

# Review of Specific Performance as a remedy for breach of contract

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There are a few different legal remedies a party may consider when another party has allegedly breached its contractual obligation, including lawsuits and arbitration. One of remedies for breach of contract is specific performance. How is a right to specific performance of a contract used by parties? Despite longstanding scholarly interest in the topic, this question has been largely left unexplored. This article presents a qualitative study of parties involved in specific performance litigation. It investigates how parties choose between remedies, whether they negotiate after judgment for specific performance, whether specific performance is implemented, and the difficulties involved in its implementation

As is generally known, one of the more common remedies for a breach of contract is a damages award. This is monetary compensation that must be made by the breaching party to compensate the other party for losses and other expenses connected with the breach. But sometimes a monetary remedy doesn't quite make the plaintiff whole, which is the goal of any civil remedy. Courts can order defendants in contract disputes to actually perform the contractual duties as originally agreed if it is determined that money alone cannot resolve the issue. This is called specific performance. Specific performance is a central contractual remedy but, in Anglo-American law, generally is subordinate to damages. The familiar rule is that courts will not award specific performance when damages provide adequate relief. [1]

Specific performance is a specialized remedy used by courts when no other remedy (such as

money) will adequately compensate the other party. If a legal remedy will put the injured party in the position he or she would have enjoyed had the contract been fully performed, then the court will use that option instead. The most common reason courts grant specific performance is that the subject of the contract is unique, when it's not merely a matter of money or where the true amount of damages is unclear. When a contract is for the sale of a unique property, for instance, mere money damages may not remedy the purchaser's situation.

Specific performance is an extraordinary equitable remedy that compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that, under the circumstances, justice will be done between the parties. Specific performance grants the plaintiff what he actually bargained for in the contract rather than damages for not receiving it; thus specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract. [12]

Specific performance can be granted only by a court in the exercise of its equity powers, subsequent to a determination of whether a valid contract that can be enforced exists and an evaluation of the relief sought. As a general rule, specific performance is applied in breach of contract actions where monetary damages are inadequate, primarily where the contract involves land or other personal property. Damages for the breach of a contract for the sale of ordinary personal property are, in most cases, readily ascertainable and recoverable so that

specific performance will not be granted.[ 12 ]

The remedy of specific performance presupposes the existence of a valid contract between the parties to the controversy. The terms of the contract must be definite and certain. This is significant because equity cannot be expected to enforce either an invalid contract or one that is so vague in its terms that equity cannot determine exactly what it must order each party to perform. It would be unjust for a court to compel the performance of a contract according to ambiguous terms interpreted by the court, since the court might erroneously order what the parties never intended or contemplated.[12 ]

Specific performance is ordered only on equitable grounds in view of all the conditions surrounding the particular case. The determining factor is whether, in equity and good conscience, the court should specifically enforce the contract because the legal remedy of monetary damages would inadequately compensate the plaintiff for the loss.

An important advantage to this remedy is that, since it is an order of an equity court, it is supported by the enforcement power of that court. If the defendant refuses to obey that order, she can be cited for criminal Contempt and even imprisoned. These enforcement powers are one of the principal reasons why plaintiffs seek specific performance of contracts.

As noted, the traditional common law rule is that specific performance is available only when damages are inadequate. The rule is an instance of the more general principle that equitable relief—specific performance being an equitable remedy is awarded only when the legal remedy is inadequate.[ 2 ] This leaves open the question of when damages are “inadequate.” This condition occurs when damages are difficult to quantify—for example during the sale of a business with no ready market value, or when the breach would prevent the non-breaching party from performing a contract with a third party—as when the non-breaching party is under a contractual obligation to resell the specific property in question and has no realistic ability to obtain the goods elsewhere. Damages can also be inadequate when the plaintiff has a particular use for the property which cannot be fully compensated by a damage award based on market value. Courts may in their discretion conclude that

damages are inadequate in other settings as well.[ 2 ]

Section 52(1) of English Sale of Goods Act (1979) limits application of specific performance to the cases of “ascertained” goods, which are “clearly identified and agreed at the time of contract” formation. In any case discretion of application is with the court, including situations where a buyer is put in hardship, which means there is no legal certainty for the plaintiff applying for the remedy. If the goods are considered to be unascertained, equitable remedy as specific performance cannot be awarded, as established by the leading case. In another case the opposite decision is reached, where in case of selling non-specific goods court has granted specific performance, considering the state of the market. Traditionally specific performance was considered as remedy claimed by the buyer only, but practice established right of the seller to demand acceptance of delivery and compensation of losses alongside. Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee the precise performance that he purchased.[3]

