

Exceptional nature of specific performance in the Indian Law

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Specific relief gives to a promisee what he is entitled under his contract. It constrains the promisor to do what he has promised to do;¹ it compels him to perform his obligation. Such relief goes by another name – ‘enforced performance’.² Remedies of specific performance and injunction give to a promisee what has been promised to him. If the main aim of contract remedies is protection of the promisee’s expectation interest, specific performance is the logical remedy that best serves this purpose. In Indian law, specific relief giving enforced performance of a contract is by way of a decree of specific performance, or injunction – prohibitory or mandatory. But it is granted as an exception, in cases where compensation either is not ascertainable or is inadequate, and where it can be executed by the promisor.

A plaintiff seeking specific performance must satisfy ‘the inadequacy test’ at the threshold. Specific performance becomes an exceptional remedy primarily because of the inadequacy test. Although other factors, viz. plaintiff’s conduct, and exercise of discretion by the Court affect availability of specific performance, this article discusses the role of the inadequacy test in the grant of specific relief. Even though the inadequacy test is fulfilled, the Court must be able to make its decree enforceable. This limitation on court’s power is also discussed. The article supports the view specific performance must be available as a routine remedy, so that a promisee can choose specific performance.

Meaning

A decree of specific performance, is one by which the court directs the defendant to perform the contract according to its terms. This is one view. Although the relief is described in terms of an order against the defendant, in some other legal systems a person other than a defendant may carry out the act ordered. In the other view, the promisee obtains what has been promised to him under the contract, whether performed by the promisor, or carried out by the promisee himself or through another.

Across various legal systems, the remedy manifests in different forms under different names:

1. performance of the promised act by the defendant himself,
2. transfer of property, movable or immovable,
3. delivery of goods,
4. repairing defective goods,³ or if they do not conform to the contract,⁴
5. delivery of substitute goods, if goods do not conform to contract⁵
6. removing encumbrance on goods,⁶
7. curing or remedying defective performance,⁷
8. paying price, or the amount promised under a contract,⁸
9. restraining from doing an act,⁹

¹ Michael Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract*, (14th edn, LexisNexis Butterworths 2001).

² Gunter Treitel, ‘Remedies for Breach of Contract’, *International Encyclopedia of Comparative Law*, (1976) Vol VII 6.

³ The German Civil Code, art 439; The Sale of Goods Act 1979 (in the UK), ss 42A and 42B: gives to a consumer the right to seek repair or replacement.

⁴ Convention on the International Sale of Goods (CISG), art 46.

⁵ CISG, art 46; The German Civil Code, art 439; The Sale of Goods Act 1979 (in the UK) ss 42A and 42B.

⁶ under the CISG: see Steven Walt, ‘For Specific Performance Under the United Nations Sales Convention’ (1991) 26 *Tex Int’l LJ* 211, 216.

⁷ Principles of European Law (revised version 1998), art 9.102.

⁸ *Subramaniam Chettiar v Arunachalam* AIR 1943 Mad 761.

⁹ viz. prohibitory injunction.

10. ordering the promisor to undo the breach of contract,¹⁰
11. performance at the expense of the promisor by promisee or another person.¹¹

Specific performance in the Indian law

The Indian law follows the common law tradition. Where the promisor refuses to perform his obligation, specific performance is not available to him by way of right. Specific performance of a contract (or injunction) in relation to a contract is an exceptional remedy, and is granted in the discretion of the court. An injunction will not be issued to enforce any promise under a contract for which specific performance will not be granted,¹² except to enforce a negative covenant when it accompanies an affirmative covenant.¹³ The most important difference between an injunction and an order of specific performance is that an injunction requires substantially less supervision.

Specific performance under Indian law refers the relief that orders the promisor-defendant to perform the promise he has given under his contract.

Specific performance is granted in the Indian law

- (i) in cases of those contracts for the non performance of which compensation will not be an adequate remedy,¹⁴
- (ii) where enforcement of the terms of the contract is not difficult, expensive or ineffective,¹⁵
- (iii) where the plaintiff's conduct does not disentitle from seeking the equitable relief.¹⁶
- (iv) the court considers fit to grant specific performance in the discretion of the court, to be exercised on the basis of sound principles.¹⁷

The first two factors are discussed below in this article.

Specific performance in other jurisdictions

In many legal systems, predominantly those from the civil law tradition, specific performance is available as the primary remedy or stands on equal footing as the other remedy of compensation. It is either available naturally, else is available to a promisee as his right.¹⁸ Some systems make specific performance the main remedy, and give the promisee a right to claim compensation if he so chooses.¹⁹ Other systems give the promisee the option to seek specific performance, or compensation, or termination.²⁰ A unique provision is found under

¹⁰ viz. mandatory injunction.

