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BETWEEN COMPENSATION AND PERFORMANCE: NAVIGATING REMEDIES FROM PICC TO NATIONAL LEGAL SYSTEMS**

Summary

This article presents a comparative analysis of remedies for non-performance in international contract law, focusing on the UNIDROIT Principles of International Commercial Contracts (PICC), the United Nations Convention on Contracts for the International Sale of Goods (CISG), German law, French law and English law. It examines the theoretical frameworks, practical implications, and comparative nuances of each legal system, providing an evaluation of how these frameworks address non-performance and the influences they exert on international contract law. Through this analysis, this study aims to elucidate the nuances and influences of each legal system on the relations between non-performance and damage compensation. The paper aims to determine which remedy offers a more equitable solution within different legal contexts, especially for PICC. The paper offers a comprehensive understanding of how various legal systems address remedies for breach of contract, highlighting their similarities, differences, and influences on one another.

Keywords: *UNIDROIT Principles of International Commercial Contracts, Remedies, Breach of Contract, Non-performance, Specific Performance, Damages.*

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1. Introduction

In the year that marks 30 years since the plenary session of the International Conference for the Codification of Private International Law (hereinafter: UNIDROIT) adopted the Principles of International Commercial Treaties (hereinafter: PICC), we may look back at the role played by the Principles, in order to praise the good sides and preserve them for the future, and to review some others and possibly question them in the present.[1] Soon after they were made publicly available to legal practitioners and academia in an integral form, the first positive results of this endeavour were already apparent. To this day, the results of this soft-law instrument are multi-dimensional. Therefore, it is the author's decision to dedicate himself in this work to the matter which, despite the various changes that the PICC underwent during the changes, remained immune to the passage of time and is completely faithful to its original version from 1994 - the legal remedies available to the creditor in case of non-performance of obligations from the contract by the other contracting party. The 30th anniversary of the UNIDROIT Principles provides a timely opportunity to reassess their impact and relevance in the global legal landscape.

Elucidation of the various issues that arise with specific performance and its relation with the compensation of damages aims to answer the question of the expediency of this solution in modern international contract law, as well as national legislation. As the situation with monetary obligations is clear, and as, regardless of the position, monetary compensation is owed, the field of analysis is narrowed to the performance of non-monetary obligations, thereby also including the obligation to give something (else, besides money), to do, not to do or to abstain from doing something. Therefore, at the centre of the dilemma are two legal remedies provided in case of breach of the contract (besides termination): a claim for the performance of a contractual obligation and a request for compensation of damages. Specific performance requires the breaching party to fulfil their contractual obligations as originally agreed, whereas damage compensation involves providing financial compensation to the aggrieved party for the losses suffered due to the breach.

As will be seen in further analysis, continental law traditionally gives primacy to the request for the performance of an obligation, which originates from the principle of *pacta sunt servanda*, while common law countries are

[1] UNIDROIT Principles of International Commercial Contracts – PICC. Black-letter version from 2016, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf, last visited 05. 08. 2024.

traditionally restrained when it comes to determining the right of the creditor to demand performance, and most often opt for compensation of damages. International sources of contract law, such as the PICC and the United Nations Convention on Contracts for the International Sale of Goods (in further text: CISG), have opted for the possibility that the creditor may demand the performance of an obligation arising from the contract, while the cases when it is not possible to demand the performance of non-monetary obligations are expressly stated, and the creditor certainly has the right to compensation for damages. Just as the PICC in its entirety, and especially the provisions on specific performance, are the consequences of the then-normative environment and dominant positions in legal theory, they now form part of the existing soft law, generating their influence. This work aims to, therefore, through the analysis of international legal instruments, as well as the solutions of selected national legal systems, present the current situation in modern law regarding the legal remedies available to the creditor in case of non-performance of contractual obligations.

