ARTICLES

For Specific Performance Under the United Nations Sales Convention

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I. INTRODUCTION

A uniform statutory scheme acceptable to a number of nations requires compromise and consensus. The United Nations Convention on Contracts for the International Sale of Goods† (the CISG or Convention) exhibits these twin vir-

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tues. However, it also exhibits a concomitant vice: its statutory provisions are highly general and brief. Such vague formulations give little guidance to courts that must apply the CISG's provisions to a given dispute. In particular, they provide few clues as to how courts should reconcile seemingly inconsistent provisions. The CISG gives even less guidance when courts in different signatory nations are required to apply its overarching statutory scheme. Guidance is at a minimum when courts in different signatory nations are applying significantly different domestic laws and legal doctrines.

The CISG's provisions on specific performance illustrate the problem. Article 46(1) provides that a buyer may require the seller to perform his obligations unless the buyer has resorted to an inconsistent remedy. Article 62 gives the seller the corresponding remedy: an action for the price. Each article appears to make specific performance routinely available. Article 28, however, may limit the availability of specific performance. Under article 28, a "court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." The CISG leaves unresolved at least five issues: (1) Under what conditions does domestic law concerning specific performance take priority over articles 46 and 62? (2) Does domestic law restrict the availability of specific performance such that it is not routinely available under the Convention?; (3) Is a court bound to grant specific performance, even if it would not do so under its domestic law? (4) Are the courts of a signatory nation bound to recognize or enforce a decree of specific performance entered by the courts of another signatory nation pursuant to the Convention when the domestic court could not itself have entered a similar decree in the dispute?; (5) Should the courts of common law signatory nations make specific performance routinely available under the Convention, their domestic law and legal doctrine notwithstanding?

The recognition and enforcement of judgments (issue four) are not addressed by the CISG. Thus, I shall be concerned only with issues one, two, three, and five. The first three issues deal with the relationship between the Convention and domestic laws governing specific performance. Discussion of these issues in Sections II through IV forces me to address the relationship between

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contracting parties to the CISG. Memorandum from the Treaty Section of the Office of Legal Affairs of the United Nations to Steven Walt (Jan. 10, 1991) (copy on file with the Texas International Law Journal). To date, no court has applied the CISG's provisions.

2. CISG, supra note 1, art. 46(1).

3. Id. art. 62 ("The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement").

4. Id. art. 28.

the remedial provisions (articles 46 and 62) and a general provision (article 28) of the CISG. I argue, based on the CISG’s documentary history and domestic case law, that specific performance is routinely available under the Convention. Although article 28 has priority over articles 46 and 62, domestic law does not significantly restrict the availability of specific performance for those parties requesting it under articles 46 or 62 of the Convention. The relation of the general provision to the remedial provisions, I argue, is one of unconstraining priority.

Section V is concerned with issue five, a normative issue: Should the courts of common law signatory nations make specific performance routinely available? This issue is important because issues one through four depend, at least in part, on its resolution. For instance, whether domestic rules on specific performance should take priority over articles 46 and 62 of the CISG depends on whether the domestic rules have more merit than the CISG’s rules. I argue that specific performance should be routinely available under the CISG. In Section V, I argue that the traditional common law rationales for limiting the availability of specific performance are unconvincing. I also present a normative case for the unrestricted availability of specific performance. A concluding section (Section VI) proposes an approach to application of the CISG’s remedial provisions based on Sections II through V.

II. REQUIRING PERFORMANCE UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

All forums limit the availability of specific performance. But important differences exist as to the extent of these limitations. A country’s domestic law could take one of four approaches to specific performance. First, specific performance could be made available generally, subject to narrow exceptions. Second, specific performance could be made available only for certain types of obligations. A third possibility is to treat specific performance as an exceptional remedy, available only in a narrow range of circumstances. Finally, specific performance could be made entirely unavailable. Types of forums can be ordered according to the availability of specific relief. Because remedial rights are defined by available remedies, the right to specific relief varies among forums.

The CISG provides injured parties a broad right to contractual performance. This remedial right is broad in three respects. First, an injured seller or buyer can elect between requiring performance and recovering damages. Article 46(1) provides that “[t]he buyer may require performance by the seller . . . unless

7. See infra notes 101-104.
8. See id.
the buyer has resorted to a remedy which is inconsistent with this requirement."9 Under articles 46 and 62, a court lacks the discretion to refuse an injured party's request for a decree of specific performance.10 Second, there is only one situation in which an injured buyer is unable to demand specific performance under article 46. This is the circumstance in which the buyer has "resorted to a remedy which is inconsistent" with specific performance. Such inconsistent remedies include: (1) avoidance of the contract under articles 26, 49, or 81; (2) reduction of the contract price under article 50; and (3) a claim for damages based on the market-contract price differential under article 74.11 Absent resort to such remedies, the buyer's right to specific performance is unrestricted under article 46.

It is worth noting what is not required under articles 46 and 62. Identification of the goods to the contract is not a prerequisite to a claim for specific performance.12 Nor are injured buyers or sellers required to demonstrate that

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9. CISG, supra note 1, art. 46(1). The "buyer may require" language of article 46(1) is somewhat misleading. Although the article 46(1) is directed at the injured buyer, the article anticipates that a court will order the seller to perform upon the buyer's request. Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, art. 42, para. 8, U.N. Doc. A/CONF.97/5 (1979) [hereinafter Secretariat Commentary], reprinted in J. HONOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 428 (1989).

10. See Secretariat Commentary, supra note 9, at 417 ("It should be noted that articles [46] and [62], when not limited by this article [article 28], have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party").

11. Not all remedial claims preclude resort to specific performance. Article 45(2) provides that "[t]he buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." CISG, supra note 1, art. 45(1). Only some claims for damages are precluded by resort to articles 46 and 62. The example given in the text is that of a precluded claim.

12. Articles 46 and 62 contain no express requirement that the goods be identified to the contract. See id. arts. 46, 62; cf. id. art. 69(3) (if the goods are not identified to the contract, they are not considered placed at the buyer's disposal until identification occurs); id. art. 67(2) (risk of loss does not pass to the buyer until the goods are identified to the contract). Nor can such a requirement be inferred from the terms of articles 46 and 62. For instance, if the contract calls for the seller to arrange for shipment, the seller would breach by failing to do so. See id. art. 32(2) ("If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation."). Failure to arrange for shipment could result in the goods not being marked or otherwise identified. Not arranging for shipment is presumably a breach of one of the seller's obligations under the contract. But article 46 permits the buyer to "require performance by the seller of his obligations . . . ." Id. art. 46(1). Since the seller has breached one of his obligations, the buyer may be awarded specific relief in the form of an order for the seller to arrange for carriage. The order could be issued without the goods being marked for shipment or otherwise identified to the contract. In fact, the order would require the goods to be identified. Thus, article 46 (and article 62) cannot be taken to imply that the goods already be identified to the contract.

Cf. U.C.C. § 2-716 comment 2 (1990) ("specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting"); STATE OF NEW YORK LAW REVISION COMMN, 1 STUDY OF THE UNIFORM COMMERCIAL CODE 575-77 (reprint ed. 1980) (noting difference between § 2-716(3), which requires identification of the goods, and § 2-716(1), which does not); ONTARIO LAW REFORM COMMN, 2 REPORT ON SALE OF GOODS 441 (1979) (noting requirement that
they cannot reasonably purchase or resell the goods under contract. The drafting history clearly supports this conclusion. The United Nations Commission on International Trade Law (UNCITRAL) Working Group began drafting the CISG’s provisions by consulting the 1964 Hague Conventions: the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).\textsuperscript{13} Article 25 of the ULIS precluded an injured buyer from requiring performance of the seller “if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.”\textsuperscript{14} A UNCITRAL Special Working Group’s proposed version of what is now article 46 retained this language.\textsuperscript{15} However, the UNCITRAL Committee rejected this version of the article. The Committee noted that the proposal would “unjustifiably restrict”\textsuperscript{16} the buyer’s right to require contract performance. In response to the 1978 draft of the CISG, the United States delegate proposed that the pertinent language be reincorporated into what is now article 46.\textsuperscript{17} The suggestion was repeated by the same delegate at the 1980 Vienna Diplomatic Conference.\textsuperscript{18} This proposal was also rejected.\textsuperscript{19} Likewise, the United States proposed amending article 77 (article 71 in the 1980 draft) to reduce a claim against the party in breach if the injured party failed to mitigate damages. As presented, the proposal would have applied to any form of relief.\textsuperscript{20} The proposal was defeated. As enacted, article 77 appears in the section entitled
\begin{itemize}
  \item[\textsuperscript{13}] See J. HONNOLD, supra note 9, at 6; J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 37 (1985); Sono, The Vienna Sales Convention: History and Perspective, in INTERNATIONAL LAW OF GOODS: DOBRONIK LECTURES I-4 (P. Volken & P. Saricovic eds. 1986).
  \item[\textsuperscript{16}] Id.
  \item[\textsuperscript{19}] Id. paras. 71-72.
\end{itemize}
“Damages.” It provides that “the party in breach may claim a reduction in damages in the amount by which the loss should have been mitigated.”

Article 62 appears in the section governing remedies for breach of contract by the buyer and is concerned with the availability of specific performance to the seller. It is not concerned with the availability of damages. Hence, neither article 46 nor article 62 requires the unavailability of cover or resale as a prerequisite for ordering specific relief.

Third, the right to specific performance is broad in scope. The buyer can require the seller to perform the full range of her contractual obligations. As far as article 46 goes, no distinction is made between different sorts of breaches. The buyer can require the seller to perform all “his obligations” under the contract. For example, article 30 requires the seller to deliver goods in conformity with the contract and the articles of the CISG. Article 41 imposes on the seller what is in effect a warranty of good title. According to article 41, the “seller must deliver goods which are free from any right or claim of a third party, unless the buyer agrees to take the goods subject to that right or claim.” Therefore, the seller’s obligations include delivery of goods free of encumbrances or third-party claims.

Because article 41 imposes this obligation on the seller, the reasonable inference seems to be that the buyer can seek specific performance under article 46 if the obligation is breached.

Unfortunately, because the documentary history is inconclusive, this last point is not entirely clear. On the one hand, the seller’s obligations under article 41 include the delivery of goods free from all well-founded third-party claims. Furthermore, the seller bears the burden of proving that a claim is not well-founded.

On the other hand, article 46 allows the buyer who has received goods that “do not conform with the contract” to require delivery of substitute goods or to require the seller to repair the goods. A Secretariat Commentary suggests that the obligation to deliver conforming goods is distinct from the obligation to deliver unencumbered goods. Article 46 does not refer to unencumbered goods. This suggests that the buyer’s right to specific performance

21. CISG, supra note 1, art. 77 (emphasis added).

22. Id. art. 30 (“The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention”).

23. Id. art. 41.

24. Cf. U.C.C. § 2-106(2) (1990) (“Goods or conduct including any part of the performance are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract”); U.C.C. § 2-312 (1990) (existence of a warranty of title).