¹¹ In this case, personal participation of the promisor is not necessary; The French Civil Code, art 1144; *Zivilprozessordnung* (German Code of Civil Procedure), s 887; The Quebec Civil Code, art 1602; The Louisiana Civil Code, art 1758; The Japan Civil Code, art 414; The Spanish Civil Code, art 1098.

¹² The Specific Relief Act 1963, ss 38 and 40.

¹³ The Specific Relief Act 1963, s 42; *Niranjan Shankar Golikari v Century Spinning and Manufacturing Co Ltd* AIR 1967 SC 1098; *Gujarat Bottling Co Ltd v Coca Cola Company* AIR 1995 SC 2372 (temporary injunction); *Andrew Yule and Co v Ardeshir Bomanji Dubash* (1914) 16 Bom LR 178; *Frank Simoes Advertising (P) Ltd v Hada Leasing and Industries Ltd* AIR 1988 Del 362.

¹⁴ The Specific Relief Act, sec 10

¹⁵ The Specific Relief Act, sec 14

¹⁶ The Specific Relief Act, sec 16

¹⁷ The Specific Relief Act, sec 20

¹⁸ The German Civil Code, art 241.

¹⁹ The German Civil Code, art 241.

²⁰ The Ethiopian Civil Code, art 1771; The Contract Law of the Peoples' Republic of China 1999

the Maryland Code. Specific performance may be ordered if the agreement provides for that remedy.²¹

In common law systems, specific performance is an order directed against the defendant personally. The order requires him to perform the contract, else suffer consequences in the nature of contempt. In civil law systems, the remedy is wider. It is the process by which the promisee receives the performance of the promise given to him. Thus the promisee can have the defect cured or the substitute at the expense of the promisor. The order therefore aims at the result, rather than a direction to the debtor.

Many legal systems enable an order authorising the promisee to perform the promise at the expense of the promisor. This is an order of enforced performance granted by the court, and is a matter of right for the promisee. The French law gives to the promisee the right to have a judgment for substitute performance. The German law makes this a method of executing a judgment of performance. The order itself will make the promisor directly liable for the expense of substitute performance. In German law, the debtor can recover this cost of substitute performance in advance.

All legal systems have some or other restrictions or limitation on availability of enforced performance. Although the German law gives performance as a matter of right, some restrictions are closely connected with the adequacy of compensation. 'Enforced performance' is ordered (i) if reparation in kind will be inadequate – thus if a profit-earning asset is damaged, repair will not compensate loss of profits during the period the repairs are being carried out, or (ii) cost of putting the promisee into the position he would have been in if the contract were performed involves unreasonable efforts of expenses,²² or would give him a more valuable thing than he had before. In this case repair will be allowed subject to his making allowance for the amount by which he is better off.

All legal systems restrict the remedy in case of personal contracts, particularly so where performance of that promise can only be rendered by the promisor personally, viz. promise to render services of a personal nature or relating to employment, or where the personal cooperation of the promisor is required, or where the performance is of an exclusively personal character. Compelling a person against his wishes to do an act, it is viewed, amounts to undue interference with personal freedom or liberty. Another objection relates to the attention required of the court to judge the quality of performance, or to supervise performance.

The German law stands out an exception, in that it primarily enables specific performance of all promises, including a promise to render personal service, so long as it can be vicariously performed. It also enforces a promise to do, even though it cannot be vicariously performed. Such enforcement becomes possible by imposing fines and imprisonment. But it will not enforce a promise to marry or provide personal services that must be performed personally. Specific performance will not be ordered where it is impossible for the promisor or anyone else to perform.²³

Justification for exceptional nature of specific performance

²¹ See the Maryland Code, s 22.811.

²² The German Civil Code, art 251, para 2.

²³ The German Civil Code, art 275.

Historical justification

Specific performance is a remedy devised in England by Courts of Equity in a system of law administered by the Court of Chancery as against that administered by common law courts. Its exceptional nature is dictated by English history. Where a proceeding could be a subject of jurisdiction in common law, equity courts exercised concurrent jurisdiction only when procedure in equity afforded advantages which were not attainable at law. Hence equity exercised jurisdiction where money payment did not afford adequate remedy.²⁴ This approach of the equity courts is attributed to two factors:²⁵ (i) the severe sanctions to enforce decrees of equitable relief, by imprisonment for contempt, and (ii) the spirit of commerce and enterprise of the market economy where a promisee could arrange substitute transaction, and in which 'money [was] equivalent of everything'.²⁶ Even after merger of courts of common law and equity,²⁷ reliefs of specific performance and injunction retained their character as equitable remedies.