2. The UNIDROIT Principles of International Commercial Contracts (PICC): A Harmonization of Remedies

2.1. General Remarks on the Drafting Style of PICC

The goal of the commission that worked on drafting the PICC was that their solutions do not explicitly rely on the solutions contained in the regulations of the countries, both of civil and common law legal tradition, which is why the neutral terminology is widely used, in order to avoid specific terms that might be associated with any particular legal system.[2] The motives behind this might be twofold. Firstly, the intent to legitimize PICC as independent legal principles that represent the most suitable solution for international trade agreements, and not those that have been judged to have won the "competitive battle" of different schools of thought.[3] Secondly, in this way, the focus on judicial practice and doctrinal analyses of national law is avoided, which at the same time reduces bias and predominance in international trade, and allows an unhindered, independent and autonomous interpretation of the PICC.

[2] M. J. Bonell, "The UNIDROIT Principles as a model for transnational commercial law", *Uniform Law Review* 2/2002, 18.

[3] F. Jose Angelo Estrella, "The influence of the UNIDROIT Principles of International Commercial Contracts on National Laws", *Uniform Law Review* 2-3/2016, 241.

However, the PICC rules were not created *ex nihilo*, and it is concluded that its provisions originate from international commercial arbitration, international conventions, mostly regarding the ones on the international sale of goods, and some modern codifications of commercial law.[4] This may lead to the conclusion that they are a good example of the so-called "common-core approach", and thus suitable for the use of the comparative analysis or those best suited for the specific circumstances.[5]

2.1. Specific Performance and Damage Compensation

It is well known that the solutions chosen by the drafters of the PICC are strongly inspired by the ones contained in the CISG, as if guided by the logic that the good solutions, i.e. not outdated, substandard or weak, should not be challenged.[6] PICC adopted a unitary concept of breach of contract[7] and provides a creditor with the remedy of termination in case of fundamental non-performance, which entails a lack of performance or defective performance.

In general, the PICC allows a creditor to demand specific performance.[8] This provision emphasizes the preference for enforcing the contract in accordance with the principle *pacta sunt servanda*, and the approach that the contract should be respected in its entirety and that the contractual obligations should be performed as they are negotiated. The principle thus reflects the civil law tradition, where the performance of contractual obligations is generally favoured over monetary remedies, namely French and German Law.

As previously mentioned, article 7.2.2 of the PICC does allow a creditor to demand performance, but this article also enlists a number of exceptions when the specific performance cannot be claimed. Firstly, PICC recognize

[4] I. Carr, P. Stone, *International Trade Law*, Routledge, London 2017. Available at: https://www.perlego.com/book/2193208/international-trade-law-pdf, last visited 14. 04. 2024.

[5] M. J. Bonell, "UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law", *Uniform Law Review* 1/2004, 7.

[6] H. Kronke, "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond", *Journal of Law and Commerce* 1/2005, 456; A. Prujiner, "Comment utiliser les principes d'UNIDROIT dans la pratique contractuelle", *Revue Juridique Themis* 2/2002, 572.

[7] More about the unitary concept of the breach of contract, see: K. Jovičić, S. Vukadinović, *Neizvršenje ugovora, odgovornost i naknada štete,* Institut za uporedno pravo, Beograd 2023.

[8] Art. 7.2.2 PICC.

both factual and legal impossibility, acknowledging the fact that the impossibility may influence the performance. Secondly, the creditor cannot claim specific performance if "enforcement is unreasonably burdensome or expensive".[9] *Ratio legis* behind this provision may be found in the necessary balance between the interests of the contracting party, meaning that the debtor should not be at a loss due to specific performance, or be extremely burdened due to performance of the obligation as such. Thirdly, sub-paragraph (c) excludes the right of the creditor to claim specific performance whenever "the party entitled to performance may reasonably obtain performance from another source".[10] The commentators of PICC find this exemption as an emanation of economic reality, as this exemption relates to obtaining goods or services that are easily accessible on the market due to their standard qualities and can be provided by many suppliers.[11] This is also in line with the potential interests of the party entitled to request performance. Since it can easily obtain the performance from another party on the market and since either goods or services of the same kind are easily found, his interests do not necessarily have to be claiming specific performance by the specific contractor. It might be even more desirable to conclude another contract and obtain the performance faster, and not to wait for the performance by the initial contracting party. This provision is somehow mitigated by introducing the standard of reasonableness. The right to claim performance should not be excluded every time performance may be obtained from another source, but only when it is reasonable for the entitled party. The next exception is regulated in sub-paragraph (d) and refers to the performance of an exclusively personal character. The phrase "exclusively personal character" is defined as a performance that is not possible to delegate to another person, that requires personal skills of some nature (artistic, scientific etc.), or if the performance is linked to the specific confidentiality between the contracting parties.[12] This definition has significant similarities with the concept of *intuitu personae* contracts of continental law.[13] Lastly, if the obligee did

