

COMPARING SPECIFIC PERFORMANCE  
UNDER THE SPECIFIC RELIEF  
(AMENDMENT) ACT 2018 WITH  
THE CISG AND THE UNIDROIT  
PRINCIPLES: THE PROBLEMS OF THE  
“UN-COMMON LAW” IN INDIA

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*The Specific Relief (Amendment) Act, 2018 expressed a clear intent to the world that India was more serious than ever about the enforcement of contracts. It took the bold step of breaking its historical chains of the common law, and like civil law jurisdictions, made specific performance the norm, rather than the exception. While this was a much-needed step, a more in-depth analysis of the concept of specific performance and the amendment, when compared with other civil law jurisdictions, the Conventions on the International Sale of Goods, and the UNIDROIT International Principles of Commercial Contracts, reveals a different picture. In a hasty effort to raise India's rank on the 'ease of doing business', India has neither completely adopted the civil law approach, nor entirely relinquished its inheritance from the common law. This created the “Un-common Law”, which creates more problems than it resolves. The paper critically analyses the amendment in light of international instruments and practice across jurisdictions to highlight the steps in the right directions, the grey areas, and the drawbacks of the amendment. It concludes that a comprehensive re-look is required in order to align the regime on specific performance with international practice.*

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## I. INTRODUCTION

Contract enforcement is vital to ensure that trade and commerce flourish in any society. In the absence of contract enforcement, private parties may resort to self-help and seize goods from a seller or use private means to coerce performance.<sup>1</sup> Contract enforcement, therefore, ensures that parties turn to courts to enforce their promises, either through the remedy of specific performance or through damages, to put the non-breaching party in the same position as it would have been but for the breach, i.e., expectation damages.<sup>2</sup>

In India, following the common law tradition, the right to damages was considered the primary remedy for breach of contracts, and specific performance was an exception.<sup>3</sup> The enforcement regime for contracts in India was considered mostly ineffective as damages fail to provide full compensation for the breach<sup>4</sup> and that considerably affected business sentiment as busi-

<sup>1</sup> Edward A Tomlinson, 'Performance Obligations of the Aggrieved Contractant: The French Experience' (1989) (12) LLICLJ 139 188-192; Subha Narasimhan, 'Modification: The Self-Help Specific Performance Remedy' (1987) (97) YLJ 61, 91.

<sup>2</sup> Subha Narasimhan, 'Modification: The Self-Help Specific Performance Remedy' (1987) (97) YLJ 61, 65.

<sup>3</sup> Report of the Expert Committee on Specific Relief Act 1963 (2016) 3.

<sup>4</sup> *Ibid.*, 13.

nesses require legal certainty. Therefore, to increase its rank on the ‘ease of doing business’ index, the government constituted an Expert Committee on the Specific Relief Act, 1963 (“**Expert Committee**”) with the objectives of *inter-alia* (a) reviewing the Specific Relief Act, 1963 (“**SRA**”) from the point of view of enforceability of contracts; b) to make specific performance a general rule and the grant of compensation for non-performance an exception; c) to dispense with discretionary relief under the SRA.<sup>5</sup> Pursuant to the recommendations of the Expert Committee, the Specific Relief (Amendment) Act, 2018 (“**2018 Amendment**”) was enacted.<sup>6</sup> After the amendment, the right to specific performance is no longer an equitable relief, rather a statutory right.<sup>7</sup>

However, as most legislations in India, the recommendations of the Committee were accepted in a piecemeal fashion, leaving several lacunae in the SRA on the question of enforceability of contracts. This is highlighted when the SRA is compared with international instruments such as the Convention on the International Sale of Goods (“**CISG**”) and the UNIDROIT Principles of International Commercial Contracts (“**PICC**”).

The paper attempts to make a comparative analysis between specific performance under the CISG, UNIDROIT, and the position in India, post the 2018 Amendment. Part A of the paper discusses the legal basis for the enforcement of contracts. Part B explores the concept of specific performance under common law and civil law in order to highlight the similarities and differences between both the systems of law and to understand how the remedy of specific performance is implemented in different jurisdictions. Part C of the paper critically analyses the 2018 amendment, in light of the comparisons with the CISG and the PICC, to identify the practical problems and lacunae in the 2018 Amendment. The paper concludes with a recommendation to revisit the 2018 Amendment and to harmonise the same with international instruments such as the PICC and CISG.

## II. PART A

### A. Basis of Contract Enforcement

Robust commerce requires promises to be upheld by parties and in case of failure, state intervention is required to enforce such promises. While States

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<sup>5</sup> *Ibid.*, 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, 60.

generally follow and respect the ‘freedom of contract’,<sup>8</sup> they may take two approaches to contract enforcement, i.e., (a) the assumption that all promises are enforceable subject to exceptions, or (b) the assumption that all promises are generally unenforceable, subject to certain exceptions. In civil law as well as common law jurisdictions, the latter approach is usually followed.<sup>9</sup> Therefore, promises become contracts, when the same are enforceable by law,<sup>10</sup> and to be enforceable by law, certain conditions ought to be met,<sup>11</sup> i.e., enforceable promises ought to have a legal basis for enforcement.

## 1. ‘Consideration’

The notion that a promise casts an enforceable duty began with Roman law.<sup>12</sup> Though English Law was not influenced by Roman Law tradition,<sup>13</sup> it created a category of actionable promises, the most important being an action of debt.<sup>14</sup> Thus, until the end of 16<sup>th</sup> century, mere promises *per se* were not enforceable unless they fell in the category of actionable promises.<sup>15</sup> The hesitation in enforcing promises was the lack of a legal basis for their execution. Hence, the concept of consideration, i.e., a sum of the conditions necessary for the action for breach of contract,<sup>16</sup> became the legal basis for the execution of promises. The broad idea was to identify those promises which, in the eyes of common law courts, were important to society and required legal sanctions for enforcement.<sup>17</sup> This legal basis as a test of *quid pro quo* has been replaced by the ‘bargain test’ in the United States, i.e., a promise or a performance should be bargained for.<sup>18</sup>

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<sup>8</sup> Learned Hand, ‘Due Process and the Eight-Hour Day’ (1908) 21 HLR 495, 507-08; Carolyn Edwards, ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’ (2009) 77 UMKCLR 647, 662.

<sup>9</sup> E Allan Farnsworth, ‘Comparative Contract Law’ in Mathias Reimann and Reinhard Zimmermann (ed), *The Oxford Handbook of Comparative Law* (OUP 2012) 907.

<sup>10</sup> Indian Contract Act 1872 (ICA) s 2 (h).

<sup>11</sup> ICA s 10.

<sup>12</sup> Farnsworth (n 9) 908.

<sup>13</sup> *Ibid.*

<sup>14</sup> David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999), 24.

<sup>15</sup> Denis Tallon, ‘Civil Law and Commercial Law’, *International Encyclopedia of Comparative Law* (1983) vol VIII, ch 2;

<sup>16</sup> Farnsworth (n 9) 908.

<sup>17</sup> *Ibid.*

<sup>18</sup> Restatement (Second) of Contracts 1981 s 73 (1981).

## 2. 'Good Faith'

Civil law, on the other hand, required no such basis of consideration as there was an existing moral as well as a legal duty to execute promises.<sup>19</sup> This moral duty to fulfil promises is referred to as good faith or *pacta sunt servanda*.<sup>20</sup> Therefore, only a promise with an intention to be bound is required under Civil law.<sup>21</sup>

## 3. The Spectrum of Remedies

This general basis of enforcement is vital to understand the broad spectrum under which contracts are enforced. The requirement to enforce a contract may arise whenever there is a breach or non-performance. It is pertinent to note that 'breach of contract' is a term used by common law systems, whereas under civil law reference is made to 'non-performance' of the contract.<sup>22</sup> Nonetheless, both the terms ultimately mean the failure to achieve a specific result, according to terms of the contract or general law.<sup>23</sup>

A breach may occur on account of (a) defective performance;<sup>24</sup> (b) performance at the wrong time;<sup>25</sup> (c) performance at the wrong place;<sup>26</sup> (d) incomplete performance;<sup>27</sup> or (e) total non-performance.

Consequently, a breach of contract gives rise to primarily three types of remedies: (a) specific performance; (b) termination of the contract; and (c) the right to damages.

Apart from these, several other remedies are often not adequately discussed or addressed, especially under Indian law. For example, the right to

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<sup>19</sup> Ole Lando & Hugh Beale, *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000) 399, 402; Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 575.

<sup>20</sup> Jason Webb Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality' (2008) (32)5 FILJ 1550.

<sup>21</sup> Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (Schweitzer 1985); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford Scholarship Online, 1996), 537; Gerhard Kegel, *Vertrag und Delikt* (Heymanns 2002) 3.

<sup>22</sup> Harriet Schelhaas, 'Non Performance' in Stefan Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2<sup>nd</sup> edn OUP 2015) 831.

<sup>23</sup> *Ibid.*

<sup>24</sup> UNIDROIT Principles of International Commercial Contracts 2016, (UNIDROIT) art 5.1.6.

<sup>25</sup> UNIDROIT arts 6.1.6 & 6.1.5.

<sup>26</sup> UNIDROIT art 6.1.6.

<sup>27</sup> UNIDROIT arts 6.1.2 & 6.1.3.

withhold performance,<sup>28</sup> the grant of additional time for performance,<sup>29</sup> and the right to cure non-performance.<sup>30</sup> An often confused reference is made to exemption clauses,<sup>31</sup> interference by the claimant,<sup>32</sup> or *force majeure*<sup>33</sup> under the concept of remedies. However, it is necessary to clarify that such references only provide an excuse from the performance of a contract, and hence a party is precluded from claiming damages or specific performance. Such references exclude only two out of the three remedies, and the remedy of termination of the contract continues.<sup>34</sup> Similarly, if the breach happens due to an act of the claimant, then there is no breach in the first place.<sup>35</sup> The scope of this paper is restricted to analysing the remedy of specific performance.

### III. PART B

#### A. The Concept of Specific Performance

The right to specific performance arises from the principle of *pacta sunt servanda*,<sup>36</sup> i.e., the binding nature of a contract entails a right to claim what was actually promised.<sup>37</sup> Specific performance, at its core, means the request by a party to direct the defendant to perform the contract in accordance with its terms. It is “all or nothing” whereas damages account for different circumstances, as well as a duty to mitigate damage.<sup>38</sup>

A critical aspect of the right to specific performance is that the contract should be in existence. The right to specific performance cannot be invoked once the contract has been terminated.<sup>39</sup> Damages, on the other hand, are not precluded by virtue of termination of the contract.<sup>40</sup> Therefore, three essential facets of the right to claim specific performance need to be addressed upfront. (a) the right to specific performance can only be invoked when

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<sup>28</sup> UNIDROIT art 7.1.3.

