

Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract

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INTRODUCTION

As even the most cursory of legal searches on specific performance will reveal, there is no shortage of doctrinal material, in the form of learned articles and even entire treatises, written on this topic.¹ Indeed, this remedy has been the subject of intense debate amongst jurists in both the civil and common law legal traditions. It has attracted the attention of theoretical scholars who seek to fit it within various theories of contractual rights.² A great deal has been written by academics pre-occupied with an economic analysis of law,³ as well as those who focus on comparative approaches to legal research. Interest in this area is not reserved exclusively to academics. Legal practitioners involved in litigating contract claims for their clients, and the judges before whom these claims are argued, are extremely conscious of the practical importance of the remedy that follows a breach of promise.

While the subject has attracted attention in most jurisdictions, Canada's legal system presents an ideal opportunity to examine specific performance from the full panoply of perspectives. The bi-jural nature of this country provides us with a local comparative laboratory, enabling us

¹ See e.g. Justice Robert Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1992); Paul-Arthur Gendreau *et al.*, *L'injonction* (Cowansville, Qc.: Yvon Blais, 1998).

² See e.g. Stephen A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), at p. 398 [Smith, *Contract Theory*] (Smith analyzes specific performance in the context of both a rights-based justification as well as a utilitarian-based justification). A more detailed discussion of the theoretical context follows.

³ These are primarily, but not exclusively, American scholars who are cited in the section on economic analysis, *infra* notes 44–54 and accompanying text. A particularly instructive European perspective on the economic analysis of the remedy may be found in Geerte Heslen and Robert Hardy, “Is the System of Contract Remedies in the Netherlands Efficient From a Law and Economics Perspective?” in Jan Smits, Daniel Haas and Geerte Heslen, eds., *Specific Performance in Contract Law: National and Other Perspectives* (Antwerp: Intersentia, 2008), at p. 287 [Heslen and Hardy].

to compare and contrast the practical and theoretical implications of the different positions of the civil and common law with respect to this remedy.

Moreover, the Quebec experience on specific performance is extremely instructive. Until the 1980s, Quebec courts remained loathe to actually award “l’exécution en nature,” creating a gap between the supposed primacy of specific performance in civilian theory on the one hand, and the narrowness of the remedy in practice on the other.⁴ Quebec judges had fallen prey to the perils of wholesale legal transplantation—namely the inappropriateness of simply adopting a legal concept from a foreign legal tradition without properly adapting it and molding it to the particularities of the receiving legal tradition. Quebec courts had committed the classic legal transplantation error in thinking that just because Quebec had borrowed the procedural remedy of the injunction from the common law, they had to interpret and apply that remedy in the same restrictive manner as the legal system from which it had been borrowed.⁵

However, beginning in the early 1980s, a new trend began in Quebec when several judges bravely rejected the inappropriate allegiance to the narrow common law attitude and specific performance emerged as an important remedy in Quebec law,⁶ eventually taking its rightful place as the presumptive remedy.⁷ Of particular importance is the 1988 decision of the Quebec Superior Court in *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*, a decision that still provides one of the most cogent and thorough examinations of specific performance in Quebec law.⁸ This case, with facts virtually identical to those in the

⁴ The remedy of specific performance is provided for in arts. 1590 and 1604 of the Civil Code of Quebec (C.C.Q.). The reluctance to award specific performance occurred most often in cases involving the breach of positive obligations to do, notwithstanding the availability of a mandatory injunction provided in art. 751 of the Quebec Civil Code of Procedure (C.C.P.).

⁵ A more detailed examination of both the common law position and the way Quebec approached the transplantation of the remedy is discussed below.

⁶ *Propriétés Cité Concordia Ltée v. Banque Royale du Canada*, [1980] C.S. 118 [*Propriétés Cité 1*]; *Propriétés Cité Concordia Ltée v. Banque Royale du Canada*, [1981] C.S. 812 [*Propriétés Cité 2* (C.S.)]; *Royal Bank of Canada v. Propriétés Cité Concordia Ltée*, [1983] R.D.J. 524 (Que. C.A.) [*Propriétés Cité 2* (C.A.)].

⁷ See Rosalie Jukier, “The Emergence of Specific Performance as a Major Remedy in Quebec Law,” (1987) 47 R. du B. 47 [Jukier, “Emergence”].

⁸ [1988] R.J.Q. 716 (C.S.) [*Golden Griddle*].

leading House of Lords decision in *Co-operative Insurance Society v. Argyll Stores (Holdings) Ltd.*,⁹ provides an ideal opportunity to compare the remedy in the context of the intellectual traditions of the civil and common law, as well as their distinct methodologies and historical development.¹⁰ Both cases dealt with lessees who closed the doors to their respective businesses because they were losing money and thereby breached the continuous operation provisions contained in their commercial leases. That these two cases result in diametrically-opposed judicial findings¹¹ is extremely revealing of the classical positions of the two legal traditions. And despite the vast amount of material already written on the subject, it certainly invites us to undertake a serious examination of whether damages or specific performance should be the presumptive remedy for breach of contract.

This paper will be divided into three broad sections. First, in order to answer the question of whether specific performance should be the presumptive remedy, we have to examine why we might want that to be the case. The first part of this paper will therefore deal with the positive aspects of specific performance and the reasons for which a creditor, victim of a contract breach, might prefer this recourse. It will also attempt to respond to some of the arguments levied against the remedy by its critics.

The second part will examine the current state of the law on specific performance in the respective legal traditions and, in particular, how the civil and common law differ and/or converge on this question in both theory and practice.

Finally, on the assumption that specific performance should be the presumptive remedy, the paper will conclude by examining whether there are any circumstances that should temper its pre-eminence and limit its award by a court and if so, what those circumstances may be.

⁹ (1997), [1998] A.C. 1, [1997] 2 W.L.R. 898 (H.L.) [*Argyll* cited to A.C.].

¹⁰ See Rosalie Jukier, “Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom” (2005) 50 McGill L.J. 789, at pp. 801–808 [Jukier, “Transsystemic Classroom”].

¹¹ Lord Hoffman in *Argyll*, *supra* note 9, rejects the request for specific performance by the lessor finding damages to be the appropriate remedy. Justice Steinberg in *Golden Griddle*, *supra* note 8, on the other hand, issues a permanent injunction ordering the defendant lessee to reopen its business and perform the contractual obligation it had voluntarily assumed. A more detailed discussion of the two cases and their holdings follows in this paper.

I. PART 1: MAKING THE CASE FOR SPECIFIC PERFORMANCE

A. THE ATTRIBUTES OF THE REMEDY OF SPECIFIC PERFORMANCE

There are clearly both theoretical and practical advantages to the remedy of specific performance that auger well in its favour as the presumptive or primary remedy for breach of contract.

i. THEORETICAL ARGUMENTS

From a theoretical standpoint, it can be said that specific performance is the remedy that accords best with the classical underlying theory of contracts itself. If the foundational premise of the conception of the contract is that it represents the very will of the parties, and if we believe that contract law seeks to have enforced, to the extent possible,¹² the parties' subjective wills, then it follows that this theoretical premise dictates that the contractual obligation actually be performed.¹³ This is what Professor Stephen Smith would term a "rights-based"¹⁴ justification for the remedy of specific performance and this reasoning asserts that there is, in fact, a "right to performance."

Support for the notion of a right to performance may be found in both civilian and common law doctrine. As Professors Hesen and Hardy state from the perspective of Dutch law,

the reason behind the formulation of a general procedural right to specific performance emanates from the fact that the right to (specific) performance is inherent in the existence of an obligation

¹² Where, for example, there is no reason not to enforce related either to defective formation of the parties' contract such as error (mistake), fraud (misrepresentation) or fear (duress) or to some significant unfairness so as to render enforcing the agreement unconscionable or contrary to the dictates of good faith.

¹³ See Jukier, "Emergence," *supra* note 7 at p. 72 ("If the will of the parties is the source of contractual obligations, the will of the parties, as evidence in the contract, dictates that the contractual obligations actually be performed. The obligation to pay damages is clearly subsidiary." This passage is quoted with approval by Justice Steinberg in *Golden Griddle*, *supra* note 8, at p. 724). See also *Carrefour Langelier v. Cineplex Odeon Corp.* [1999] Q.J. No. 5216, at para. 55 (Qc. Sup. Ct.) (QL) [*Carrefour Langelier*].

¹⁴ Smith, *Contract Theory*, *supra* note 2 at pp. 371–372.

(in this case contract) itself, and therefore is not merely a consequence of non-performance.¹⁵

From a common law perspective, Professor Charlie Webb posits a similar duty to perform when he states

[t]he defendant's duty is not to provide the claimant with something of equal value to the performance for which the claimant contracted, nor is it simply to ensure that the claimant is not left worse off by virtue of not receiving that performance. *It is a duty to perform, to provide the performance the defendant undertook to provide.*¹⁶

Following this reasoning to its logical conclusion, this duty to perform translates into a right on the part of the creditor, the victim of the contract breach, to demand specific performance. As Justice Fraiberg stated in the recent Quebec case of *Carrefour Langelier*: “The creditor has *the right* to demand that the obligation be performed ‘in full, properly and without delay’.... It is thus misleading to describe specific performance as reparation. The sole legal justification for specific performance of a contractual obligation is the will of the parties that it be performed, sanctioned by the force of the state if it is not.”¹⁷ The Court goes further in stating that the claimant “does not have to establish any present or future prejudice, other than the loss of the performance it wishes to re-establish.”¹⁸

¹⁵ Heslen and Hardy, *supra* note 3 at p. 315.

