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On Specific Performance in Civil Law and Enforcement Costs

By

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Abstract: We argue that enforcement costs, ignored in the literature on 'efficient breach', are important for the choice of contract breach remedy. Empirically we find that specific performance is almost never claimed in Civil Law countries. It involves forcing a party in breach to perform actions while damages involves extracting only a monetary payment. The former is more difficult and more coercive. We study enforcement rules of Denmark, France and Germany. Enforcement of specific performance is absent in Denmark and weak in France. In Germany it seems stricter, which points to the importance of costs of enforcement to the claimant.

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1. Introduction

When a party to a contract does not perform his part and the contract remedy is 'specific performance', the other party can insist on performance in accordance with the contract. If the rule is 'damages', the non-breaching party cannot do so; he can then only sue for monetary compensation. The choice between specific performance and damages is analyzed in the economic literature on 'efficient breach'. According to this literature the main argument in favor of damages is that one should not force a party to carry out a contract when, due to changed circumstances, costs exceed benefits. The main argument in favor of specific performance is that the judge commonly cannot ascertain damages correctly. Often damages are set too low, reflecting that some costs of breach are unobservable to the judge. Under the rule of specific performance, the parties may renegotiate under the threat of specific performance, perhaps agreeing to some monetary compensation which will then more accurately reflect the parties' true valuation of performance (Ulen, 1984). Aghion-Dewatripont-Rey (1994) show that first-best levels of reliance investments may under certain circumstances be achieved by proper design of the renegotiation game[3]. Broadly speaking, this is where the discussion stands.

[3] See also Edlin-Reichelstein (1996) and Maskin-Tirole (1999) as well as the literature on cooperative investments, e.g Chung and Che (1999).

In the present article, we argue that an important aspect is missing in this discussion, namely the cost and difficulty of ultimate enforcement. The importance of the following question seems to have been overlooked: When a party demands specific performance and the court decrees it, but the breaching party still refuses to perform, what coercive mechanism should be employed to ensure compliance? This is a real question, as the legal history of contract breach remedies reveals[4]. It turns out, that ultimate enforcement entails costs of various, interrelated kinds. First, it is simply costly for the authorities to implement specific performance against the will of a breaching party. It is generally much easier for enforcement authorities (the bailiff) to enforce a payment of damages, i.e. to make the breaching party pay a sum of money, than it is to make him perform certain actions. Second, while people may be coerced through (the threat) of monetary sanctions or even incarceration, being coerced in this way into performing certain actions is often felt to be more intrusive, than to be forced to pay a sum of money, especially when the breaching party does not feel that he ever agreed to perform the actions in question. Third, the process of enforcement including appeals may take a long time which often significantly reduces the value to specific performance for the non-breaching party[5]. We argue that the existence

[4] See Dawson (1959).

[5] Not all of the postponement cost in the present system can be recovered by the non-breaching since some of them are unverifiable.

of these kinds of enforcement costs significantly increases the attractiveness of damages compared with specific performance.

The 'efficient breach' theory differs from a theory that focuses on enforcement costs, though the theories are complementary, in one important respect. The former stresses that specific performance is inferior to damages in an ex-ante sense, i.e. that the parties will prefer damages at the contract formation stage. The latter stresses the ex-post perspective, that even if specific performance is the default rule, it may not be claimed or if claimed it may not be enforced by the authorities. Thus, it becomes of interest to see how many cases of specific performance we can observe in Civil Law countries where specific performance is the default rule (where the aggrieved party may, generally speaking, choose between damages and specific performance).

Hence, we shall start by studying case material from Civil Law countries and what legal scholars have noted about the actual use of specific performance in these countries. We find that specific performance is almost never claimed in our data-set, which includes CISG-cases as well as Danish contract cases, whenever actions need to be performed (in contrast to cases where goods simply need to be handed over). That specific performance is very rarely claimed in Civil Law countries seems also to be the consensus among comparative legal scholars.