26. Secretariat Commentary, supra note 9, art. 39, para. 4, reprinted in J. HONNOLD, supra note 9, at 426.

27. CISG, supra note 1, art. 46(2), (3).

28. Secretariat Commentary, supra note 9, art. 39, para. 7, reprinted in J. HONNOLD, supra note 9, at 426.
does not include a right to require the seller to deliver goods free of third-party claims. At the Diplomatic Conference, Norway proposed an amendment to article 41 that would have made explicit the buyer’s right to invoke articles 41 through 47 in cases in which the seller breached the warranty of good title. The proposed amendment was defeated. Rejection of the amendment was not accompanied by discussion. It is therefore difficult to draw any conclusions from the outcome of the Norwegian proposal.

Diplomatic history notwithstanding, the pertinent provisions are clear. Article 41 appears in “Chapter II: Obligations of the Seller” and provides that “[t]he seller must deliver goods which are free from any right or claim of a third party.” Article 46 gives the buyer the remedial right of specific performance. Thus, article 46, when read in conjunction with article 41, gives the buyer a right to specific performance when the seller breaches the warranty of good title.

The form that specific performance takes depends on the circumstances surrounding the sale. There are two possible circumstances. In one circumstance, the seller (S) fails to deliver the goods to the buyer (B), and S’s creditor (C) claims a security interest in the goods. An order of specific performance under article 46(1) would require S to deliver the goods to B free of C’s claims. In a second circumstance, S delivers the goods to B, but C claims a security interest in the goods. Article 46(3) does not apply because a remedy by “repair” is not possible. In this circumstance, if the nonconformity constitutes a material breach, an order of specific performance may, under article 46(2), require S to deliver substitute goods free of C’s claims. Alternatively, S may be required to sue C in order to quiet C’s claim against the goods. S can also be required to pay off its debt to C, thereby extinguishing C’s security interest in the goods.

III. A LIMITATION ON SPECIFIC PERFORMANCE

Article 28 limits the availability of specific performance under articles 46 and 62. Article 28 provides:

29. *Id.* para. 8.
31. CISG, *supra* note 1, art. 46(3) (“If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances.”).
32. *Id.* art. 46(2) (“If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract.”).
33. *Secretariat Commentary, supra* note 9, reprinted in J. HONNOLD, supra note 9, at 426.
34. *Id.*
If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.\(^{35}\)

In other words, a court is not required to grant specific performance of a foreign contract unless it would require specific performance of a similar domestic contract. This limitation was the result of a compromise between civil law countries, which tend to grant specific performance more routinely, and common law countries, which tend to view specific performance as an extraordinary remedy.\(^{36}\) Delegates to the Diplomatic Conference understood article 28 to permit common law courts to refuse to grant specific performance of contracts governed by the CISG when they would not grant specific performance of a similar domestic contract.\(^{37}\) Here they obviously are correct. The limitation also has been taken to be stringent in effect. I shall argue that this is false: the types of international sales contracts for which specific performance is sought are those types of contracts for which common law courts routinely grant specific performance. Article 28 does not restrict the availability of specific performance under the CISG.

A. Article 28 Clarified

There are two important ambiguities in article 28. These are the references to “its own law” and to “similar contracts of sale not governed by this Convention.” The meaning of the statement “its own law” is far from apparent. This phrase could refer to the substantive domestic law of the forum or to the

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35. CISG, supra note 1, art. 28.
36. In practice the difference in tendency may be more apparent than real. See infra notes 37, 76, 107, 108, and text accompanying notes 107-109.

The effect of article 28 is not limited to common law forums. Article 28 also potentially restricts the availability of specific performance in civil law forums. Such relief is unavailable under German law after the expiration of a Nachfrist, a demand for performance within a set time period. G. Treitel, supra note 6, at 48. Only monetary damages (Schadenersatz) can be recovered in the event of noncompliance with the Nachfrist. Id. at 52-53. Similarly, specific performance (execution en nature) is unavailable under French law for obligations requiring personal performance (obligation de faire). See B. Nicholas, FRENCH LAW OF CONTRACT 213 (1962); G. Treitel, supra note 6, at 56-57. Article 28 insulates German and French forums from granting specific performance in such cases.
forum's entire law, including its conflict of law rules. Article 28 is un-

enlightening on this point, and the diplomatic history is inconclusive at best.38

The better view is that "its own law" refers only to the forum's substantive
domestic law. Any other interpretation would defeat the apparent purpose of
article 28. The early drafting history indicates that the provision was intro-
duced to avoid requiring a court to order specific performance when that
remedy does not exist under the domestic law of the forum.39 Subsequent draft-
ing history reveals that article 28 was amended to ensure that a jurisdiction that

treats specific performance as exceptional would not be required to order such

relief.40 Interpreting "its own law" as referring to a forum's entire law, includ-
ing its conflict-of-law rules, would defeat the purpose of the amendment. Sup-
pose, for example, that a forum's conflict-of-law rules require the application
of a second nation's law. If specific performance is available under the second
nation's law, the forum would be required to order specific performance under
the "entire law" construction of article 28. This result would occur even if
specific performance was entirely unavailable or considered an exceptional
remedy in the forum. Construing "its own law" as referring to the forum's

substantive domestic law avoids this result. This construction also is more con-

sistent with the drafting history of article 28 and with conflict of law principles
used to avoid problems of renvoi.41 Therefore, it is the preferred interpretation
of article 28. As clarified, the restriction provided by article 28 is: A court
need not order specific performance unless it would do so under its own domes-
tic substantive law.

38. See J. HONNOLD, supra note 13, at 196; Conference on Contracts for the International Sale


39. See Secretariat Commentary, supra note 9, art. 26, para. 3, reprinted in J. HONNOLD, supra
note 9, at 417; Kastely, The Right to Require Performance in International Sales: Towards an

40. See Conference on Contracts for the International Sale of Goods, Mar. 10-Apr. 11, 1980,
A/CONF.97/C.1/SR.13 (1980), reprinted in J. HONNOLD, supra note 9, at 525-26; cf. Farnsworth,
Damages and Specific Relief, 27 AM. J. COMP. L. 247, 250 (1979); Lando, Specific Performance,
in COMMENTARY ON THE INTERNATIONAL SALES LAW 233 (C. Bianca & M. Bonnell eds. 1987).

41. Cf. Draft Convention on the Law Applicable to Contracts for the International Sale of
Goods, art. 15, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: PROCEEDINGS OF THE
EXTRAORDINARY SESSION 14 TO 30 OCTOBER 1985 169 (Permanent Bureau of the Conference ed. 1987)
("In this Convention, the word 'law' means the law in force in a State, other than its rules of private
frustrate goals of governmental-interest analysis); RESTATEMENT (SECOND) OF CONFLICTS § 8 comment
k (1969).

"The 'doctrine of renvoi' is a doctrine under which [a] court in resorting to foreign law adopts
rules of foreign law as to conflict of laws, 'which rules may in turn refer court back to law of
forum.' BLACK'S LAW DICTIONARY 1167 (5th ed. 1979). See, e.g., University of Chicago v. Dater,
Next, consider the phrase, "in respect of similar contracts of sale not governed by this Convention." Article 28's limitation on specific performance does not extend to all international sales contracts. It applies only to "similar contracts not governed by this Convention." Here, "similar contracts" are those contracts that, at a minimum, govern subject matters comparable to those to which the CISG applies. For example, because contracts for the sale of consumption goods to consumers are not covered by the CISG, such contracts are not "similar contracts" within the meaning of article 28. Article 2 lists the types of sales to which the CISG does not apply:

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.43

Therefore, all sales contracts that do not fall within article 2 are potentially "similar contracts."

"Contracts of sale not governed by this Convention" refers to contracts outside the scope of CISG. They are contracts for the sale of goods between parties whose places of business are in the same nation or in at least one nonsignatory nation or when conflict of laws rules select a nonsignatory nation's law to govern the contract.44 Therefore, generally speaking, "similar contracts of sale not governed by this Convention" consist of contracts for the domestic sale of goods or contracts for the sale of goods between parties in noncontracting states.45 In the United States, contracts for the domestic sale of goods are

42. See CISG, supra note 1, art. 2(a).
43. Id. art. 2.
44. See id. art. 1(1) ("This Convention applies to contracts for the sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.").
governed by Article 2 of the Uniform Commercial Code (UCC). Article 28 therefore requires a United States court to ascertain whether specific performance is available for “similar contracts of sale” under the UCC. A comparison is needed: that between the subject matters of contracts governed by the CISG and the subject matters of similar domestic contracts governed by domestic law.

Article 28’s reference to “similar contracts of sale” is somewhat vague and must be characterized more precisely. Domestic law may provide specific performance for only some contracts whose subject matter falls within the CISG’s scope. The similarity therefore must go beyond the general subject matter of the contract. What features of the contract should a court look at in determining whether a contract governed by the CISG is similar to the types of contracts for which specific performance is available under domestic law? Price is not a relevant feature. True, comparable goods will be sold internationally only if they are offered at a lower price than locally produced goods. Such a comparative price advantage may result from differences in transportation costs, import-export restrictions, subsidies, tariffs, technology, and factor endowments. However, price disparities between comparable goods are also present within domestic markets, caused by at least some of the same factors. The price term therefore does not provide a relevant basis for comparing a contract for the international sale of goods with a domestic contract for which specific performance is available.

Nor is the solvency of the breaching party or the financial situation of the injured party relevant to the application of article 28. The comparison required by article 28 is between “similar contracts of sale not governed by this Convention.” The availability of funds to purchase substitute goods is a fact about the injured buyer. And having sufficient funds to pay damages to an injured buyer is a fact about the breaching seller. Both facts do not concern the subject matter of the contract or the market for the goods under contract. They have nothing to do with the availability of substitute goods. Thus, specific performance cases that turn on the breaching party’s solvency are


48. CISG, supra note 1, art. 28 (emphasis added).
irrelevant. In *Proyectos Electronicos, S.A. v. Alper*, for instance, the Bankruptcy Court granted the buyer specific performance under UCC § 2-716 because the seller was insolvent. Bankruptcy law, a topic outside the scope of the CISG, was therefore pertinent. The subject matter of the contract, the contractual provisions, and the market in which the goods were bought or sold were not factors in the Bankruptcy Court’s decision to order specific performance.

In *Proyectos*, the buyer purchased electronic equipment from the seller and paid in advance of shipment. Prior to shipment, the seller filed a bankruptcy petition. The court lifted the automatic stay, requiring the bankruptcy trustee to turn over the electronic equipment to the buyer. In doing so, it found that requiring the buyer to cover and recover the cover-contract price differential from the seller would be an “illusory hope.” The buyer, as an unsecured creditor, would not be made whole by a damage award. The court therefore determined that the seller’s insolvency was within the “other proper circumstances” of § 2-716 and ordered specific performance. A United States court

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51. The CISG is silent on bankruptcy issues in general and on issues concerning preferences in particular. See CISG, supra note 1, art. 4 (“This Convention governs only the formation of the contract of sale and the rights and obligations of seller and the buyer arising from such a contract.”).
54. *Id.*
55. *Id.*
deciding whether to grant specific performance under the CISG could not look to Proyectos as evidence of how similar contracts would be handled under United States law. The contracts would not be similar within the meaning of article 28 just because an insolvent seller was involved.