US Uniform Commercial Code 118 (UCC) distinguishes the agreement as bargain of the parties from the contract as total legal obligation between the parties, resulting from agreement.[13] Under Sec. 52(1) of UK Sales of Goods Act 1979 court may at own discretion in plaintiff’s action for breach of contract to deliver specific or ascertained goods (by judgment or decree) award specific performance without giving the defendant the option of retaining the goods on payment of damages.[11]

Under §2-716 UCC specific performance can be affected by the court where the goods are unique or in other proper circumstances; additionally court may order payment of the price, damages or other relief as my deem just. A buyer has right to receive identified goods, if he is unable to find substitute or under the reasonable circumstances such effort is not justified. Doctrine of specific performance is expounded by three subsidiary rules: 1) damages presumed inadequate when the subject of the contract is unique and 2) in respect of real property; 3) prevention of specific performance in respect of services of personal nature or causing undue judicial supervision. Current

general opinion expresses that specific performance is awarded more often, than conventional policy prescribes.

American legal doctrine of specific performance is divided into three mainstreams:

1) considering that specific performance should be granted routinely;

2) it should be more restricted (efficient breach theory);

3) it should be awarded, unless a special moral, policy or practical reason prevents in a certain group of cases, or if a “virtual” performance is available.

Major reasons in favor of specific performance are:

1) it is the best way to ensure indifference principle;

2) implementation of the bargain principle;

3) stimulates efficient information exchange.

A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. §17 (1) the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.

Objections against specific performance are:

1) pitfalls of enforcement process (from position of society specific performance is very intrusive and coercive and inherent of judicial error risk);

2) opportunism of a promisee: (I) the latter decides should she sue for damages or performance; (II) undermining the mitigation of damages rule; (III) a seller, demanding specific performance or damages, is indifferent which remedy to apply, whereas a buyer can choose: to sue for damages only, which would be calculated at the time of breach or to sue for specific performance along with damages, which would be calculated at the time of award.

A promisee is entitled to sue for damages in conjunction with specific performance. Suit for damages can be decided by the jury trial, while specific performance by a single judge. Therefore a promisor will be placed in unequal procedural position by not having option to choose.[3]

Temporary injunction can be granted fast, but suit for specific performance can take long time. Duty of promisee to mitigate damages re-

duces social costs, but she can be awarded this remedy even without mitigation. Specific performance will involve significant social cost, because a breaching buyer values the seller’s performance less than the cost of production, by continuing performance a seller increases buyer’s costs without own benefit (seller covers his lost profit irrespective of performance, but buyer’s damages will increase), 2) cover damages are easier to prove; 3) minimizes social and private costs; 4) circumvent disadvantages of traditional specific enforcement.

This cover principle of Common law is analogous to the principle of surrogate performance in Civil law. We can see a good example of similarities of the end result, achieved in different legal doctrines; it also more precisely reflects practical aspect of the contract law in relation to current world economy. If to take a closer look on more recent instruments of International codification, we can see different ways of how divergence of specific performance in Civil and Common law doctrines was overcome.

Arguments in Favor of the Traditional Rule will be reviewed as follows. Several justifications can be imagined for the Anglo-American rule, at least as a default principle that most contracting parties would prefer: 1. Damages, it is said, are generally a more efficient remedy because they permit either party to engage in efficient breaches of contract—that is, to breach the contract results from the inability to procure at any price the goods necessary to assure the successful operation of a plant) when the social value of breaching exceeds the social cost. If one party will gain more from breaching than the other will lose from the breach, then the first party can breach the contract and pay the second party damages equal to the latter’s lost profits. The first party is better off as a result of the breach and the second is no worse off; society as a whole is a beneficiary. [2]

Specific performance, on the other hand, does not promote efficient breaches in the same way. Because under specific performance the non-breaching party can compel the breaching party to perform its obligations under the contract, the social value of the breach is lost. Settlement bargaining will overcome this problem if transactions costs are low enough the breaching party can pay the non-breaching

party some amount larger than the breaching party's damages but lower than the breaching party's profit from breach, leaving both parties better off and generating the socially efficient allocation of resources. But sometimes costs of transactions—such as strategic behavior of the parties, miscalculations, emotional factors, or simply a lack of time to bargain—can prevent the parties from engaging in this sort of value-enhancing deal. In such cases, society can be worse off under specific performance than under damages.[3]