While this provides support for the idea that enforcement of specific performance is difficult or costly, it does not tell us whether people do

not claim specific performance because it is not ultimately enforced by the legal system or because the non-breaching party for other reasons prefers to claim damages. Hence, we take a closer look at enforcement practices in three Civil Law countries: Denmark, France and Germany[6]. It turns out that enforcement of specific performance when actions must be performed is entirely absent in Denmark and weak in France[7]. Germany, on the other hand, does seem to enforce specific performance in the cases analyzed in the economic literature where specific reliance investments have been undertaken and substitute performance from third parties is hence not (readily) available. Thus, the question whether specific performance is claimed in Germany becomes of special interest (our data material includes some cases adjudicated in Germany but we do not study a large sample of German cases). Since specific performance seems to be (ultimately) enforced in Germany, if there were only few claims for it in Germany the reason would have to be a lack of demand for specific performance. If, on the other hand, there were many claims for specific performance in Germany, then this would point in the direction that the absence in other countries of such claims is caused by lack of enforcement on the part of their legal system. According to our sources, the number of claims for specific performance is low also

[6] Time does not allow us to analyze other countries.

[7] Cases may be found in both countries where one party is forced to deliver an already existing good or forced not to undertake an action, such as violate a competition clause.

in Germany. This leads us to conclude (although only tentatively since we are not positive that enforcement in Germany is strict when it comes to the actual practice of the bailiff (the Gerichtsvollzieher)), that the fundamental reason for the very limited use of specific performance in Civil Law countries probably is the lack of demand (ex post) for specific performance. We discuss some reasons that may lie behind this lack of demand.

Finally, we discuss implications of our findings for the literature on efficient breach and renegotiation design, as well as for the differences between Civil and Common Law countries as far as breach remedies are concerned. We end by restating our conclusions.

2. Empirical Evidence

2.1 Specific Performance in Cases Adjudicated under CISG

The CISG was the first major international sales law accepted by a large number of nations. CISG is now ratified by more than 55 countries around the world including leading trade nations.

2.1.1 Remedies for breach in CISG

Article 46 (1) provides that the buyer may require performance by the seller of his obligations. However under article 28, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale. This means that the courts of the common law countries such as USA, Canada, and Australia are not bound to grant specific performance. CISG gives both the seller and the buyer the right to claim damages instead of specific performance.

2.1.2 CISG; data and results

The data consists on an extensive case material obtained both from the privately UNILEX database and the following databases available on the internet; http://www.cisg.law.pace.edu/cisg/database.html and www.jura.uni.freiburg.de which contain some of the largest collections of cases involving CISG from all over the world. The databases include both cases decided by national courts as well as arbitration awards. The data set contains more than 200 cases where the question of specific performance vs. damages is present. Almost all the industrialized countries are represented in the data[8]. Of these 200 cases, only *one case mentions a buyer who claimed specific performance*[9]. A Russian enterprise had sold raw aluminum to a group of buyers located in Argentina and Hungary. After the enterprise was privatized in December 1994, the new owners stopped delivery in February 1995 and the case was subsequently submitted to arbitration in Switzerland. Concerning the buyer's request for specific performance the tribunal found that it had no legal support

[8] An exception is Japan that has not yet ratified the convention.

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

but the reasoning of the tribunal on this point is not clear[10]. The tribunal further stated that even if CISG was applied the tribunal "fails to see how specific performance could be an appropriate remedy for buyers in this case". The tribunal pointed to the problems associated with the enforcement of specific performance of contracts in Russia for the next eight or ten years.

2.1.3 Empirical Conclusion on CISG

The conclusion is clear. Even though specific performance is a remedy which is available in many of the CISG-cases we have studied, it is almost never claimed and in our material literally never granted. In very many cases, cover purchases are made and reimbursed under a rule of expectation damages.

2.2 Specific Performance in Danish Contract Cases

Our material covers cases reported in the Danish Weekly Law Report (Ugeskrift for Retsvæsen, hereinafter UfR) from 1950 till April 2000. UfR contains most of the important published cases but no arbitration awards most of which are not published. Apart from this material, we have studied an overview by Søren Lehman Nielsen[11] of Danish cases involving specific performance in construction contracts[12].

We have found very few cases involving specific performance. In UfR we found no published case within the last five decades where the buyer claimed specific performance in a case concerning the sale of

[10] See reference to the case in footnote above.

[11] In Ugeskrift for Retsvæsen 1996.

