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Specific Performance: a Comparative Analysis

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As an heir to the Romano-Germanic tradition, a Spanish lawyer might argue that the responses of Spanish judges to contractual non-performance mirror bedrock principles of the Spanish legal order. These judicial responses resonate with familiar maxims such as *pacta sunt servanda*. A fondness for German law might lead him to invoke Kant's categorical imperative, according to which a promise would be idle chatter and not a promise at all if it were not in principle to be kept. The distinguished comparative scholar, Ernst Rabel, seems to have embraced a Kantian view of the sanctity of promises when he wrote that the duty to perform [was] "the backbone of the obligation." In stating the axiom in this form, Rabel presumably would have been less enthusiastic for the proposition that the backbone of the obligation consisted in a duty to pay damages upon breach.

Following Rabel's suggestion, if the meaning of *pacta sunt servanda* is not to be hollowed out, then a solemn undertaking should offer the contract violator no alternative obligation. In other words, a legal regime should not grant a breaching promisor an option either to perform or to pay damages. As Schlechtriem has remarked, **the party in breach should not be allowed to buy itself free of a contract that it has violated**. On the contrary, so argue proponents of *pacta sunt servanda*, the victim of the breach, not the contract violator, should be afforded an opportunity to decide whether it prefers the

breaching party's performance or a judgment against the latter for damages consequent upon non-performance.

By reserving this remedial option for the victim, a legal regime excuses it from having to mitigate its losses. Although the victim may ultimately mitigate its losses, its failure to do so should entail no penalty, such as a reduction of the claim by an amount which reasonable mitigation would have saved. In a classical Civilian perspective committed to the ideal of *pacta sunt servanda*, a buyer in breach should not compel the seller to seek a substitute sale, nor should the breaching seller force the buyer to enter into a substitute purchase. At the moment of a breach, so goes the conventional wisdom, the aggrieved party has the moral high ground. If an innocent party's conduct vis-a-vis the co-contracting party has been above reproach, then it should stand on its contract, confident that a court will protect its interest in the contract.

D. THE UNITED STATES APPROACH TO REMEDIES FOR CONTRACT BREACH

As a result of a conditioning process dating back to his or her pragmatic law training, an American lawyer would probably react with amusement (or alarm) to our narrative of Spanish enforcement rules. He or she would likely say that performance orders make sense if one finds it helpful to moralize about a defaulter's conduct. But the complexity and velocity of business transactions usually make moralizing impractical. People default on their obligations every day, sometimes intentionally and in bad faith, but more often unintentionally and in good faith. We cannot condemn all of these defaulters to Dante's Inferno for their contractual transgressions.

Failed transactions may be the stuff of tragedy, but while litigation may heighten the sense of tragedy, mitigation may turn the affair into comedy or farce. Ideally, mitigation should also permit the aggrieved party to reallocate his assets efficiently with minimal judicial intervention. In a US lawyer's view, efficient reallocation is a by-product of bedrock principles, for American law qualifies the principle of *pacta sunt servanda* by inverting the preference for performance over compensatory damages. More than a century ago, Judge Oliver Wendell Holmes captured the American preference for damages in case of breach in a famous (and provocative) law review comment: "**The duty to keep a contract means a prediction that you must pay damages if you do not keep it - and nothing else.** Such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." Perhaps Holmes's pronouncements on contract breach were tinged with too much moral agnosticism; he would not have deemed a contract breaker a sinner whose conduct warranted casting him into the inferno. Unlike proponents of *pacta sunt servanda*, who grant the breach victim the benefit of an alternative obligation, Holmes seems to have granted such an alternative to the breaching promisor. His vision has endured. Today, a US court would be extremely reluctant to compel a breacher to perform in the usual situation when the goods in question are not unique and the loss is reparable in damages.