<sup>29</sup> UNIDROIT art 7.1.5.

<sup>30</sup> UNIDROIT art 7.1.4.

<sup>31</sup> UNIDROIT art 7.1.6.

<sup>32</sup> UNIDROIT art 7.1.2.

<sup>33</sup> UNIDROIT art 7.1.7.

<sup>34</sup> AS Hartkamp, ‘Principles of Contract Law’, in AS Hartkamp et al (eds), *Towards a European Civil Code* (3rd edn, Wolters Kluwer 2004) 125, 135-136

<sup>35</sup> Vogenauer (n 22) 830.

<sup>36</sup> UNIDROIT art 1.3.

<sup>37</sup> Vogenauer (n 22) 887.

<sup>38</sup> Ingeborg Schwenzer, ‘Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts’ (1999) 1(3) EJLR303.

<sup>39</sup> UNIDROIT art 7.3.5(1); *Crompton Greaves Ltd v. Hyundai Electronics Industries Co. Ltd.*, 1998 SCC OnLine Del 805 : 1999 (49) DRJ 754.

<sup>40</sup> Vogenauer (n 22) 826.

the contract is in existence; (b) the distinction between the substantial and procedural issue related to specific performance, i.e., the substantive issue is whether a party is entitled to the remedy of specific performance or only entitled to damages.<sup>41</sup> The procedural question is whether the two remedies are mutually exclusive or cumulative? If they are cumulative, can damages be claimed immediately? Or does a party have to insist on specific performance, first?;<sup>42</sup> and (c) whether the claim for specific performance is being made with respect to monetary obligations or non-monetary obligations, i.e., to do 'to do or not to do' something? While each country provides for enforcement differently and is a matter of the *lex fori*, three broad categorisations can be made: (a) enforcement of monetary obligations; (b) enforcement of an action to hand over something; and (c) enforcement of negative covenants, i.e., 'not to do'.<sup>43</sup>

## 1. Monetary Obligations

Specific performance as payment of money, as a rule, is not subject to exceptions in both common law and civil law.<sup>44</sup> It is only the non-monetary obligations that are subject to exceptions. Thus, monetary obligations ought to be specifically performed.

Monetary obligations are neither impossible in law nor in fact, and the performance or enforcement is neither unreasonably burdensome nor expensive.<sup>45</sup> More importantly, performance can neither be obtained from another source, and the same is not exclusively of personal character.<sup>46</sup> In fact, even English law recognises monetary obligations as 'an action of debt'.<sup>47</sup> Thus, payment of damages is, in effect, a new obligation to pay money for the breach of contract and the decree for payment of this sum of money is specific relief. The objective is to compensate a party for losses rather than deter for the breach.<sup>48</sup>

<sup>41</sup> Schwenzer (n 38) 289.

<sup>42</sup> Guenter H Treitel, *Remedies for Breach of Contract* (OUP 1988), 47.

<sup>43</sup> Schwenzer (n 38) 302.

<sup>44</sup> *Ibid.*, 293.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 289.

<sup>47</sup> Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung Auf Dem Gebiete Des Privatrechts* (3rd edn, Tübingen 1996) 553; Paul Neufang, *Erfüllungszwang als "remedy" bei Nichterfüllung* (Baden 1998), 9.

<sup>48</sup> Zimmermann (n 21) 829; Treitel (n 42) 965; James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2007), 395; Stephen A Smith, *Contract Theory* (OUP 2004), 409.

The request for the performance of a monetary obligation is called an ‘action for an agreed sum’ or ‘action of price’. Such actions do not fall within the realm of specific performance as the English law recognised only an ‘action for debt’ as specific performance. An action for money or damages was not ‘debt’ in the strict sense and hence an ‘action for price’ is often provided in a section different from the right to specific performance. Even under the Uniform Commercial Code (“UCC”), a right to the performance of monetary obligations does not include the right to recover the price as specific performance, which is different from the civil law approach.<sup>49</sup> This absence of recognition of the right to specific performance of monetary obligations is surprising as both civil law and common law jurisdictions recognise the right as the primary remedy of the aggrieved party.<sup>50</sup> In contrast, Article 7.2.1 of the PICC recognises the right to specific performance for monetary obligations, with the only exception being certain usage under article 1.9 of the PICC, where the usage requires the seller to resell the goods, which are neither accepted nor paid for by the buyer.<sup>51</sup> Following the philosophy of the common law, the SRA does not make reference to monetary obligations. Instead, Chapter I begins with reference to immovable property.<sup>52</sup>

## 2. Non-Monetary Obligations

The often-cited distinction between civil law and common law, with respect to specific performance, actually is in the context of non-monetary obligations where specific performance is considered to be the primary remedy under civil law and an ‘extraordinary remedy’ under common law.

### (a) *Specific Performance under Common Law*

In common law jurisdictions, the primary remedy for breach of non-monetary obligations is the right to damages<sup>53</sup> for breach of contract.<sup>54</sup> Thus,

<sup>49</sup> Nayiri Boghossian, ‘A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods’ (LLM Thesis, McGill University 1999).

<sup>50</sup> Vogenauer (n 22) 884.

<sup>51</sup> *Ibid.*, 886.

<sup>52</sup> *However, a provision for execution for money decrees is provided in Order XXI Rule 30 which states that a money decree may be executed by detention in the civil prison or by attachment in sale of property or both. Therefore, unlike other common law jurisdictions, India treats the execution of money decree as specific performance bringing it closer to civil law jurisdictions.*

<sup>53</sup> Mariana Pargendler, ‘The Role of the State in Contract Law: The Common-Civil Law Divide’ (2018) YJIL 143, 167.

<sup>54</sup> *Ibid.*; *There is a difference of opinion on this amongst commentators. Trietel and Smith opine that the differences between the civil and common law approach may be more*



common law jurisdictions seek to ensure that the promisee obtains the economic benefit for which such party had contracted. As long as this benefit or advantage is received, it does not matter whether the defaulting party performs the contract or pays damages.<sup>55</sup> The idea is that the breach of the promisor's primary obligation of performance is transformed into a secondary obligation to compensate the non-breaching party by payment of damages. The underlying rationale is to balance the competing interest of the breaching party with that of the protection of the performance interest of the non-breaching party.<sup>56</sup> From a policy perspective, the restrictions on the availability of specific relief demonstrate that the encouragement of performance and the deterrence of breach are not the primary objectives.<sup>57</sup>

Specific performance, in common law jurisdiction, is primarily driven by history.<sup>58</sup> Specific performance was granted by courts of equity and not by courts of law. This duality of rights and remedies in equity and law have added much to its obscurity and lack of systematisation.<sup>59</sup> One of the results of relying on equity was that the commands of the Chancellor of the courts of equity became decrees *in personam*. Thus, a person was directed to do or not to do something at the threat of contempt of court and resultantly jailed for such contempt.<sup>60</sup> It is pertinent to highlight that specific performance as a remedy was brought to remedy the deficiencies of the common law and hence was characterised as an 'extraordinary' remedy.

In order to find a point of reconciliation between the powers of courts of law and courts of equity, the 'inadequacy test' was developed, i.e., specific performance will be granted only if an award of damages is inadequate to compensate the losses arising from the breach.<sup>61</sup> This was done to prevent the courts of equity encroaching upon the jurisdiction of the common law

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*theoretical than practical, while Rowan differs. Availability of specific performance is not uniform across civil law and common law jurisdictions, but rather varies from country to country, and different exceptions may apply. Specific performance may not be used with significant frequency in civil law practice, even when it is formally available "on the books." Common law courts have been increasingly liberal in granting requests for specific performance, suggesting further convergence between both traditions. Nevertheless, conceptual and practical differences persist.*

<sup>55</sup> Solène Rowan, *Remedies For Breach of Contract, A Comparative Analysis of the Protection of Performance* (OUP 2012) 52.

<sup>56</sup> *Ibid.*, 19.

<sup>57</sup> *Ibid.*, 53.

<sup>58</sup> Max Rheinstein, 'Die Struktur des vertraglichen Schuldverhältnisses im angloamerikanischen Recht' (De Gruyter 1932) 138; T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 479; Treitel (n 42) 63.

<sup>59</sup> Charles Szladits, 'The Concept of Specific Performance in Civil Law' (1955) 4(2) *AJCL* 208, 209.

<sup>60</sup> *Ibid.*, 211.

<sup>61</sup> Farnsworth (n 9) 931.

judges.<sup>62</sup> Further, fetters were imposed on the grant of specific performance by the courts of equity, such as consideration of fairness, morality and onerous supervision by courts.<sup>63</sup> However, an exception was made for agreements relating to sale of land due to the social and political values associated with the ownership of land in England.<sup>64</sup> Thus, specific performance was granted for such agreements.

The reluctance to make specific performance as a primary remedy stems from two concerns, (a) the remedy ignores the concept of mitigation of damages; and (b) there are new techniques now available to identify and quantify losses recoverable as damages.<sup>65</sup> The reluctance also had its roots in the 'freedom of contract', and the far greater role of the State requires for specific performance.<sup>66</sup> One view was that the frequent use of the remedy of specific performance has the potential to turn a breach of contract into a matter that is regulated by criminal law.<sup>67</sup> A less powerful sanction might incline a court to make greater use of specific performance as a remedy.<sup>68</sup>

Common law courts were also reluctant to grant specific performance due to the costs of enforcing such claims.<sup>69</sup> The 'heavy-handed nature' of specific relief, the 'injustice' of compelling the breaching party to perform at a loss, and the extent to which the aggrieved party can be compensated through damages, also played a role.<sup>70</sup> Therefore, while the choice to claim specific performance was with the party suing for breach of contract, the decision to grant specific performance rested with the common law judges.

A common-law judge would ordinarily venture into the following considerations before granting the relief of specific performance: (a) Are the goods

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<sup>62</sup> *Ibid.*, 181.

<sup>63</sup> *Ibid.*, 932.

<sup>64</sup> David Cohen, 'The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry' (1982) 32 U Toronto LJ 31 <<http://digitalcommons.pace.edu/lawfaculty/428/>> accessed 26 October 2020: *common law courts continue to award automatically specific performance to enforce contracts for the sale of land irrespective of whether the buyer has a special interest in performance.*

<sup>65</sup> A Burrows, *Remedies for Torts and Breach of Contract* (2nd edn, 1994) 350-3.

<sup>66</sup> Hand (n 8) 507-08; Carolyn (n 8) 662.