[12] Construction contract cases are published in a separate collection (called KFE).

goods[13]. Lehman's study shows, on the other hand, that there have been a few construction contract cases where specific performance were granted. However, as Lehman Nielsen stresses as his main point, in all of those cases *both parties* to the contract preferred specific performance to a cover transaction *(p.178).* The following case is an example[14]: a group of entrepreneurs had agreed in a contract to repair in a specified fashion some houses which they had built and which suffered from defects that might in the future prove costly. After signing the contract, the entrepreneurs realized that the cost of repair was out of proportion to the gain. Experts confirmed in court that the probability of future loss was very small in comparison to the expense of repair. Still, the Supreme Court voted by 3 to 2 to grant specific performance. This verdict could possibly have been enforced by the foged, since he could have granted the buyers the right to contract for a third party to do the repair. This possibility is confirmed by the fact that the repairs actually were carried out by the entrepreneurs[15]; they probably preferred this to a 'cover purchase'. Thus, we do find some, but not many, of the kind of cases discussed in the economic literature where specific performance leads to a social loss in comparison with damages by the cost of performance exceeding the value.

We should also note that there are cases where contractual obligations *not to perform certain acts* have been enforced, such as when a person violates a competition clause by leaving a firm to work for a competitor. In such cases the judicial enforcement agent (in Denmark he is called the foged, similar to the bailiff in common law) has sometimes issued an injunction. In this sense specific performance is in some circumstances an available remedy but our interestlies mainly not with the enforcement of duties *not* to act but

[13] UfR 1989.1039H.

[14] It is actually published in UfR (1989, page 1039). It is the only such case in UfR.

[15] Our source for this information is the parties' lawyers.

with the enforcement of positive duties to perform certain acts, mainly to finish a good or to deliver a service.

2.2.1 Conclusion on Danish Data

According to the empirical material, even when specific performance is available it is very rarely claimed. The number of cases involving specific performance is very limited; however, in construction contracts specific performance has been granted by arbitrators in some cases but only where both parties have preferred that remedy to damages.

3. Enforcement Systems in Three Civil Law Countries

The very limited use of specific performance in Civil Law countries might conceivably be attributed to lack of final enforcement. Whether specific performance is actually implemented in the Civil Law countries is the question to which we now turn. We investigate the systems in Denmark, France and Germany.

3.1. Denmark

Danish contract law lays down that a party whose contractual rights have been violated may choose between specific performance and damages[16]. However, the Code of Procedure greatly diminishes the number of cases for which specific performance will actually be enforced by the legal system. The system is the following: If the court orders the party in breach to perform as provided in the contract, there are two possibilities. Either the defaulting party performs or he does not. If he does not, the other party may choose to go to the

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

judicial enforcement agent (in Denmark he is called the foged, similar to the bailiff in common law). What the foged must do is provided in the Code of Procedure[17]. It stipulates that except in a specified class of cases, 'the foged converts the plaintiff's claim into money damages' (Code of Procedure §533). The specified set of cases §528-532 are the following:

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

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

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

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

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

Thus, whenever the defendant must perform acts, and these acts cannot be performed by a third party (a noteworthy exception), the foged converts a claim of specific performance into money. As a Danish foged said: *"As soon as some act needs to be performed by the defendant, we convert*[18].

It should be added that the plaintiff can bring suit in a separate criminal law case if the defendant has 'willfully disobeyed a verdict of specific performance'. However, this option is widely said never to have been used.

[17] Law no. 469 (3 june 1993).

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

3.2 Germany

The German Code of Civil Procedure is very similar to the Danish code. As the general rule, the non-breaching party has the right to claim specific performance. As in Danish (and French[19]) law, a basic distinction is made between the situation when the seller should take some positive action and when he just has to hand over the goods (see Zweigert & Kötz 1998, pp. 470). In the latter case, there will be enforcement if it can be done by the bailiff, if necessary with the help of the police, taking possession of the goods. In the former case a further distinction is made whether or not the act could equally well be performed by someone else (i.e. is 'vertretbar', see § 887 in the Code of Civil Procedure, Zivilprocessordnung, ZPO). If substitute performance is available (at reasonable cost, it may be added), a claim for specific performance will not be executed, but the plaintiff may make the cover purchase and the bailiff (the Gerichtsvollzieher) will then execute the money claim in value equal to the cover purchase. Thus, when substitute performance is available, the claim is ultimately, if not already at the court-level[20], converted to a money claim. In commercial transactions, cover purchases seem from our evidence frequently available, so this rule importantly limits the use of specific performance in German contract law. The only major difference between German and Danish law seems to lie in the enforcement of performance when performance consists of acts that can only (at reasonable cost) be performed by the seller himself, i.e. acts that are, in the German expression, 'unvertretbar'. Contrary to Danish law, the breaching party can for such acts be threatened with a fine or imprisonment if he refuses to deliver (§ 888 in ZPO). There

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

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

are, however, further exceptions: performance must not depend on the seller's inspiration or special effort[21] but rather must have a more routine character. Furthermore, § 888 describes some other situations where the penal pressure is also not available, notably in employment contracts[22].