Remedy for contempt is drastic

The exceptional nature of remedies granted by equity courts is also attributed to the drastic nature of the contempt action available for enforcing these remedies,²⁸ which results into imprisonment,²⁹ and violates personal liberty of the promisor. Moreover, if orders do not get enforced, contempt powers are put to test and there is a danger of undermining authority of courts.³⁰

Protection of personal liberty

Every person has a natural right not to be coerced into performing against his will. Specific performance, it is argued, should not be easily granted because compelling performance unduly interferes with the promisor's liberty, especially in relation to compelling personal services, or a promise to marry.³¹ Such compulsion encroaches upon personal freedom, imposes involuntary servitude and violates public policy.³² Most legal systems, including India,³³ concur in refusing specific performance of contracts for personal services, i.e., those requiring the promisor to perform personally.

Economic analysis supports efficient breach

The most important justification for a regime of compensation is based on economic analysis. This is based on an assumption that compensation is fully compensatory, and that it can place

²⁴ *Halsbury's Laws of England* (4th edn, Reissue) Vol 16, para 658, Vol 44(1), para 813.

²⁵ Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little Brown 1989) 28.

²⁶ Edward Fry, *A Treatise on the Specific Performance of Contracts* § 8 (Northcote ed, 6th edn 1921).

²⁷ Supreme Court of Judicature Acts of 1873 and 1875, later replaced by Supreme Court of Judicature (Consolidation) Act 1925

²⁸ see G H Treitel, 'Specific Performance in the Sale of Goods' (1966) JBL 211, 213; Stephen A Smith, 'Performance, Punishment and the Nature of Contractual Obligation' [1997] Mod LR 360, 364; Edward Yorio, 'In Defense of Money Damages for Breach of Contract' (1982) 82 Colum LR 1365.

²⁹ See the Contempt of Courts Act 1971, s 12; The Code of Civil Procedure 1908, Order 21 rule 32.

³⁰ Fionnghuala Cuncannon, 'The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand' (2004) 35 VUWLR 657, 660.

³¹ *In the matter of Gunput Narain Singh* (1875) 1 Cal 74.

³² Randy Barnett, 'Contract Remedies and Inalienable Rights' (1986) 4 Soc Phil & Pol 179.

³³ The Specific Relief Act 1963, s 14(1)(b).

the promisee in a position as if the contract is performed. By compensating the promisee, the promisor is free to follow a better opportunity in the market.³⁴

This economic approach, prevalent in American and English thought, supports and justifies breach of contract where performance would cost the promisor more than paying compensation to the promisee for the breach. The promisor can compensate the promisee for the loss arising from the breach in a manner and to an extent that the promisee shall be indifferent whether he receives performance or compensation. Economic theory supports compensation as the primary remedy based on this theory of 'efficient breach'.³⁵

Specific performance is not to be granted in cases where the promise sought to be enforced has minute details, or is complex, or involves performance of numerous acts over a period of time, the court has to spend more time for supervising enforcement of its decree. A court is required to attend, instead of its normal functions, to give effect to contracts which cannot be effectively supervised. Granting compensation also involves lower costs in terms of transacting, adjudication and monitoring enforcement, than in the case of remedy of specific performance.

Concerns of effective enforcement

It is important for the healthy growth of a legal system that orders of a court or tribunal must be effectively enforced. It is also important that honour and dignity of judges and courts be maintained. This requires that a court must be able to formulate an order capable of obedience by a defendant and of being enforced against him in case he does not comply with the order. This also requires that the modes of enforcing an order against such unwilling promisor must be capable of extracting such performance from him as would give in effect to the promisee such level and quality of performance as has been promised to him.

Difficulties of enforcement arise where the terms of the contract are not certain enough to formulate a precise decree, the cooperation of the promisor is necessary, the court is required to decide the quality of performance, and the court is required to supervise the enforcement.