<sup>67</sup> Qiao Liu and Wenhua Shan, 'China and International Commercial Dispute Resolution' (2015 Brill) 14.

<sup>68</sup> Ewan McKendrick and Iain Maxwell, 'Specific Performance in International Arbitration' (2013) 1(2) CJCL 195, 202. Alan Farnsworth makes the point that, beyond factors relating to historical path dependence, "[a] more rational basis [for U.S. courts' reluctance to grant specific relief] can be found in the severity of the sanctions available for enforcement of equitable orders.

<sup>69</sup> Randy E Barnett, 'Contract Remedies and Inalienable Rights' (1986) (4) SPP 179 <<http://www.bu.edu/rbarnett/4sophilpol179.html>> accessed November 09, 2020.

<sup>70</sup> Henrik Lando, Caspar Rose 'On the Enforcement of Specific performance in Civil Law Countries' (2004) 24 IRLE 473, 484.

unique? (b) Did the claimant mitigate the damages? (c) Would damages suffice to repair the harm? (d) Did the contract stipulate specific performance as the primary relief? (e) Would an order of specific performance unduly interfere with the defendant's liberty or require unusual court supervision?

However, even within English jurisprudence, the view on damages being a primary remedy has not been consistent. The failure of the common law to recognise the interest of a party in the actual performance of the contract has been the subject of criticism.<sup>71</sup> The general understanding that adequacy of damages would disentitle a party from claiming specific performance is also not entirely correct. English courts have ordered specific performance when the remedy would "*do more perfect and complete justice than an award of damages*".<sup>72</sup>

Nonetheless, in common law, the remedy of specific performance is not available as a matter of right rather available at the court's discretion or more precisely, the judge's.<sup>73</sup> Whenever such performance is granted, the court orders the defendant to do specifically what was promised, else face sanctions, fines or contempt.<sup>74</sup> Hence, courts are reluctant to grant an order for specific performance where damages would be an adequate remedy for the claimant as such an order would require constant supervision, or there is need for precision in making the order. Hence, it is extremely difficult to obtain specific performance in a long-term contract, which requires a continuous service.<sup>75</sup> As a general rule, common law courts will not enforce personal service contracts to prevent involuntary servitude,<sup>76</sup> and thus, specific performance is excluded for employment contracts.<sup>77</sup> Similarly, if the specific

<sup>71</sup> *Alfred McAlpine Construction Ltd. v Panatown Ltd.* (2001) 1 SCC 518 : (2000) 3 WLR 946, 973, 1101 and 1112.

<sup>72</sup> Anson (n 19) 576.

<sup>73</sup> *Quadrant Visual Communications Ltd v Hutchison Telephone UK Ltd.*, (1993) BCLC 442, 451: *The Judge can take account of the wishes of the parties when exercising his or her discretion, but the view of the parties is not, and cannot be, decisive.*

<sup>74</sup> Boghossian (n 49).

<sup>75</sup> *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* (1998) AC 1: *This scenario was illustrated by the decision of the House of Lords, where the court refused to grant a specific performance order requiring the defendant store owner to perform its obligation under a 35-year lease to keep the shop open for retail trade for the duration of the lease. This was done in spite of the doubtful adequacy of the damages remedy to the claimant. It was left with the uncertain task of quantifying its losses over the remaining period of the lease. Much easier would have been the remedy of specific performance.*

<sup>76</sup> *De Francesco v Barnum* (1890) 45 Ch D 430, *Additionally, courts are realistic enough to recognize that the relationship of mutual confidence and respect, which is central to many such contracts, is seldom capable of being quantifiably restored by court order. In R v Incorporated Froebel Educational Institute Ex p L* (1999) ELR 488 (08), *a claim against a fee-paying school for the reinstatement of a pupil who had been excluded for alleged misconduct was refused on this basis.*

<sup>77</sup> The Trade Union and Labour Relations (Consolidated) Act 1992 s. 236.

performance would cause undue hardship to the breaching party, it is likely that it will be refused.<sup>78</sup> It is also necessary to point out that common law jurisdictions, except India,<sup>79</sup> rarely contain rules of execution that permit specific performance at the expense of the breaching party as are found in civil law systems.<sup>80</sup>

### *(b) Specific Performance under Civil Law*

The remedy of specific performance, under civil law jurisdictions, is the primary remedy unless there is an equitable reason denying such relief.<sup>81</sup> In such jurisdictions, the obligatory bond is considered to have intrinsic value, and the focus is primarily on upholding the relationship of the parties. It is for this reason that only performance by the original contracting party will be regarded as being truly satisfactory,<sup>82</sup> subject to specific performance being possible and conscionable.<sup>83</sup>

In Germanic systems, the remedy of specific performance was so obvious that it was not even expressly contained in the civil codes.<sup>84</sup> The only instance when the same was not granted was when the performance was impossible. Under French law, a distinction is made between obligations to transfer property (*obligations de donner*) and obligation to do or not to do (*obligations de faire ou de ne pas faire*).<sup>85</sup> In the latter case, the obligation automatically triggers an action for damages only,<sup>86</sup> especially in the case of personal services<sup>87</sup> since specific performance is not possible.

In civil law jurisdictions, specific performance is carried out in the case of movable property with the aid of an official, who takes the property from a party in breach and gives it to the claimant.<sup>88</sup> Similarly, in France, obligations to transfer property are carried out through court officials by putting

<sup>78</sup> *Duraisingam v S.R. Jagannathan*, 2015 SCC OnLine Mad 12742; *Jayakantham v Abaykumar*, (2017) 5 SCC 178; *K. Narendra v Riviera Apartments (P) Ltd.*, (1999) 5 SCC 77; *Wedgewood v Adams* [1843] 49 ER 958.

<sup>79</sup> The Code of Civil Procedure 1908 (CPC) Order XXI Rule 30.

<sup>80</sup> *Boghossian* (n 49).

<sup>81</sup> *Szladits* (n 59), 213.

<sup>82</sup> *Rowan* (n 55) 52.

<sup>83</sup> Jan M. Smits, *Contract Law: A Comparative Introduction, Second Edition* (EEPL 2014) 205.

<sup>84</sup> *Kötz* (n 58) 469; *Treitel* (n 42) 51.

<sup>85</sup> The Law of Contract, The General Regime of Obligations, and Proof of Obligations, 2016 (French Civil Code), art 1142.

<sup>86</sup> *Kötz* (n 58) 472; *Treitel* (n 42) 56.

<sup>87</sup> Code Civil France art 1142 c.f. E. Allan Farnsworth (n 9) 930.

<sup>88</sup> *Kötz* (n 58) 472; *Treitel* (n 42) 51; Code of Civil Procedure 2005( ZPO) ss 883, 887, 888, 890.

the claimant in possession through force.<sup>89</sup> Delivery of goods or acts to be carried out by a person are enforced by permitting the purchase of replacement goods at the expense of a seller<sup>90</sup> or through a substituted performance at the expense of the party in breach.<sup>91</sup>

In France, specific performance is also carried out through the concept of *astreinte*, i.e., the payment of a fixed sum for each day or such other period that the party remains in default.<sup>92</sup> These judicial penalties<sup>93</sup> may be used for enforcement of negative injunctions. Similarly, enforcement of negative covenants is carried out through fine and imprisonment in Germany, and like the French system,<sup>94</sup> such fine is paid to the aggrieved party and not to the state.<sup>95</sup> Interestingly, Denmark has abandoned the remedy of specific performance due to the costs of enforcement and the need for constant supervision.<sup>96</sup>

It is important to note that once a party has claimed specific performance, the judges or the courts have limited latitude in deciding whether to grant the remedy or not.<sup>97</sup> In contrast to the considerations of a common law court, a judge, under civil law, would make rather narrow and objectively verifiable enquiries, namely, (a) Does the defendant have the concerned item? (b) Has the performance become impossible? (c) Is the defendant still capable of performing the contract? While the answers to these questions would end the scope of enquiry of a judge in a civil law jurisdiction, the same would mark the beginning of a more extensive analysis of the conduct and motivation of the parties, under common law.

Thus, under civil law, there are fewer bars to specific performance as compared to common law systems.<sup>98</sup> The doctrine of 'good faith' permits considerations of economic hardship.<sup>99</sup> The only considerations are that specific performance must be possible (in the practical and reasonable sense of the

<sup>89</sup> Code de procédure civile art 826 c.f. E. Allan Farnsworth (n 9) 930.

<sup>90</sup> Code Civil France art 1144 c.f. E. Allan Farnsworth (n 9) 930.

<sup>91</sup> Kötz (n 58) 472; Treitel, (n 42) 51; Code of Civil Procedure, 2005( ZPO) ss 883, 887, 888, 890.

<sup>92</sup> Farnsworth (n 9) 930.

<sup>93</sup> Treitel (n 42) 59.

<sup>94</sup> Pargendler (n 53) 189.

<sup>95</sup> Kötz (n 58) 475; Treitel (n 42) 55.

<sup>96</sup> Pargendler (n 53) 167.

<sup>97</sup> Shael Harman, 'Specific Performance: A Comparative Analysis' (1) (2003) 7 ELR 5, 25.

<sup>98</sup> Vanessa Mak, *Performance Oriented Remedies in European Sale of Goods Law* (Hart 2009) 99.

<sup>99</sup> *Ibid.*, 94; Bürgerliches Gesetzbuch (BGB) art. 275II includes it as a factor that may limit the creditor's entitlement to specific performance. An analysis of Dutch law shows a similar development. In the Dutch case *Multi Vastgoed/Nethou*, it was held that, whilst a creditor, in case of delivery of non-conforming goods, in principle has a choice between making and damages, in the exercise of his choice he is bound to the requirements of 'reasonableness and equity'.

word),<sup>100</sup> and must not be oppressive to the personal right of the defendant.<sup>101</sup> Further, the enforcement must be of an obligation in the contract directly and not that of a new obligation incidentally arising, as a result of the breach.<sup>102</sup>

Clearly, there are various points of convergence between the remedies of specific performance in common law and civil law systems. Consequently, even under civil law, specific performance is limited to instances where the claimant has a specific interest in performance, which is not satisfied by damages. Similarly, sometimes it is limited by procedural law, which does not provide for coercive measures to enforce performance of certain claims.<sup>103</sup>

## IV. PART C

### A. Comparing Specific Performance under the CISG, PICC and SRA

The 2018 Amendment can, at best, be characterised as the “Un-common Law”<sup>104</sup> as it recognises specific performance as a norm, despite the Indian Contract Act, 1872 (“ICA”) making no reference to the concept of ‘good faith’.<sup>105</sup> The obvious implication of this inconsistency is that the legal basis for the enforcement of promises continues to be a consideration under the ICA and yet the actual enforcement is under the concept of ‘good faith’. Several such other inconsistencies or lacunae arise after the 2018 Amendment when compared to the CISG and the PICC. This is especially surprising since the 2018 Amendment was introduced to bring the SRA in line with the PICC.<sup>106</sup> This does not mean that the 2018 Amendment is a step in the wrong direction. An analysis of the hits and misses is provided below.

