical in orientation.

The reasons for the practical similarity are generally grounded in commercial realities and enforcement costs. For example, aggrieved parties may speculate on the choice of


61 See Liang Huixing’s lecture note no. 10 of Contract law, which is available at http://wenku.baidu.com/view/07478c0abb68a98271fefab9 p 6-9


remedy. In case of a breach by the seller, the buyer may choose specific performance if prices go up and damages if prices drop. However, this speculation does not affect the infrequent application of specific performance in practice. For the following reasons, it would be ill-advised for aggrieved parties to choose to claim specific performance:

(1) From the court’s perspective, enforcing a specific performance order would require a more effective judicial mechanism than would an award for damages. Courts will, before issuing an order of specific performance, weigh the benefits to the aggrieved party and general public, against the difficulties of enforcement. If the process of enforcement would be difficult and unduly lengthy, there is a high probability that a court would decline to make such an order. For Chinese courts overburdened by a heavy docket, the additional judicial supervision required would be a waste of resources, and therefore undesirable. The process of enforcing an order for specific performance might involve substantial expenses and result in unexpected outcomes, such as further litigation or administrative petitions.64

(2) Even if there is a good chance that the court would order specific performance, the aggrieved party might want to avoid the risk of expensive and lengthy proceedings. The cost of litigation may be high due to legal fees, and it may be time-consuming to convince the court to issue a specific performance order.

(3) If the aggrieved party is very determined to demand specific performance, and even if the court finally issues a specific performance order, he still needs to conduct a cost-benefit analysis in view of the enforcement of the judgment. The effectiveness of the enforcement of court decisions has long been regarded as notoriously worrying and deficient in China.65 The court judgment (specific performance order) may, at the end of the day, remain toothless. The difficulty will be compounded if the court order to be enforced requires the performance of activities in a different city or province. Local protectionism and judicial corruption may deter the aggrieved party from enforcing specific performance in another location. It is not in the litigant’s interest to spend considerable time and effort to execute the judgment, as it would be more economically efficient to seek a quick recovery of his actual monetary losses.

(4) It would be more sensible for the aggrieved party to resort to damages when the subject—matter of the contractual obligation is generic or fungible goods.

64 Carl Minzner, “Xinfang,: an Alternative to the formal Chinese legal System” 42 Stanford Journal of International Law, 2006, 103-79.
situations, it is questionable whether the aggrieved party would choose specific performance, as monetary compensation would be sufficient to provide the aggrieved party with necessary funds to obtain replacement goods in the market.

Finally, an aggrieved party may not want the defaulting party's continued performance after the breach. Having to enforce an order of specific performance indicates the defaulting party’s reluctance to perform. Even if the defaulting party obeys the order of specific performance, the quality of their goods or performance may be affected. Gauging and maintaining the quality of performance is a practical concern, and it would be hard to complain to the court to further enforce the order of specific performance to compel the defaulting party to meet certain standards, particularly when a complicated performance is involved.

Although the claim for specific performance remains available to the aggrieved party, rational commercial parties may prefer to claim damages rather than risk wasting time and money on a claim for specific performance, when the difficulties in enforcement may well not yield favorable results. This is especially so in the light of the larger community interest of efficient usage of judicial resources. Although the aggrieved party should have the right to select a remedy by gauging the costs and benefits of such remedy, making specific performance generally available as a remedy is quite different from having to select (and subsequently enforce) it in a particular case.

It is up to the court to balance the costs and benefits of enforcing the remedy. Perhaps what makes specific performance further unappealing is that Chinese courts may exercise discretion on whether to uphold the aggrieved party’s choice of specific performance as a remedy. The question here is simple: Will the court order specific performance when contracting parties have selected specific performance as the remedy in their contract? Courts in some civil law systems, such as France and Spain, seem to have rather limited latitude in selecting another remedy, once it has been contractually agreed and the aggrieved party has made his choice. In these jurisdictions, there is great respect for the freedom of parties to agree on remedial terms. Parties should have the freedom to contract on their private matters provided there is no public interest issue involved (e.g. specific performance for matters involving smuggling or human trafficking). Moreover, such an approach would lower transaction costs, from the viewpoint of the law and economic theory.

With regard to the freedom of parties to agree on the contractual remedy before the event of a breach, the position in Chinese law is not entirely clear. While it seems that courts would be reluctant to enforce specific performance clauses even when the parties contractually agree to them, such reluctance is justified by the argument that parties cannot oust the court’s jurisdiction via their private agreements. On a doctrinal level, the court’s willingness to order specific performance hinges largely upon whether specific performance would be inconvenient or unjust. On a judicial policy level, there is an
overriding factor which impacts the court’s discretion, i.e. whether the specific performance order would be relatively easy to enforce so that the case can be quickly closed.\textsuperscript{67} This is more of an operational concern in relation to judicial case management.

6Concluding Remarks

Comparative studies have shown that while the common law world favours awarding damages over ordering specific performance, civil law systems still endorse specific performance as a primary remedy. Chinese law seems to adopt a middle-ground approach by regarding the award of specific performance as a routine remedy,\textsuperscript{68} meaning that Chinese law does not display a hierarchical preference between the two remedies. Under Chinese law, aggrieved parties are free to request specific performance or other remedies that they prefer. This indicates the general availability of specific performance as a contractual remedy. However, in order to enhance efficiency by ensuring that the aggrieved party’s interests are not protected at the expense of the defaulting party’s legitimate interests, several restrictions are put into place to limit the application of specific performance (and the sub-remedies of repair and replacement). The restrictions to the rule of general availability are as significant as the rule itself. Damages are awarded when specific performance is impossible, impractical or excessive, or when the aggrieved party does not request for specific performance within a reasonable period of time.

To a large extent, the main emphasis in the Chinese law of remedy is placed on the performance interests of the promisee. The middle-ground approach appears to work well in the Chinese context, where parties are given a free hand in selecting the appropriate remedy because they are in the best position to determine whether damages or specific performance is the better compensatory mechanism. The underlying reason is that parties may have more information available than the court to make a self-interested decision. However, Chinese courts still retain their discretion as to whether to award specific performance as a remedy, even if the aggrieved party requests it. It may seem that Lord Hoffman’s statement holds true, at least so far as the Chinese legal system is concerned. Different legal systems have reached similar results, on the practical level, with regard to

\textsuperscript{67} Gu Quan, an Analysis on the Scope of Application of specific performance in Contract Law, 2012 (24) People’s Judicature, 28-31.
\textsuperscript{68} John Y. Gotanda, Damages in Lieu of Performance Because of Breach of Contract, This paper can be downloaded from the Social Science Research Network Electronic Paper Collection, available at http://ssrn.com/abstract=917424
the practical usage of specific performance as a contractual remedy. In recent years, the Chinese legal system has utilized specific performance less often, albeit on the reasonable grounds mentioned above. However, this comment is only based on anecdotal evidence. It would be useful to see more nuanced empirical studies on the frequency of use by the Chinese courts of specific performance as a contractual remedy.

69 It is sometimes argued that the primacy of the specific performance in civil law countries is a myth. See H. Lando & C. Rose, 479. The differences between civil and common law systems are not always as stark as might at first appear.