3.3 France

Although the Code Civil in France provides the right to claim specific performance this principle is severely modified in Art. II42 which prohibits any judgement which obliges the seller to act in a particular way. The idea behind Art. II42 is that citizens are 'free' and should not be forced into a certain course of action by the State. However, according to Zweigert & Kötz (1998, p. 475), how far this principle is carried in practice is unclear.

The French Code Civil makes a basic distinction between an "obligation de faire" (to do) and an "obligation de donner" (to give), as do the German and the Danish. The latter situation refers to the situation where the seller simply has to deliver the goods to the buyer while the former refers to the case where an act needs to be performed. The case of 'donner' (giving) follows the same rules as in Denmark and Germany. For the case of 'faire' the rules are formally also quite similar to the Danish and German rules. Thus, the bailiff can execute a money claim arising from a cover purchase. There is, however, a difference in that French courts administer a special system of fines (astreintes) which is paid from the breaching party to the conforming party, if the breaching party chooses not to perform.

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[21] This is often mentioned but according to Dawson no cases of this nature exist.

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

However, Dawson (1959) called the whole French system non-sensical due to the lack of effective enforcement.[23]

This is confirmed by Zweigert & Kötz's conclusion (p.475): ''We may sum up by saying that French law generally admits the issuance of judgments for performance in kind but enforces them in a very grudging manner''.

3.4 Conclusion on Enforcement Systems

We may distinguish the following contractual duties:

a) duties to give (a further distinction can be made here between things and human beings, the latter is relevant in child custody cases).
b) duties not to do something.
c) duties to act when substitute performance is available.
d) duties to act when substitute performance is not available, as when the parties have made important relationship-specific investments.

Concerning a) and b) the duties will often be specifically enforced in all three countries.

Concerning c) specific performance may be enforced (or implemented) but, in all three countries only when it is in the interest of both parties. When substitute performance is available, specific performance will not be enforced against the will of the breaching party in any of the three countries. On the other hand, when substitute performance is readily available (what this means in practice is unclear) it is generally the case that the non-breaching party can, in all three countries, make the cover purchase and be reimbursed under the rule of expectation damages.

Concerning d), it seems that specific performance will be effectively enforced only in Germany. In Denmark it will not be enforced at all against the will of the breaching party while in France it will be

[23] He criticized the ineffectiveness of the use of 'astreintes', see p. 524-525.

ineffectively enforced due to the ineffectiveness of the system of 'astreintes'.

4. The Rationale For Not Enforcing Duties to Act

The account just given raises the question why duties to act are rarely enforced. In France, one reason is clearly that coercing someone to act in a specified way is seen as a restriction of his personal freedom, which is out of proportion to the aim thereby advanced, as expressed in Art. II42. The account below of the history of the Danish Civil Code reveals a similar rationale and in Germany one finds the same rationale both behind the rule that specific performance is not enforced when substitute performance is available and behind the rule that employment contracts are not specifically enforced.

4.1. A Brief History of the Danish Civil Code

The history of the Danish Code concerning enforcement of specific performance is the following: The law of 1842 prescribed that if the breaching party did not perform according to a court-decree stating specific performance, he could be sanctioned to periodic fines or imprisonment. The latter sanctions were abandoned as a means of coercion in 1916. The motives for changing the Code of Civil Procedure in 1916 states that one would not in the final instance incarcerate a person in consequence of his not meeting a commercial contractual obligation[24]. It was argued that this would be in conflict with fundamental principles of modern jurisprudence as well as violate a principle of proportionality[25]. Finally, as a reason for changing the law, conversion of claims

[24] see Parliamentary Report (Betænkning) No. 1178 1989

[25] The argument must be that if a person lacks assets, incarceration will be the only available instrument for if a person has assets one would assume that he could be coerced through fines alone.

was seen as administratively much easier and hence the method actually employed in the overwhelming majority of cases.
In conclusion, when enforcement of specific enforcement has been abandoned the reason is that costs have been seen as higher than benefits. The benefits have been perceived to be simply the difference in value for the plaintiff between specific performance and a money claim, which may often not be very great. Forcing people to act in a particular way requires a system of sanctions that is both expensive to apply (periodic fines and perhaps eventually imprisonment) and far-reaching for the individual. Enforcing money claims, where seizure of assets is in itself sufficient, is less costly.