#### 1. Steps in the Right Direction

<sup>100</sup> Mak (n 99)97.

<sup>101</sup> *Ibid.*, 105.

<sup>102</sup> *Ibid.*, 120.

<sup>103</sup> Kötz (n 58) 471.

<sup>104</sup> Ajar Rab, ‘Contract Law and Specific Relief: The “Un-Common” Indian Law’ (*IJIEL Blog*, 25 November 2019) <<https://ijiel.in/blog/f/contract-law-and-specific-relief-the-%E2%80%98un-common%E2%80%99-indian-law>> accessed 20 December 2020.

<sup>105</sup> Arpit Vihan, ‘A Comparison of ‘Doctrine of Good Faith’ Under UNIDROIT PICC and the Indian Contract Act 1872’ (2019) SSRN<<https://ssrn.com/abstract=3389216>> accessed 20 November 2020.

<sup>106</sup> Expert Committee Report (n 3).

## 1. Removal of ‘Volition of the Parties’ (Personal Character)

Section 14(c) of the SRA provides that specific performance cannot be granted when “*a contract, which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms*”. The amended provision omits the phrase “*or volition of the parties*” after ‘personal qualifications’ of the parties. The original rationale for such limitation is that contracts of personal character are excluded to protect the personal freedom of a contracting party and to limit disputes concerning the quality of the performance.<sup>107</sup>

Differing from the SRA, the PICC uses the phrase ‘performance of an exclusively personal character’, which is capable of varied interpretation. While common law denies any kind of specific performance in relation to services of personal character,<sup>108</sup> irrespective of whether the services are standard or not, civil law systems grant specific performance even to generic obligations.<sup>109</sup> Specific performance is denied only in case of non-generic obligations out of a service contract under German law.<sup>110</sup> Similarly, French law recognises the enforcement of ‘to do’ obligations with the aid of *astreinte*, unless the obligations are of a scientific or an artistic nature.<sup>111</sup>

The removal of the phrase ‘or volition of the parties’ aligns with the approach more to civil law jurisdictions as the general approach of denying specific performance is problematic. This is because such a remedy may be critical in commercial disputes such as rendering accounts, giving information, the conduct of an employee etc. Awarding only damages in such cases fails to adequately protect the interest of the claimant.<sup>112</sup> Hence, both civil law and common law systems grant specific relief such as injunctions to enforce negative covenants.<sup>113</sup> Likewise, awarding damages for the breach of negative covenant like restraint of trade is largely ineffective as such damages are extremely difficult to prove.<sup>114</sup> Therefore, the removal of the reference to the phrase ‘volition of the parties’ rightly narrows down the restrictions only to cases where personal qualifications are required from the performance of a contract.

<sup>107</sup> UNIDROIT art 7.2.2.

<sup>108</sup> Dan B Dobbs, *Dobbs Law of remedies: Damage, equity restitution* (2nd edn., WPC 1993) 808; Gareth Jones and William Goodhart, *Specific Performance* (2nd edn, London 1996) 169.

<sup>109</sup> Schwenzer (n 38) 299.

<sup>110</sup> ZPO s 888 Abs 2.

<sup>111</sup> Schwenzer (n 38) 299.

<sup>112</sup> *Ibid.*, 300.

<sup>113</sup> Rajasi Clerk, ‘Civil Law And Common Law Systems Grant Specific Relief Such As Injunctions To Enforce Negative Covenants’ (2016) 38 (1) JILI 83-89;

<sup>114</sup> Schwenzer (n 38) 300.

Under Article 7.2.2 (d) of the PICC, only specific performance of obligations ‘to do something’ are barred and not those of ‘to not to do something’.<sup>115</sup> Further, if the obligation to perform something can be fulfilled by a member of an obligated organisation, the same does not remain ‘exclusively personal’, neither do the tasks that can be delegated.<sup>116</sup> Given that the SRA does not use the phrase ‘exclusively’, a similar interpretation ought to be afforded to Section 14(c) of the SRA, post the 2018 Amendment.

## 2. Recognition of Partial Performance

Under Section 56 of the ICA, when substantial performance is possible, the contract cannot be said to be frustrated.<sup>117</sup> From this perspective, Indian law envisages partial performance of the contract. Section 12 of the SRA deals with this issue more directly. As per Section 12 of the SRA, the court may, as per its discretion, award specific performance of a part of the contract, and order compensation for the part that remains unperformed (similar to the duality of remedies allowed under the CISG).<sup>118</sup> However, this cannot be claimed by the buyer as a matter of right, which seems anomalous after the 2018 Amendment to Section 10 of the SRA.

It is interesting to note that the PICC is silent on partial specific performance. However, the domestic law equivalents such as section 275 of the German Civil Code (“BGB”) restrict a claim for performance *in so far as it is impossible*. Even under the CISG the right to claim partial performance has not been addressed rather may be inferred from the fact that a claim for damages and specific performance may run concurrently.<sup>119</sup> However, when the seller only performs a part of the contract on her own accord, such as partial delivery of the goods, she will have breached the contract. In such a case, the delivery of the missing part can be claimed under Art. 46(1).<sup>120</sup> On the contrary, the delivery of goods, other than those agreed upon between the parties, will not be considered as a non-delivery subject to the remedy of specific performance under Art. 46(1). Rather, it would be considered as a

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<sup>115</sup> Official Comment to the PICC 249.

<sup>116</sup> Vogenauer (n 22) 795.

<sup>117</sup> *Gian Chand v York Exports Ltd.*, (2015) 5 SCC 609.

<sup>118</sup> CISG art 61; Christoph Brunner and Olivier Luc Mosimann, ‘Article 61 [Remedies Available to Seller]’ in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer Law International 2019) 431-436.

<sup>119</sup> *Ibid.*

<sup>120</sup> J Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers 1989) 428.



non-conforming delivery subject to the remedy of substituted delivery under Art. 46(2).<sup>121</sup>

The SRA, on the other hand, provides that if substantial performance is possible, and a contract is not frustrated, partial specific performance may be granted.<sup>122</sup> In fact, Section 12 (3) of the SRA goes a step further than the PICC and requires that the aggrieved party should identify and relinquish the right to the remaining portion of the performance.<sup>123</sup>

### 3. The Grey Areas

#### (a) *Claims for Pre-Contractual Negotiations*

A collateral implication of the acceptance of ‘good faith’ or the ‘moral obligation’<sup>124</sup> maybe that pre-contractual negotiations would become admissible and possibly binding on the parties since there would be a moral obligation to negotiate in good faith.<sup>125</sup>

The common law refuses to recognise an obligation, arising out of pre-contractual negotiations, because such an obligation is too indefinite to be enforceable, and there is no way to calculate expectation damages as the terms of the contract might not have been finalised. However, the US courts have enforced such agreements where significant terms have been agreed upon,<sup>126</sup> calculating loss on the basis of reliance and loss of opportunity rather than loss of expectation.<sup>127</sup>

Given the implied acceptance to the ‘moral obligation’ of upholding contracts, post the 2018 Amendment, it may be possible to bring claims on pre-contractual negotiations. This would also affect the rule on parole evidence, i.e., once a contract is reduced to writing, no other evidence

<sup>121</sup> C Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 336.

<sup>122</sup> *Gian Chand v York Exports Ltd.*, (2015) 5 SCC 609 paras 13,14.

<sup>123</sup> *Shanker Singh v Narinder Singh*, (2014) 16 SCC 662 paras 24, 28, 29.

<sup>124</sup> Expert Committee Report (n 3) 50.

<sup>125</sup> T Sourdin, ‘Good Faith, Bad Faith? Making an Effort in Dispute Resolution’ (2012) Australian Centre for Justice Innovation, Good Faith Paper 1 <<http://classic.austlii.edu.au/au/journals/DICTUMVicLawSJl/2012/4.html>> accessed 26th March 2021; *United Group Rail Services Ltd. v Rail Corp'n. New South Wales*, (NSW) (2009) NSWCA 177 : (2009) 74 NSWLR 618, 637-39; *Strzelecki Holdings Pty Ltd. v Cable Sands Pty Ltd.* (2010) WASCA 222 : (2010) 41 WAR 318 paras 45, 47, 64, 109; Leon E. Trakman and Kunal Sharma, ‘The Binding Force to Negotiate in Good Faith’ (2014) (73)3 CLJ 598, 604, 611.

<sup>126</sup> Farnsworth (n 9) 918.

<sup>127</sup> *Ibid.*

may be led to show a contrary intention.<sup>128</sup> Civil law jurisdictions permit pre-contractual negotiations as evidence in order to satisfy the threshold of ‘good faith’.<sup>129</sup> Since India has also aligned itself to this approach, the 2018 Amendment may result in the subversion of the rule of parole evidence and the admissibility of pre-contractual negotiations as evidence.

### (b) *The Discretion under the Sale of Goods Act, 1930*

Specific performance is also addressed in Section 58 of the Sale of Goods Act, 1930 (“SOGA”). Despite the amendment to the SRA, Sec. 58 of the SOGA, still leaves this remedy to the discretion of the court.<sup>130</sup> While this would not practically affect the right to specific performance under the SRA, since Sec. 58 starts with, “*Subject to the provisions of Chapter II of the Specific Relief Act*”, this should nonetheless be amended to bring it in line with the pro-specific performance approach of the SRA. This would also avoid any possible confusion since Sec. 58 of the SOGA and Section 10 of the SRA, before the amendment, have often been read in conjunction.<sup>131</sup> In fact, now that the SRA has largely been brought in line with CISG, India might as well ratify the CISG.<sup>132</sup> This would replace the SOGA and also correct the above mentioned inconsistency.

### (c) *Inconsistency of Remedies*

Section 10 of the SRA recognises that the remedies will be accumulated because of the use of the language “in addition to, or in substitution of”. Internationally, a claim for full damages and specific performance are incompatible, except clauses surviving termination.<sup>133</sup> Only damages for delay or

<sup>128</sup> *Premanand Naik v Fabrica De Mandur Church*, 2020 SCC Online Bom 833; *Mukesh v Maya*, 2013 SCC Online Bom 825.