[9] Art. 7.2.2 (b) PICC.

[10] Art. 7.2.2 (c) PICC.

[11] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[12] *Ibid*.

[13] About the definition and the practical implications of *intuitu personae* contracts, see: J. Vukadinović Marković, I. Radomirović, „Pravo na naknadu štete kao posledica povrede receptum arbitri -građansko pravna odgovornost arbitara -" in: *Prouzrokovanje štete, naknada štete i osiguranje* (ur. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo,

not request performance within a reasonable time after becoming, or ought to become, aware of the non-performance, the obligee loses the right to request specific performance (subparagraph (e)).[14]

When it comes to the enforcement of the contractual obligations whose performance is ordered by the court, article 7.2.4 introduces the possibility of the court directing a fine to the party who failed to perform, and this fine is not to be linked with any damages, i.e. oblige can claim damage compensation separately. Primarily, the penalty is to be paid to the aggrieved party, but other solutions may be applied as well if *lex fori* states otherwise. Ordering a penalty is at the discretion of the court, so it is easily concluded that not all types of non-performances would be equally fined. While it is not expected to impose a penalty for the monetary obligations, the judicially imposed penalty is considered to be the most effective solution when it comes to the obligations to do something or to abstain from doing something.[15] More widely, the threat of a penalty for failing to perform is recognized as one of the most effective means of ensuring performance. Furthermore, a judicially imposed penalty does not present only a punitive measure, but also a measure of securing and ensuring that the performance is to be made, which is an entirely different function besides being punitive, which may provide performance before the penalty actually being paid.

Judicially imposed penalty, regulated as it is, is considered to be a copy of the *astreinte* of French law.[16] Namely, paying a penalty to the aggrieved party is an unknown concept to both German and common law. Since the institute is almost the same, further analyses will follow in the part of this article dedicated to French law. Only a few remarks will be made, for the sake of future comparison. Although the commentators point out that the judicially imposed penalty is to be more used when it comes to the specific kinds of obligation (to do or to abstain from doing), the possibility for the court to order a judicial penalty is undifferentiated, i.e. the court may order a penalty whenever it sees fit, irrelevant of the type of obligation *in concreto.* Furthermore, PICC do not distinguish different kinds of penalty, nor does it regulate how the penalty is to be calculated, which leaves a lot of questions to be asked.

Beograd-Valjevo 2022, 231–245.

[14] Art. 7.2.2(e) PICC.

[15] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[16] I. Schwenzer, "Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts", *European Journal of Law Reform* 3/1999, 302.

Article 7.4.1 provides for damages that cover the actual loss and lost profits resulting from non-performance. The PICC's approach to damages aligns with the principle of full compensation, which ensures that the injured party is entirely compensated. However, contractual liability is limited to the foreseeable damage, i.e. damage that was foreseen or could reasonably have been foreseen at the time of the contract conclusion,[17] which is similar to the approach under the CISG and the French Civil Code.

It may be concluded that the PICC's approach to remedies represents a balance between civil and common law traditions. The broad availability of specific performance in the PICC is proof of civil law influences, while the provisions on damages show an influence of common law tradition. The preference for specific performance aligns with the principle that contracts are binding and should be fulfilled as agreed. However, damage compensation serves as a practical alternative when specific performance is not an adequate solution.

3. The CISG Approach to Remedies

The Convention addresses remedies for non-performance in Articles 45-52, balancing the need for enforcement with practical considerations.