A century of American case-law has vindicated Holmes's dictum on the appropriate consequences of a contract breach. Commercial realities have conspired with US jurisprudence to instill in merchants certain conditioned reflexes upon breach by their counterparts. Typically, an aggrieved buyer or seller, after canceling the contract, seeks damages rather than specific performance. Even before the victim of the breach

seeks damages, it will routinely try to minimise the loss by seeking a suitable replacement contract, or by buying replacement goods on a spot market

The Uniform Commercial Code calls this mitigation effort "cover" when it refers to a buyer's locating a substitute transaction for the one that has been repudiated. In a line of commerce populated by numerous sellers and buyers, an obligation of good faith requires a buyer to make reasonable efforts to cover from another source of comparable goods. If the market discloses an adequate supply of substitute goods not exceeding by too much the original contract price, then an aggrieved party will likely absorb modest losses.

A breach victim knows today that no rule of natural law prevents it from defaulting tomorrow, and thus incurring the wrath of the very co-contracting party who disappointed it yesterday. If the aggrieved party is particularly upset, it may vow never to deal with the breacher again, or even complain to the local chamber of commerce. A merchant is unlikely to sue someone with whom he needs to continue dealing, and the law does not grant a disappointed trader damages for emotional upset resulting from a contract breach, unless the breach has been malicious. (The Spanish formulation is *de dolo y malo*.) Such malice is exceedingly difficult to prove in a commercial affair. As a result of these disincentives, lawsuits are reserved for grave situations, and most such suits would seek damages rather than performance.

To cure a routine default in a contract for readily available merchandise, a suit for specific performance is unappealing and ill-advised for several reasons. The merchant realizes that his demand for specific performance may profit his lawyers more than

himself. In many cases, the litigation cost may exceed the concrete losses likely to be suffered if he mitigates promptly and reasonably (the phrase of UCC § 2-706 is "commercially reasonable manner"). Beyond the immediate litigation costs, a specific performance claim may entail logistical difficulties. During protracted litigation, an aggrieved seller would have to risk the vagaries of the market by holding the goods at the buyer's disposition. Storing the goods can result in a log jam of obsolescent inventory, which can sink a retailer financially. Considerable storage costs can impel many merchants to minimize the inventory on hand. Pioneered years ago by Japanese enterprises, "just in time" techniques of inventory maintenance would probably lead many sellers to prefer mitigation by resale over specific performance. So strong is the UCC's preference for mitigation as a means to preserving the utility of the contractual object, that a seller may sell the goods to a third party, even after obtaining judgment for the purchase price against a defaulting buyer. But an aggrieved merchant would likely reflect a long time before pursuing a claim under UCC 2-709 that could ultimately result in a judgment rendered moot by a later resale of the goods.

Specific performance is no more financially appealing for the aggrieved seller than for the aggrieved buyer: if the seller demands the price from the buyer, then the seller will likely have to hold the goods pending the litigation in anticipation of a favorable result. If the seller meanwhile sells the goods to a third party to cut the loss associated with stockpiling them, then it may have mooted or collapsed its claim for the price. Rarely will the facts allow a US claimant to have it both ways.

Although a lawyer may sometimes file a demand for specific performance on behalf of an aggrieved client, the lawyer knows that the claim is unlikely to impress the judge or threaten the breacher. The US legal system does not shame breachers into silence. On the contrary, upon receiving a demand for performance, the breacher will likely bombard the plaintiff with a fusillade of defenses including the following: the injury is reparable in money, and thus a demand for performance is inappropriate; the merchandise is not unique and thus cover in the marketplace is feasible; the contract does not explicitly authorize specific performance as a remedy; judicial supervision of the seller's performance would be time-consuming and cumbersome for a court overburdened by a heavy docket. Because mitigation was commercially feasible, the court will likely make it clear that the plaintiff's damage claim could be reduced by the amount that could have been saved by prompt mitigation. Furthermore, the judge will probably credit the defendant's argument that specific performance represents undue interference with personal liberty. An order of specific performance might be seen as overkill.

Behind the judge's resistance to the plaintiff's demand for performance lies a conviction that an appeal court is unlikely to overturn a denial of specific performance. This confidence is borne of knowledge that specific performance is equitable, discretionary, and justified only in rare cases when the object is unique and damages will not repair the injury. Although the UCC does not explicitly make this irreparability criterion a condition of specific performance, the standard is deeply imbedded in judicial practice. The judge probably realizes that by the time his denial of performance reached the appellate court, passage of time should have begun to heal the injuries from the breach. A judge's reluctance to grant a performance decree may also result from his

belief that his contempt power, though in principle an available tool, should be saved for rare situations, not routinely tested in a dispute between merchants.