<sup>129</sup> Nadia E Nedzel, ‘A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability’ (1997) 12 TECLF 97, 98; Gregory J Marsden and George J Siedel, ‘The Duty to Negotiate in Good Faith: Are BATNA Strategies Legal?’ (2017) 14 BBLJ 127, 133.

<sup>130</sup> The Sale of Goods Act 1930 (SOGA) s 58: “*Subject to the provisions of Chapter II of the Specific Relief Act, 1877 (1 of 1877), in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.*”

<sup>131</sup> *Union of India v Prem Kumar Lihala* 2005 SCC Online Del 934 paras 12-13; *Embassy Property Developments Ltd. v Jumbo World Holdings Ltd.*, (2013) SCC Online Mad 1795 para 32.

<sup>132</sup> Ajar Rab & Siddharth Jain, ‘Can the Adoption of the CISG Save the Commercial Relationship of Parties in India?’ (OBLB 2020) <<https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/can-adoption-cisg-save-commercial-relationship-parties-india>> accessed 9 August 2020.

<sup>133</sup> Vogenauer (n 22) 825.

consequential damages or partial termination of the contract are compatible.<sup>134</sup> However, due to the broad language in Section 10 of the SRA, it is now unclear whether it is possible to claim full damages along with specific performance. A possible reference may be found in Section 12(2) for deficiency. However, in some cases, damages would be inconsistent with specific performance. For example, the damages for non-delivery based on the difference between the contract and the market price. In such cases, a claim for damages would lie only if the contract is avoided.<sup>135</sup>

Therefore, the point of time at which a damages claim is brought is critical. In civil law jurisdictions, such point of time is decided using the general principles of good faith.<sup>136</sup> Similar principles are provided under Section 21(1) of the SRA. The broad idea is that damages, along with specific performance, should not result in unjust enrichment of the claimant, and the court will be guided by the principle specified in Section 73 of the ICA.

#### 4. *The Drawbacks*

##### *(a) Lack of Choice*

After the 2018 amendment, specific performance is a statutory right and not a discretionary power granted to the courts as Section 10 of the SRA provides “*specific performance of a contract shall be enforced by the court*”.<sup>137</sup> This is similar to article 7.2.2 of the PICC, which provides that a court “*must order performance*”.

However, a vital point of divergence between the SRA and the PICC and the CISG is that under the PICC<sup>138</sup> and the CISG,<sup>139</sup> the claimant *may* require performance. Once a party opts for performance, the court has no discretion whether to grant the remedy or not.<sup>140</sup> On the contrary, post the 2018 Amendment, the SRA gives no such discretion and makes specific

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<sup>134</sup> *Ibid*; CISG also permits concurrence of the remedies of damages and specific performance in arts 45(2) and 61(2).

<sup>135</sup> Treitel (n 42) 50-51.

<sup>136</sup> P Schlechtriem, *Commentary on the UN Convention on the International Sales of Goods CISG* (2nd edn) 378.

<sup>137</sup> The Specific Relief Act 1963 (SRA) s 10: 10. Specific performance in respect of contracts.— The specific performance of a contract shall be enforced by the court subject to the provisions contained in s 11(2), s 11, s 14, s 16.

<sup>138</sup> UNIDROIT art 7.2.1.

<sup>139</sup> CISG arts 46(1) & CISG art 62.

<sup>140</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat / UN DOC. A/CONF. 97/5, (1978) (Secretariat's Commentary) art 26, para 4.

performance compulsory, except as provided under Section 11(2), 14 and 16 of the SRA.

The option to require performance is not surprising since a party will normally turn to the international market only when it is unable to find the goods in its local markets or because the goods in the local market are not of good quality<sup>141</sup> thus making damages a less preferred remedy. The only restriction to a claim for specific performance under the CISG is provided under Article 46(1) of the CISG, which provides that the claim shall be denied when the injured party has “*resorted to a remedy which is inconsistent*” with specific performance. These may be in the form of avoidance of contract<sup>142</sup> or price reduction<sup>143</sup> but does not include a claim for damages.<sup>144</sup> Thus, damages can run consistently with a claim for specific performance in placing the aggrieved party into as good a position as it would have been, had the contract been performed as agreed.<sup>145</sup>

The mandatory language contained in section 10 of the SRA provides no choice to the claimant to select the most appropriate remedy or to switch remedies if specific performance is ineffective.<sup>146</sup> A logical consequence of such mandatory language is that the SRA does not provide the opportunity to the breaching party to cure the non-performance, unlike the PICC.<sup>147</sup> Similarly, the use of such mandatory language ignores the possibility that parties opt for waiver of specific performance, in advance.<sup>148</sup> Further, the use of such mandatory language ignores the possibility of circumstances where a party may want to release itself from a contract knowing fully well that she may not be able to fulfil the same. In such situations, it would be unreasonable to insist on specific performance of the contract.<sup>149</sup> Thus, courts in the US and UK would most likely award only damages in such cases.<sup>150</sup>

Claims to unlimited performance of monetary obligations would lead to unjustified results where the goods have not been delivered, or the work is not yet completed.<sup>151</sup> More importantly, injured parties seldom claim specific

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<sup>141</sup> Boghossian (n 49).

<sup>142</sup> CISG art 49, read with CISG art 81(1); CISG art 64.

<sup>143</sup> CISG art 50.

<sup>144</sup> CISG arts 45(2) & 61 (2).

<sup>145</sup> Jussi Koskinen, CISG, ‘Specific Performance and Finnish Law’ (1999) <<https://www.cisg-law.pace.edu/cisg/biblio/koskinen1.html#>> accessed 10 October 2020.

<sup>146</sup> Unlike UNIDROIT art 7.2.5.

<sup>147</sup> UNIDROIT art 7.1.4.

<sup>148</sup> Vogenauer (n 22) 890.

<sup>149</sup> Schwenzer (n 38) 293.

<sup>150</sup> *Hounslow London Borough Council v Twickenham Garden Developments Ltd.* (1971) Ch 233 : (1970) 3 WLR 538.

<sup>151</sup> Schwenzer (n 38) 295.

performance since avoidance, cover and price reduction are more time and cost-efficient.<sup>152</sup> Hence, section 2-709, paragraph 1 of the UCC requires delivery of goods or passing of the risk before requiring the payment of the price.<sup>153</sup> Even civil law jurisdictions such as Germany,<sup>154</sup> Switzerland,<sup>155</sup> and France<sup>156</sup> permit cancellation of a contract before the work is completed.

Post the 2018 Amendment, courts have no such leeway to make room for such considerations and will have to grant specific performance mandatorily.

### (b) *Willingness to Perform*

A curious construct largely absent from the PICC, CISG or other jurisdictions, is that a party claiming specific performance must prove under Section 16 “*who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him*”. The phrase 2018 Amendment substituted the phrase “*who fails to aver and prove*” with “*who fails to prove*”. Further, the aggrieved party “*must prove performance of, or readiness and willingness to perform, the contract according to its true construction.*”<sup>157</sup> The rationale for this burden of proof seem counter-intuitive to the Expert Committee’s view that specific performance should be the norm to foster commercial transactions.<sup>158</sup> It is rather illogical that an aggrieved party should at first instance prove that such party has always been capable and willing to perform her own duties under the contract. Such proof is a question of fact and not law.<sup>159</sup> Further, such willingness must be shown not only up till the time of filing the claim, but also at all times from the time of the contract till the suit and up to the decree.<sup>160</sup>

The Drafting Committee of the CISG specifically noted that incorporating such a threshold would “unjustifiably restrict” the buyer’s right to require

<sup>152</sup> Honnold (n 121) 302-303.

<sup>153</sup> The Revision of Uniform Commercial Code Article 2- Sales, 1977 (UCC Draft) S. 2-822(a); Patrick Selim Atiyah, *The Sale of Goods* (8th edn. London, 1990) 471.

<sup>154</sup> Schwenzer (n 38) 294.

<sup>155</sup> *Ibid.*

<sup>156</sup> Code Civil art 1794, c.f. *Ibid.*

<sup>157</sup> The (unamended) Specific Relief Act 1963; Explanation to s. 16 (c) *the phrase used was “must aver”; Mehboob-ur-Rehman v Ahsanul Ghani*, (2019) 19 SCC 415 : 2019 SCC Online SC 203; *Umabai v Nilkanth Dhondiba Chavan*, (2005) 6 SCC 243; *Vijay Kumar v Om Parkash*, (2019) 17 SCC 249 : 2018 SCC Online SC 1913.

<sup>158</sup> Expert Committee Report (n 3) 66.

<sup>159</sup> *Kamal Kumar v Premlata Joshi* (2019) 3 SCC 704 para 6-10.

<sup>160</sup> *Gomathinayagam Pillai v Palaniswami Nadar*, AIR 1967 SC 868 : (1967) 1 SCR 227 para 6; *J.P.Builders v A. Ramadas Rao*, (2011) 1 SCC 429 para 27.

contract performance.<sup>161</sup> Similarly, the standard for performance, under the PICC, is strict. It does not require the demonstration of fault or blameworthy behaviour.<sup>162</sup> Fundamental breach does not require notice, whereas non-fundamental breaches may require notice before termination.<sup>163</sup>

The saving grace, if any, is a step in the right direction with the change in Section 10 of the SRA. Before the 2018 Amendment, under Section 10 of the SRA, the buyer had the burden of proving that the good is not easily obtainable in the market, as a pre-condition to demanding specific performance.<sup>164</sup> After the 2018 Amendment, this requirement has been omitted and is thus, no longer required.

### (c) *Removal of the Inadequacy Test*

Section 14(a), before the 2018 amendment, provided that specific performance will not be granted in cases where compensation would be adequate,<sup>165</sup> an approach followed across jurisdictions.<sup>166</sup> Thus, damages were treated as the primary remedy, and specific performance was the exception. This was in line with the “efficient breach” theory,<sup>167</sup> according to which damages would supposedly put both parties in a better economic position as compared to specific performance.

The discretionary power of the court under Section 20 and the restrictive “inadequacy test”<sup>168</sup> under section 14(a) of the SRA were subsequently removed by the 2018 Amendment. Now, in line with the Statement of Objects and Reasons of the 2018 Amendment, specific performance is the rule.<sup>169</sup> This aligns with the approach under the PICC and CISG, and the principle

<sup>161</sup> Committee Report of the Draft Convention on the International Sale of Goods, in Report of the United Nations Commission on International Trade Law 10th Session (1977), 32 UN GAOR Supp (No. 17) annex 1, U.N. Doc. A/32/17 para 239.

<sup>162</sup> Kötz (n 58) 515; Treitel (n 42) 20.