Identifying the pertinent similarity in turn requires identification of the distinguishing features of international sales contracts of goods. As noted, price terms and the financial condition of the parties are not relevant distinguishing features. Two characteristic features of the subject matter of international sales contracts instead are relevant: either the goods sold are nonstandard goods in the buyer’s local market or the supply of goods is inelastic in the buyer’s local market.66 A paradigmatic instance is the sale of a customized sophisticated computer in short supply in the market in which the buyer’s place of business is located. Another paradigmatic instance is the sale of an otherwise generic computer in short supply in the buyer’s local market. A third instance is the sale of a good under trademark, the trademark differentiating the good from otherwise undifferentiated substitutes. The limiting case is one in which a good is entirely unavailable for purchase in a local market. In each instance, resort to an international purchase would be unnecessary if a price-equivalent substitute were available in the domestic market.

Limitations in the available supply of standardized or nonstandardized goods in a local market therefore are relevant features. The “similar” domestic contracts referred to in article 28 are contracts for goods having these features. In the vast majority of cases in which the buyer will seek specific performance of a contract governed by the CISG, the goods will be nonstandardized goods or goods in short supply in the buyer’s local market.67 Thus, on the domestic level, the relevant comparison dictated by article 28 is with contracts for the sale of nonstandardized goods or goods in short supply. Section 2-716(1) of the UCC allows a court to order specific performance under statutorily specified conditions.68 Thus, article 28 requires a United States court to grant specific

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66. See Secretariat Commentary, supra note 9, art. 42, para. 1, reprinted in J. HONOLD, supra note 9, at 428:

[If] the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true when alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

67. See id.

68. See infra note 64.
performance only if, applying § 2-716(1), it would do so when a contract involves the sale of goods in short supply in the buyer's local market. Article 28 gives no discretion to a court. If specific relief would be ordered under § 2-716(1), a court must make the remedy available under the CISG. The injured buyer, not the court, has discretion by way of electing between remedies.

B. Article 28 and the Uniform Commercial Code

Assume that the CISG governs a particular contract and that suit is brought in the United States for nonperformance of the contract. Assume also that the buyer, the injured party, seeks an order of specific performance. A United States court deciding whether specific performance must be granted has to engage in the following inquiry: First, the court must determine whether the buyer requesting specific performance is entitled to that remedy under article 46. Second, a finding is needed as to whether specific performance would be ordered under § 2-716(1) of the UCC. Required is an answer to the properly posed counterfactual question: Would the court, invoking § 2-716(1), order specific performance of the contract were it a domestic contract of sale and similar in subject matter to the contract governed by the CISG? If the court would order specific performance in the counterfactually specified circumstance, it must too; otherwise not. The court has no discretion on this point. The interpretation and application of § 2-716(1) therefore is crucial to the court's inquiry.

IV. SPECIFIC PERFORMANCE UNDER THE UNIFORM COMMERCIAL CODE

Section 2-716(1) of the UCC provides that a court may order specific performance when the contracted goods are "unique or in other proper circumstances." Section 2-716(1) does not give the injured buyer an unrestricted right to elect specific performance. The statute's reference to uniqueness of the goods and to "other proper circumstances" demonstrates this much. But the issue is not whether the right to elect specific performance is always available under § 2-716(1). For the issue is not whether a right of election of remedy

59. Louisiana, of course, is the sole exception, since it has not adopted Article 2 of the UCC. Article 1986 of the Louisiana Civil Code provides that "the court shall grant specific performance . . . if the obligee so demands," where the obligor fails "to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument." La. Civ. Code Ann. Art. 1986(1) (West 1984). A court can deny specific relief "if specific performance is impracticable." Id. Because specific relief is generally available in Louisiana, my arguments about the availability of specific performance in the United States apply to Louisiana as well.

60. See supra notes 9-15, 33 & 34 and accompanying text.

61. See supra Section III.A.

62. See CISG, supra note 1, art. 28 ("unless the court would do so"); cf. supra text accompanying notes 35 & 37.

is always available. It is whether an injured buyer has the right to elect specific performance under a given set of facts and circumstances.\textsuperscript{64} Here the question is whether specific performance is available when the goods are in short supply in the buyer's local market. If specific performance would be available under the UCC, the buyer is entitled to specific performance under the CISG. Granted, a decree of specific relief is discretionary in nature.\textsuperscript{65} A court need not give automatic effect to a request for specific performance. But the concession is innocuous. When the statutory conditions for awarding specific relief obtain, a court cannot refuse to award such relief upon request.\textsuperscript{66} Specific relief is not a discretionary remedy in this sense. Thus, under article 28, the question is: Applying § 2-716(1), does a nonbreaching buyer have a right to specific performance when the contract involves the sale of goods in short supply in the buyer's local market?

In applying § 2-716(1), the replaceability of the goods is generally the key issue. Suppose that the seller repudiates a domestic sales contract. If the goods are in short supply, the buyer will have difficulty replacing the goods by purchasing substitutes. Of course, difficulty of replacement is not the same as absolute irreplaceability.\textsuperscript{67} Ordinarily, some goods are produced and some buyers are supplied even during severe shortages. There is almost always a market-clearing price at which a good will be supplied. If perfect or close substitutes are available, the goods are not "unique." Sometimes, however, no adequate substitute goods are available. In \textit{Copylease Corp. of America v. Memorex Corp.},\textsuperscript{68} the buyer argued that it could not cover, because alternative supplies of toner were "distinctly inferior."\textsuperscript{69} The court held that specific performance

\textsuperscript{64} Specific performance, like other forms of equitable relief, is a discretionary remedy. \textit{See} U.C.C. § 2-716(1) (1990) ("Specific performance may be decreed . . . "); U.C.C. § 2-716 comment 1 (1990) (§ 2-716(1) is not intended to impair the exercise of a court's "sound discretion"); \textit{Erbert v. Hancheit Mfg. Div. MWA}, 41 Pa. D. & C.3d 659, 663 (Somerset County 1983). \textit{Cf. Restatement (Second) of Contracts} § 357 comment c (1979). However, the fact that a remedy is discretionary does not mean that a court has the license to be arbitrary. If the plaintiff meets the relevant statutory or common law criteria, the court cannot refuse to award specific performance. \textit{See Laclede Gas Co. v. Amoco Oil Co.}, 522 F.2d 33, 39 (8th Cir. 1975) (trial court's discretion whether to order specific performance is limited; "when certain equitable rules have been met and the contract is fair and plain, 'specific performance goes as a matter of right'") (citations omitted); \textit{Miller v. Coffeen}, 365 Mo. 204, 205, 200 S.W.2d 100, 102 (Mo. 1955) (when certain equitable rules are satisfied, specific performance is a matter of right); \textit{DiPompeo v. Preston}, 385 Pa. 512, 519, 123 A.2d 617, 675 (1956); \textit{McCormick Dray Line, Inc. v. Lovell}, 6 Lyc. 110, 115, 13 Pa. D. & C.2d 464, 467 (1957).

\textsuperscript{65} \textit{See id.}

\textsuperscript{66} \textit{See Laclede Gas Co. v. Amoco Oil Co.}, 522 F.2d 33, 39 (8th Cir. 1975); \textit{Miller v. Coffeen}, 365 Mo. 204, 205, 200 S.W.2d 100, 102 (Mo. 1955); \textit{McCormick Dray Line, Inc. v. Lovell}, 6 Lyc. 110, 115, 13 Pa. D. & C.2d 464, 467 (1957); \textit{DiPompeo v. Preston}, 385 Pa. 512, 519, 123 A.2d 671, 675 (1956).

\textsuperscript{67} \textit{Cf. First Nat'l State Bank v. Commercial Fed. Sav.}, 455 F. Supp. 464, 470 (N.J. 1978) ("the question turns on whether the subject is unavailable in similar form").

\textsuperscript{68} 408 F. Supp. 738 (S.D.N.Y. 1976).

\textsuperscript{69} \textit{Id.} at 758.
would be granted if the buyer’s allegations were proven. And, in *Ace Equip. Co., Inc. v. Aqua Chem, Inc.*, the court granted specific performance to the buyer upon finding that it was "unlikely" that a substitute used machine could be located.

Usually, however, substitutes are available. The buyer’s claim is merely that cover is difficult rather than impossible. Courts have divided over whether specific performance is to be granted in these circumstances. A minority of courts hold that damages are adequate if cover is merely difficult. Accordingly, specific performance has been denied. But even here judicial treatment can be misleading. For some of these courts have allowed buyers to recover the equivalent of specific relief when § 2-716(1) is not satisfied. Specifically, buyers have been allowed to recover against *third party buyers* of the breaching seller under § 2-722. Section 2-722 provides in pertinent part that

[w]here a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract . . . a right of action against the third party is in either party to the contract for sale who has title to or a security interest or special property or an insurable interest in the goods . . . .

Injured buyers have recovered damages from third party buyers of the seller based on conversion, an “actionable injury” under § 2-722. Where the measure of damages for conversion is the fair market value at the time that the third party purchases, the injured buyer’s damages can equal a recovery by specific performance. For example, suppose the contract price is $70 and the now-increased market value of the good under contract is $120. Suppose too that the injured buyer (B1) has prepaid the contract price. And suppose that the seller (S) breaches by selling to another buyer (B2) for $120, the now-competitive market price. B1 will not be granted specific relief against S if cover is feasible. However, if B1 can recover in conversion against B2, B1’s recovery is $120. B1 would have realized a net recovery of $50 had specific performance been ordered ($120 - $70 = $50). The same net recovery ($50) therefore is realized by successfully invoking § 2-722: $120 is recovered from B2, less $70, the prepaid contract price. B1 recovers indirectly in conversion.

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74. *See supra* note 72.
from B2 what could not be recovered directly from S by way of specific performance.  

Most courts, however, do not require a showing that cover is impossible. Specific performance is granted even if cover is merely difficult. In such cases, courts simply may deem the goods “unique.” Four cases illustrate the majority approach. *Mitchell-Hunt Cotton Co. v. Waldrep* involved an output contract for the sale of cotton. After the contract was made, a cotton shortage developed, causing the market price to rise. The seller refused to deliver the cotton, and the buyer sought specific performance. The court found that “there will be very little cotton available for purchase in the open market through the 1973 cotton season.” There was no finding that substitute cotton could not be purchased from other buyers or that scarcity had rendered substitute cotton entirely unavailable. Nonetheless, the court granted specific performance, deeming the cotton “unique and irreplaceable because of the scarcity of cotton.”

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75. For a recommendation that this possibility be precluded by amendment of pertinent UCC comments, see PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 242 (Mar. 1, 1990). A recommendation preserving the possibility and extending the scope of § 2-722(a) to any interest in goods, not only an ownership or security interest, appears in Note, Disentangling Sales Law from the Sales Construct: A Proposal to Extend the Scope of Article 2 of the UCC, 96 HARV. L. REV. 470, 491 (1982).


78. Id. at 1219.

79. In R.L. Kinsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975), the court simply accepted the parties’ stipulation that the cotton under contract was “unique.”

Similarly, the court in *Colorado-Ute Electric Ass'n v. Envirotech Corp.*,\(^{81}\) deemed a specially designed pollution-control device "unique" and "essentially irreplaceable" once installed.\(^ {82}\) This despite the fact that five other companies had initially bid on the project. No showing was made that another company could not bring the installed unit's performance to contract warranties, the breach for which specific performance was sought. The court implicitly recognized the availability of substitute service when it deemed the unit "essentially irreplaceable."\(^ {83}\) Repair or replacement was not impossible. It simply was difficult, as was a substitute purchase in *Mitchell-Hunt*.