¹⁶ Charlie Webb, “Justifying Damages” in Jason W. Neyers, Richard Bronaugh and Stephen G. A. Pitel, eds., *Exploring Contract Law* (Oxford: Hart, 2009) 139, at p. 155 [emphasis added]. Accord Lucinda Miller, “The Enforcement of Contractual Obligations: Comparative Observations on the Notion of Performance” in John Cartwright, Stefan Vogenauer and Simon Whittaker, eds., *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (‘the Avant-projet Catala’)* (Oxford: Hart, 2009), at pp. 151–158 (“For the debtor, the obligation represents the duty to perform and, for the creditor, it denotes the right to receive performance,” at p. 151; “[Damages] are *not a substitute for performance*; they rather *compensate* for non-performance [...] the interest in having the contract performed has been considered the ‘core of contract law,’” at p. 155 [emphasis in original]).

¹⁷ *Supra* note 13 at paras. 53, 55 [emphasis added]. The notion that specific performance is a “right” belonging to the wronged creditor is echoed in most civilian jurisdictions. See Part 2 at p. 104, for further discussion.

¹⁸ *Ibid.* at para. 56. Accord Geneviève Viney and Patrice Jourdain, *Traité de Droit Civil: Les effets de la responsabilité*, 2d ed. by Jacques Ghestin (Paris: L.G.D.J., 2001), at p. 43.

Not all legal theorists would agree that the existence of a right to performance thereby makes specific performance the presumptive remedy for breach of contract. Professor Stephen Smith, for example, would claim that while there may be a right to performance that flows from a contractual duty, that right is what he would term an “ordinary private right.” Specific performance is, by contrast, what he terms a “court-ordered right,” and court-ordered rights are distinct from and, once ordered, replace the ordinary rights which might be at their source. While Professor Smith recognizes that rights and remedies are related and that sometimes remedies directly replicate rights, he would claim that it is not always a one-to-one relationship.¹⁹

However, viewing the remedy of specific performance as a right on the part of the creditor carries with it many other added benefits. For one, it properly places the emphasis on the correct side of the contract dispute—namely on the innocent party who has been the victim of a contract breach, and not on the breaching party who has much less claim to our sympathy. Furthermore, by making the remedy “promise-centered,”²⁰ and by asserting that the choice of remedy belongs to the wronged creditor,²¹ specific performance becomes, as it has been termed, “the morally superior remedy.”²² Finally, making specific performance

¹⁹ According to Smith, often remedies transform rights into near substitutes or create entirely new rights. See Stephen A. Smith, “Rights and Remedies: A Complex Relationship” presented at the Canadian Institute for the Administration of Justice (CIAJ) Conference entitled “Taking Remedies Seriously” in Ottawa, Ontario on October 1, 2009; Stephen A. Smith, “The Rights of Private Law” in Andrew Robertson and Hang Wu, eds., *The Goals of Private Law* (Oxford: Hart, 2009 [forthcoming]) at p. 181; Stephen A. Smith, “The Law of Damages: Rules for Citizens or Rules for Courts?” in Dajkhongir Saidov and Ralph Cunnington, eds., *Contract Damages: Domestic and International Perspectives* (Oxford: Hart, 2008) at p. 33.

²⁰ Hesen and Hardy, *supra* note 3 at p. 307.

²¹ See Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les obligations*, 6th ed. by Pierre-Gabriel Jobin with the collaboration of Nathalie Vézina (Cowansville, Qc.: Yvon Blais, 2005), at para. 709 (“c’est le créancier, victime de la faute, qui a le choix de la sanction”). This has been followed jurisprudentially in many Quebec decisions: see e.g. *Golden Griddle*, *supra* note 8 at pp. 722–723; *Aubrais v. Laval (Ville de)*, [1996] R.J.Q. 2239, at p. 2251 [*Aubrais*]. The notion that the injured party has the choice of remedy is prevalent throughout civilian legal systems: see note 78.

²² Martin Vranken, “The Relevance of Civil Law Doctrines in Australian Courts: Some Examples from Contract and Tort” (1999) 22 U.N.S.W.L.J. 1, at p. 14. See also Hesen and Hardy, *supra* note 3 at p. 296 (authors speak of the “moral obligation to keep one’s promises”); Fionnghuala Cuncannon, “The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand” [2004] 35

the primary remedy accords well with the goal of encouraging contract performance and adherence to the “parole donnée”;²³ this in turn bodes well for the institution of contracts as a whole by promoting, to quote Lon Fuller, a social order that creates “a system of stabilized interactional expectancies.”²⁴

ii. PRACTICAL ADVANTAGES

If these theoretical justifications are not convincing enough, what about the practical advantages to the creditor? How can we deny that to a creditor who has been wronged by the breaching co-contractant, specific performance may offer the most complete and simplest remedy? Its major practical advantage reflects the fact that the alternative remedy of damages, while termed “performance by equivalence,” is often nothing of the sort. It is trite to proclaim that it can be both difficult and costly to prove the damages suffered by the creditor in a court of law. Furthermore, even when the quantum of damages is proven, awards are often limited by rules of foreseeability or remoteness, duties to mitigate, restrictions on the recovery of moral damages, hesitancy to award damages that represent the true cost of cure, and the fact that the subjective value of contract performance to the creditor is often not considered in the assessment of such damages.²⁵ In short, damages, as

V.U.W.L.R. 657, at p. 677 (“The ‘innocent’ promisee surely has a greater moral claim to protection”); Alan Schwartz, “The Case for Specific Performance” (1979) 89 Yale L.J. 271, at p. 297 (“to give the promisee the performance he bought because he is morally entitled to it” is one of the “relevant goals of contract law”).

²³ Miller, *supra* note 16, at p. 151 (“In brief, the commitment to the principle stems from such things as philosophical and moral concerns with preserving the contractual obligations and *la parole donnée*; alignment of *la force obligatoire* with the principle that, as binding, the obligation must be enforced”); See generally Charles Fried, *Contract as promise: a theory of contractual obligation* (Cambridge, Mass.: Harvard University Press, 1981) (author expands a moral obligation to keep one’s promises).

²⁴ Lon L. Fuller, “Human Interaction and the Law” (1969) 14 Am. J. Juris. 1, at p. 14. See also Lon L. Fuller and William R. Perdue Jr., “The Reliance Interest in Contract Damages: 1” (1936) 46 Yale L.J. 52, at p. 61 (the award of expectation damages is justified as part of a “policy in favor of promoting and facilitating reliance on business agreements”).

²⁵ See Heslen and Hardy, *supra* note 3 at pp. 296–298 (“subjective preferences of promisees are often not reflected in the market price,” at p. 297). See also Thomas S. Ulen, “The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies” (1984) 83 Mich. L. Rev. 341, at pp. 375–376.

opposed to specific performance, most often undercompensate the victim of a contract breach.²⁶

B. MEETING THE OBJECTIONS TO SPECIFIC PERFORMANCE

The above arguments, however, have not seemed to convince the detractors of the remedy of specific performance. Arguments against its pre-eminence fall, likewise, into both theoretical and practical categories.

i. PERSONAL LIBERTY

Often at the top of the list of arguments levied against the remedy is the one that claims that orders of specific performance constitute an undue intrusion on the debtor's personal liberty. According to the Latin maxim *nemo praecise cogi potest ad factum*, courts cannot order a debtor to perform a promise when it would require physical violence or constraints on a person's freedom to act.²⁷ This argument is at the root of the distinction made by many courts, as well as doctrinal writers, between obligations to do and obligations not to do, the former often being deemed incapable of specific relief.²⁸

I have argued elsewhere that this distinction creates a false dichotomy for a variety of reasons. The first is that both positive and negative obligations can equally engage human liberty and it is misleading to assume that only the former do so.²⁹ The second is that the distinction between obligations to do and obligations not to do is often

²⁶ See Schwartz, *supra* note 22 at pp. 276–277; Cuncannon, *supra* note 22 at p. 674; David Baumer and Patricia Marschall, “Willful Breach of Contract for the Sale of Goods: Can the Bane of Business be an Economic Bonanza?” (1992) 65 Temple L. Rev. 159, at pp. 161–163.

²⁷ A discussion of the *nemo praecise cogi potest ad factum* principle may be found in: Jukier, “Emergence,” *supra* note 7 at p. 55; Viney and Jourdain, *supra* note 18 at p. 37.

²⁸ See Sharpe, *supra* note 1 at paras. 7.240–7.250, c. 9. Compare Baudouin and Jobin, *supra* note 21 at para. 861.