A noteworthy difference between Spanish regulation of specific performance and its American counterpart results from the relative power of the parties and the court to select the remedy, i.e. the enforcement weapon. Although the choice of remedy belongs initially to the plaintiff in a US context, it ultimately rests with the judge. By contrast, the criteria for decision confided to the Spanish tribunal seem considerably to limit the judge's latitude in dictating the remedy once the plaintiff has announced his choice.

As we have noted, a US court could grant or reject a demand for performance after considering several questions: Are the goods unique? Did the claimant mitigate? Would damages suffice to repair the harm? Did the contract stipulate specific performance as the primary relief? Would an order of specific performance unduly interfere with the defendant's liberty or require unusual court supervision? By contrast, once a plaintiff demands specific performance in a Spanish tribunal, the tribunal seems pretty much bound to acquiesce in the plaintiff's choice. The Spanish judge, instead of addressing the victim's mitigation efforts and the other concerns of interest in a US court, would make rather narrow and objectively verifiable inquiries: Does the defendant have the item? Has the performance become impossible? Is the defendant still capable of performing the contract? These are important questions, and a US judge, like his Spanish counterpart, would expect answers to them. But while these answers might conclude the Spanish judge's inquiry, they would likely mark the beginning of the US court's more extensive analysis of the conduct and motivation of the parties.

Familiar with the dictum that parties make contracts while judges interpret them, a US lawyer is accustomed to thinking that contract litigants benefit from a liberal, hands-off, policy on the part of the court. A US lawyer might be surprised to discover that the questions posed by a Spanish judge facing a demand for performance give a Spanish claimant a freer hand in selecting and maintaining the enforcement weapon than a US counterpart would have. Perhaps the Spanish plaintiff's advantage grows naturally out of an ideal of *pacta sunt servanda*; perhaps it is a reward for occupying the moral high ground. In the US context, the victim's moral high ground, such as it is, is no guarantee that the court will honor the remedy of choice. The spirit of Holmes' maxim invites the contract breacher to deflect the victim's demand for performance with evidence that damages will repair the harm. If only the victim would mitigate, so goes the breacher's claim, the matter would be set right. The court would be spared inquiries into the uniqueness of the goods and the feasibility of supervising the requested specific relief. Then the breacher would settle with the claimant in cash.

Preferring compensation in the usual case, a US judge is the final arbiter of the relative merits of the parties' contentions regarding suitability of performance or damages. In US regulation of specific performance, mitigation duties and reparability in damages tend to give the breacher a large hand in the judge's evaluation, leaving the judge as referee of the ultimate option. This judicial trump card seems to make a US judge a spokesman for society, at least for the breach at hand. To the court is confided the task of deciding whether society's advantage lies in forcing the breacher to perform or to pay. It is true that the breach victim in an American setting can state his preference for performance, but this preference is less decisive than it would be for a breach victim in a

Spanish setting. As the master of its utilitarian calculus, the Spanish victim can demand performance with little risk of the tribunal's refusing the request in response to the breacher's arguments. Spanish doctrine seems to regard the victim, not the judge, as best situated to know its own interest. On this view, if the Spanish victim demands performance, and performance is a possibility, then the breacher should not be able to defeat the victim's choice by buying itself free of the contract.

Behind the talk of cash and goods among market actors we may find a dialogue of quasi-religious dimensions in the rivalry between adherents of *pacta sunt servanda* and those favoring Holmes's pragmatic (unethical?) view of contract remedies. Although the rival views concern material goods, not salvation, their adherents seem to advance them as articles of faith. As such, the views are not easily dislodged by rational argument or empirical evidence. Decades ago, Rabel forecast an irreconcilable and intense competition between proponents of the rival views. More recently, the rivals' fervor has prompted John Honnold, a senior United States delegate to the drafting sessions for [the International Convention on the Sales of Goods], to remark:

"One bred in the Common Law remains puzzled at the Civil Law's insistence on a remedy (specific performance) that is rarely useful while a scion of the Civil Law must be dismayed by an attitude that seems to subvert the sanctity of obligations."