*Kaiser Trading Co. v. Associated Metals & Minerals Co.*,\(^ {84}\) provides another example of the majority approach. In *Kaiser*, the court ordered delivery of 3500 tons of cryolite under contract.\(^ {85}\) In doing so, the court acknowledged that a few hundred tons were available on the open market. The available quantity, however, fell far short of the quantity for which the buyer had contracted.\(^ {86}\) The remainder of marketable cryolite was otherwise committed under long-term contracts to other buyers. *Kaiser*, the buyer, could have partially covered by purchasing the seller's available cryolite. Furthermore, *Kaiser* could have completely covered by contracting with other buyers who already had long-term contracts for the delivery of cryolite. Presumably, covering in this manner would have been costly. It would not, however, have been impossible. Yet, in granting specific performance, the court did not require the buyer to cover at all.

In *Laclede Gas Co. v. Amoco Oil Co.*,\(^ {87}\) the dispute involved a long-term requirements contract for the delivery of propane. In remanding the case with instructions to enter a decree of specific performance, the court found that propane was readily available on the open market.\(^ {88}\) No evidence was presented to show that the quantity available was insufficient to satisfy the buyer's requirements. The court also accepted expert testimony that the buyer "probably" could not obtain another long-term contract. Determining that the buyer would face "considerable expense and trouble"\(^ {89}\) in obtaining new contracts, the court held that specific performance was the proper remedy.

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82. Id. at 1159.
83. Id. (emphasis added).
85. Id. at 927.
86. Id. at 933.
87. 522 F.2d 33 (8th Cir. 1975).
88. Id. at 40.
The holdings in these cases are consistent with the UCC provisions and comments on specific performance. While the availability of replevin under § 2-716(3) is expressly conditioned on the buyer's inability to cover, the availability of specific performance is not so conditioned under § 2-716(1). Section 2-716(1) provides only that "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances." That the drafters incorporated the inability to cover requirement into the language of § 2-716(3) but omitted it from § 2-716(1) suggests that the omission was intentional. The drafters' choice should not be overridden by reading into § 2-716(1) an inability to cover requirement.

The much-cited comment 2 to § 2-716(1) states that "inability to cover is strong evidence of "other proper circumstances." An inability to cover provides grounds for an appropriate decree of specific performance. But an ability to cover does not preclude the presence of "other proper circumstances" warranting the decree. Thus, an inability to cover is evidentiary and does not constitute "other proper circumstances." Of course, § 2-716(1)'s reference to "uniqueness" may be just a proxy for inability to cover. But if so, the proxy is imperfect, because specific performance may be decreed when goods are unique or in "other proper circumstances." Assuming that "other proper circumstances" is not surplusage, the ability to cover does not preclude the application of § 2-716(1).

An inability to cover, as comment 2 has it, is "strong evidence" of "other proper circumstances." The majority of courts go further. They hold that difficulty of cover provides adequate evidence of "other proper circumstances." Cover may be difficult when a good is either in short supply or otherwise unavailable on the open market. Those goods may or may not be standardized goods. Given the current case law, most United States courts will grant specific performance when the subject matter of a contract concerns the domestic counterpart of an international sale: a contract for the sale of a good in short

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90. See, e.g., U.C.C. § 2-716(1) (1990) ("other proper circumstances"); U.C.C. § 1-106 (1990) (liberal administration of remedial provisions); U.C.C. § 2-716 comment 1 (1990) (provision "seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale"); cf. RESTATEMENT (SECOND) OF CONTRACTS § 359 comment a (1981).

91. U.C.C. § 2-716(3) (1990) provides, in pertinent part, that "[t]he buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing . . . ."

92. See STATE OF NEW YORK LAW REVISION COMM’N, 1 STUDY OF THE UNIFORM COMMERCIAL CODE 575-77. (reprint ed. 1980) (noting absence of requirement of identification in U.C.C. § 2-716(1) and urging its removal from § 2-716(3)).


95. See supra note 92 and accompanying text. Cf. Kronman, Specific Performance, 45 U. CHI. L. REV. 351, 357 n.28 (1978) ("other proper circumstances" is to be read simply as a "clarification" of the uniqueness test).
supply in the buyer’s local market. Most United States courts, therefore, would grant specific performance of contracts corresponding to those governed by the CISG. Thus, article 28, notwithstanding its reference to domestic law, does not restrict the availability of specific performance under the Convention. In practice, article 28 places no constraints on a buyer’s recourse to article 46 or a seller’s recourse to article 62.

This conclusion has practical importance. Article 28 has been criticized for its potential to encourage forum-shopping. For example, a breaching seller could preempt a buyer’s choice of forum by filing suit against the buyer in a common law forum. A counterclaim by the buyer for specific performance arguably could be denied by recourse to article 28. Other commentators, however, have urged that this will rarely create a problem in practice. Different forums, they argue, will grant specific performance when adjudicating similar contracts. Besides, most contracts expressly preclude specific performance. Exclusion via trade usage also is possible under article 9(2). Both positions are weak. The possibility of forum-shopping exists, but the potential for it is minimal. Four types of forums can be identified. One type allows for the general availability of specific performance, subject to narrow exceptions.

96. See cases cited supra notes 47 and 76; Bomberger v. McKelvey, 35 Cal.2d 607, 614, 220 P.2d 728, 734-35 (1950) (citing decisions in other jurisdictions granting specific performance when goods under contract or their equivalent are unavailable in local market). See also Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 A. 378 (1929) (specific performance decreed when steel scrap not procurable in area). Cf. Laycock, supra note 76, at 688, 691, 701 (case law embodies preference for specific relief; generalization based on study of 1400 cases).


99. Id.; see also CISG, supra note 1, at 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”). Cf. Letter from Albert Krizter, Former International Sales Counsel for the General Electric Co., to Steven Walt (Feb. 10, 1990) (copy on file with the author). For informal empirical evidence that some types of sellers do not contractually exclude specific performance, see Yorio, In Defense of Money Damages for Breach of Contract, 82 COLUM. L. REV. 1365, 1378 n.64 (1982) (a sample group of New York City rare art dealers stated they do not contractually exclude the buyers’ right to specific performance).

100. See CISG, supra note 1, at 9(2) (“The parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”).

second type makes the relief available only for certain classes of obligations. A third type treats specific performance as an exceptional remedy, available only in a narrow range of circumstances. The fourth type treats specific performance as entirely unavailable. This difference in availability of specific performance among different forums is sufficient to induce forum-shopping. By honoring different forums' limitations on relief, article 28 enables parties to shop for a forum with favorable remedial rules. Specific performance, of course, may be excluded by contractual provision or by trade usage. How-


103. See, e.g., D. Dobbs, REMEDIES § 2.5, at 57-58 (1973) (noting traditional view of restrictions on equitable relief); E. Farnsworth, CONTRACTS § 12.4, at 820, 821 (1982) (equitable remedies characterized as "extraordinary"); English courts have "strong preference" for substitutionary relief; Dawson, supra note 102, at 535 (specific performance an exceptional remedy in common law countries). Some arbitration rules expressly make specific relief available. See, e.g., Am. Arb. ASS'N, COMM. Arb. RULES § 43 (1986) ("The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of agreement of the parties, including, but not limited to, specific performance of a contract."). Judicial forums of the third type have confirmed arbitral awards of specific performance even when they would not have ordered the same relief in the first instance. See also Marion Mfg. Co. v. Long, 588 F.2d 538, 541 (6th Cir. 1978) (arbitral award of specific performance of contract for fungible goods confirmed despite being "somewhat unusual"); Grayson-Robinson Stores v. Iris Constr. Corp., 8 N.Y.2d 133, 138, 168 N.E.2d 377, 379, 202 N.Y.S.2d 306 (1960) (arbitral award of performance of building contract confirmed; motion to award not a suit in equity); Stakhinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 163-64, 160 N.E.2d 78, 89, 188 N.Y.S.2d 541, 543 (1959) (arbitral award of specific performance of employment contract confirmed; whether a court of equity could issue the same decree in the circumstances was "beside the point").


105. See Hippodrome Garage Corp. v. Sixth Ave. & 44th St. Corp., 84 N.Y.S.2d 123, 126 (N.Y. Sup. Ct. 1948). Cf. Am. Bar Ass'n Report to the House of Delegates, supra note 33, at 47; Kromman, supra note 95, at 370 n.62 (both recognizing the possibility of excluding specific relief by contractual provision). The converse problem of enforcing contractual provisions mandating specific relief presents complications. A Montana statute provides that "[a] contract otherwise proper to be specifically enforced may be thus enforced though a penalty is imposed or the damages are liquidated for its breach and the party in default is willing to pay the same." MONT. CODE ANN. § 27-1-418 (1987). Other provisions effectively restrict the scope of the statute, however. Specific performance cannot be ordered against a party when, among other things, doing so is not "as to him, just and reasonable." Id. § 27-1-415(2). Nor can it be ordered when "it would operate more harshly upon the party required to perform than its refusal would operate upon the party seeking it." MONT. CODE ANN. § 27-1-413 (1990). For a collection of cases addressing the problem, see MacNeill, Power of Contract and Agreed Remedies, 47 CORNELL L.Q. 495, 520-23 nn.88-92 (1962).
ever, such a provision might not be given effect by a court on the grounds of fraud, unconscionability, or infelicities of drafting. Also, some contracts do not contain any limitation on remedies.\textsuperscript{106} In each case, specific performance would be available under articles 46 and 62. So, the possibility of forum-shopping does exist.

Nonetheless, article 28’s potential for inducing forum-shopping is minimal. United States courts make specific performance routinely available for domestic sales contracts that are similar to those for which specific relief will be sought in a dispute involving a contract governed by the CISG. Therefore, article 28 does not restrict the availability of specific performance in United States courts. The incentive for forum-shopping among United States courts is therefore negligible. As a practical matter, the potential for forum-shopping in other countries is also limited. Comparative evidence suggests that injured parties seldom seek specific performance of contracts for the sale of goods.\textsuperscript{107} Differences in the availability of specific performance among different jurisdictions apparently do not affect the relative frequency with which the remedy is sought.\textsuperscript{108} This is not surprising. An injured party to a sales contract usually does not want to suffer the delay required to obtain a judgment compelling performance. The prospect of obtaining a reputation for compelling performance may also be a significant deterrent. Both cover and avoidance of the contract are preferable alternatives. Both alternatives preclude resort to specific performance under the CISG.\textsuperscript{109} Thus, there is little prospect that article 28 will encourage forum-shopping.

The argument thus far can be succinctly stated. Articles 46 and 62 make specific performance generally available under the CISG, subject to narrow exceptions. The approach of the CISG thus corresponds to that of the first type of forum identified above. Article 28 seems to restrict the general availability of specific performance by allowing other forums to recognize domestic rules that place limitations on the remedy. But, upon closer examination, article 28

\textsuperscript{106} See Yorio, supra note 99, at 1378 n.64.