<sup>163</sup> Vogenauer (n 22) 830.

<sup>164</sup> The (unamended) Specific Relief Act 1963 s 10, Explanation (ii)(a) *where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market.*”

<sup>165</sup> The (unamended) Specific Relief Act 1963 s 14(1).

<sup>166</sup> See generally Alan Schwartz, ‘The Case for Specific Performance’ (1979) (89)2 YLJ 271-306; Ingeborg Schwenzer (n 38).

<sup>167</sup> Rab (n 133).

<sup>168</sup> Nilima Bhadbhade, ‘Exceptional Nature of Specific Performance in the Indian Law’ (2013) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2238909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238909)> accessed September 20, 2020.

<sup>169</sup> The Specific Relief Act (Amendment 2018), *The Statement of Objects and Reasons*, expressly reads, “(3) *In view of the above, it is proposed to do away with the wider discretion of courts to grant specific performance and to make Law, specific performance of contract a general rule than exception subject to certain limited grounds.*”

of *pacta sunt servanda* as the expert committee report makes an explicit reference to the “moral obligation” to honour contractual promises.<sup>170</sup>

However, as noted earlier, civil law courts and international instruments,<sup>171</sup> continue to give weight to considerations relating to an award of damages. In such jurisdictions, specific performance is the primary remedy, subject to the consideration that an award of damages would be an adequate remedy. Thus, a claimant is entitled to the remedy of specific performance, unless the defendant proves, and the court comes to the conclusion that an award of damages is an adequate remedy.

Earlier, under the common law and the unamended Section 10 of the SRA, the possibility of claiming specific performance itself was barred. Hence, a claimant would have had to prove why an award of damages would be inadequate relief and only then the court would consider granting the remedy of specific performance. Effectively, this threshold placed the burden of proof on the claimant.

Therefore, while removing the inadequacy test from the statute was a much-needed step, the removal of such a consideration altogether may result in more enforcement problems, especially when parties would have been better off not incurring the high costs of enforcement. It may have been better to have given primacy to specific performance, and shifted the burden on to the defendant to prove why an award of damages would be adequate relief in the particular facts and circumstances. Given that the discretion of the courts has been taken away, and specific performance is no longer a remedy under equity, courts will face considerable hurdles to take recourse to equitable considerations of justice, equity, good conscience or fairness in order to justify why a mandatory statutory right to performance is not being granted to a claimant.

#### *(d) Substituted Performance or Cover Transactions*

The 2018 Amendment and the Expert Committee Report take an inconsistent stand by expressly removing the ‘inadequacy test’ but making substituted performance discretionary, instead of mandatory. The result is the incongruous position of law that while the aggrieved party may effectively arrange for a substitute transaction by an award of damages, but chooses not to do so, the courts *shall* grant specific performance.<sup>172</sup>

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<sup>170</sup> In fact, the Expert Committee Report (n 3), para 11.5.2: *highlights the “moral obligation to honour contractual promises.*

<sup>171</sup> UNCITRAL Model Law art 17(2)(a).

<sup>172</sup> SRA s 10.

The 2018 Amendment has other disastrous consequences as well. Section 41 (h) of the SRA continues to provide that the specific relief of injunction may be refused when “*an equally efficacious relief can certainly be obtained by any other usual mode*”. Therefore, given the possibility of a substitute transaction, the court will not grant an injunction but has to mandatorily grant specific performance of the contract, if the aggrieved party does not opt for a substituted transaction.

In contrast, if one invokes the right to a cover transaction, the remedy of specific performance cannot be granted under Article 7.2.2 (c) of the PICC. More importantly, as is the case in most civil law jurisdictions,<sup>173</sup> if the defaulting party can provide that a replacement or cover transaction is reasonably possible, specific performance will not be awarded. However, civil law jurisdictions usually make this an option for the aggrieved and not a mandatory exception.<sup>174</sup>

Under the PICC, a cover transaction is a mandatory provision and not a discretion at the option of the aggrieved. Hence, there is no explicit provision for a reasonable notice before pursuing a cover transaction. Though in practice, the right must be exercised without delay if the possibility exists. If the defaulting party can prove that a reasonable cover transaction is possible, then not only will specific performance not be granted, rather even additional damages may be refused for the failure to mitigate damages.<sup>175</sup>

Unlike the PICC, Section 20 grants the right to obtain substituted performance and a claim to costs from the defaulter.<sup>176</sup> It is pertinent to note that the remedy is at the discretion of the aggrieved,<sup>177</sup> exercisable after a thirty-day notice, in writing.<sup>178</sup> In fact, the ‘inadequacy test’ under the unamended SRA and generally under common law, proceeds on the assumption that a market economy ought to enable the claimant to arrange for a substitute transaction.<sup>179</sup> Therefore, an exception was made for land, which could not, under this economic rationale, be substituted, even by an award of damages.<sup>180</sup>

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<sup>173</sup> Civil Code of Netherlands (Dutch Civil Code) arts 7:36 and 7:37; French Civil Code art 1144.

<sup>174</sup> Lando (n 71) 485.

<sup>175</sup> UNIDROIT art 7.4.8.

<sup>176</sup> SRA s 20 (1).

<sup>177</sup> SRA s 20 (1); uses the phrase “*shall have the option of substituted performance*”.

<sup>178</sup> SRA s 20 (2).

<sup>179</sup> Farnsworth (n 9) 931.

<sup>180</sup> *Ibid.*



Thus, in case of fungible goods or standard services, a claimant may opt for substituted performance, instead of insisting on specific performance,<sup>181</sup> even though common law courts and Swiss law<sup>182</sup> in such circumstances, would rather protect the interest of claimant by an award of damages.<sup>183</sup> However, with the removal of the inadequacy test, courts in India would be mandated to grant specific performance even in instances where the grant of damages would have been a preferable option to protect the interest of the claimant.

### (e) *The Misplaced Criteria of Determinable Contracts*

The word ‘determinable’ under Section 14(d) of the SRA means ‘a contract which can be put to an end’.<sup>184</sup> The court explained that “*the Court shall not go through the ideal ceremony of ordering the execution of deed or instrument which is revocable and ultimately cannot be enforced as specific performance cannot be granted of a determinable contract.*”<sup>185</sup> Thus, all revocable deeds, voidable contracts<sup>186</sup> and contracts that are terminable on a particular event<sup>187</sup> would fall withing ‘determinable contracts’.<sup>188</sup> Ironically, the court referred to an English case,<sup>189</sup> which had recognised the possibility of terminating a contract by reasonable notice. Therefore, every contract, by its very nature, is determinable.<sup>190</sup>

Unfortunately, the leading view about contracts being ‘determinable’ is a confusion between contracts terminable at the occurrence of an event and contracts being terminable unilaterally without assigning any reasons. The genesis of this confusion is the lack of clarity in the judgement in *Indian Oil Corporation Ltd. v. Amritsar Gas Service*,<sup>191</sup> which failed to distinguish

<sup>181</sup> SRA s 20; Schwenzer (n 38) 297.

<sup>182</sup> Code of Civil Procedure Basel s 251.

<sup>183</sup> Farnsworth (n 9) 860.; Dobbs (n 109)169; Jones (n 109) 32; Treitel, (n 42) 64; Steven Walt, ‘For Specific Performance Under the United Nations Sales Convention’ (1991) 26 TILJ 211, 224.

<sup>184</sup> *Turnaround Logistics (P) Ltd . v Jet Airways (India) Ltd.*, 2006 SCC Online Del 1872 para 27.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Indian Oil Corpn. Ltd. v Bhagwan Bala Sai Enterprises* 2013 SCC Online Mad 1445.

<sup>187</sup> *Indian Oil Corpn. Ltd. v Amritsar Gas Service* (1991) 1 SCC 533; *Jindal Steel and Power Ltd. v SAP India (P) Ltd.*, 2015 SCC Online Del 10067; *Spice Digital Ltd. v Vistaas Digital Media (P) Ltd.*, 2012 SCC Online Bom 1536.

<sup>188</sup> *Turnaround* (n 185)27.

<sup>189</sup> *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.*, (1978) 1 WLR 1387 : (1978) 3 All ER 769.

<sup>190</sup> *Rajasthan Breweries Ltd. v Stroh Brewery Co.*, 2000 SCC Online Del 481; *Inter Ads Exhibition (P) Ltd. v Busworld International Coop. Vennotschap Met Beperkte Anasprakelijkheid*, 2020 SCC Online Del 351.

<sup>191</sup> *Indian Oil Corpn.* (n 187).

between two termination clauses, i.e., one which provided for a notice without assigning any reason and the other which provided for termination on the occurrence of certain specified events.<sup>192</sup> The said judgement has been followed subsequently and applied to situations when the contract only contained a termination clause on specified events.<sup>193</sup>

A more lucid interpretation was referred to in *Narendra Hirawat v. Sholay Media*,<sup>194</sup> where the court held that the word ‘determinable’ means “at the sweet will of a party”, without any breach, eventuality, or circumstance, i.e., a unilateral right to termination without assigning or having any reason to terminate.<sup>195</sup> Therefore, the court held that a license is not determinable as the contract could be terminated only on the occurrence of a breach. Since the determination depends on an eventuality, which may or may not occur, the contract cannot be held to be determinable.<sup>196</sup> The court distinguished the leading authorities<sup>197</sup> and held that in all three cases, there was a clause in the agreement, which permitted termination of the contract by a notice of thirty days without assigning any reason. Hence, such contracts, which can be terminated by either party (such as a partnership at will),<sup>198</sup> without any reason, are by their very nature ‘determinable’.<sup>199</sup>

The effect of this misplaced jurisprudence is that an injunction can never be granted when the contract is determinable as Section 41(e) of the SRA denies the grant of an injunction when the contract cannot be specifically enforced. This excludes a majority of commercial contracts and runs afoul to the mandate of “minimum interference” by courts as suggested by the Expert Committee.<sup>200</sup> Surprisingly, the Expert Committee Report does not even make a mention of ‘determinable contracts,’ probably because such a requirement is absent in every other jurisdiction. At best, its roots can be traced to the Specific Performance Act, 1877, which denied specific performance when the contract was ‘revokable’.<sup>201</sup> Hence, the rationale for contin-

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<sup>192</sup> *Jumbo World Holdings Ltd. v Embassy Property Developments (P) Ltd.*, 2020 SCC Online Mad 61 para 23; *KSL Industries Ltd. v National Textiles Corpn. Ltd.*, 2012 SCC Online Del 4189 para 77.