²⁹ One need only look to orders enjoining a debtor from breaching a non-competition clause. Although strictly speaking an obligation not to do, it is illusory to assume that such enforcement does not violate the *nemo praecise* principle. By enjoining the debtor not to breach the clause, which necessarily requires him to cease working for a competitor or to cease operating a competing business, the court is, in effect, making an order which involves his personal participation and restricts his personal liberty. See Jukier, “Emergence,” *supra* note 7 at p. 59.

difficult to apply in practice and the differences between the two types of obligations can be merely semantic. Examples abound where otherwise indistinguishable obligations are merely expressed differently by the courts and which, as a result, carry with them different consequences with respect to the remedy of specific performance.³⁰

It is not to say that the personal liberty interests of a debtor should never constitute a justified limitation to the remedy of specific performance. It is readily conceded that when there is a purely personal character to the obligation in a contract, one that the civil law would classify as *intuitu personae*, specific performance will not be an appropriate remedy. But this fact alone should not relegate the remedy to secondary status. There is a clear difference between specific performance being the presumptive remedy and it being the remedy that is always applicable. No legal system wants to force the proverbial opera singer to sing.³¹ Not only would this infringe the singer's personal freedom, but one should legitimately be concerned about the quality of the forced operatic performance, not to mention the practical difficulties involved in supervising such an order.³²

The problem is thus not with the concept itself, but rather with how it is applied. That is because if broadly interpreted, personal liberty could prevent virtually all orders of specific performance, for at their root, all performances involve some voluntary act of a creditor. The key is to unpack the meaning of an obligation with a "personal character" and to disassociate the remedy of specific performance from only those personal

³⁰ For example, identical orders have been phrased positively as "an obligation to remove a barrier" and negatively as "an obligation to cease blocking access." See *Crawford v. Fitch* [1980] C.A. 583 and *Zais v. Briaud* [1959] B.R. 258. For further examples and discussion, see Jukier, "Emergence," *supra* note 7 at pp. 60–61. See also *Aubrais*, *supra* note 21 at p. 2253 (Court acknowledges the artificial character of the distinction between obligations to do and not to do).

³¹ See e.g. Baudouin and Jobin, *supra* note 21 at para. 862 ("la demande d'exécution forcée ne doit pas être accordée lorsqu'elle exigerait une intervention unique et personnelle de la part du débiteur, personne physique, pour satisfaire à son obligation (par exemple, peindre un portrait, jouer dans une pièce de théâtre)"). See also *Gennium Pharmaceutical Products Inc. v. Genpharm Inc.*, 2008 QCCS 2292, at para. 377.

³² See *UNIDROIT: Principles of International Commercial Contracts* (Rome: International Institute for the Unification of Private Law (Unidroit), 1994), at p. 175 [*Unidroit*] (official commentary on UNIDROIT Principles, art. 7.2.2); Isabelle de Lamberterie, Georges Rouhette and Denis Tallon, *Les principes du droit européen du contrat: l'exécution, l'inexécution et ses suites* (Paris: La documentation Française, 1997), at p. 185.

obligations that would, if specifically enforced, place the debtor in a situation of involuntary servitude.³³ In this vein, it has now been recognized in civilian doctrine and jurisprudence that obligations on the part of moral persons, as opposed to physical persons, do not generally fall foul of the *nemo praecise* principle.³⁴ Likewise, services that can be delegated to another by the debtor who is emphatic about not performing can also be susceptible of specific performance.³⁵ Even in contracts of employment, historically considered the epitome of the personal services contract, the courts can and have ordered specific performance, thereby dispelling the myth that every employment contract involves an *intuitu personae* character.³⁶ The key seems to be whether “the personal action of the debtor of the obligation is of the essence”³⁷ or whether the services are such as to require “une compétence individuelle de nature artistique ou scientifique ainsi que ceux qui doivent être exécutés dans le cadre d’une relation confidentielle et personnelle.”³⁸

While these guidelines are helpful, there will always be ambiguous situations facing courts. Take, for example, the facts of the recent Supreme Court of Canada decision in *Bruker v. Marcovitz*.³⁹ In that case, a “get clause” found in a corollary relief agreement was upheld as a valid and enforceable contractual obligation. The clause contained a promise by an ex-husband to appear before the *Beit Din*, or religious tribunal, for the purpose of obtaining a *get*, or Jewish divorce, thereby releasing his ex-wife religiously from their marriage. On the facts of that particular case, the issue of specific performance was moot because the

³³ See Vincent Karim, *Les Obligations*, vol. 2, (Montreal: Wilson & Lafleur, 2002), at p. 381 (noting in recent years a more limited application of the *nemo praecise* principle stating that the “principe voulant que le caractère incontractable de la personne humaine ne s’applique à l’exécution en nature que dans le cas où la participation personnelle du débiteur implique nécessairement une contrainte physique contre la personne”).

³⁴ See e.g. *Aubrais*, *supra* note 21 at p. 2254 (“on saurait difficilement parler de liberté de la personne lorsque l’employé est une personne morale”); Hesen and Hardy, *supra* note 3, at p. 307; Jukier, “Emergence,” *supra* note 7 at pp. 65–66.

³⁵ See Viney and Jourdain, *supra* note 18 at p. 41.

³⁶ See *Aubrais*, *supra* note 21, at p. 2254; Marie-France Bich, “Du contrat individuel de travail en droit québécois: essai en forme de point d’interrogation” (1986) 17 R.G.D 85, at p. 96ff.

³⁷ *Varnet Software Corp. v. Varnet U.K. Ltd.*, [1994] R.J.Q. 2755 at p. 2758 (C.A.), 59 C.P.R. (3d) 29 [Varnet cited to R.J.Q.].

³⁸ Viney and Jourdain, *supra* note 18 at p. 41.

³⁹ 2007 SCC 54, [2007] 3 S.C.R. 607.

promisor had ultimately granted his ex-wife the *get* and the sole issue before the courts was whether he could be held liable in damages for the 15 years he had withheld performance of this promise. However, on the assumption that the *get* had not yet been granted, could the Court have ordered the husband to specifically perform this obligation?⁴⁰ On the one hand, it does not seem that the promisor has much to do here by way of personal performance except to present himself at the *Beit Din* and consent to the granting of the *get*. On the other hand, while the promisor does not have to perform any creative or intellectual act,⁴¹ appearing before the religious tribunal could be said to violate the *nemo praecise* principle, because such performance arguably involves the religious conscience and free-will of the debtor that we are loathe to compel or coerce through this remedy.⁴² On the other hand, it is worth noting that some U.S. courts have, notwithstanding the more restrictive attitude of the common law to the remedy, ordered specific performance in these precise circumstances.⁴³

ii. ARGUMENTS ATTRIBUTED TO ECONOMIC ANALYSIS

Another legendary argument against specific performance has been developed by those promoting the economic analysis of contract law, as well as those endorsing the concept of efficient breach.⁴⁴ Many

⁴⁰ This question was briefly considered in Rosalie Jukier and Shauna Van Praagh, “Civil Law and Religion in the Supreme Court of Canada: What Should We *Get* out of *Bruker v. Marcovitz?*” (2008) 43 S.C.L.R. (2d) 381, at p. 388.

⁴¹ See Yves-Marie Laithier, “The Enforcement of Contractual Obligations: A French Perspective” in Cartwright, Vogenauer and Whittaker, *supra* note 16 at p. 134 (author expresses the criterion for purely personal obligations as those involving “the interpretation or creation of works of intellectual value”).

⁴² See *ibid.* at pp. 133–134 (author discusses the fact that certain obligations may not be personal *per se* but can harm the debtor’s liberty and dignity if forced to be performed and thereby equally offend the *nemo praecise* principle).

⁴³ See e.g. *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. 1981); *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976), *aff’d* 394 N.Y.S.2d 253 (App. Div. 1977).

⁴⁴ See generally Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972), at pp. 131–132; Anthony T. Kronman, “Specific Performance” (1978) 45 U. Chicago L. Rev. 351, at pp. 354, 358; E. Allan Farnsworth, *Contracts*, 3d ed. (New York: Aspen, 1999), at p. 773; William Bishop, “The Choice of Remedy for Breach of Contract” (1985) 14 J. Legal Stud. 299; Steven Shavell, “Specific Performance Versus Damages for Breach of Contract: An Economic Analysis” (2006) 84 Tex. L. Rev. 831.

prominent legal theorists argue that this economic analysis supports a restrictive approach to specific performance on the ground that the remedy leads to economic inefficiency. Non-specific relief in the form of damages, it is argued, better advances efficient resource allocation in the setting of a market economy. It presumes that parties would themselves favour a liability rule (damages) as opposed to a property rule (specific performance) “were they free to make their own rules concerning remedies for breach and had they deliberated about the matter at the time of contracting.”⁴⁵ Having damages as the presumptive remedy thus reduces the parties’ transaction costs in the pre-breach (contract negotiation) phase. It is also argued to reduce costs in the post-breach phase, for it is assumed that an order of specific performance will trigger the parties into a costly negotiation to “buy out” of that order.⁴⁶

The doctrine of efficient breach advocates, in a nutshell, “that a party should be allowed to breach a contract and pay damages, if doing so would be more economically efficient than performing under the contract.”⁴⁷ In fact, supporters of this theory go further than to assert that the law should merely “allow” a party to breach in these circumstances. They profess that the law ought to encourage and promote breach when this situation arises. According to Judge Richard Posner, who has taken his views expressed on this subject as an academic with him to the bench:

Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to breach his promise, provided he makes good the promisee’s actual losses.⁴⁸

⁴⁵ Kronman, *ibid.* at p. 365.