Article 46(1) allows a buyer to "require performance unless he has resorted to a remedy inconsistent with such requirement". This article further regulates the cases of non-conformity of the goods with the contract, allowing the buyer to require delivery of substitute goods under certain conditions, or to remedy the non-conformity by repair.[18] However, this provision has to be read in conjunction with Article 28, which recognises any limitation on such a remedy under a particular national system, if the court is not bound to enter such judgment under its law.[19] Article 79 of the CISG points out the principle of impossibility, excusing a party from performance if an impediment beyond their control prevents the fulfilment of the obligation, which is an exemption also provided by the PICC. On the other hand, when it comes to the compensation of the other party in case of non-performance, it falls within the scope of the CISG, and the relevant provisions of the PICC do express the "general" principles on which the CISG is based.[20]

[17] Art. 7.4.4 PICC.

[18] Art. 46(2) and (3) CISG.

[19] L. Hsu, "Remedies Available for Breach of Contract under the UN Convention on Contracts for the International Sale of Goods", *Singapore Academy of Law Journal* 1/1996, 117.

[20] H. Kronke, 458.

Article 74 allows for the compensation of damages that cover the loss suffered due to non-performance, as a consequence of the breach. The same article also limits the damage by the standard of foreseeability, meaning that "damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract".[21]

This dual approach ensures that while specific performance is available, damages provide a necessary alternative when performance is not feasible. This solution is praised in legal doctrine, bearing in mind that the CISG prefers performance over termination, which has the effect of minimizing the costs and risks and is more in accordance with the presumed interests in international trade law.[22]

In conclusion, The CISG's remedies for non-performance contain ideas of both civil and common law systems, same as PICC. On the other side, PICC appears to complement the CISG provisions, making them more precise and more detailed. It is stated that this improvement is not to be attributed to the merit of the PICC's drafters but is more a result of the spontaneous evolution of international trade law and legal practice, and, perhaps, the participation of independent experts in drafting procedures.[23]

4. Continental Legal Traditions

4.1. French Law

Literal enforcement, as a key principle of French contract law, is mostly linked to the principle of the binding force of the contract.[24] It is introduced by the Law of 9 July 1991 on the reform of civil enforcement procedures, which states that "all obligations can, under the conditions laid down by law, constrain the

[21] Art. 74 CISG.

[22] B. Ceesay, "Finding an Ideal Contract Law Regime for the International Sale of Goods: Comparative Study on the Remedy of Termination for Breach of Contract under the United Nations Convention on Contracts for International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC) and the Gambia Sale of Goods Act", *European Journal of Law Reform* 2/2021, 186.

[23] H. Kronke, 458.

[24] Article 1221 of *Code Civil (France), Journal Officiel de la République Française, 1804.*

defaulting debtor to carry out his obligations".[25] It is usually considered that, if deprived of such a remedy, a contract has less binding force.[26]

As previously mentioned, Article 1221 of the French Civil Code establishes specific performance as the primary remedy for non-performance, unless "the performance is impossible or there is a disproportion between the interest of the creditor and the expenses of the debtor acting in good faith". This provision reflects a commitment to ensuring that contractual obligations are fulfilled while accommodating practical obstacles. It may be concluded that French law also recognizes the proportionality condition as necessary to request specific performance.

Article 1231-1 provides for damages in cases of non-performance (and delayed performance), which is further elaborated in the following articles of the Code. The French approach to damages emphasizes the full compensation (similar to the PICC and CISG), but only to the limit of its foreseeability, including both actual loss and missed gain. The debtor has to pay only for the damages that were foreseen or could have been foreseen since the conclusion of the contract, unless he has acted faulty or fraudulently.[27]

4.1.1. Astreinte

As mentioned when analysing relevant provisions of PICC, French law imposes a penalty called *astreinte,* which is a fine ordered by the court in case of non-compliance with the order of the court to fulfil its contractual obligation. As in PICC, this penalty is independent of damages and is ordered for the sake of compliance with the court orders. French Code on Civil Enforcement Procedure states that the court may, at its own initiative or otherwise order the payment of *astreinte*. Article L-131-2 distinguishes provisional and definitive *astreinte*. Provisional *astreinte* is ordered when the court hasn't determined its definitive character yet, while the definitive one is ordered after the provisional one, for a determined period. If not all the conditions for definitive *astreinte* are met, it is considered to be

[25] Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution, *Journal officiel de la République Française* 1991. *Astreinte* is now regulated by the Code of civil executional procedure (Code des procédures civiles d'exécution), *Journal Officiel de la République Française* 2012.