<sup>193</sup> *Gujarat Chemical Port Terminal Co. Ltd. v Indian Oil Corpn. of India*, 2016 SCC Online Bom 2605.

<sup>194</sup> *Narendra Hirawat and Co. v Sholay Media Entertainment (P) Ltd.*, 2020 SCC Online Bom 391.

<sup>195</sup> *Ibid.*, para 8.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Amritsar Gas Service* (n 188); *Jindal Steel* (n 188); *Spice Digital* (n 188).

<sup>198</sup> *Jumbo World* (n 193) para 23.

<sup>199</sup> *T.O. Abraham v Jose Thomas*, 2017 SCC Online Ker 19872 para 18.

<sup>200</sup> Expert Committee Report (n 3).

<sup>201</sup> *T.O. Abraham* (n 200) 18.

uing with the exception to performance is quite unclear, though the result is effectively leaving room to defeat the objectives of the amendment.s

### *(f) The Blanket Ban on Supervision by Courts*

Section 14 (b) of the SRA denies the grant of specific performance if the enforcement of the contract would require a continuous duty which the court cannot supervise.<sup>202</sup> This is rooted in the concerns of practicality and efficiency.<sup>203</sup>

However, the impossibility of court supervision should not be a ground to deny relief.<sup>204</sup> If a court can determine with sufficient precision what the defendant must do, any breach would be punishable by contempt of court.<sup>205</sup> A distinction can be drawn between achieving a result and carrying on an activity<sup>206</sup> as it is difficult to determine the level of trade, the areas of trade or the kind of trade.<sup>207</sup> However, the enforcement may take place by the grant of an injunction.<sup>208</sup>

Under the PICC, the rule exempting grant of specific performance would extend to situations where the enforcement of the performance is burdensome for the court.<sup>209</sup> Nonetheless, it is relevant to highlight that under the civil law, the burden to supervise is on the aggrieved party, whereas in the common law, the burden is on the courts itself.<sup>210</sup> Given any explicit limitation in Section 14 of the SRA, the courts in India may well direct independent third parties or the claimant to supervise the performance, with regular reports to the court. To deny relief only on the ground of burdensome supervision, without damages providing adequate relief, largely fails to protect the interest of the aggrieved party.

### *(g) Lack of Exceptions*

The PICC provides for five exceptions to specific performance namely, (a) impossibility; (b) unreasonable burden, i.e., hardship; (c) cover transactions or substituted performance; (d) personal character; and (e) request within a

<sup>202</sup> *Shantidevi P. Gaikwad v Savjibhai Haribhai Patel*, (2001) 5 SCC 101 paras 58-60.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Shiloh Spinners Ltd. v Harding*, 1973 AC 691 724 : (1973) 2 WLR 28.

<sup>205</sup> Anson (n 19) 579.

<sup>206</sup> *Co-operative Insurance Society* (n 76).

<sup>207</sup> *Mortlock v Buller* (1804) 10 Ves 292; *Walters v Morgan* (1861) 45 E.R. 1056 (1861) 3 De GF & J 718; *Sang Lee Investment Co. v Wing Kwai Investment Co.*, (1983) 127 SJ 410.

<sup>208</sup> Anson (n 19) 581.

<sup>209</sup> UNIDROIT art 7.2.2.(b).

<sup>210</sup> UNIDROIT art 7.2.2 (Illustration b).

reasonable time. Surprisingly, despite the reliance on the PICC by the Expert Committee, Indian law only recognises the exception contained in (c) and (d).

## 5. Impossibility

An important and obvious, yet a missing aspect under the SRA, is the exemption from performance on account of the impossibility of performance. Under Article 7.2.2 (a) of the PICC, specific performance may be refused when there is an impossibility in fact or law, e.g. the failure to obtain necessary statutory permission for a service.<sup>211</sup> It is necessary to note that such impossibility only removes the remedy of specific performance and does not frustrate the contract as a whole.

On the contrary, Art. 79 of the CISG only exempts the party from liability to pay damages. All other remedies are still available to the injured party.<sup>212</sup> Thus, impossibility does not seem to excuse the breaching party from specific performance. However, some scholars advocate for an exemption from performance in line with the *spirit* of Art. 46(1).<sup>213</sup>

This has not been addressed in SRA, despite the recommendation by the Expert Committee.<sup>214</sup> Similar to the CISG, there is no provision expressly exempting specific performance by reason of *force majeure*. In fact, the Expert Committee on the 2018 Amendment, recognised that a change in circumstances should *not* limit the right to specific performance.<sup>215</sup>

The closest equivalent is the explanation provided in Section 12 of the SRA, which provides that ‘a portion of the subject matter existing at the date of the contract as ceased to exist’. However, this aligns more with Section 56 of the ICA, which pertains to the frustration of contracts as a whole and the discharge of all obligations and all remedies<sup>216</sup> rather than an exemption from only performance. A harmonious interpretation can be made and an exemption on account of impossibility may be read into Section 12 based

<sup>211</sup> UNIDROIT art 7.2.2 (Comment 3 a).

<sup>212</sup> Secretariat's Commentary (n 141) art 79 para 8.

<sup>213</sup> Schlechtriem (n 137) 378: “It would be inconsistent to allow a buyer to require performance where performance is prevented by an impediment which, by virtue of Article 79, the seller is not required to overcome.”

<sup>214</sup> Expert Committee Report (n 3) para 12.2.2-12.2.3: recommending adoption of UNIDROIT art 7.2.2 and Principles of European Contract Law art 9:102, both of which account for impossibility or unreasonable burden of performance.

<sup>215</sup> Expert Committee Report (n 3) 11: “Rise or fall in prices or market value or change in circumstances after entering into the contract shall not be a factor for refusal of relief.”

<sup>216</sup> *Satyabrata Ghose v Mugneeram Bangur & Co.*, AIR 1954 SC 44.

on the explanation as Section 12 of the SRA refuses specific performance. However, such an interpretation would only extend to the ceasing of the 'subject matter' of the contract and not other circumstances or events, which may render performance impossible.

## 6. Hardship or Unreasonable Burden

It is rather surprising that while the Expert Committee made explicit reference to Article 7.2.2 of the PICC, it failed to recommend an exemption from performance, if the result would be unreasonably onerous on the party required to perform. Under the PICC, such an exemption is extended to cover circumstances *at the time of the Court's decision* that would make performance unreasonably burdensome or expensive according to principles of *good faith and fair dealing*.<sup>217</sup>

It is necessary to note that some scholars<sup>218</sup> prefer using the standard of 'unreasonably expensive' as a more objective economic assessment of the cost to the defaulter versus the benefit to the aggrieved. An alternative standard is that of 'change in equilibrium'<sup>219</sup> or commercial uniqueness.<sup>220</sup> If the circumstances give rise to hardship, the defaulter is entitled to request renegotiation under Article 6.2.1 of the PICC, notwithstanding the obligation to perform the remaining. The SRA affords no such options.

Art. 7 of the CISG requires provisions to be interpreted in good faith. Thus, although Art. 46 provides specific performance to the buyer as a matter of right, this may be constrained by Art. 7: a) If the seller proves that the buyer is seeking this remedy to inflict undue pain on the seller;<sup>221</sup> or b) The remedy was claimed only after a delay that permitted the buyer to speculate at the expense of the seller – as when a buyer seeks to compel delivery (rather than damages) only after a sharp rise in the market.<sup>222</sup> This may also be found when the cost of performance is disproportionate to the benefit received.<sup>223</sup> However, since the good faith restriction is not explicit, there is

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<sup>217</sup> Official comment to PICC 245.

<sup>218</sup> Vogenauer (n 22) 893.

<sup>219</sup> *Ibid.*, 895.

<sup>220</sup> UCC § 2-716(1).

<sup>221</sup> A Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 WLR 607, 619.

<sup>222</sup> Albert H Kritzer, 'Guide to Practical Applications of the United Nations Convention on the International Sale of Goods' (1994 Boston) 383.

<sup>223</sup> J Klein, 'Good Faith in International Transactions' (1993) 15 LLR 115, 131.

still scope for parties to abuse the discretion provided to them by the CISG scheme.<sup>224</sup>

While courts in India have in the past refused to grant specific performance in similar circumstances, the same may not be possible now given the mandatory language contained in Section 10 and the lack of an explicit exception, on account of hardship or unreasonable burden.

## 7. Reasonable Time

Article 7.2.2 (e) of the PICC provides that specific performance should be claimed within a reasonable time, failing which the remedy of specific performance may be barred, with other remedies still surviving.<sup>225</sup> The right subsists not from the actual discovery of the breach, rather the expected discovery of the breach.<sup>226</sup> Further, parties may contractually increase or decrease the import of ‘reasonable time’.

Indian law does not address the issue of raising a claim within a reasonable time once the claimant becomes aware of the non-performance. Therefore, a claim, as per the Limitation Act, 1963, may be brought within three years of the non-performance.<sup>227</sup> Parties can neither limit<sup>228</sup> nor expand<sup>229</sup> this period. Though an implied limitation on the ground of laches would be recognised by courts,<sup>230</sup> it remains unclear when the period would commence as there exists no specific duty to examine. The closest similarity would be the rule of *caveat emptor*, with respect to the sale of goods.<sup>231</sup>

Permitting a party to bring a claim of specific performance, beyond a reasonable time, may destroy the entire commercial viability of the contract, drastically shift the equilibrium of the parties, and make performance excessively burdensome.

<sup>224</sup> Disa Sim, ‘The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods’ (2001) <<https://www.cisg.law.pace.edu/cisg/biblio/sim1.html#196>> accessed 10 November 2020.

<sup>225</sup> Dutch Civil Code art 6:89 is an exception where all remedies will be exhausted.

<sup>226</sup> CISG art 38; BGB s. 377; Dutch Civil Code art 7:23.

<sup>227</sup> The Sales of Goods Act 1930 (SOGA) s 54.

<sup>228</sup> ICA s 28.

<sup>229</sup> The Limitation Act 1963 (LA) s 3.

<sup>230</sup> *Consolidated Engg. Enterprises v Irrigation Department*, (2008) 7 SCC 169.

<sup>231</sup> SOGA s 16.