5. Legal Scholars on the Use of Specific Performance

So far, the main conclusions are that claims for specific performance seem very rare indeed according to our empirical material, and that lack of enforcement can account for this in Denmark, partly (at least) in France but not in Germany where enforcement seems to be in place. This raises the question whether specific performance is also a remedy that is rarely used in Germany. This would point to the conclusion that lack of demand for specific performance is the ultimate reason behind its rare use. Since our empirical material is not directed at Germany in particular, we will instead consult the writings of legal scholars who know the Civil Law systems well.

In legal, comparative, writings on contract breach, the view that damages is the dominant form of relief also in Civil Law countries seems quite universal. Thus, the Principles of European Contract Law contain a section called ‘practical convergence’ (p. 400) where it is plainly stated that: ‘’The basic differences between common law and Civil Law are of theoretical rather than practical importance’’.

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

On the other hand, in his book on 'Rechtsverwirklung durch Zwangsgeld', Oliver Remien discusses the German case-material. He writes (our translation)[26]:

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

but the cases which he mentions do not generally involve production contracts. They concern such cases as (p. 134): a company being forced to render its accounts (a case from 1933) or to write up a balance-sheet (1985) , or: the printing in a newspaper of a correction (1986). However, Remien does mention two cases that involve production contracts: One case from 1897 concerning the delivery of electricity to a hotel and another case from 1985 concerning the reparation of a computer by the deliverer. Still, the impression remains that specific performance is rarely used, especially in commercial transactions.

The rare use of specific performance is directly stated by Kötz and Zweigert (p. 484):

'In Germany... where the claim to performance is regarded as the primary legal remedy, it does not in practice have anything like the significance originally attached to it, since whenever the failure to receive the promised performance can be made good by the payment of money commercial men prefer to claim damages rather than risk

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[26] ''Das Zwangsgeld findet beit unvertretbaren Handlungen ein weites und vielfältiges Anwendungsgebiet''.

wasting time and money on a claim for performance whose execution may not produce satisfactory results'.

This statement coincides with our conclusion[27],[28].

5. Why Do Businessmen Prefer Damages?

We can point to the following reasons:

1. When substitute performance is available it is often easier for the non-breaching party to claim damages that can pay for substitute performance than to claim specific performance that may lead to the same result.
2. Quality of performance may be hard for the court to observe and hence the non-breaching party can fear the quality of performance if it is forced upon the breaching party.
3. The time it takes for the court system (with possible appeals, it may take six years) to reach a verdict limits the value of ultimate delivery. This strengthens the bargaining position of the breaching party. In general, he can impose costs on the other party which will not all be recovered in the ultimate verdict.
4. The aggrieved party may fear that specific performance will be made impossible by the breaching party before the time of the verdict in which case the claim will anyway be converted into a money claim.

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[27] Another interpretation is that cases where specific investments are so important that substitute performance is not available are rare. We do not think that they are, although the number of CISG-cases which we found hat did visibly involve specific investments was much smaller than we had anticipated.

[28] According to Professor Møgelvang Hansen, who was member of an expert-committee to investigate the Danish rules of civil procedure in the beginning of the 1990's, the view that there is little demand for specific performance was an important rationale for the committee not to suggest the reintroduction of fines in Denmark as a means to coerce a party to perform.

5. Courts have difficulty writing down exactly what the required performance involves (though the empirical evidence from the construction contract cases where specific performance has been enforced indicates that this difficulty is not prohibitive). Thus, performance may not in the end be satisfactory.

There may be other reasons but the above would seem to go a long way in explaining the lack of demand for specific performance[29].

6. Implications for the Literature on Efficient Breach and Renegotiation Design

Our analysis suggests that the existing literature on breach remedies by abstracting from the problems and costs of enforcement have missed an essential aspect in the comparison between specific performance and damages[30]. It may of course be objected that the economic literature studies the ideal system of specific performance; that one could envisage a system in which specific performance would be enforced by immediate, tough measures, e.g. without a right of appeal or with heavy damages awarded for costs incurred by the non-breaching party due to postponement of performance. Whether such a system would actually be optimal is not clear, however. Coercion is costly both administratively and to the party being coerced, and the advantage which specific performance in some cases can hold over

[29] If this preference for damages was also present in older times, this would also explain a fact noted by Dawson (1959) that in Roman law damages gradually replaced specific performance.