[26] H. Beale *et al*, *Cases, Materials and Texts on Contract Law*, Hart Publishing, Oxford 2010, https://www.perlego.com/book/391516/contract-law-ius-commune-casebooks-for-the-common-law-of-europe-pdf, last visited 14. 04. 2024.

[27] Art. 1231-3 French Civil Code.

a provisional one.[28] Also, French law envisages cases where the *astreinte* is not allowed, which refers to the cases of *force majeure* and the case when the contractual obligation is strongly linked to the debtor. It is argued that the personal character of the obligation would, in case of the forced execution, lead to an excessive intrusion into the debtor's personal liberty, which prevents ordering of *astreinte*.[29]

Although the possibility of imposing a penalty is known in other legal systems as well, there is no unique approach as to the beneficiary of this payment. In both French law and PICC, the penalty is considered to be a kind of private fine that is to be paid to the aggrieved party, which is not the case in other legal systems. That might be considered as an unjust enrichment for the aggrieved party, as it is claimed independently of the damages. Since this solution originates from French law, it might be concluded that French law was a predominant influence that caused the introduction of judicially imposed penalties in PICC. However, a few differences are significant. Firstly, PICC do not know the mechanism for calculating the penalty. Secondly, PICC do not know the difference between different kinds of penalties, in contrast to the French distinction between provisional and definitive *astreinte*. Although it would be not necessary to regulate the penalty in PICC in the same way as in French law, this lack of regulation may demonstrate the lack of clarity and precision when it comes to this penalty, which may be repelling for the legal practitioners from the other legal systems. That is why the commentators of the PICC have explicitly expressed their doubt that the judicially imposed penalty is to be followed outside of French legal systems.[30]

4.2. Germany

German contract law, as codified in the *Bürgerliches Gesetzbuch*,[31] presents a specific approach to non-performance. The BGB grants the obligee the right to claim performance in kind, as stipulated in Section 241(1) BGB. However, this right is limited by several exceptions, provided in Article 275 BGB. The request for specific performance of the obligation

[28] Art. L-131-2 French Code on Civil Enforcement Procedure.

[29] G. Naumoski, *Pojam, punovažnost i izvršenje predugovora,* doctoral thesis defended at the Faculty of Law University of Belgrade, Belgrade 2021, 192.

[30] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[31] German Civil Code (*Bürgerliches Gesetzbuch)*, *Bundesgesetzblatt* (hereinafter: BGB).

is excluded to the extent that performance has become impossible for the debtor or any other person.[32] Then, the BGB proclaims the principle of proportionality, as it is stipulated that "the obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in the performance of the oblige".[33] Thus, proportionality also plays a significant role, since the obligor may refuse performance if it entails an expense or effort grossly disproportionate to the obligee's interest in the performance. Thirdly, "the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor."[34] Remedies, including damages, are available if specific performance is not feasible, considering that the obligor is at fault for the non-performance.[35] The starting point is that the obligor is liable for damages only if he is at fault.[36] The right of the obligee to demand damages *in lieu* of the performance is subject to a few conditions. The obligee has to give a reasonable deadline to the obligor for the performance prior to demanding damages *in lieu* of the claim for a specific performance.[37] This deadline has to pass without results, while the trivial non-performance is not enough for the obligor to claim damages.[38] This framework reflects the civil law tradition's preference for performance over damage compensation.

[32] Therefore, both objective impossibility, which makes execution impossible for every person, and that which makes execution impossible only for the debtor *in concreto* are relevant.

[33] Art. 275(2) BGB.

[34] Art. 275(3) BGB.

[35] Art. 280(1) BGB.

[36] H. Beale *et al*.