⁴⁶ See R. Posner, “Economic,” *supra* note 44; Andrew Tettenborn, “Absolving the Undeserving: Shopping Centres, Specific Performance and the Law of Contract” (1998) 62 *Conv.* 23, at pp. 34-35 (the author discusses, but ultimately rejects, the “blackmail” value of specific performance); Schwartz, *supra* note 22 at p. 279.

⁴⁷ *Black’s Law Dictionary*, 8th ed., s.v. “efficient-breach theory.” See Charles J. Goetz and Robert E. Scott, “Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach” (1977) 77 *Colum. L. Rev.* 554; See R. Posner, “Economic,” *supra* note 44, at p. 120; Ronald J. Scalise Jr., “Why No “Efficient Breach” in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract” (2007) 55 *Am. J. Comp. L.* 721.

⁴⁸ *Patton v. Mid-Continent Sys.*, 841 F.2d 742 (7th Circ. 1988) cited in Heslen and Hardy, *supra* note 3, at p. 295. See also the articles published in (2009) 107:8 *Mich. L. Rev.* from a recent conference organized at the University of Chicago entitled “Fault in

To put it mildly, “[s]cholars have noted the ‘tension between efficient breach theory and ... specific performance,’ the proliferation of which would serve to eviscerate the doctrine of efficient breach.”⁴⁹

However, the final verdict on the efficiency of damages as opposed to specific performance is far from unanimous with many equally prominent and thoughtful theorists espousing the contrary view. While some of these views emanate from those writing in civilian jurisdictions where, because of the preference in the civil law for the remedy, it might be thought more natural to hold this position,⁵⁰ there are many common law theorists who argue in favour of specific performance from an economic standpoint as well. Professor Ulen, for example, asserts that specific performance as the routine remedy can be justified on efficiency grounds for several reasons: it will lead parties to allocate more efficiently the risks of loss from breach at the time of contract formation; it will provide the most efficient mechanism to protect subjective values attached to performance; the post-breach costs will be minimized; and under-compensation to the debtor will be avoided.⁵¹ Likewise, Professor Schwartz argues that specific performance is actually a “superior method for achieving the compensation goal” and that “an expanded specific performance remedy would not generate greater transaction costs than the damage remedy involves.”⁵² Finally, Professor Eric Posner has pointed out that the assumption underlying the economic analysis may be flawed given that such analysis presumes a rationale actor. How many people in contractually-tense situations can profess to be that? According to Eric Posner, “emotion introduces an asymmetry into the standard analysis of contract remedies”⁵³ and he has more recently concluded, in an examination of the effect of economic analysis on contract law more

Contract Law,” September 26–28, 2008. See especially Richard A. Posner, “Let Us Never Blame a Contract Breaker” (2009) 107 Michigan Law Review 1349.

⁴⁹ Joseph M. Perillo, “Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference” (2000) 68 Fordham L. Rev. 1085, at p. 1102, cited in Scalise, *supra* note 47 at p. 725.

⁵⁰ Most notably the thorough and thoughtful examination of this issue by Heslen and Hardy, *supra* note 3.

⁵¹ Ulen, *supra* note 25 at pp. 365–366.

⁵² Schwartz, *supra* note 22 at p. 305.

⁵³ Eric A. Posner, “Law and the Emotions” (2001) 89 Geo. L.J. 1977, at p. 2008 [E. Posner, “Emotions”].

generally, that “it does not explain why expectation damages are the standard remedy.”⁵⁴

A further examination of the economic analysis of remedies is beyond the scope of this paper. Suffice it to say that like the personal liberty argument, it is not uniformly convincing enough to relegate the remedy to inferior status as a default position.

iii. PROBLEMS OF IMPRECISION AND SUPERVISION

There are, in addition, many practical obstacles that are said to come in the way of specific performance. Some of these involve the parties themselves, others the courts and the administration of justice. We have frequently heard how specific performance orders cannot be adequately supervised and thus should not be routinely granted. This problem of supervision seems to reflect two different, although often related, difficulties. The first is more properly termed the problem of imprecision. It is said that orders of specific performance are difficult to frame in precise-enough terms.⁵⁵ The reaction of Lord Hoffman in *Argyll* to the request for an order to keep the premises open for trade was that such order “says nothing about the level of trade, the area of the premises within which trade is to be conducted, or even the kind of trade”⁵⁶ and was therefore too imprecise to be granted. The second difficulty reflects the presumption that such imprecision will lead to repeated applications to the court by the parties alleging breaches of the order, thereby creating wasteful and expensive litigation not only for the parties, but for the judicial system as a whole.⁵⁷ Of course, these arguments become particularly relevant in cases where the specific performance relates to an ongoing activity rather than a one-time result.⁵⁸

⁵⁴ Eric A. Posner, “Economic Analysis of Contract Law After Three Decades: Success or Failure?” (2003) 112 Yale L.J. 829, at p. 880.

⁵⁵ This is the case even when the terms of the original contract were precise enough to escape an argument of invalidity due to uncertainty. Jeff Berryman points out that orders must be more precise than the terms of the original contract: see Jeff Berryman, “Recent Developments in the Law of Equitable Remedies: What Canada Can Do For You” (2002) 33 V.U.W.L.R. 51, at p. 83.

⁵⁶ *Argyll*, *supra* note 9 at p. 16; *Ryan v Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116. See generally Sharpe, *supra* note 1 at paras. 7.340–7.530.

⁵⁷ *Argyll*, *ibid.* at p. 13–14.

⁵⁸ For a more fulsome discussion see Berryman, *supra* note 55 at pp. 83–84.

While there is no doubt merit to this argument in certain cases, what is curious is how convincing the complexity and supervision impediments have been to judges and doctrinal writers in the field of specific performance, whereas they have been less preoccupying in many other legal domains where equally, if not more, complex orders are required to be made by the court. There are countless examples to which one can refer, but suffice it to say that the recently popular extraordinary remedies, such as *Mareva* injunctions or *Anton Piller* orders, put the complexity of most specific performance orders to shame. The *Anton Piller* order which, according to Justice Binnie “bears an uncomfortable resemblance to a private search warrant,”⁵⁹ can be so complex and difficult to draft that in the Supreme Court decision of *Celanese Canada v. Murray Demolition*, he provides a full page of drafting directions to judges.⁶⁰

It has been asserted, and I think correctly so, that this problem has been “overstated,”⁶¹ and it is interesting to note that the imprecision and supervision arguments, which are routinely argued in Quebec cases, have obtained little traction in that civilian jurisdiction. Justice Fraiberg, in the previously cited case of *Carrefour Langelier*, reacted to this argument by stating that courts have successfully granted mandatory injunctions in challenging circumstances ranging from the resumption of operation by retail tenants of shopping centres, to the continued provision of treatment by a hospital, to even the “forced re-activation of a complicated contract involving the resale of electrical power at a discount to multiple subscribers ... after the defendant supplier had closed its operations and dispersed its personnel.”⁶²

The judicial reaction was slightly different, but equally dismissive of this argument, in the *Golden Griddle* case, where, contrary to *Argyll*, an order of specific performance to keep a restaurant open for business was granted. Justice Steinberg claimed that the self-interest of the defendant company, and the value of its trade-mark and franchise, would

⁵⁹ *Celanese Canada v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, at para. 1 (Justice Binnie describes an *Anton Piller* order as authorizing “a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim in a private dispute”). One of the primary practical purposes of this order is to seize electronic evidence on computer hard drives, diskettes and USB keys.

⁶⁰ *Ibid.* at para. 40.

⁶¹ Heslen and Hardy, *supra* note 3 at p. 308; Tettenborn, *supra* note 46 at pp. 27–31.

⁶² *Supra* note 13 at paras. 67–69.

ensure that the level of operation was consistent with its image and would not be so shoddy as to require the court to constantly intervene in the order.⁶³ This argument acknowledges the value of relationships and business reputation in the contracts matrix which theorists, most notably Stewart Macaulay, have long asserted play a crucial role, even more important than the role played by contract law.⁶⁴ Furthermore, Quebec courts have chosen to presume that parties will adhere to the order once made, rather than exploit the potential for ambiguity or incompleteness in its language as a pretext to breach it.⁶⁵

From a common law perspective, it is worth noting that Professor Berryman has proposed a middle ground to the problem of supervision, advocating a “wait and see” approach. He argues that it is appropriate for courts to grant specific performance where the problems with supervision remain “hypothetical and speculative ... [and] then see if fear of multiple suits is in fact generated. If it does eventuate, a court may always bring the proceedings to a close by reverting to damages.”⁶⁶

Once again, the problems of imprecision and supervision that may arise in some isolated cases need to be taken seriously, but should not be conclusive of the place held by the remedy of specific performance in the hierarchy of remedies.

iv. PRACTICAL DISADVANTAGES

The list of impediments to the remedy would not be complete without the somewhat paternalistic argument that specific performance is

⁶³ *Golden Griddle*, *supra* note 8 at pp. 728–729. Note that in the Court of Appeal decision in *Argyll, Cooperative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1996] 3 W.L.R. 27 (C.A.), at p. 37, [1996] 3 All E.R. 934 [*Argyll* (C.A.) cited to W.L.R.], which had granted specific performance, Roch L.J. stated that “if the defendants are ordered to continue the operation of a supermarket at the premises, it is *inconceivable* that they would not operate the business efficiently. *To do otherwise would damage their commercial reputation*. Day-to-day supervision by the court or by the plaintiffs would be unnecessary” [emphasis added].