\textsuperscript{107} See J. Hornold, supra note 13, at 302-03 (injured parties in commerce usually cover rather than seek judgment compelling performance); N. Horn, H. Kotz & H. Lasser, supra note 6, at 109 (victim of breach usually has no interest in compelling performance from breaching party); B. Nicholas, supra note 37, at 212 n.15 (article 1142 of the French Code Civil, allowing injured party to recover damages for breach of contract, is the predominately exercised option); G. Treitel, supra note 6, at 53 (injured party usually finds it “more convenient” to seek remedies other than specific relief).

\textsuperscript{108} See A. Kritzer, supra note 98, at 219 (parties from Western market economies do not resort to specific performance more frequently than parties from common law jurisdictions). Some evidence suggests that different types of forums grant specific performance in similar circumstances. See id. (specific performance likely to be ordered by any court with respect to similar contracts not governed by the CISG); Bishop, The Choice of Remedy for Breach of Contract, 14 J. Legal Stud. 299, 318 (1985) (pressures on courts will tend to make judicial practice identical everywhere). If so, article 28’s potential to induce forum-shopping is even less significant.

\textsuperscript{109} See CISG, supra note 1, arts. 46(1), 62.
does not actually effect any practical limitation on specific performance when the forum is a United States court. Traditionally, common law forums, such as United States courts, are classified as the third type of forum. The third type of forum treats specific performance as an exceptional remedy.\textsuperscript{110} However, parties entering into contracts governed by the CISG generally will not seek specific performance unless the goods are in short supply in the buyer's market. A careful reading of United States domestic case law indicates that, when domestic contracts have these same features, specific performance is made generally available. Thus, classifying United States forums as forums of the third type is misleading. When the relevant subset of contracts is identified, United States courts typically grant specific performance. Once the relevant subset of contracts is identified, treatment of these contracts generally corresponds to the availability of specific performance in the first type of forum. Article 28 therefore does not effectively restrict the availability of specific performance in United States courts. In other words, the relation of article 28 to articles 46 and 62 is one of unconstraining priority.

V. FOR THE ROUTINE AVAILABILITY OF SPECIFIC PERFORMANCE

A. The Weakness of the Traditional Doctrine

Traditional common law doctrine\textsuperscript{111} limits the availability of specific performance to those cases in which the injured party can show he will suffer irreparable injury in the absence of specific relief. The justifications offered in support of the doctrine are unconvincing. Two principal justifications were presented by the United States delegate to the 1980 Vienna Diplomatic Conference. One was the severity of the sanction for violating a decree of specific performance.\textsuperscript{112} Civil contempt, it was noted, could result in imprisonment. True, but irrelevant. While a court may imprison a defendant for failing to comply with the court's order to specifically perform the contract, a court is not required to do so. In fact, a court is much more likely to use fines to compel compliance. Fines may be just as effective as imprisonment in obtain-

\textsuperscript{110} See supra note 103.

\textsuperscript{111} Doctrine is to be distinguished from judicial practice. The arguments below only consider doctrine concerning the availability of specific relief. For a convincing documentation of the disparity between doctrine and judicial practice concerning equitable relief, see Laycock, supra note 76.

ing compliance. Indeed, fines may be more effective. It will often be more difficult for an imprisoned defendant to specifically perform than a defendant who is not behind bars.

The second justification offered for restricting the availability of specific performance is both more familiar and more important. It is that making specific performance routinely available is inefficient. Suppose that buyer (B1) contracts with seller (S) for the delivery of a good at a price of $100. S’s production cost is $90. Subsequently, the market is in temporary disequilibrium. Another buyer (B2) offers to pay S $130 for the same good. S accepts. When the market returns to equilibrium, the market price of the good is $115. If S breaches the contract with B1 and delivers the good to B2, her gross profit is $40 ($130 - $90 = $40). B1’s injury, however, is only $15 ($115 - $100 = $15, the market-contract differential). After paying B1’s damages, S’s net profit is $25 ($40 - $15 = $25). The S-B2 contract is a Pareto superior allocation, because B1 is no worse off and S is better off than if S had performed the S-B1 contract. Allowing specific performance would discourage the reallocation made by the S-B2 contract.

The conclusion of the justification is unsound. Allowing specific performance need not discourage an efficient allocation of goods. Whether the allocation is inefficient depends upon the transaction costs associated with the remedy. If transaction costs are zero, S and B1, by assumption, will renegotiate their contract. This will occur without any attendant bargaining costs, again by assumption. Renegotiation will distribute the surplus ($25) that S would

115. A Pareto superior allocation is an allocation that all parties prefer at least as well as its alternative and at least one party prefers to its alternative. See A. Feldman, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 140 (1980).
116. See Conference on Contracts for the International Sale of Goods, Mar. 10-Apr. 11, 1980, Official Records, First Committee Deliberations (18th mtg.), para. 50, U.N. Doc. A/CONF.97/C.1/SR.18 (1980), reprinted in J. Honold, supra note 9, at 552; Date-Bah, supra note 37, at 61-62; Farnsworth, supra note 40, at 250-51. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 359, reporter’s note; 56 A.L.R. Proc. 383 (1979) (statement of Professor Coquillette) ("A most recent historical study has shown that, on the contrary, the primary justification for this rule has been economic. It has been the interests of economic progress.").
realize from performing the S-B2 contract. How the surplus is distributed is efficiency-neutral. However it is distributed, the efficient allocation represented by the S-B2 contract will occur. Therefore, given zero transaction costs, specific performance will not discourage efficient allocation of resources by contract.\footnote{See Epstein, Inducement of Breach of Contract as a Problem of Ostensible Ownership, 16 J. LEGAL STUD. 1, 36-37 (1987); MacNeil, Efficient Breach of Contract: Circles in the Sky, 68 VA. L. REV. 947, 950-53 (1982). For experimental evidence suggesting that assignments of nonmandatory contract rules do not affect the likelihood of reaching efficient bargaining outcomes, see Schwab, A Coasian Experiment on Contract Presumptions, 17 J. LEGAL STUD. 237 (1988).} This is a simple corollary of the Coase Theorem:\footnote{See Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960); Cooter, The Cost of Coase, 11 J. LEGAL STUD. 1 (1982).} given zero transaction costs, the choice of remedial rule is irrelevant.

If transaction costs are positive, the result is indeterminate. Transaction costs generated by alternative remedies must be identified.\footnote{See Goldberg, Production Functions, Transactions Costs and the New Institutionalism, in ISSUES IN CONTEMPORARY MICROECONOMICS & WELFARE 395, 398-400 (G. Feiwel ed. 1985).} Pre- and post-negotiation costs, and the costs of cover, litigation, and proof can all be considered transaction costs, broadly construed. So too are the costs of taking precautions in performing according to the contract terms.\footnote{See Craswell, Contract Remedies, Renegotiation, and the Theory of Efficient Breach, 61 S. CAL. L. REV. 629, 646-56 (1988) (traditional theory of efficient breach ignores differential precaution costs).} These costs are identified comparatively, by the difference in costs between remedies. Two types of routinely available remedies are damages and specific performance. Not only must all transaction costs be considered, but the difference between transaction costs generated under a damage remedy must be compared with those generated under specific performance. Comparison is unproblematic only in a single circumstance: when one type of remedial regime dominates the other. This occurs when each type of transaction cost in one regime is lower than the corresponding transaction cost in the other regime. But domination of one type of remedy is an implausible circumstance. Consider three types of transaction costs: post-breach negotiation costs, litigation costs, and proof costs. Routinely available specific performance may increase post-breach negotiation costs,\footnote{See, e.g., R. Posner, supra note 114, \S 4.11, at 118; Muris, The Costs of Freely Granting Specific Performance, 1982 DUKE L.J. 1053 (1982).} but it may reduce both litigation and proof costs. A specific relief regime will be less efficient than a damages regime only if post-breach negotiation costs increase more than litigation and proof costs are reduced. No a priori assessment or estimate based on unsupported assertions can be made.\footnote{For examples of such assertions, see Kastely, supra note 39, at 632 (efficiency losses from allowing specific performance in international sales contracts are "very small, probably insignificant"); Muris, supra note 121, at 1062 (seller with knowledge of his competition does not necessarily know which competing products satisfy his buyer’s needs); Schwartz, The Case for Specific Performance, 89 YALE L.J. 271, 287 (1979) ("no basis exists for assuming that buyers generally have significantly lower cover costs than sellers"); Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 MICH. L. REV. 341, 389 (1984).} Nor can the
burden of persuasion be assigned in favor of a damages regime. The empirical evidence required to establish comparative efficiency is the same evidence required to assign the burden of persuasion.

This point is particularly important in the context of international trade. A significant percentage of imports into the United States consists of machines and machinery used as capital equipment. High technology products form a substantial portion of the total percentage of manufactured imports. Presumably, some of these imports are sophisticated items. Assuming such sophistication, the market for many imported machinery and high technology products may be characterized by a high degree of product differentiation. Correspondingly, determining market price may be costly because of difficulties in identifying the relevant market. In addition, due to the sophistication of the imported items, sellers may have more information than importers about substitutes. The former possibility suggests that proof costs may exceed postbreach negotiation costs. The latter possibility suggests that the seller’s cover costs may be lower than the buyer’s. If either possibility obtains, specific performance will be preferable to money damages. Whether either possibility obtains crucially depends on determining comparative cover costs and the size of proof costs. Both determinations are empirical matters pertaining to the market for imported machinery and high technology products in the United States. Nothing systematic can be asserted about that market without empirical evidence. Reliance on presumptions is also unjustified because the same empirical evidence is required to create the presumption in the first place. Absent the requisite empirical findings, the choice between specific performance and damages regimes is efficiency-neutral.

A damage remedy will not guarantee an efficient allocation of resources. For example, suppose the contract price of the S-B1 contract is $100 and S’s production costs are $90. B1 can realize a profit of $50 by reselling the good. Thus, total profit from the S-B1 contract (S’s profit + B1’s profit) is $60 ($50 + $10 = $60). Now suppose that B2 offers S $120 for the same good. If B2


123. For an example of such an assignment, see Muris, supra note 121, at 1067. Assignment of a presumption in favor of a damage regime is similarly unjustified for the same reasons. See infra text at pp. 236-37; see generally Schaver, Formalism, 97 Yale L.J. 509, 546-47 (1988) (discussing role of presumptions in decision making); Ullmann-Margalit, On Presumption, 80 J. Phil. 143 (1982); Ullman-Margalit & Margalit, Analyticity by Way of Presumption, 12 Can. J Phil. 435 (1982).


can realize a profit of $30 from a resale, total profit from the S-B2 contract is $50 ($20 + $30 = $50). A social cost of $10 ($50 - $60 = -$10) results from performance of the S-B2 contract. If B1's litigation costs exceed $50, B1 will not sue S.

Consider another set of transaction costs: post-breach negotiation costs. Suppose that a remedy of specific performance is available to B1. Suppose also that B2 agrees to pay S $130. The market price of the good eventually declines to $115. If S can cover as effectively as B1, S will do so by purchasing another good from another seller (S1). S then will sell that good to B1 and will sell the good it produced to B2. No breach of the S-B1 contract need occur, and B1 need not resort to specific performance. No post-breach negotiations between S and B1 are necessary. There are three transactions here: S1-S, S-B1, and S-B2. Since no additional negotiations are necessary between S and B1, there are no post-breach transaction costs. This result depends on S's cover costs being less than or equal to B1's cover costs. In the context of international trade, comparative cover costs depend partly on the functioning and accessibility of foreign markets. These factors are empirical. The point is that one cannot make abstract assertions about the comparative efficiency of damages remedies over specific performance. Therefore, the United States representative's second justification for limiting the availability of specific performance is unsound.