(a) *No Distinction of Type of Obligations*

An issue closely tied to hardship and commercial viability is the lack of distinction between the type of obligations. Despite the 2018 Amendment, an issue which is still under a cloud is whether the right to performance extends to repair and replacement. Article 7.2.3 of the PICC explicitly provides for the right to require repair and replacement. Therefore, the right to require performance applies to the defective performance of monetary obligations, e.g., payment in the wrong account and non-monetary obligations.<sup>232</sup> However, this view is criticised from an economic point of view. The Principles of European Contract Law, therefore, extend the right to performance only in cases of defective performance of non-monetary obligations,<sup>233</sup> i.e., obligations ‘to deliver’ or obligations ‘to do’. The remedy may comprise repair, replacement, or any other measure.<sup>234</sup>

The civil law recognises specific performance to cure defects in generic goods,<sup>235</sup> repair in contracts for work and services, if undue costs arise.<sup>236</sup> The CISG also adds a threshold of reasonability, while considering whether a remedy ought to be granted or not.<sup>237</sup> As per Arts. 47(1) and 63(1) of the CISG, the buyer and seller respectively may set an additional time for the performance of obligations. During this time, known as the *Nachfrist* period, she may not require specific performance.<sup>238</sup> Even the court can grant a grace period for performance.<sup>239</sup>

This issue is not addressed under Sec. 11(2), 14, and 16, which are the recognised exceptions to specific performance under Sec. 10. It is doubtful whether the right to provide additional time for performance can be claimed under Indian law.

Further, Art. 46(1) of the CISG does not make any distinction between different types of obligations, rather only mentions that the seller may be required to perform “his obligations”. This may be in the form of completion of delivery, or delivery of conforming goods.<sup>240</sup> However, as per Art. 41, the seller has an obligation to deliver goods that are free from third party claims. It is unclear whether the obligation to deliver unencumbered

<sup>232</sup> Schwenzer (n 38) 301.

<sup>233</sup> European Principles 1997 art 9.102(1).

<sup>234</sup> Schwenzer (n 38) 301.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> CISG art 46 paras 2 & 3.

<sup>238</sup> Jussi Koskinen, ‘CISG, Specific Performance and Finnish Law’ (1999) <<https://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html#27>> accessed October 10, 2020.

<sup>239</sup> CISG art 45(3) read with CISG art 61(3).

<sup>240</sup> CISG art 35.

goods is also subject to the right to specific performance under Art. 46(1). On one hand, scholars argue that since Art. 41 falls under the Chapter titled “Obligations of the Seller”, the obligation to provide goods free of third-party claims should fall within the scope of Art. 46(1).<sup>241</sup> On the other hand, the Secretariat’s Commentary clearly distinguishes between the obligation to deliver *conforming* goods and *unencumbered* goods,<sup>242</sup> and proposals to expressly subject Art. 41 to the buyer’s right under Art. 46(1), were defeated.<sup>243</sup> Thus, the position remains unclear.

Since the 2018 Amendment does not distinguish between the type obligations that can be specifically enforced, except those expressly falling within the ambit of Section 14 of the SRA, the effect of the 2018 Amendment is to provide for specific performance of all obligations, irrespective of the commercial prudence or practical impossibility in enforcing such an obligation, that too without any limitation on the ground of ‘good faith’, as compared to civil law jurisdictions.

### (i) *Applicability – Retrospective or Prospective*

In the absence of a savings clause, it is unclear whether the 2018 Amendment will have a retrospective effect or not. A statute, which affects substantive rights, is presumed to be prospective in operation and unless made retrospective, either expressly or by necessary intendment, can only apply prospectively.<sup>244</sup>

Generally, an amendment cannot be applied retrospectively, subject to two exceptions, i.e., (i) retrospective amendments can apply to procedural rules applicable to a person;<sup>245</sup> and (ii) a retrospective amendment can apply to substantive rights that have not yet been vested.<sup>246</sup> One view suggests that the amendments to the SRA would be procedural.<sup>247</sup> However, since the amendment results in loss to offer damages, it is bound to cause hardship.

<sup>241</sup> Bianca (n 122) 339-340; Walt (n 184) 215.

<sup>242</sup> Secretariat’s Commentary (n 141) art 39, para 7.

<sup>243</sup> *Conference on Contracts for the International Sale of Goods, Mar. 10 -Apr. 11, 1980, Official Records, First Committee Deliberations (17th mtg.)*, para. 67, U.N. Doc. A/CONF.97/C.1/SR.17 (1980).

<sup>244</sup> *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602, para 26.

<sup>245</sup> *Memon Abdul Karim Haji Tayab v Custodian General*, AIR 1964 SC 1256, para 4.

<sup>246</sup> *Arcelormittal India (P) Ltd. v Satish Kumar Gupta*, (2019) 2 SCC 1.

<sup>247</sup> Nigam Nuggehalli, ‘The Retroactive Effect of Statutory Amendments: Assessing the Impact of Recent Amendments to the Specific Relief Act, 1963’ (*NLSIR Online*, 11 February 2018) <<http://www.nlsir.com/?p=778>> accessed 10 November 2020.



Therefore, it would be a substantial matter and hence ought to be prospective in nature.<sup>248</sup>

The provision which touches a right in existence at a time of passing of statute, cannot be applied retrospectively.<sup>249</sup> Furthermore, even procedural laws, which affect the rights of the parties, cannot be applied retrospectively.<sup>250</sup>

The next question is whether the rights have become vested by virtue of pending litigation. Since the amendment only takes away the discretion of the judge, it does not take away the vested rights of any of the parties.<sup>251</sup> In view of Section 6(c) of the General Clauses Act, 1897, it is more reasonable to take the view that the right to offer an alternative remedy, under Section 20 of the Relief Act, was a right in privilege of the parties and cannot be taken away retrospectively.<sup>252</sup> A similar view was expressed by the Supreme Court<sup>253</sup> that the effect of substitution of certain clauses in an Act, through an amendment, can only have a prospective application from the date of introduction of the provision. However, the view of the Supreme Court has not been consistent.<sup>254</sup>

Following the latter approach, the High Court of Calcutta, in *Church of North India v Ashoke Biswas*,<sup>255</sup> held that any suit in which a decree was not passed on the date of coming into force of the 2018 Amendment, i.e., 01.10.2018 would fall within the scope of the amendment. The court was of the view that the enforcement of contract has to be considered at the time of passing of the decree and not the date of institution of the suit. Therefore, the 2018 Amendment will apply retrospectively, and all pending suits will fall within its ambit.

Along the same lines, the Allahabad High Court<sup>256</sup> has held that the effect of the substitution of new provisions is that the old ones are repealed and are

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<sup>248</sup> *Ibid.*

<sup>249</sup> *Jose Da Costa v Bascora Sadasiva Sinai Narcornim*, (1976) 2 SCC 917, para 31; *Delhi Cloth and General Mills Co. Ltd. v Income-Tax Commissioner*, 1927 SCC Online PC 76.

<sup>250</sup> *Thirumalai Chemicals Ltd. v Union of India*, (2011) 6 SCC 739, paras 24, 31.

<sup>251</sup> *Arcelormittal (n 247)*; *Swiss Ribbons (P) Ltd. v Union of India*, (2019) 4 SCC 17 : 2019 SCC Online SC 73.

<sup>252</sup> *Ardee Infrastructure (P) Ltd. v Anuradha Bhatia*, 2017 SCC Online Del 6402 para 30; *Nuggehalli (n 248)*.

<sup>253</sup> *National Agricultural Coop. Marketing Federation of India Ltd. v Union of India*, (2003) 5 SCC 23.

<sup>254</sup> *Surinder Singh Deswal v Virendar Gandhi*, (2019) 11 SCC 341 : 2019 SCC Online SC 739 para 8.1: the court applied the amendment to the Negotiable Instruments Act retrospectively despite it affecting substantial rights.

<sup>255</sup> *Church of North India v Ashoke Biswas*, 2019 SCC OnLine Cal 3842, para 101.

<sup>256</sup> *Mukesh Singh v Saurabh Chaudhary*, 2019 SCC OnLine All 5523.

no longer available. Therefore, only the substituted provisions can be made applicable, and the General Clauses Act is not attracted.<sup>257</sup>

Contrary to this interpretation, though of limited precedent value, the Bangalore City Civil Judge<sup>258</sup> held that the 2018 Amendment can only apply prospectively. The purpose of the 2018 Amendment was to bring the law up-to-speed with the rapid economic growth and expansion of infrastructure activities needed for the overall development of the country.<sup>259</sup> Therefore, a prospective application would make the amendments futile. The view taken by the Calcutta High Court is judicially sound and in consonance with the objectives of the amendment.

## V. CONCLUSION

The 2018 Amendment was inarguably a much-required step in giving a fillip to the regime of contract enforcement in India. The recognition of the intrinsic value of the bond to execute promises, as a moral obligation, recognises the value of contracts and the need to grant legal sanctity to the intention of the parties to seek enforcement of the terms of the contract. While the 2018 Amendment unequivocally changes the philosophy of contract enforcement and recognises the inadequacies of damages not fully achieving the expectation from a contract, the 2018 Amendment requires a comprehensive re-look in order to truly fulfil its objective.

The above mentioned comparisons between specific performance in common law and civil law jurisdictions show a significant convergence in the practical implementation of the right to specific performance. However, the current positions of law in India seems to be stuck between its historical dependence on the common law and its practical acceptance of the civil law approach, thus, creating the “uncommon law”. In the absence of a necessary and consequent amendment to the ICA and the full acceptance of the civil law approach, the 2018 Amendment is likely to fuel more legal challenges before the court instead of resolving the ambiguities and problems of the past.

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<sup>257</sup> *After considering the entire law laid down in State of Punjab v Mohar Singh*, AIR 1955 SC 84; *Udai Singh Dager v Union of India*, (2007) 10 SCC 306 paras 62-71; *Bhagat Ram Sharma v Union of India*, 1988 Supp (I) SCC 30 paras 17-19; *State of U.P. v Hirendra Pal Singh*, (2011) 5 SCC305 para 22; *K.S. Puttaswamy v Union of India*, (2019) 1 SCC 1 para 1466.

<sup>258</sup> *Somashekar v Appu Ramanand Sharma* O.S. No. 5395 of 2011 decided on 29-11-2018 (not found).

<sup>259</sup> The Specific Relief (Amendment) Act 2008, Statement of Objects.

It appears that the 2018 Amendment has adopted the recommendation of the Expert Committee in a cherry-picking manner, without entirely going into the depth of the rationale of such recommendations. Further, the Expert Committee report has not adequately considered actual convergence between different jurisdictions, in relation to specific performance and has blindly removed the inadequacies test, which will most likely result in fetters on the power of the court to accommodate different circumstances.

Though a re-look into the ICA and the SRA together would have been ideal, for now, a comprehensive second look is required into the SRA in order to completely align its provisions and the regime on contract enforcement with other international jurisdictions and instruments. Without such a re-look, the 2018 Amendment neither follows the historical approach of the common law and neither the approach of the civil law, thus creating the “Un-common Law” on specific performance in India.