⁶⁴ See Stewart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study” (1963) 28 *Amer. Soc. Rev.* 55; Stewart Macaulay, “An Empirical View of Contract,” (1985) *Wis. L. Rev.* 465.

⁶⁵ See *Dargaud Éditeur v. Presse-Import Léo Brunelle Inc.*, [1990] R.D.J. 341 (Q.C.A.), at p. 351, Chevalier, J.A. (“...on ne saurait, en matière d’exécution en nature, [tenir] d’avance pour acquis que l’ordonnance ne sera pas respectée; à mon avis, c’est plutôt la présomption contraire qui devrait seule être retenue”).

⁶⁶ Berryman, *supra* note 55 at pp. 84, 87.

not of practical benefit to the creditor. Professors Lando and Rose have claimed that specific performance “seems generally speaking not to be an attractive remedy for plaintiffs”⁶⁷ for reasons that include the high costs of its enforcement, as well as the time lapse between the moment of breach and the actual court-ordered performance which, they argue, makes the performance ultimately inadequate.⁶⁸ Others have pointed out that coerced performance may turn out to be “half-hearted performance” and likewise of little benefit to the creditor.⁶⁹

Lord Hoffman in *Argyll* evokes images of forensic science and even the battlefield in order to convince us that hostile parties are psychologically better off “divorced” from each other. Damages, he claims, is the better remedy because it “brings the litigation to an end” and as far as the parties are concerned, “the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.”⁷⁰ By contrast, he asserts that specific performance “yokes the parties together in a continuing hostile relationship ... and prolongs the battle.”⁷¹

These arguments, while possibly legitimate in certain cases, are not compelling as reasons to relegate the remedy of specific performance, because nowhere is anyone arguing that this remedy ought to be imposed upon creditors of breached promises. Victims of contract breach are not required to request specific performance but may merely choose to request it after they weigh all the practical and legal considerations inherent in litigation generally, and in the enforcement of contractual obligations more particularly.⁷²

⁶⁷ Henrik Lando and Caspar Rose, “The Myth of Specific Performance in Civil Law Countries” (November 21, 2003), at p. 20, Lefic Working Paper No. 2003–14, online: SSRN <<http://ssrn.com/abstract=462700>> [Lando and Rose, “Myth”]. See also Henrik Lando and Caspar Rose, “The enforcement of specific performance in Civil Law countries” (2004) 24 Int’l Rev. L. & Econ. 473, at p. 474 [Lando and Rose, “Enforcement”].

⁶⁸ Lando and Rose, “Myth,” *ibid.* at p. 19.

⁶⁹ Tettenborn, *supra* note 46 at p. 23.

⁷⁰ *Argyll*, *supra* note 9 at p. 16.

⁷¹ *Ibid.*

⁷² See Heslen and Hardy, *supra* note 3 at p. 320 (“Dutch law allows the creditor to choose the type of remedy *which it finds most apt* instead of constraining parties’ choice and leaving the decision to the court” [emphasis added]). See also Lamberterie, Rouhette and Tallon, *supra* note 32 at p. 184 (“Le juge n’est donc pas libre de décider ou non d’ordonner l’exécution ; il est tenu de déférer à la demande”).

II. PART 2: THE STATE OF THE LAW IN CIVIL AND COMMON LAW LEGAL TRADITIONS

With the backdrop of the theoretical and practical attributes of specific performance, we must now examine what a creditor requesting the remedy will face by way of judicial reaction in the courts of the various legal traditions. It is fairly easy to state the general positions of the civil and common law legal traditions for two reasons. First, these legal positions are largely uncontroversial and second, unlike in many other areas of law, there is a great deal of consistency between the various national legal systems⁷³ within each tradition.

From the perspective of the common law, and largely due to its historical development as a remedy of equity, specific performance is seen as an exceptional remedy, one that is inherently discretionary and available only in circumstances where damages are said to be “inadequate.”⁷⁴ This long-standing view not only shows no signs of weakening, but can even be said to have been reinforced by the 1996 Supreme Court of Canada decision in *Semelhago v. Paramadevan*.⁷⁵ According to Justice Robert Sharpe, one can view this case as signaling a change in direction. By questioning the virtually automatic award of specific performance in real estate contracts, this case can be seen as actually strengthening the classically restrictive common law position.⁷⁶

The civil law espouses a diametrically opposed view. Uninhibited by this historical encumbrance for the simple reason that the division between courts of chancery and courts of law is a uniquely English phenomenon, the civil law’s position has been described as a “free choice between a range of remedies.”⁷⁷ A remedy of right rather than of discretion, specific performance is typically viewed by civil law jurisdictions as the primary or presumptive remedy, exercisable at the option of the creditor.⁷⁸

⁷³ Such as common law Canada, the U.K and the U.S. in the common law tradition and Quebec, France, Germany, Holland and other continental legal systems within the civil law tradition.

⁷⁴ This position, echoed by most doctrinal writers, is summarized by Lord Hoffman in *Argyll*, *supra* note 9 at p. 11.

⁷⁵ [1996] 2 S.C.R. 415, (1996) 136 D.L.R. (4th) 1

⁷⁶ Sharpe, *supra* note 1 at para. 8.220.

⁷⁷ Heslen and Hardy, *supra* note 3 at p. 288.

⁷⁸ See generally Rudolf B. Schlesinger et al., *Comparative Law: cases, text, materials*, 6th ed. (New York: Foundation Press, 1998) 739 (6th ed. 1998), at pp. 739–740 (“a

As previously alluded to, Quebec, although a civil law jurisdiction, had initially viewed specific performance through the more restrictive common law lens. The rationale was based on the fact that because the procedural mechanism for its enforcement, the injunction, was borrowed from the common law, it should therefore be applied in the exact same manner as the jurisdiction from whence it came.⁷⁹ It is now recognized, however, that the process of legal transplantation is much more sophisticated than the simple wholesale application of borrowed legal concepts. Legal transplantation is an ambitious and delicate undertaking requiring careful adaptation of the borrowed concept into the receiving legal culture and tradition. Due in large part to breakthroughs in judicial decisions rendered in the 1980s,⁸⁰ specific performance in Quebec today follows the more expansive and generous interpretation of other civilian jurisdictions. As Justice Baudouin of the Quebec Court of Appeal aptly stated, “[i]t is not because injunction is historically a *common law* procedural remedy that the restrictive approach of *common law* to mandatory injunctive relief should also be followed.”⁸¹

judgment ordering specific performance [...] is the normal, primary remedy for non-performance in most civil-law countries.”). See e.g. for Dutch law: Daniel Haas and Chris Jansen, “Specific Performance in Dutch Law” in Smits, Haas and Heslen, *supra* note 3 at pp. 11, 14; Art. 3:296(1) CC. See e.g. for French law: Viney and Jourdain, *supra* note 18 at pp. 42-43. See e.g. for Belgian Law: Patrick Wéry, “Specific Performance in Belgian Law” in Smits, Haas and Heslen, *supra* note 3 at pp. 31-33; Art. 1184 C. civ. See e.g. for German law: Florian Faust and Volker Wiese, “Specific Performance—A German Perspective” in Smits, Haas and Heslen, *supra* note 3 at p. 47; Arts. 241(1) BGB; Arts. 883(1), 885(1), 888, 890 ZPO. See e.g. for Scots law: Laura Macgregor, “Specific Implement in Scots Law” in Smits, Haas and Heslen, *supra* note 3 at p. 70; William Murray Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2d ed. (Edinburgh: W. Green & Son Ltd., 1929), at p. 655. This is also the direction in which international instruments are heading: see UNIDROIT Principles, Art. 7.2.2; Art. 9.102(1) PECL; Lamberterie, Rouhette and Tallon, *supra* note 32 at pp. 182-183; Arts. 46, 62 CISG; Avery W. Katz, “Remedies for Breach of Contract Under the CISG” (2005) 25 Int’l Rev. L. & Econ. 378, at p. 385.

⁷⁹ See e.g. *Trudel v. Clairol of Canada* (1974), [1975] 2 S.C.R. 236, at p. 246, per Pigeon J. (“Art. 752 of the Code of Civil Procedure states that one may demand an injunction by action. The circumstances in which one may do so are not specified. Consequently, it is a matter of discretionary power to be exercised having in mind the principles established in common law jurisdictions, *since this is a remedy taken from them*” [emphasis added]).

⁸⁰ Which began in the *Propriétés Cité Concordia* cases, *supra* note 6.

⁸¹ *Varnet*, *supra* note 37 at p. 2758.

It is easy enough to articulate the doctrinal positions of the two legal traditions. The more difficult question to address is the extent to which this theoretical “abyss”⁸² translates into very different outcomes in practice. In an examination of the actual state of the law in Denmark, France and Germany, Professors Lando and Rose assert that specific performance is largely a myth both for reasons that parties rarely seek the remedy, and that courts often refuse it.⁸³ If that is the case, one may ask whether the many doctrinal writings on this subject are obsessing about a purely theoretical phenomenon with little practical value. Without large-scale empirical study, this question cannot be answered with any certainty, but some conclusions may be drawn from an examination of recently decided cases in civil and common law jurisdictions.