B. A Normative Case for Routine Availability

Current United States case law and legal doctrine do not support restricting the availability of specific performance for the types of contracts for which specific performance will be sought under the CISG. But neither do they alone support making specific performance routinely available. Article 28 directs a court to order specific performance when it "would do so under its own law in respect of similar contracts of sale" not governed by the CISG. Since specific performance is an equitable remedy, whether a court would order specific performance depends in large part on whether it thinks it should do so. A normative case for making such relief widely available therefore is needed.

1. A Taxonomy of Cases

This discussion begins with the types of occasions in which contractual performance can be demanded. Initially the following four types can be identified schematically.

126. Schwartz, supra note 122, at 286-87.
127. Even if there is agreement about pertinent variables, reasonable disagreement is possible with respect to the values of the identified variables. Cf. Levmore, Uniformity and Variety in the Treatment of the Good Faith Purchaser, 16 J. LEGAL STUD. 45, 60 n.58 (1987) (reasonable people can disagree over preference for damages over specific performance regimes).
128. CISG, supra note 1, art. 28.
129. See Friedman, The Efficient Breach Fallacy, 18 J. LEGAL STUD. 1, 8-12 (1989).
1. S contracts with B1 to supply a good. Later, B2 offers S a higher price to deliver the same good. S accepts.

2. S contracts with B1 to supply a good. Later, B2 offers S a higher price to deliver a different good, and S is unable to supply both goods. S accepts B2’s offer.

3. S contracts with B1 for the delivery of a good. Later, the value of the good to B1 drops to zero. B1 repudiates the contract.

4. S contracts with B1 for the delivery of a good. Later, the cost of supplying the good exceeds the contract price as well as the value of the good to B1. S repudiates the contract.

In cases one, two, and four, B1 can demand that S perform. S can demand that B1 perform in case three. Cases one through four can be reduced to two types: those in which there is a shortage of goods (cases one and two) and those in which delivery of the good involves economic waste (cases three and four). In cases three and four, the benefit of performance to the promisee is less than the cost of that performance to the promisor. S in case three and B in case four are indifferent between performance and receipt of the profit that performance would yield. Absent strategic considerations, specific performance will not be sought in these cases. Mitigation rules mimic this result. Therefore, only cases one and two need to be considered.

Cases one and two occur only if there is a shortage of goods. Absent a shortage, either B2 will buy from another seller or S will sell to both B1 and B2. Neither of these options require S to breach the contract with B1. S will breach only when S cannot supply both B1 and B2. The goods therefore must be in short supply. In a shortage situation, S will have an economic incentive to breach if S cannot either produce both goods or purchase one of the goods elsewhere. Case one involves a shortage of a single sort of good. Case two involves a shortage of one of two different goods.

Neither case one nor case two involves economic waste. B1’s benefit from S’s performance can exceed S’s cost of performance. It is simply that S can realize greater profit by delivery of the good to B2. Given that there is a shortage, S cannot deliver the same good to both buyers. In cases one and two, unlike cases three and four, B1 is not indifferent between damages and specific performance. If specific performance is available, B1 can realize additional profit by reselling the good. Does B1 have a right to S’s specific performance under these circumstances? According to Holmes’s well-known dictum, B1 has no such right: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and noth-}

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ing else."

Posner implicitly endorses Holmes’s dictum by urging that S breach the S-B1 contract in cases one and two. However, I will argue that the Holmesian dictum is unsound.

2. The Defects of the Holmesian Dictum

To recognize the defects in the Holmesian dictum, note first that Holmes’s statement incorporates a persuasive definition. Holmes himself recognized the revisionary nature of the proposed definition, calling it “paradoxical.” To have a contractual duty, according to the definition, means that the promisor must either perform or pay damages for nonperformance. The correlative contractual right is similarly disjunctive: the right to demand damages or performance. Associated with Holmes’s definition is the view that legal obligations forbid nothing. Remedies are not sanctions for doing what is forbidden by the contract; instead, they are the prices for doing what is otherwise permissible, including breaching a contract. Both Holmes and Posner urge such a view of remedies. Adopting the view urged requires justification.

A familiar complaint is that Holmes’s definition ignores the prescriptive nature of legal rules. The definition eliminates by conceptual fiat the reason-

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The notion of duty involves something more than a tax on a certain course of conduct . . . . A legal duty cannot be said to exist if the law intends to allow the person supposed to be subject to it an option at a certain price . . . . In a case of this sort, where there are no collateral consequences attached (which is perhaps the fact with regard to some contracts, to pay money, for instance), it is hard to say that there is a duty in strictness, and the rule is inserted in law books for the empirical reason above referred to, that is applied by the courts and must therefore be known by professional men.


For a contemporary statement of Holmes’s view, see Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554, 558 (1977) (“The modern law of contract damages is based on the premise that a contractual obligation is not an obligation to perform, but rather an obligation to choose between performance and compensatory damages”).


133. See, e.g., 1 Holmes-Pollock Letters, supra note 131, at 177 (letter of March 12, 1911) (“I stick to my paradox as to what a contract was at common law”); cf. F. Pollock, Contracts 192 n.k (8th ed. 1911) (“Mr. Justice Holmes . . . suggests that every legal promise is really in the alternative to perform or to pay damages; which can only be regarded as a brilliant paradox”). Holmes’s “paradox” obviously has rhetorical elements. Cf. Burton, Law as Practical Reason, 62 Cal. L. Rev. 747, 751-54 (1989). The arguments below assess the truth or justification of Holmes’s statement, not its rhetorical force.
giving features of law, so the complaint goes. A different defect should be noted. It is that Holmes’s definition is inaccurate as a description of current law. A contractual duty does not normally provide the promisor with the option of either performing or paying damages. There is, of course, a well-known theory, adopted to defeat the pre-existing duty rule, that a party incurs a legal detriment in giving up his right to breach the contract. Legal detriment would be incurred only if contractual duties were disjunctive in nature. If contracts were disjunctive, the promisor could forego his right to pay damages upon non-performance. That is, the promisor could forego his right to breach the contract. But, in fact, the theory has been almost uniformly rejected. Breach of contract has been held to be a wrong. A wrong can be committed only if the promisee’s right to performance is violated. If the promisee merely had a right to performance or payment of damages upon breach, the promisor’s breach could not violate that right. Since a breach is a legal wrong, the Holmesian definition is not an accurate description of current law.

Another indication that Holmes’s definition does not describe current law is the existence of a cause of action for promissory fraud. A contractual promise made with a present intent not to perform constitutes actionable fraud. It is the intention not to perform, not the nonperformance of the promise, that is actionable as fraud. All but a small minority of jurisdictions recognize promissory fraud as a tort. Yet Holmes’s definition leaves no room for such a tort.


135. See Armstrong v. Stiffler, 189 Md. 630, 635, 56 A.2d 808, 810 (Ct. App. 1948) ("Normally contracts are made to be performed, not to give an option to perform or pay damages"); Wirth & Hamid Pair Booking, Inc. v. Wirth, 265 N.Y. 214, 192 N.E. 297 (1934); U.C.C. § 2-609 comment 1 (1990) ("the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit"). See also P.S. Atiah, Essays on Contract 60 (1986); J. Finnis, Natural Right and Natural Law 324 (1980) (both finding a nondisjunctive contractual duty of performance); Corbin, Does a Pre-Existing Duty Defeat Consideration?: Recent Noteworthy Decisions, 27 Yale L.J. 362, 363 (1917) (contractual duty is not in the alternative, to perform or to pay damages). For an historical argument that Holmes’s definition is inaccurate as a description of common law, see Barbour, The "Right" to Break a Contract, 16 Mich. L. Rev. 106 (1917).


Under Holmes’s definition, a promisor would merely be committing herself to either perform or pay damages. Promising with a present intent not to perform would not be a misrepresentation of the promisor’s intent. Instead, the commitment would be to pay damages in the event of nonperformance. Nonperformance, therefore, could not constitute promissory fraud unless the promisor intended neither to perform nor to pay damages upon nonperformance. It simply is a breach of contract. Current law requires less in order to establish promissory fraud: only proof that the promisor intended not to perform when making a contractual promise. This requirement indicates that a promise incorporates a representation that the promisor presently intends to perform.\textsuperscript{139} Holmes’s definition appears accurate when contractual liability is considered alone. The definition is inaccurate when current law concerning tort liability is taken into account.

Nor is Holmes’s definition accurate as a description of the CISG. A number of representatives to the Convention viewed the buyer’s contractual right as a right to performance of the contract.\textsuperscript{140} At the Diplomatic Conference, the Japanese delegate found it “obvious” that the buyer should have the right to demand performance. France’s delegate stated that the “essential remedy” was to secure performance of contractual obligations. The Belgian delegate saw the right to performance as the foundation of the Convention.\textsuperscript{141} The delegates perceived the right to performance as existing even when the buyer could cover at a reasonable cost.\textsuperscript{142} Likewise, as previously noted,\textsuperscript{143} the delegates defeated the United States proposal to amend article 77 to reduce any claim against a buyer upon the seller’s failure to mitigate damages. An unqualified right to performance entails a correlative duty of performance on the promisor. Therefore, the CISG’s characterization of the nature of a contractual right is not consistent with Holmes’s dictum.

\textsuperscript{139} See Scarce Manor Operating Corp. v. W.P. & L. Realty Corp., 136 Misc. 910, 911, 241 N.Y.S. 229, 230 (N.Y. Sup. Ct. 1930) ("Plaintiff was induced to believe that it was getting a lease and not a lawsuit").


\textsuperscript{143} See supra text accompanying note 20.
3. The Content of Contractual Promises

The normative issue concerns the content of a contractual entitlement. It concerns the obligation that a contractually bound promisor must fulfill. The normative force of a promise is not at issue. Likewise, the remedies for breach of a contractually created obligation are not relevant. The content of the promise, rather than the act of promising or the consequences of breaking the promise, is in question. There are two different specifications of the content of contractual promises. Holmes's dictum has it that the correlative entitlement is to either the good contracted for or to damages. The alternative specification has it that the correlative entitlement is to the good contracted for. The difference is between a disjunctive (damages or performance) and a categorical (only performance) specification of promissory content.

Different distributional effects follow from the two alternative specifications. The different distributional effects are guaranteed by the assumption of cases one and two: that there is a shortage of the good in the buyer's local market. Under Holmes's approach, the seller realizes the entire surplus represented by the difference between the S-B2 and S-B1 contract prices, adjusted by an amount representing B1's damages. The seller receives the surplus because B1 is entitled only to damages. B1's entitlement is the correlative of S's disjunctive promise. Under the alternative characterization, B1 realizes the entire surplus represented by the difference between the S-B2 and S-B1 contract prices, adjusted by the cost that B1 saves by not having to arrange the S-B2 sale. B1 receives the surplus because she is entitled to the good. B1's entitlement is the correlative of S's categorical promise. Both specifications of promissory content are possible. I shall argue that the contractual promise is a categorical one: a promise to perform.

