Taking Specific Performance Seriously:

Trumping Damages as the Presumptive Remedy for Breach of Contract

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Overview

- Why might we want Specific Performance to be the presumptive remedy?
- Current state of the law in the civil and common law traditions – how do they differ and/or converge in theory and in practice?
- If Specific Performance is the presumptive remedy, what, if any, circumstances should temper its pre-eminence?

Attributes of the Remedy

- Theoretical Arguments:
- Remedy accords with the foundational premise of the contract itself
- "Right" to Performance
- Promisee-centered
- Morally superior remedy
- Practical Advantages:
- Avoiding undercompensation

Meeting the Objections

- Personal liberty concerns
  - *nemo praecise cogi potest ad factum*
- Arguments attributed to Economic Analysis
  - Economic efficiency
  - Theory of Efficient Breach
- Problems of Imprecision and Supervision
- Practical Disadvantages

State of the Law

- Theoretical positions of the Common and Civil Law are largely uncontroversial
- Common Law: remedy is discretionary, exceptional, available where damages are "inadequate"
- Civil Law: Primary, presumptive remedy of right
- Evolution of Quebec's position

Law versus Practice

- Much similarity at either end of the spectrum
- Distinctive treatment arises in the "middle ground" cases
- Compare and contrast House of Lords decision in *Argyll Stores* with Quebec decision in *Golden Griddle* (both dealing with a continuous operation provision in commercial lease)

What's the difference?

Limitations on S.P. as a Presumptive Remedy?

- 1. Hardship
- When is this a relevant consideration?
- Is this not just a readily foreseeable consequence of breach?
- See 7.2.2(b) Unidroit, 9.102(2)(b) PECL, 275(2) BGB, French Projet de réforme
- Good Faith Principle – the "right" to Specific Performance cannot be abused
- 2. "Damages only" clauses

Conclusion

- "Presumptive" is not the same thing as "Always"
- Would change advocated in this paper be merely semantic?
- No - presumptive versus exceptional status of remedy affects the mindset and mentalities of the judiciary
- Reconsider the common law test measured by "inadequacy of damages"

Conclusion

- Oliver Wendell Holmes: "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - *and nothing else*"
- On the contrary, the duty to keep a contract ought presumptively to mean a duty to perform it.