As might be expected, situations that fall at either end of the specific performance spectrum will receive similar treatment before both civil and common law courts. Neither legal tradition will enforce purely personal obligations that involve the liberty and dignity of the promisor. Likewise, both legal traditions will award the remedy in circumstances where the obligation in question is to supply a good which the court characterizes as unique. Nor is uniqueness restricted to “decorative Chinese vases”⁸⁴ but rather may be inferred into complex commercial transactions, even those involving shares. In fact, a quick survey of recent Ontario decisions finds many instances where the court has granted specific performance.⁸⁵

⁸² Ernst Rabel, “A Draft of an International Law of Sales” (1938) 5 U. Chicago L. Rev. 559, cited in Charles Szladits, “The Concept of Specific Performance in Civil Law” (1955) 4 Am. J. Comp. L. 208, at p. 208.

⁸³ See Lando and Rose, “Myth,” *supra* note 67 at p. 1; Lando and Rose, “Enforcement,” *supra* note 67 at pp. 473–480.

⁸⁴ This is a frequent reference to unique chattels that originates in the case of *Falcke v. Gray* (1859), 4 Drewry 651, 62 E.R. 250 (Ch.). A recent appellate decision from Ontario that awarded specific performance of an agreement for the purchase and sale of shares of a private company viewed those shares as unique property: see *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.* (2009), 95 O.R. (3d) 93 [*UBS Securities*].

⁸⁵ See e.g., in just 2009, *UBS Securities, ibid.*; *Certicom Corp. v. Research in Motion Ltd.* (2009), 94 O.R. (3d) 511 [*Certicom* cited to O.R.] (the Court ordered a permanent injunction enjoining the respondent from proceeding with a hostile takeover bid); *Pioneer Petroleum Ltd. Partnership v. 2049904 Ontario Inc.*, 2009 ONCA 122 (specific performance of an option of purchase contained in a lease); *Midas Realty Corp. of Canada Inc. v. Galvic Investments Ltd.*, 2009 ONCA 84, 75 R.P.R. (4th) 197 (specific performance of an option to lease agreement);

Not surprisingly, the distinctive treatment by each legal tradition is to be found in the cases falling somewhere in the middle-ground. The most striking illustration of the practical repercussions of the differing mentalities of the civil and common law may be found in two cases with virtually identical facts—the House of Lords decision in *Argyll Stores* and the Quebec decision in *Golden Griddle*. Rarely are academics so fortunate to be confronted with two cases that bear such eerily similar facts, which are then reasoned and decided completely differently. In both cases, the contract in question concerned a commercial lease and the obligation breached by the promisor-lessee was an explicit “continuous operation” clause. In both cases, the reason for the breach was financial, in that the tenants’ respective businesses (in the former case a supermarket and in the latter a restaurant) were losing significant amounts of money. True to their respective legal traditions, the UK case refused to order specific performance where the Quebec case ordered it with gusto.⁸⁶ Of particular interest is the fact that identical arguments were raised by the defendants in each of the cases. The defendants on both sides of the Atlantic raised objections on the grounds of hardship⁸⁷ and problems of supervision. These arguments were received positively by the House of Lords, where Lord Hoffman concluded that as the order to stay open defied precision⁸⁸ and would cause great injustice to the debtor, specific performance could not be awarded. On the other hand, Justice Steinberg in the Quebec case had no hesitation rejecting both these claims. He responded to the argument regarding problems of supervision by appealing to the self-interest of the debtor and his reputation in the market place⁸⁹ and dismissed the hardship claim stating simply that “[h]ardship and personal consequences are irrelevant.”⁹⁰

Kyriacopoulos v. Fitzgerald, 2009 CarswellOnt 3328 (Sup. Ct.) (WLeC) (specific performance of a contract for the sale of land).

⁸⁶ A full analysis of these two decisions may be found in Jukier, “Transsystemic Classroom,” *supra* note 10 at pp. 801–807. Note that the holding in *Argyll*, *supra* note 9 has been followed in Ontario: see *Tritav Holdings Ltd. v. National Bank of Canada* (1996), 47 C.P.C. (3d) 91 (Ont. Ct. J. (Gen. Div.)) [*Tritav* cited to C.P.C.(3d)]; *Islington Village Inc. v. Citibank Canada* (1992), 27 R.P.R. (2d) 100 (Ont. Ct. J. (Gen. Div.)), *aff’d* 1992 CarswellOnt 2579 (Ont. C.A.) (WLeC).

⁸⁷ The question of hardship as a relevant consideration in the awarding of specific performance will be discussed below.

⁸⁸ See *supra* note 55 and accompanying text.

⁸⁹ See *supra* notes 63–65 and accompanying text.

⁹⁰ *Golden Griddle*, *supra* note 8 at p. 724.

Moreover, the Quebec decision in *Golden Griddle* is not an isolated instance of a civilian court granting an order of specific performance in these circumstances. The Scottish case of *Highland and Universal Properties Ltd. v. Safeway Properties Ltd* not only dealt with Specific Performance in the context of a continuous operation clause in a commercial lease, but involved the breach of such a clause by Safeway, the very same supermarket chain that was involved in the *Argyll Stores* case.⁹¹ The Scottish Court of Sessions chose not to follow the restrictive position espoused in *Argyll*, stating that “[i]n Scotland there is no doubt that—unlike the position in England—a party to a contractual obligation is, in general, entitled to enforce that obligation by decree for specific performance as a matter of right.”⁹²

From the foregoing examination, one may conclude that despite diametrically opposed theoretical and doctrinal approaches, there are indeed many similarities in practical outcomes in civil and common law jurisdictions. However, the differing mentalities and mindsets of the respective legal traditions on this subject do not escape practical differences, as best illustrated by contrasting the *Argyll* and *Golden Griddle* cases.

III. PART 3: THE CONSEQUENCES OF SPECIFIC PERFORMANCE AS THE PRESUMPTIVE REMEDY. CAN THERE BE LIMITATIONS?

Viewing specific performance as the presumptive remedy for breach of contract has often seemed too drastic and problematic for most common law jurists. The concern is that the remedy would lie in inappropriate circumstances, beyond those that interfere with the personal liberty of the debtor which, as has been seen, neither legal tradition has any interest in enforcing. It is therefore necessary at this juncture to identify the additional circumstances under which the remedy might be thought unsuitable and further, to examine whether it is possible to place limitations on the award of specific performance while at the same time encouraging a philosophical shift (in the common law) to regard the remedy as the presumptive one.

⁹¹ [2000] SC 297, [2000] SLT 414 (Scot Court of Sessions). See Berryman, *supra* note 55 at p. 85, n. 110.

⁹² *Ibid.*

A. HARDSHIP

The first such situation involves claims of hardship by the breaching debtor in having to perform the promised obligation in lieu of paying compensatory damages. The question of whether a promisor should be forced to keep a losing enterprise open for business was front and centre in the *Argyll Stores* decision. At the Court of Appeal level, where the remedy of Specific Performance was actually awarded, Millett L.J. stated, in his dissenting opinion, that ordering the tenant to stay open for business exposed him to “potentially large unquantifiable and unlimited losses which may be out of all proportion to the loss which his breach of contract has caused.”⁹³ He went on to assert that the remedy must be refused when there is potential for it to become an instrument of oppression.⁹⁴ Lord Hoffman, speaking for the House of Lords, agreed, and in rejecting the request for specific performance stated it would “cause injustice [to the debtor] by allowing the plaintiff to enrich himself at the defendant’s expense”⁹⁵ because the costs of complying with the order would outweigh the loss caused by the breach.

This issue raises two relevant questions. The first is the extent to which hardship to the debtor should be a legitimate consideration in the refusal to award specific performance by the court. The second is whether viewing specific performance as the presumptive remedy would preclude the courts from taking the existence of hardship into consideration.

At first blush, one may rightfully question whether hardship for the breaching party should be relevant at all. Justice Steinberg has little patience for such argument in the Quebec case of *Golden Griddle*. In his opinion, specific performance should not be refused because the defendant will lose money as a consequence because, as he correctly asserts, such losses would be “readily foreseeable consequences at the time Golden Griddle contracted its obligations under the lease and are commensurate with the rewards to be earned if the restaurant’s operations are successful.”⁹⁶ Calling such argument “specious,” he goes on to state

⁹³ *Argyll* (C.A.), *supra* note 63 at p. 42.

⁹⁴ See *ibid.* at para. 43.

⁹⁵ *Argyll*, *supra* note 9 at p. 16.