The issue of promissory content is an interpretive one. That is, justification is required for construing utterances or written statements as committing the promisor to a particular course of conduct. This justification is a matter of certain contractual background rules. Background rules provide procedures for contract formation and for implying terms of the contract, the conditions under which contractual nonperformance is excused, and remedies for nonperformance. Types of background rules can be identified in different ways. Rules that can be modified by agreement are distinguished from rules that cannot be

144. See infra Section V.C.
145. See supra text accompanying note 129.
146. In practice, B1's damages will equal the sum of the cover-contract price differential and incidental expenses.
so modified.\textsuperscript{149} Alternatively, there is a distinction between rules that provide procedures for changing other rules and those that do not.\textsuperscript{150} Another distinction is between background rules that identify the terms of a contract and those that do not. Since the issue of promissory content is an interpretive issue, the latter classification is appropriate. Determination of promissory content by reference to the parties' statements or background rules is needed.

Pre-theoretical beliefs\textsuperscript{151} assume that a contractual promise is a promise to perform. There is no distinction between contractual and noncontractual promises.\textsuperscript{152} To be sure, promises may be conditional—for instance, on the failure to exercise a power of termination. Promises may also be stated in disjunctive form—for example, by promising to either perform or pay liquidated damages. Again, trade usage or the course of performance may indicate the disjunctive form of a promise.\textsuperscript{153} Alternatively, the contract's express exclusion of specific performance may indicate that the promise is disjunctive in form. Absent such terms, however, the content of a promise is unqualified: the promisor commits herself to perform. The promise is viewed as categorical. It is possible to treat the promise as disjunctive in content. But there is no justification for doing so. Absent a contractual provision, there is no reason to ascribe a disjunctive content to the promise.

In fact, there is a good reason not to ascribe a disjunctive content to a promise. Contractual undertakings are voluntarily assumed. Finding that the obligation accepted by a promise is disjunctive therefore requires evidence as to the parties' intentions. However, the only evidence available is the agreement itself. The agreement consists of the contractual terms provided, interpreted in light of any trade usage. Absent express or implied qualifying terms,

\begin{itemize}
\item \textsuperscript{149} See Ayres & Gertner, supra note 148, at 91.
\item \textsuperscript{150} See Creswell, supra note 148, at 503.
\item \textsuperscript{151} That is, immediate and unreflective beliefs held independently of particular theories or doctrines. Cf. L. Cohen, The Dialogue of Reason: An Analysis of Analytical Philosophy 77 (1985) ("The point is that analytical philosophy is concerned with what is a reason for what, not with what is taken by scientists, lawyers, or others to be a reason for what. It has normative implications that the history or sociology of ideas does not have. Hence, even when a philosopher's premise accords with the official tenets of some non-philosophical doctrine, it must be assumed to have an independent standing and authority.").
\item \textsuperscript{152} Cf. Address Constr. Equip. Ltd. v. Harlow & Jones G.M.B.H., 41(6) P.D. 221, 278 (Ist. Sup. Ct. 1988) (Barak, J.) ("A contract has to be performed and not just damages paid for its breach . . . Filling promises is the basis of our lives, as a society and as a nation."); Beale & Dugdale, Contracts Between Businessmen: Planning the Use of Contractual Remedies, 2 Brit. J.L. & Soc'y 45 (1975) (to the same effect); Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963) (Businessmen described do not rely on legal norms to define or enforce contractual relations with each other); State of New York Law Revision Comm'n, 1 Study of the Uniform Commercial Code 575 (reprint ed. 1980) (citing survey of trade opinion, Second Report, Mercantile Law Commission, 354 Parliamentary Papers 10 (King and Son 1855), advocating recourse to specific relief).
\item \textsuperscript{153} But see infra note 154.
\end{itemize}
the provisions pertaining to performance are categorical.\textsuperscript{154} The promises made are promises to perform. To be sure, given the routine availability of damages, parties will not expect specific enforcement of such promises upon breach. But this expectation concerns only the available remedies in case of breach. It says nothing about the expectations of parties as to contractual performance. The buyer normally interprets the seller’s undertaking as one of performance. She may or may not also expect performance to be forthcoming. Given the routine availability of damages, the buyer also expects that damages can be recovered should the seller not perform. Expectations about remedies are distinct from the parties’ understanding of the duties created by the contract. Thus, facts about the current remedial regime are irrelevant to what is required under a contract. What is required by the contract obviously is determined by the parties’ undertakings. Absent any qualifying terms, the parties’ undertakings as to performance are categorical.

Facts about the current remedial regime are not only irrelevant. They are also temporally distinct from the parties’ contractual obligations. That is, these facts do not occur at the time the contract is entered into or even at the time of performance. These facts therefore cannot define a party’s obligations concerning performance. Initially, a promisor’s undertaking is performance. If the promisor subsequently fails to perform, the promisor does not have an obligation to pay the promisee damages. The promisee may not discover the breach or may decide not to bring suit. Furthermore, even if suit is brought and liability is assessed, the promisee may be judgment-proof. Alternatively, the promisor may allow seizure of her assets to satisfy the outstanding judgment. Payment of damages in this event would not be required. Each possibility depends on facts that occur after the contract is entered into. Post-breach facts

\textsuperscript{154} The effect of trade usage on promissory content is worth identifying. Trade usage may alter the contractually required type of performance. It does not normally render contractual obligations disjunctive as between performance and nonperformance. Textbook cases concerning parol evidence are illustrative. In Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971), the court held that evidence of usage in the mixed fertilizer industry should have been introduced to show that price and quantity terms were “mere projections,” to be adjusted according to market forces. Pertinent trade usage did not permit the buyer to order no fertilizer and pay damages instead, price and quantity terms notwithstanding. The court in Ambassador Steel Co. v. Ewald Steel Co., 33 Mich. App. 495, 190 N.W.2d 275 (1971), found evidence of trade usage allowing a permissible range of carbon content in “commercial quality” steel. Such usage did not include the delivery of no “commercial quality” steel and payment of damages instead. Parol evidence of trade usage in each case provides an interpretation of the terms of the parties’ agreement. See U.C.C. § 1-201(3) (1990) (‘‘ ‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act’’); U.C.C. §§ 1-205(2), (3), 2-208(1) (1990) (allowing relevance of trade usage in determining meaning of an agreement). Trade usage may even alter contractually required performance by qualifying or supplementing contractual terms. As such, the type of performance required is rendered disjunctive. Trade usage does not transform contractual terms into disjunctive undertakings as between performance and nonperformance. It therefore provides no reason for ascribing a disjunctive content to the entitlement represented by the promise.
may alter the breaching party’s obligations. For example, the breaching promisor has an obligation not to interfere with the seizure of her assets to satisfy the judgment. The bankruptcy trustee, the successor in interest to the debtor-promisor, has the option of assuming or rejecting the contracts made by the debtor-promisor.\textsuperscript{155} Post-breach events do not alter the initial obligation to perform.\textsuperscript{156} These facts change only the subsequent obligations of the party in breach. The initial obligation is categorical: one of contractual specified performance.

An analogy supports this conclusion. Compare a sales contract to an entitlement to personal property. Suppose S delivers a chair to B1 under a sales contract.\textsuperscript{157} Subsequently, another buyer, B2, offers S a higher price for the chair. S accepts. Chairs of the same sort being otherwise unavailable, S goes to B1’s place of business, takes the chair, and delivers it to B2. S has converted B1’s property. The example is structurally identical to case one. If, in case one, B1 has an entitlement to either the chair or damages upon non-delivery, B1 has the same entitlement in this example. Conversely, if S has violated B1’s entitlement to the chair in case one, S has also violated B1’s entitlement in this example. But B1’s entitlement is violated only if B1 has a right to the chair and not merely to its monetary equivalent. I submit that B1 has a right to the chair. The pre-theoretical beliefs discussed above support this conclusion.

It could be claimed that contractual rights are distinct from personal property rights. Personal property rights, it may be said, are protected by more stringent entitlements than are contractual promises. This is a non sequitur. Entitlements are one thing; how entitlements are protected or secured is another. This distinction is discussed below. Entitlements and their protection notwithstanding, the distinction between property and contractual rights is unfounded. As Ian MacNeil notes, B1’s property “can just as well be attributed” to B1 in case one once the S-B1 contract has been executed.\textsuperscript{158} After all, B1 has an effective


\textsuperscript{156} Cf. Corbin, supra note 135 (initial obligation of performance remains).

\textsuperscript{157} The example is a variant on the one given by MacNeil, supra note 117, at 963.

\textsuperscript{158} Id. at 964. See also J. BENTHAM, THEORY OF LEGISLATION 11-12 (R. Hildreth ed. 1871) ("Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it"); Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504, 513-14 (1980) (contractual rights are property for restitutionary purposes); Fuller & Perdue, The Reliance Interest in Contract Damages (Part I), 46 YALE L.J. 52, 59 (1936) ("In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of promise as an injury to that property . . . , an ‘actual’ diminution of the promisee’s assets"). Cf. Munchak Corp. v. Riko Enter., 368 F. Supp. 1366, 1372 (M.D.N.C. 1973) (contract right is a property right under North Carolina law); Address Constr. Equip. Ltd. v. Harlow & Jones GmbH, 41(6) P.D. 221, 236 (Isr. Sup. Ct. 1988) (Barak, J.) (agreeing with Friedmann, supra; "property includes every interest worth protection as well as contractual rights").
claim against S both for breach of contract and for conversion. Whether that
case is one of specific performance or replevin cannot be settled simply by
labelling the entitlement a property right. The protected interest is determina-
tive; the label alone is irrelevant. Therefore, the label applied is no reason to
distinguish between the content of entitlements in the contract and conversion
cases.

Familiar justifications for ascribing disjunctive content to contractual
promises fail. Sometimes it is observed that the background rule could be dif-
f erent: 159 where the parties’ agreement is silent on the matter, the rule could
require a disjunctive specification of promissory content. This observation
misses the point. Of course there could be such a rule, but, absent trade usage
or course of performance, there is no such rule. 160 Categorical promissory con-
tent is generated according to existing background interpretative rules. The
possibility of different background rules does not alter actual promissory con-
tent. Sometimes interpretive background rules for enforceable promises are
taken to hold for all promises. 161 This treatment is implausible because en-
forceable promises are a small subset of all promises. The treatment leaves an
utterly mysterious discontinuity between the promissory content of enforce-
able and unenforceable promises. Why should the content of unenforce-
able promises be categorical while the content of enforceable promises is
disjunctive?