[30] The part of the existing literature which comes closest to addressing the concern raised in this article, i.e. the cost and difficulty of enforcement, is the discussion concerning the monitoring of quality of performance. Ulen (1984) recognizes that quality of performance may be hard for courts to monitor, and that the breaching party may hence under-perform as a reaction to being coerced, but he stresses that this factor may be mitigated by the breaching party's concern for reputation.

expectation damages (when the value of performance is hard to verify) may not outweigh these costs. In any event, it seems clear that the current literature, both that on breach remedies and that on contract renegotation (e.g. Aghion, Dewatripont, Rey (1994)) is far from being descriptively accurate of the present legal system of Civil Law countries. In the real world, specific performance is far from being the mechanism which the literature analyzes[31].

Naturally, the case for damages rather than specific performance is strengthened by the inclusion of enforcement costs. While a well-functioning mechanism for enforcing damages exists, constructing one for specific performance is harder. These difficulties, which a study of the history of specific performance in Civil Law countries brings out clearly, are given little attention in the models of renegotiation design[32].

7. The Difference Between Civil and Common Law

It follows from the empirical section that Civil Law and Common law are not at all as different as sometimes imagined. Damages (often anticipated in a cover purchase) is in practice the main remedy in both systems. However, the analysis reveals that differences do exist, although on a small scale. To illustrate one difference we can take the case where the bailiff can order substitute performance if the breaching party refuses to perform according to a court-decree. We found that for the case of Denmark, in such cases the breaching party may end up performing according to the contract even though this is very costly to him. He may prefer this to a cover purchase that may be

[32] The present article relates to the debate on the methodological correctness of assuming incomplete contracts where more elaborate mechanisms are theoretically available, see Maskin-Tirole (1999). That even such a simple mechanism as specific performance turns out to be quite difficult and costly to enforce in practice does not give promise to more elaborate mechanisms.

even costlier, and renegotiation may not be feasible. We may hence end up with the kind of case envisaged in the literature on efficient breach where specific performance is socially costly. Some (Danish) construction contract cases illustrate this possibility[33].

However, the fact remains that very few such cases exist. Expectations damages is by far the most prevalent remedy both in Civil and in Common Law.

8. Conclusions

Our main points are the following:

1. Enforcement costs of various kinds are greater for specific performance than for damages. It is more costly for authorities to enforce specific performance, it is more costly in terms of violation of individual freedom to coerce people into performing certain actions, and it is more costly for the non-breaching party having to wait for performance which may take years. The higher administrative costs of specific performance and its higher degree of coercion are factors that speak in favor of damages and against the use of specific performance (while the cost to the non-breaching party is hardly an argument against giving him the choice of remedy).
2. The latter cost (to the non-breaching party) seems to be the most fundamental in explaining the very limited use of specific performance in Civil Law countries. Businessmen prefer damages (not only ex-ante as stressed by in the theory of 'efficient breach' but also ex-post). It is our impression that the major reason for this preference lies in the time it may take to obtain the goods or services of the contract. Appeals may prolong the case, and this

[33] In construction contracts, performance may be delayed at little cost. Thus, the breaching party cannot by threatening to appeal very greatly lower the value of a claim for specific performance.

gives the breaching party a strong bargaining position since, in reality, not all the costs hereby suffered by the non-breaching party will be included in the final damages.

3. The first two kinds of costs (administrative difficulty and coercion costs) explain why authorities are generally very reluctant to enforce specific performance in both France and (especially) Denmark. For the case of Germany it should be noted that specific performance is enforced only when substitute performance is not available and then only for some kinds of contracts (e.g. not for employment contracts). In Denmark, enforcement of specific performance was, broadly speaking, abandoned in 1916.
4. In the analysis of contract breach remedies, it is important to study not only what the judge will state but also what the bailiff will eventually do. In general, enforcement seems in practice to be more difficult than envisaged both in the literature on breach remedies and in the literature on renegotiation design. Enforcement is a mechanism in itself and the rule of specific performance is not well-defined unless the mechanism of enforcement is also specified.

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