[37] Provision of Article 281 of BGB regulates the right to demand compensation when the deadline for the performance of the contractual obligation is not an essential element of the contract. If it is, the compensation for damages may be demanded immediately after the deadline, and it is unnecessary to inform the debtor that the contract is terminated. B. Stjepanović, I. Radomirović, „Fiksni formalni ugovori – raskid po sili zakona", u: *Uporednopravni izazovi u savremenom pravu - In memoriam dr Stefan Andonović* (ur. Jovana Rajić Ćalić), Institut za uporedno pravo, Pravni fakultet Univerziteta u Kragujevcu, Beograd 2023, 540.

[38] Art. 281(1) BGB.

When it comes to the enforcement of contractual obligations, the German Code of Civil Procedure[39] allows the courts of first instance to impose a fine on the debtor in case of breach. This fine may be imposed only when an obligation to refrain from an action or to cease it is not performed, which makes the provision predictable and clarified. The debtor may be ordered to pay a fine for each infraction, and he can even be detained, for each infraction.[40] Contrary to the French *astreinte*, this fine is not to be paid to the creditor, but to the state budget, as any other fine.

5. English Law

The common law remedy of specific performance appears to be much more limited than the literal enforcement of performance in continental systems.[41] Some authors argue that one of the reasons for this lies in the different understanding of the notion of the so-called literal performance. Civil law systems have a broader perception of this notion, including the case where the obligee is entitled to obtain performance by himself or by a third party, while the common law systems use this notion only to cases when the obligor performs the obligation by himself.[42]

English contract law traditionally takes a more restrictive stance on specific performance compared to its continental counterparts. The Sale of Goods Act regulates the action for specific performance in Article 52.[43] The provision of Article 52 states that the court may order that the contract is to be performed specifically, which means that the remedy of specific performance is generally applied at the court's discretion, only if it thinks fit.[44] In exercising this discretion, the court shall refuse the remedy if it finds that the damage will fully compensate and will but the plaintiff in as good a position as if the contract has been performed.[45] An action for damages for non-delivery of goods is regulated in Article 51, before the provisions regulating specific performance.

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[39] German Code of Civil Procedure (*Zivilprozessordnung)*, as promulgated on 5 December 2005 (*Bundesgesetzblatt (BGBl., Federal Law Gazette*) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 10 October 2013 (*Federal Law Gazette* I page 3786) and Book 10 last amended by Article 1 of the Act of 5 October 2021 (*Federal Law Gazette I*, p. 4607)

[40] Art. 890 of the German Code of Civil Procedure.

[41] H. Beale *et al.*

[42] *Ibid.*

[43] Sale of Goods Act 1979.

[44] Art. 52 of the Sale of Goods Act.

[45] J. Beatson, *Anson's Law of Contract,* Oxford University Press, Oxford 1998, 596.

Two arguments are pointed out as a reason why the specific performance should be a secondary remedy for breach of contract: mitigation rule, as a core principle of English tort law, is to be avoided if the specific performance is applied, and, secondly, the techniques for quantifying losses have significantly improved and thus justify accepting damages as a primary remedy.[46]

Also, the English courts were historically reluctant to order specific performance for contracts that require supervision, due to the challenges that may arise. This cautious approach reflects a preference for monetary damages over specific performance, emphasizing the practical difficulties in enforcing specific performance. Damages are given as a way of compensation, and there is not any punitive element of damages.[47] English contract law, same as its continental counterparts, limits contractual liability to the foreseeable damage resulting from non-performance.[48]

6. Instead of Conclusion

The development of these remedies has been influenced by various legal philosophies and legal traditions. Specific performance has often been mostly favoured by civil law systems, reflecting a strong commitment to the binding force of the contract. In contrast, common law systems have traditionally prioritized damage compensation, pointing out the practicality of this remedy as a more suitable one.