More often, remedial background rules are taken to specify promissory con-
tent. 162 Holmes’s dictum provides a notable example. The definition is defec-
tive. For the discontinuity between the content of unenforceable and
enforceable promises is unexplained. Why should the content differ? The
definition also appeals to the wrong type of background rules: remedial rules,
not interpretive rules concerning promissory content. Even if background rules
define the substance of a promisor’s obligations, only interpretive rules specify
what the promisor has undertaken to perform. Holmes’s dictum appears
plausible only because an important distinction is conflated. This is the dis-
tinction between the content of the entitlement and the remedies for breach of
the entitlement. The distinction is between the violation of an entitlement and
the remedies provided for the violation. Sometimes Holmes’s conflation of the
two concepts is oblique, as in the following statement:

Even though ‘legal obligation’ be converse to the right rather than to
the remedy, yet when a right is conferred by agreement, it is fair to
presume that the form of the remedy was in contemplation of both

159. See Craswell, supra note 148, at 490.
160. See supra note 154 and accompanying text.
Express and Implied Contract Terms, 73 Cal. L. Rev. 261, 278 (1985) ("Since the legal system
retains ultimate power over interpretation and enforcement, parties cannot be certain what effect will
be given to any formulation until it is tested.").
162. See, e.g., O.W. Holmes, The Common Law, supra note 131, at 236; Goetz & Scott, supra
note 131; Note, The Performance of a Legal Obligation as Consideration for a Promise, 14 Mich.
L. Rev. 480 (1916).
parties as determining the extent of the right so conferred, and, hence, indirectly, of the obligation.\(^\text{163}\)

The content of an entitlement here is determined by the remedy for its violation, and the correlative obligation is determined by the entitlement. Expectations as to liability ground entitlements. Whether direct or oblique, the conflation is illegitimate, for entitlements specify the actions that others must perform (or not perform) if compliance with norms is to be observed. The entitlements do not themselves specify the sanctions or liabilities likely to be assessed in the event of nonconformity. Entitlements can be created contractually, by voluntary agreement. To fail to comply with those entitlements is to violate them. The connection between entitlements and their enforcement is at best contingent. Entitlements, as these arguments suggest, are not defined by the remedies available when they are violated. They are defined by interpretive background rules and by the parties' understandings.

4. The Consequences of Conflation

Guido Calabresi and A. Douglas Melamed's framework for the transfer of entitlements illustrates the above conflation.\(^\text{164}\) They treat property and liability rules as "protecting" or "securing" entitlements. The interpretation is odd, for property rules require compensation \textit{ex ante} for the transfer of an entitlement. However, when a transfer is negotiated, the entitlement is not violated. And when an entitlement is transferred without \textit{ex ante} compensation, no protection is afforded. A liability rule requires only compensation \textit{ex post}. As long as compensation is provided \textit{ex post}, no violation of an entitlement occurs. That is why Calabresi and Melamed say that an entitlement is protected by a liability rule when it may be destroyed if the party destroying it is willing to pay an objectively determined compensation.\(^\text{165}\) But a rule that protects an entitlement cannot also be a device for empowering others to violate it. In fact, liability rules do not protect or secure entitlements at all. Liability rules simply provide a particular remedy for the violation of an entitlement. They do not permit a violation of a right. To view them otherwise confuses a violation of an entitlement with a remedy for its violation.

This view also ignores potentially different contents among entitlements. There is a distinction between an entitlement to use another's property conditional on payment and a lack of such an entitlement. If A has the former entitlement, then B has a duty not to interfere with A's use of B's property (provided, of course, that B receives the appropriate compensation). If A lacks that entitlement, B has no correlative duty. A is not permitted to use B's

\(^{163}\) Note, \textit{supra} note 162, at 482.


\(^{165}\) Id. at 1092. See also Kornhauser, \textit{The New Economic Analysis of Law: Legal Rules as Incentives}, in \textit{Law and Economics} 27, 30, 31 (N. Mercuro ed. 1989).
property at all (without B’s consent). The same “remedy,” money, can be
given to B in both cases. However, in the first instance, B’s entitlement is not
violated and no wrong has been committed. Instead, B has simply attached a
price to A’s permissible conduct. In the second example, B’s entitlement is
violated and a wrong has been committed. Damages are awarded to B for A’s
wrongful conduct. A liability is thereby attached to A’s forbidden conduct.
Thus, when Holmes conflates entitlements with remedies for their violation, it
becomes impossible to distinguish between permissible and prohibited uses of
another’s property.

Contractually created entitlements do not have the form of conditional enti-
tlements. That is, contractual entitlements do not provide that damages are to
be paid if a party fails to perform according to the contract. As noted above,
absent express or implied terms, the entitlement to performance under the con-
tract is categorical. There may be reasons for awarding only damages for viola-
tion of a contractually created entitlement, but Holmes’s dictum is not among
them. Given the uncertainty of the finding that specific performance is ineffi-
cient, together with the specific remedy’s pre-theoretical support and specific-
ation of promissory content, there is a compelling normative case for making
specific performance routinely available. Positive law does not preclude its use,
and normative concerns favor its routine availability.

C. The Structure of the Normative Argument

The structure of the argument above should be emphasized. Some commen-
tators have argued for or against the routine availability of specific performance
on the basis of efficiency. Recommendations have depended upon assess-
ments of the respective size of transaction costs under both damages and
specific performance regimes. Other commentators call for the availability of
specific performance on a different basis: the obligation to perform contract-
ually created promises. Recommendations on this basis derive from the
normative force generated by the institution of promising. My argument is distinct
from both sorts of reasoning. No case for or against specific performance can

166. See J. Coleman, Markets, Morals and the Law 44-48 (1988); Davis, Rights, Permission,
and Compensation, 14 Phil. & Pub. Aff. 374 (1985); Westen, Comment on Montague’s “Rights

167. See, e.g., R. Posner, supra note 114; Farnsworth, supra note 40; Marris, supra note 121;
Schwartz, supra note 122; Ulen, supra note 122. Arguments citing the adverse consequence to com-
petitive markets are derivatively efficiency arguments, assuming that competitive markets are them-
selves efficient. See, e.g., Friedmann, supra note 129, at ¶ (“If failure to reach an agreement created
a license to take another’s property . . . . then a complete breakdown of the market economy could
follow.”); Friedmann, supra note 158, at 515 (limiting remedies to damages tends to trivialize im-
portance of contractual obligations, diminishing confidence in the other party’s performance); Ad-
J.) (citing approvingly Friedmann, supra note 158, to the same effect).

168. See, e.g., Linzer, supra note 112; cf. C. Fried, CONTRACT AS PROMISE (1981) (contractual
obligations are a special case of the general obligation to keep promises).
be made by relying on a priori assumptions about transaction costs. Nor can a case be made by relying merely on obligations generated by promises. The disagreement is not over the duty to perform one's contractual promises. It is over what was promised in the first place—the content of the promise. My case for specific performance depends on specification of the content of such promises. Proper specification of that content, together with a distinction between contractual rights and remedies, provides the basis of a case for the routine availability of specific performance.

Application of the normative argument to cases one and two in Section V.B.1 is straightforward. If B1 is promised a good in cases one and two, she is entitled to the good. B1's entitlement is not a right to either the good or a sum of money. B1's entitlement is determined by S's promise and that promise, absent qualification or trade usage, is categorical. If B2 is offering to pay a higher price for the good, B1, not S, is entitled to elect between the good and the higher price. S has already transferred that entitlement to B1 for valuable consideration. B1's entitlement includes the benefit of owning the good contracted for or controlling the resources represented by the good. That benefit in turn includes the option of using the good or realizing any productive surplus from its sale. Here that surplus is represented by the difference between the S-B1 contract price and the S-B2 contract price, minus the costs that B1 saves by not having to arrange for the sale to B2. B1's contractually created option is recognized if specific performance is made routinely available to her.

Justifying the recognition of B1's entitlement poses a distributional problem. Priority in entitlement between B1 and S determines whether B1 or S has the superior claim to the productive surplus upon resale to B2. There is not a discrete justification for this claim. Stability of commercial relationships, incidence of long-term planning, the direction of investment in particular types of contractual relations, and respect for the parties' projects may all be part of the justification. The point is simply that, whatever the justification, it applies equally to the appropriation of holdings. For a given distribution of holdings, the same question can be posed: what justifies giving priority of entitlement to an owner over a subsequent appropriator? The justification of priority is not peculiar to contractually created entitlements. That priority in entitlement does determine the superiority of the claim for both contractual rights and holdings is sufficient. The justification for this claim remains open.

VI. AN APPROACH TO AVAILABLE REMEDIES

The normative argument for specific performance and the CISG's treatment of the remedy are complementary. Specific performance should be routinely available given its pre-theoretical support, its proper specification of promissory content, and the tenuousness of the claims that it is inefficient (Section V).

169. See supra text accompanying notes 117-23.

170. See supra text accompanying note 147.
Specific performance is routinely available under the CISG in United States courts, given a close reading of pertinent CISG articles and domestic case law and by proper definition of characteristic features of international sales contracts (Sections II-IV).\textsuperscript{171} The normative argument is more forceful than the CISG’s treatment, because the normative argument is independent of particular features of certain types of contracts. It holds true for all contracts, absent other considerations. The CISG’s treatment of specific performance applies only to international contracts for the sale of goods. Since the normative argument is stronger than the CISG’s treatment, it justifies making the remedy routinely available in United States courts.

A United States court’s approach to remedial rights should not be restrictive. The remedial approach taken by courts to confirm arbitral awards suggests the proper attitude. Domestic arbitral awards of specific performance are typically confirmed, even when the confirming court would not grant the same remedy were it hearing the case on the merits.\textsuperscript{172} Confirmation of foreign arbitral awards is similarly broad in effect. Statutory provisions require United States courts to enforce the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, subject to seven specified exceptions.\textsuperscript{173} Of the specified exceptions, article V(2)(b) is most pertinent. This subsection provides that enforcement of an arbitral award may be refused when enforcement would violate the public policy of the enforcing states.\textsuperscript{174}

Courts have construed this provision very narrowly. “Public policy” has been construed to include only those policies that incorporate “the forum state’s most basic notions of morality and justice.”\textsuperscript{175} The regular availability of specific performance presumably does not violate those notions. After all, courts have confirmed arbitral awards of specific performance. They have done so when they otherwise would not have granted the remedy if they were affording relief in the first instance.\textsuperscript{176} Of course, confirmation of an arbitral award is one thing; affording a remedy on the merits is another. But the difference is un-

\begin{footnotesize}
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\item \textsuperscript{171} Subject to restrictions provided by the CISG, discussed supra text accompanying note 11.
\item \textsuperscript{172} See, e.g., cases cited supra note 103.
\item \textsuperscript{174} See Arbitral Awards Convention, supra note 173, art. V, para. (2)(b) (“Recognition and enforcement of an arbitral award may also be refused if . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”).
\item \textsuperscript{176} See supra note 103.
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important for construing article V(2)(b). For it is implausible to hold that a forum's basic moral notions change when it confirms an arbitral award. If those notions are not violated when a forum confirms an arbitral award requiring contractual performance, then ordering contractual performance initially could not violate those notions. Clearly, specific performance of contracts for the sale of goods does not violate "basic notions of morality and justice." Thus, adopting the same approach, United States courts should make specific performance routinely available under the CISG.

This approach is only suggestive. There are obvious and important differences between confirming arbitral awards and affording remedial relief. Strong governmental policies favoring arbitration, litigation costs largely internalized by the contracting parties, and implicit consent to arbitral remedies are among the differences. Such differences are irrelevant here. For independent arguments, both exegetical (Sections II-IV) and normative (Section V), justify the unrestricted availability of specific performance under the CISG. None of the arguments rely on arbitration awards or features of domestic or international arbitration. Judicial confirmation of arbitral awards therefore is not a reason for making specific performance routinely available. Instead, it is used to justify a similar judicial practice, assuming the soundness of the arguments in Sections II-V. Given these arguments, courts should take the same approach to specific performance that they have taken to confirming arbitral awards.