⁹⁶ *Golden Griddle*, *supra* note 8 at p. 728.

somewhat sarcastically that “[j]udicial interference is rarely necessary to enforce contracts which will yield a profit to the defendant.”⁹⁷

Notwithstanding a line of Quebec cases evidencing a reluctance to consider issues of hardship,⁹⁸ it is worth noting that hardship has become an increasingly recognized consideration in many international harmonization projects involving civilian legal systems, even where specific performance is given presumptive status. Article 7.2.2(b) of Unidroit, for example, reverses the presumption in favour of specific performance where it would be “unreasonably burdensome or expensive.” Likewise, Article 9.102(2)(b) of the Principles of European Contract Law provides that the creditor is entitled to specific performance except where “performance would cause the debtor unreasonable effort or expense.” And while formal reference to hardship in civil codes is certainly not universal, the German BGB provides an example of explicit codal reference to this concept.⁹⁹ In addition, the most recent version of the proposed codal reform to the law of obligations in France recommends that specific performance not lie in cases where its cost would be manifestly unreasonable.¹⁰⁰

There is no doubt that courts are often inclined to take hardship into consideration in choosing whether to award specific performance. In some cases, the nature of the hardship goes beyond economic consequences, evoking images of soap opera drama. One case involved circumstances of trauma on the part of the breaching debtor resulting from

⁹⁷ *Ibid.*

⁹⁸ The view expressed in *Golden Griddle*, *supra* note 8, has been echoed in other Quebec decisions: See *AVI Financial Corp. (1985) inc. v. Novergaz inc.* (1997), AZ-97021793 (Qc. S.C.), at para. 70, per Guthrie J. (“the Court is of the opinion that the ‘balance of hardship’ rule of the common law jurisdictions has no place in the civil law of Québec in an action for a final injunction”). See also *Carrefour Langelier*, *supra* note 13 at para. 83.

⁹⁹ BGB s. 275(2) (“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 performance of the obligee.”)

¹⁰⁰ France, Ministère de la justice, *Projet de réforme du droit des contrats*, art. 162(a) (July 2008) (“Le créancier d’une obligation de faire peut en poursuivre l’exécution en nature sauf si cette exécution est impossible ou si son coût est manifestement déraisonnable”).

his wife's murder;¹⁰¹ still another contains facts of a seriously disabled defendant whose husband had gone bankrupt and was sent to prison.¹⁰²

It is clear that we cannot create doctrinal principles from such exceptional and pathological cases.¹⁰³ It is also important not to confuse the concept of "hardship" with that of "unfairness," only the former being relevant to the award of specific performance. As Justice Sharpe aptly points out, unfairness refers to "misconduct of the plaintiff in *procuring the bargain*"¹⁰⁴ and "where specific performance is refused on grounds of unfairness, it is highly unlikely that the contract [would have been] enforced in any way."¹⁰⁵ The issue of hardship, on the other hand, arises when the "burden of *enforcing the contract* is so unexpected or unreasonable as to be unjust."¹⁰⁶ Situations of unfairness in the contract itself are more properly dealt with by applying other contract doctrines and should be disassociated with hardship in its execution.

As with many of the other issues examined in the context of specific performance, the key is not whether to consider such hardship but rather, in what circumstances it might be appropriate to do so. Clearly, the circumstances must go beyond those inherent in the bargain made by the defendant. As Justice Steinberg pointed out in *Golden Griddle*, hardship in such cases would have been foreseeable and moreover, would

¹⁰¹ *1110049 Ontario Ltd. v. Exclusive Diamonds Inc.* (1995), 25 O.R. (3d) 417 (Ont. C.A.).

¹⁰² *Patel v. Ali*, [1984] Ch. 283 [*Patel*].

¹⁰³ See Ian R. Macneil, "Whither Contracts?" (1969) 21 J. Legal Educ. 403, at p. 408 (contract law deals mainly with pathological cases and that the problem with that is that "the rule of the pathological case governs the healthy contract too." Unfortunately, Macneil concludes, "the law arising from sick cases is not necessarily the optimum law for healthy cases").

¹⁰⁴ Sharpe, *supra* note 1 at para. 10.230 [emphasis added].

¹⁰⁵ *Ibid.* at para. 10.310.

¹⁰⁶ *Ibid.* at para. 10.330 [emphasis added]. Equally confusing is the distinction often made in doctrine and jurisprudence between 'pre' and 'post' hardship with the general rule being that in order to be a relevant consideration, hardship must exist at the time of the contract (See *Stewart v. Ambrosina* (1976), 10 O.R. (2d) 483 (H.C.), *aff'd* 16 O.R. (2d) 221 (C.A.); *Matthews v. McVeigh*, [1954] O.R. 278 (C.A.), at p. 289. Compare *Patel*, *supra* note 102; *City of London v. Nash* (1747), 26 E.R. 1095. This is misleading because as Justice Sharpe points out, *supra* note 1 at para. 10.370, "a party will not be relieved against a speculation which has gone wrong. Where the parties have by contract allocated certain risks, if specific performance is otherwise available it should be not refused simply because the risk has materialized adversely to the defendant."

fall within the risks assumed by the parties in their bargained agreement. The paradigmatic hardship example often provided is that of a ring that has been dropped into a lake after its sale but before its delivery, where the cost of draining the lake and recovering the ring would be 1000 times its value.¹⁰⁷ This illustration is reminiscent of the exceptional cases in which courts have had to quantify damages in situations where there is great disparity between the cost-of-cure and the diminution-in-value.¹⁰⁸ In cases where the cost of curing the defect is so out of proportion as to be unreasonable to be required of the defendant, courts have generally tended towards merely awarding diminution-in-value. Awarding cost-of-cure is often seen as the mirror-image of specific performance, since it gives the creditor the financial means to have the actual promise performed, albeit by a person other than the promisor. It is not unusual, therefore, to see an analogous interpretation of hardship in specific performance cases, one that is based on unusual situations of extreme discrepancy between cost and value of performance. This was not the type of hardship that was encountered in *Argyll Stores* and precluding specific performance in that case, which also happened to involve a commercial bargain that was fair at its outset, is arguably taking the notion of hardship too far.¹⁰⁹

B. THE GOOD FAITH PRINCIPLE

The remaining question is whether consideration of hardship can live alongside specific performance if we treat it as the presumptive remedy. While hardship is often considered as part of the inherent

¹⁰⁷ Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (New York: Oxford University Press, 2005), at p. 45. Similar examples are found in *Lamberterie, Rouhette and Tallon*, *supra* note 32 at p. 184 (yacht sinks to the bottom of the sea and cost of raising it back up would be forty times its value) and in *Unidroit*, *supra* note 32 at p. 174 (“An oil tanker has sunk in coastal waters in a heavy storm. Although it would be possible to lift the ship from the bottom of the sea, the shipper may not require performance of the contract of carriage if this would involve the shipowner in expense vastly exceeding the value of the oil”).

¹⁰⁸ See e.g. the well-known common law cases: *Peevyhouse v. Garland Coal & Mining*, 382 P. 2d 109 (Okla. Sup, Ct. 1963); *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1995] 3 All E.R. 268 (H.L.); *Tito v. Waddell (No.2)*, [1977] 3 All E.R. 129.

¹⁰⁹ Tettenborn, *supra* note 46, at p. 25. See also the Scottish decision in *Highland and Universal Properties Ltd. v. Safeway Properties Ltd.*, *supra* note 91, where Lord Kingarth states that the court has discretion to deny Specific Performance only where it would cause “exceptional hardship” such that it would “impose a burden upon the defender grossly disproportionate to any advantage to the pursuer.”

discretion afforded to courts in the common law, it is actually the civil law that is most instructive on this issue. By virtue of the doctrine of good faith, an integral and expanding component of civilian theory, contracting parties are obliged to act without malice and in a reasonable manner in the exercise of all contractual rights, be it at formation, at performance and even at extinction of the contract.¹¹⁰ If any right belonging to a creditor is exercised in a manner that is contrary to the dictates of good faith, the creditor may be seen as abusing his rights. The “right” to specific performance, like any other contractual right, may be abused where “no rational person placed in the same circumstances as the promisee would likely insist on the performance at all, or when and how the promisee does so.”¹¹¹

Many European doctrinal writers echo this use of good faith and abuse of rights in the context of the remedy of specific performance. Professor Patrick Wéry has written on this subject in the Belgian context, stating that “le créancier perd le droit d’obtenir l’exécution en nature, s’il l’exerce d’une manière qui excède manifestement le comportement qu’eût adopté un bon père de famille normalement diligent et prudent.”¹¹²

While actual examples of abuse of rights in the context of specific performance are not abundant, there are several helpful jurisprudential illustrations. In *Carrefour Langelier*, Justice Fraiberg posits the following hypothetical that would, if true, justify a finding of bad faith. In an assignment of lease agreement where the assignee entertainment corporation (Guzzo) agreed to operate its theatre under the assignor’s name (Cineplex), the latter’s exercise of the remedy of specific performance to insist on the use of such name would be an abuse of right

¹¹⁰ Arts. 6, 7 and 1375 of the Civil Code of Quebec. Following the Supreme Court decision in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, the standard of good faith reflects not only the absence of malice or intent to harm, but reasonable norms of behaviour as well.

¹¹¹ *Carrefour Langelier*, *supra* note 13 at para. 81.

¹¹² Patrick Wéry, “Les sanctions de l’inexécution des obligations contractuelles” in Patrick Wéry, ed., *Le droit des obligations contractuelles et le bicentenaire du Code civil* (Brussels: La Charte, 2004), at p. 301. See Patrick Wéry, “Les sanctions de l’abus de droit dans la mise en œuvre des clauses relatives à l’inexécution d’une obligation contractuelle” in *Mélanges Philippe Gérard* (Brussels: Bruylant, 2002), at p. 134. See also Heslen and Hardy, *supra* note 3 at p. 316.

in circumstances where Cineplex itself had gone out of business or changed its name.¹¹³

Requesting specific performance in circumstances of hardship, where the cost of performance so outweighs its benefit to the creditor, would arguably run afoul of the good faith obligation.¹¹⁴ Allowing good faith and the notion of abuse of rights into the equation will prevent, to use the words of Eric Posner, “enraged promisees [from using] the tool of specific performance ... to exact retaliation”¹¹⁵ and will help curb vindictive and unfair behaviour on the part of creditors who claim the remedy in highly unreasonable circumstances.