Nonetheless, the point remains that in French and German law specific performance is seen as a normal remedy for non-performance, while in common law, it is seen as a remedy of the "second line", subject to a court's discretion. The arguments in favour of specific performance generally revolve around the statements that the specific performance logically emanates from the contract itself, that the damages may be inadequate and that actions for damages may cause higher costs, that it might be more difficult to assess the amount of damage and provide compensation to be just and satisfactory.[49] The argument against the specific performance can be deducted from the fact that specific performance is rarely ordered and judicial procedures for

[46] *Ibid.*

[47] *Ibid.*

[48] G. Naumoski, 186.

[49] M. Zahraa, A. A. Ghith, "Specific Performance in the Light of the CISG, the UNIDROIT Principles and Libyan Law", *Uniform Law Review* 3/2002, 752.

specific performance can be costly and time-consuming.[50] English scholars also, as previously mentioned, point out the concerns regarding supervision of enforcement and avoidance of mitigation principle. Besides the matters of supervision pointed out in English doctrine, most of these arguments are practical, and most of them can be equally attributed to both of these remedies. However, what should be beyond doubt is that the arguments *pro et contra* regarding international contract law should be elaborated bearing in mind specific circumstances of international trade.

In international settings, it is argued that there is no justification to prioritize specific performance over the award of damages, because the creditor's interests may be more satisfied through the damages.[51] It is said that the specific performance relies on the principle "all or nothing", while the compensation of damages appears to be a more flexible remedy, that may more adequately respond to the needs of flexibility in international trade.[52] An important argument in favour of damages is also already pointed out, that the compensation of damages as a remedy allows the application of the mitigation principle.

The relationship between compensation of damages and specific performance as stated by the PICC is harmonized, tending to use solutions from both civil and common law traditions. It is evident that the drafters of the PICC have tried to find a common ground for these legal traditions, which is why it is said that the PICC offer "neutral solutions".[53] They offer a balanced approach, integrating elements from both traditions in order to facilitate international commercial transactions. That is why it is nicely put that commercial law is based on experience, and by the words of Kronke, "it listens as much as it talks".[54] Understanding these differences is crucial for international businesses and legal practitioners, as it influences contract negotiation, enforcement, and dispute resolution. PICC reflect significant influences from the CISG, BGB, and *Code Civil*, while introducing novel concepts to address specific challenges in international contracting. The PICC's approach to the

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] Guide juridique de la CNUDCI, la HCCH et Unidroit sur les instruments de droit uniforme relatifs aux contrats du commerce international (notamment de vente), https://www.perlego.com/book/3835203/guide-juridique-de-la-cnudci-la-hcch-et-unidroit-sur-les-instruments-de-droit-uniforme-relatifs-aux-contrats-du-commerce-international-notamment-de-vente-pdf, last visited 14. 04. 2024.

[54] H. Kronke, 460.

claim for specific performance and damage compensation, as remedies in case of breach of the contract, represents a compromise between civil law on the one hand and flexible common law practices on the other.

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IZMEĐU NAKNADE ŠTETE I IZVRŠENJA: PRAVNA SREDSTVA U SLUČAJU NEIZVRŠENJA UGOVORA OD UNIDROIT PRINCIPA DO NACIONALNIH PRAVNIH SISTEMA

Apstrakt

Rad predstavlja uporednu analizu pravnih sredstava koja stoje na raspolaganju poveriocu u slučaju neizvršenja ugovora u međunarodnom ugovornom pravu, fokusirajući se na UNIDROIT principe za međunarodne trgovačke ugovore, Konvenciju Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe (CISG), nemačko, francusko i englesko pravo. U radu se ispituju teorijski okviri, praktična primena i upoređuju rešenja svakog pravnog sistema, čime se pruža prikaz odredaba koje se bave neispunjenjem i uticajima koji vrše u međunarodnom ugovornom pravu. Ovaj rad ima za cilj da rasvetli rešenja i uticaje svakog pravnog sistema na koncept neispunjenja u odnosu na naknadu štete. Rad ima za cilj da utvrdi koji pravni lek nudi pravičnije rešenje u različitim pravnim kontekstima, sa akcentom na UNIDROIT principe.

Ključne reči: UNIDROIT principi međunarodnih trgovačkih ugovora, pravna sredstva, povreda ugovora, neizvršenje, ispunjenje, naknada štete.

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