English legal historians remind us that the English Chancellor, keeper of the conscience of the realm, ordered specific performance against a defaulter to help him redeem his soul. For this senior royal figure, who was also an archbishop and adviser to the monarch, oath-breaking was a serious offence akin to perjury. Locking away a

defaulting oath-taker was seen as a fitting inducement to having him assure his salvation. If we look back over centuries of judicial decisions ordering specific performance, the claim of economic inefficiency of specific performance seems a modern gloss, perhaps even an ahistorical reformulation of a venerable remedy anchored in ideas of piety and spiritual healing.

Not surprisingly, heirs of the Romano-Germanic tradition, influenced to a considerable extent by canonical ideas, display a quasi-religious faith in *pacta sunt servanda* as a principle of social cohesion. (This faith may explain a general resistance in the world community to recent US proposals to renounce unilaterally a number of our long-standing treaty obligations.) The principle of *pacta sunt servanda* is a cornerstone of Spanish contract regulation, though a Spanish jurist may rightly wonder if the principle is sometimes ignored in practice. According to Spanish doctrine, while impossibility might excuse from performance, a promisor should not escape his or her duties on flimsier grounds than this. Nor should the breacher be heard to claim that the breach, by permitting efficient reallocation of assets, has enhanced social welfare.

Holmes boldly characterized as unethical the view that a promisor did not have to perform a promise just because he or she had promised to do so. If the contract was breached, the breacher would pay damages; in Schlechtriem's phrase, the breacher could buy him or herself free of the contract. Holmes evidently did not mean that a breacher, immediately upon repudiation, should write the promisee a certified check to cover the damages. Indeed, the breacher would not write any check at all unless pushed to do so. When the victim complained, the breacher would likely shift the burden to the victim,

demanding first that the victim mitigate damages which the victim had not caused. If the breacher was not lucky enough substantially to reduce damages via mitigation, then a lawyer's services could be engaged to recover what was lost. In many cases a patient and persistent promisee might get a judgment, plus a large lawyer's invoice. But winning a judgment after a long period of anxiety and struggle was not tantamount to receiving a certified check on the date of repudiation, let alone delivery of the merchandise.

Following Holmes's view, considerations of efficiency allow a breacher to put the victim at risk with respect to forward customers. In seeking to make himself whole, a victim faced a number of challenges. Would customers forgive delays not of the victim's making? Would substitute goods be found promptly in the necessary quantities? Would the witnesses remember events properly? Would a court be sympathetic to the victim's mitigation efforts, even if largely unsuccessful? Could a judgment against the breacher be collected? Would the currency in which the judgment was to be paid remain stable enough fully to compensate the victim? The answers to these questions were not assured, even if the breacher belonged to the *beati possidentis*. In view of the frustrations for the breach victim, we may wonder why the jurisprudence did not evolve to impose on the breacher a trust protecting the promised goods for the victim's benefit. Alternatively, if the seller had resold the merchandise at a higher price than the original contract provided, perhaps the cases could have forced the seller as trustee to disgorge any profit without allowing a defense based upon a victim's mitigation and foreseeability of the damages.

These challenges for an innocent victim make it easy to sympathize with proponents of *pacta sunt servanda*; for a breach victim, performance seems an ideal way

of assuring the benefit of the bargain. Spanish procedure would grant the victim the choice of remedy. If a victim mitigated, though without a duty to do so, then damages would be sought. But deciding against mitigation would not hurt a claim for performance.

Holmes's vision seems to have been anchored in a fundamental faith, though a faith of a different kind than that underlying *pacta sunt servanda*. Associated with efficient markets and the invisible hand, this faith was described by Farnsworth: "In a market economy it is supposed that with rare exceptions for such 'unique' items and heirlooms and objects of art, substantially similar goods were available elsewhere." Advising a breach victim to mitigate may sometimes seem like tough love therapy, but prompt effort can earn grace at least among customers and the tribunals. Manipulated by an invisible hand, an omniscient market promises the victim that prompt and virtuous efforts to mitigate will make everything come out for the best. If we do not impede the function of efficient markets, so goes the argument, everybody seems pretty much able to do what suits his or her own interest. An invisible hand is counted on for social utility.