The foregoing discussion illustrates that there may indeed be situations where hardship becomes a relevant consideration in the availability of specific performance. Furthermore, the civilian experience of applying the doctrine of abuse of rights, as part of the good faith principle, to this remedial area of law is richly instructive. Most importantly, it demonstrates that there is no inherent contradiction between viewing the remedy as presumptive, while at the same time limiting its award in appropriate circumstances of hardship.

C. CONTRACTUALLY STIPULATED “DAMAGES ONLY” CLAUSES

Finally, one must examine whether the parties’ own intentions, as expressed in their contract, can be an additional reason for limiting the availability of specific performance. The more general question is the extent to which the parties’ expressed intentions can determine the remedial outcome of their dispute.

What seems to be fairly clear is that in Canada, a contractual clause specifying specific performance as the applicable remedy in case of breach will not be binding on a court. Despite the explicit acknowledgment of such a stipulation in the Uniform Commercial

¹¹³ *Carrefour Langelier*, *supra* note 13. See also Cass. 1^{re}, 16 January 1986, *Pas.* 1986. I. 602, No. 317 (in this Belgian case the Cour de Cassation ruled that the creditor’s rejection of the debtor’s reasonable offer for resolving the lease and demand for specific performance constituted an abuse of right and caused disproportionate hardship to the debtor).

¹¹⁴ See Viney and Jourdain, *supra* note 18 at p. 45.

¹¹⁵ E. Posner, “Emotions,” *supra* note 53 at p. 2009.

Code,¹¹⁶ and Professor Kronman's suggestion that a specific performance provision should be respected since parties "are in the best position to determine which remedial devices will serve their respective interests most satisfactorily,"¹¹⁷ Canadian courts are not inclined to agree. In the Ontario case of *Tritav Holdings Ltd. v. National Bank of Canada*, Justice Gotlib expressed the view that "parties cannot contract out of the law as it exists."¹¹⁸ As such, the existence of such a clause will not ensure the availability of specific performance when it would otherwise not lie, and the most it will do is go to weight, providing an indication to the court that the parties considered damages to be an inadequate remedy.¹¹⁹

Will the courts, however, enforce a contractually stipulated "damages only" clause, and thereby exclude the remedy of specific performance where it may otherwise be appropriate in the circumstances? The Convention on the International Sale of Goods (CISG), which gives pre-eminence to the remedy of specific performance, explicitly provides that parties may contract out of that default remedy.¹²⁰ But even absent specific legislative permission, such a clause should fall within the purview of the parties' freedom of contract and ought to be enforceable according to the ordinary rules of contract law. As long as there is no defect in the formation of the contract and no question of unconscionability, a clearly-drafted "damages only" clause should, in principle, exclude the remedy of specific performance. In the United States, there is judicial support for upholding such a limitation of remedy provision as long as the contract is "mutual, unequivocal and

¹¹⁶ U.C.C. § 2-716(1) stipulates that "In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy."

¹¹⁷ Kronman, *supra* note 44 at p. 376. A similar argument is made in Laithier, *supra* note 41 at p. 138.

¹¹⁸ *Tritav*, *supra* note 86 at para. 9.

¹¹⁹ *Certicom*, *supra* note 85 at p. 527.

¹²⁰ Art. 6 CISG; See Katz, *supra* note 78 at p. 385 ("Specific relief is available as a default rule under Articles 46 and 62. Parties can contract out of this default by using Article 6, or by explicitly granting the promisor an option to pay a liquidated sum in lieu of performance").

reasonable”¹²¹ and many doctrinal writers, in both the civil and common law, agree that such a clause should, in principle, be enforceable.¹²²

Parties should be aware, however, that if they truly intend to ban the remedy of specific performance, they cannot do so by merely stipulating a liquidated damages clause in their contract. There is ample jurisprudence, particularly in Quebec, to the effect that such a clause will not prevent the creditor from suing for, and obtaining, specific performance.¹²³ Moreover, to be effective, a “damages only” clause must be unambiguous because, as Spry has pointed out, the clause must be such as to justify its interpretation as clearly ousting specific performance, rather than offering a choice of remedy to the claimant.¹²⁴ It seems warranted that such a clause, which has the effect of removing a potentially beneficial remedy to the victim of a contract breach, would have to pass the more stringent tests of contractual interpretation, such as those of strict construction and *contra proferentem*, typically applied to exoneration clauses and other draconian provisions.

The above illustrates that, as in the case of hardship, clearly-drafted “damages only” clauses may also limit the availability of specific performance even if the common law moves in the direction of considering specific relief to be the presumptive remedy.

¹²¹ *Greenstein v. Greenbrook, Ltd.*, 413 So. 2d 842 (Fla. Dist. Ct. App. 3d Dist. 1982) as followed in *Hatcher v. Panama City Nursing Center, Inc.*, 461 So. 2d 288 (Fla. Dist. Ct. App. 1st Dist. 1985). See also *L.K. Sta. Group, LLC v. Quantek Media, LLC*, 879 N.Y.S.2d 112 (Sup. Ct. App. Div. 1st Dep’t 2009); *Rubinstein v. Rubinstein*, 285 N.Y.S.2d 125 (Sup. Ct. App. Div. 1st Dep’t 1967).

¹²² See Heslen and Hardy, *supra* note 3, at p. 315 (“parties are in principle free to restrict the right to specific performance by contract”). *Contra* Laithier, *supra* note 41, at p. 139 (“a clause excluding enforced performance in kind should be ineffective, at least where it relates to an essential obligation”).

¹²³ See Art. 1622(2) of the Civil Code of Quebec.; Baudouin and Jobin, *supra* note 21, at para. 903 (“Le créancier n’est jamais obligé de se prévaloir de la clause pénale et peut, à son choix, opter plutôt pour l’exécution en nature de l’obligation.” Authors cite many Quebec cases supporting this claim at n. 346). See, most recently, *Groupe Ultima inc. c. Beaucage Mercedem Assurances inc.*, 2009 QCCS 628.

¹²⁴ See I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Remedies*, 6th ed. (Australia: LBC Information Services, 2001), at p. 75, nn. 1–4.

CONCLUSION

This paper has attempted to examine the remedy of specific performance through a variety of lenses, ranging from the theoretical and practical advantages and disadvantages to the doctrinal positions of the respective legal traditions. From the outset, the position advocated has been the typically civilian one viewing specific performance as the presumptive remedy.

However, this paper has also attempted to emphasize the fact that “presumptive” is not synonymous with “always.” As such, treating specific performance as the presumptive remedy for breach of contract does not lead to the conclusion that it is the remedy that will always be applicable. Compelling circumstances and common sense dictate that specific relief may not be appropriate and should not lie in a given case for the myriad of reasons previously examined including personal liberty concerns, abuse of rights or the parties’ own bargained intention to prioritize the remedy of damages. Making specific performance the presumptive remedy does not prevent a court from ousting its application in a justified context.

Some may argue that the above concession will result in nothing more than a semantic change. After all, if we simply label the remedy a presumptive one but continue to apply the same impediments used by the common law to relegate its status, what will truly be accomplished? I would assert that reversing the common law’s inherent prejudice against the remedy will indeed have practical effects on its award in individual cases. The common law’s psychological stance has enabled judges to seize upon, more readily, any reason to reject the award of the remedy. One need look no further than the comparable cases of *Argyll Stores* and *Golden Griddle* as evidence. Lord Hoffman’s restrictive attitude towards the remedy results in him viewing “the cup as half-empty” and he is therefore extremely receptive to arguments of imprecision, supervision and hardship. Justice Steinberg, on the other hand, psychologically views “the cup as half-full” and succeeds in overcoming similar objections raised against the availability of the remedy. I would therefore propose that asserting the presumptive status of the remedy would help common law judges to abandon this inherent prejudice and would reinforce the message propounded at many junctures of this paper that the reasons that justify refusing specific performance in an individual case do not support relegating it, as a general rule, to a lower status on the rung of remedies.

Finally, the common law should reconsider its current articulation of the doctrinal test for the award of specific performance which involves assessing the “adequacy” of damages. It seems that this test is but a euphemism for what courts are actually doing when faced with a request for specific relief, and it is therefore misleading, simply masking the true considerations for the appropriateness, or lack thereof, of the order. Unless the plaintiff receives punitive damages and/or significant damages for intangible loss, both highly unusual in contract cases, damages will always be an inadequate remedy for a plaintiff, especially after subtracting from the damage award the judicial and extra-judicial costs inherent in litigation and in meeting the evidentiary burdens of proof.

It is high time to abandon Oliver Wendell Holmes’ century-old and oft-quoted dictum to the effect that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—*and nothing else.*”¹²⁵ On the contrary, the duty to keep a contract ought presumptively to mean a duty to perform it.

¹²⁵ Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv. L. Rev 457, at p. 462 [emphasis added].