2. The rule preferring damages over specific performance might limit the parties' ability to extract unfair consideration during settlement negotiations. Suppose that the plaintiff's damages from breach are \$100,000 but performing the contract would cost the defendant \$200,000. If it is presumed that the plaintiff's purpose in entering the contract is only to obtain the profits expected from the defendant's performance, rather than to also obtain extra profits after breach, then the injunctive remedy would allow the plaintiff to obtain up to \$100,000 in unbargained-for compensation from the defendant as the price for settling the suit. The rule limiting specific performance to cases where damages are inadequate polices against this sort of opportunism. At the same time, the rule may also limit the defendant's ability to behave opportunistically in some settings. Suppose that the contract is one for personal services. If the preferred remedy were injunctive relief, then the defendant could satisfy its obligation by performing the services in question. But since relations between the parties have broken down at this point, the defendant can elect to shirk on performance in order to reduce its costs of complying with the judgment. The Anglo-American rule protects plaintiffs against this risk by preferring a monetary remedy thus allowing the plaintiff to find another service provider to carry out the contract obligations.

3. The rule favoring contract damages over specific performance could be seen to police against destructive behaviors by litigants who are so emotionally involved in the litigation that they seek specific performance for reasons of spite—not to benefit themselves, but rather to harm their adversaries.

4. The rule could be seen as enhancing the defendant's right to jury trial, since it establishes a preference for damages (which trigger a jury trial) over injunctive relief (generally adjudicated by the court).

5. The rule might conserve on judicial resources to the extent that the burden on courts of ascertaining the correct measure of damages is lower than the burden of policing the defendant's performance of the contract.

6. The rule might be justified as a tie-breaker: since some remedy must be awarded, and it would not be appropriate to award both, courts need a principle for deciding which one to award. The Anglo-American rule (in theory) partitions the remedy into two mutually exclusive categories: cases where damages are adequate, in which case money is the exclusive remedy; and cases where damages are not adequate, in which case specific performance is the exclusive remedy.

7. The rule might be justified simply because it would be too disruptive to change it, given that millions of contracts are written under the assumption that the rule will govern their enforcement.

8. A preference for damages over specific performance might be justified from a moral point of view. The damages remedy, for example, could be conceived of not as an option to breach a promise, but rather as an alternative form of performing a contractual obligation; in this view, the morally problematic idea of the law rewarding people for breaking promises disappears because no promise is broken. [2] Backing this interpretation is the idea that because people in contractual relationships implicitly promise to act in a way that maximizes their joint welfare, the law does not unduly interfere with autonomy when it permits a party to an incomplete contract to avoid performance by paying damages. [4] Meanwhile, an order to pay damages can be seen as less intrusive on the liberty of the breaching party than an order requiring that party to perform the contract.[5]

The foregoing arguments support the rule favoring contract damages over specific performance. On the other hand other consider-

ations so-called Arguments against the Traditional Rule suggest that specific performance ought to be the favored remedy, or at least that the law ought to favor neither remedy, leaving the non-breaching party with the option about which to seek in a given case. These arguments include the following:

1. Specific performance might be preferred if courts frequently make errors as to the measure of contract damages.[6] The rule favoring contract damages takes this consideration into account, to a degree, by recognizing that uncertainty in the estimation of damages is one reason to conclude that the damages remedy is inadequate.

The problem is particularly acute if courts err systematically in measuring damages.[7] If the error bias is systematic and low, the result will increase the frequency of inefficient breaches because parties who are deciding whether to breach their promises anticipate that they will not have to pay full compensatory damages if they do breach. Especially if the inefficiencies of holding parties to inefficient terms are often corrected in settlement bargaining, the factor of judicial error may favor specific performance over damages.

2. Specific performance may enhance efficiency to the extent that it respects and enforces the *ex ante* agreement of the parties.[8]

If at the time of contract the parties have superior information, or superior analytical skills, than courts can bring to bear in *ex post* breach of contract litigation, then other things equal it could be more efficient to require the parties to perform their obligations.[3]

3. Specific performance may also enhance efficiency by providing nonbreaching parties with the power to decide what remedy is preferable once a breach has occurred. This avoids the need to expend time and effort to anticipate what the situation may be at the time of contracting. For example, an indenture contract may provide that, in the event of default, the indenture trustee may enforce rights by any method the trustee chooses “whether for the specific enforcement of any covenant or agreement in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy or legal or equitable right

vested in the Indenture Trustee by this Indenture or by law.”[2]

4. Specific performance might be preferable from a moral point of view.[9] If we accept the ethical premise that people ought to keep their promises, then it would seem that the law should hold the breaching to his promise. The non-breaching party did not promise to pay the breaching party damages; he promised to perform the contract as agreed. Thus, according to this argument, the courts ought to award specific performance as a matter of course, unless good reasons are presented to prefer the damages remedy.[6]

5. Specific performance might be preferred on the ground that it rewards and enforces the socially valuable investments that contracting parties make in their relationship with one another. If people could casually walk away from contractual commitments simply by paying money, they and their counterparties have less of an incentive to invest in the relationship in the first place—much as Donald Trump may find it easier to terminate a marriage when he has an iron-clad prenuptial agreement in place which allows him to exit in exchange for some specified monetary compensation.

6. Specific performance might be preferred because it honors and encourages norms of fidelity and trust in commercial settings. If one believes that these social norms are inherently valuable, and believes further that the damages rule encourages the breakdown of these norms by validating the commodification of commercial relationships, then perhaps specific performance should be preferred because it enhances norms of social solidarity.

7. Perhaps specific performance should be preferred because the preference for damages favors sophisticated parties, who are better able to determine whether to perform or breach and pay damages. If the law in general should avoid favoring more sophisticated parties, then perhaps it should prefer specific performance to damages when the contract is breached.[10]

The compensation goal of contract law can be achieved by requiring the promisor to pay damages or by requiring the promisor to ren-

der the promised performance. Under current law, a promisee is entitled to a damage award as of right but the court retains discretion to decide whether specific performance should be granted. Because specific performance is a superior method for achieving the compensation goal, promisees should be able to obtain specific performance on request

Setting aside qualifications, the conclusion for breach of contracts to produce goods is that parties would tend to prefer the remedy of damages, essentially because of the problems that would be created under specific performance if production costs were high. In contrast, parties would often favor the remedy of specific performance for breach of contracts to convey property, in part because there can be no problems with production cost when property already exists. The conclusions reached shed light on the choices made between damages and specific performance under AngloAmerican and under civil law systems, and they also suggest the desirability of certain changes in our legal doctrine.[1]

Specific performance is denied when a contract's terms are too uncertain, even though the uncertainty might not defeat a damage action. If the contract's meaning is unclear, a court would have difficulty in framing a specific performance decree, but would also have difficulty in making a damage award. Thus if a contract is not too uncertain to enforce at law, it should be enforceable in equity. This justification is unsatisfactory, however, because the liberty interest distinction between conveying property or performing services and paying money is obscure. tempting to create forms of contractual specific performance such as liquidated damage clauses.

#### REFERENCES:

1. Anthony T. Kronman, "Specific Performance," 45 *University of Chicago Law Review*
2. Specific Performance in Common Law Eisenberg, Theodore and Miller, Geoffrey P., "Damages versus Specific Performance: Lessons from Commercial Contracts" (2013).
3. Alan Schwartz, The Case for Specific Performance, 89 *Yale L.J.* 271, 276 (1979)
4. Louis Kaplow & Steven Shavell, Why Breach of Contract May Not Be Immoral Given

the Incompleteness of Contracts, 107 *Mich. L. Rev.*

5. Brian Bix, Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles

6. Steven Shavell, Damage Measures for Breach of Contract, 11 *Bell J. Econ.* 466, 488-89 (2008).

7. Melvin A. Eisenberg, Actual and Virtual Specific Performance, The Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 *Calif. L. Rev.* 975 (2005);

8. Thomas S. Ulen, Specific Performance, in 3 *New Palgrave Dictionary of Economics and the Law*

9. Charles Fried, Contract as Promise: A Theory of Contractual Obligation 16 (1981)

10. Gregory Klass, To Perform or Pay Damages, 98 *Virginia L. Rev.* 143, 146 (2012)

11. US Uniform Commercial Code

12. <http://legal-dictionary.thefreedictionary.com/specific+performance>