Specific performance often requires the cooperation of both parties. After disputes have arisen, both parties would have hard feelings that can often result in a new dispute. After disputes have arisen, specific performance would keep parties in a hostile relationship. If the defendant 'pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.'³⁶

Actual performance is delayed till after the decree

Common law's approach to specific performance can be justified on the ground that often by passage of time between breach and decision of the proceeding, performance is no longer possible, or may be of no use to the promisee because the promisee may no longer desire it, perhaps because he has obtained the substitute, or also because he no longer wishes to deal

³⁴ Joseph G LoPresti, 'The Evolution of Specific Performance: A Discussion of Specific Performance and Equitable Damages before and after *Semelhago v Paramadevan*' (2002) 49 RPR (3d) 88.

³⁵ for example: X contracts to manufacture a machine for Y for a price of Rs 100. Before X begins the manufacture, he receives an order from Z for another type of machine at a price of Rs 150. X cannot fulfil both orders. If he breaks his contract with Y, it will cost Y Rs 120 to get it done from another supplier. Efficient breach theory encourages X to break his contract with Y, because after compensating Y by paying Y Rs 20, X is better off by Rs 30.

³⁶ *Cooperative Insurance Society Ltd v Argyll Stores Holdings Ltd* [1997] 3 All ER 297 (HL) [305] (Lord Hoffman).

with the promisor who has committed breach.³⁷ On the other hand, where compensation is the routine remedy, the promisor would like to break the contract because he becomes liable to pay it after a long period of time, i.e. after the decree.

Allows promisee to evade duty to mitigate

Specific performance should be rarely granted because its grant does not require that the promisee should have taken steps to mitigate his losses,³⁸ since the principle of mitigation is not applied to specific performance. A buyer of goods might seek specific relief simply because he has not mitigated.³⁹

On the other hand, in a claim for compensation for breach of contract, the promisee is required to mitigate losses.⁴⁰ This prevents the promisee from recovering compensation to the extent he could have avoided the loss. The operation of this principle compels the promisee to take immediate steps to reduce his losses, viz. by taking cover. This minimizes the loss for which the promisor can be made liable. Remedy of compensation thus encourages avoidance of waste.⁴¹ The promisee who mitigates protects his expectation interest in a way least costly to the promisor.

Present regime matches promisee's choice

The present regime matches promisees' choice. If the promisee were to choose his remedy after breach of contract, he would opt for specific performance in precisely the same circumstances in which the present regime grants it. It also matches the parties' choice if they choose their remedy at the time of making their contract. Were the parties to deliberate about the matter at the time of contracting, they will provide for specific performance where subject-matter is unique, and compensation where it is not.⁴²

Protection of interests of parties and of administration

A regime that restricts specific performance recognises that the promisors as well as the court administration have a legally protected interest in the remedy. Once the court intervenes for giving the remedy, it must protect this interest of the promisor. Promisors' interests deserve consideration because often he may have broken the contract for inability to perform.⁴³

Justification for making specific performance a routine remedy

Advocates support routine availability of remedy of specific performance broadly on grounds mentioned below. The most important bases for supporting easy availability of specific performance are:

³⁷ Suggested in Stephen A Smith, 'Performance, Punishment and the Nature of Contractual Obligation' [1997] Mod LR 360, 363.

³⁸ G H Treitel, 'Specific Performance in the Sale of Goods' (1966) JBL 211, 212.

³⁹ G H Treitel, 'Specific Performance in the Sale of Goods' (1966) JBL 211, 215.

⁴⁰ Section 73 of the Indian Contract Act 1872 provides: 'In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.'

⁴¹ Andrew Burrows, 'Specific Performance at the Crossroads' (1984) 4 LS 102, 107.

⁴² Anthony Kronman, 'Specific Performance' (1978) 45 U Chi LR 351, 369.

⁴³ Edward Yorio, 'In Defense of Money Damages for Breach of Contract' (1982) 82 Colum LR 1365.

Moral argument

It is a moral duty to keep promises.⁴⁴ It is not moral to break a contract and pay compensation instead. The principal justification in support of making specific performance the primary remedy is founded on the moral obligation of the promisor,⁴⁵ on the premise that it is of utmost importance to maintain sanctity of contracts. If the remedial regime rests on the moral notion that promises must be kept, specific performance must be the preferred remedy. This goal ought to be achieved despite higher costs of the remedy of specific performance.

Making compensation a primary remedy ‘fails to take into account notions of sanctity of contract and the resulting moral obligation to honor one’s promises’.⁴⁶ A legal system that favours compensation as a remedy appears indifferent to a moral harm (breaking a promise), and it permits making profit from breaking a contract.

Encourage performance and enable planning

It is stated that the common law position merely enables to replace the right to performance with an award of compensation.⁴⁷ It allows a party to benefit from his own wrong.⁴⁸ It encourages behaviour: “breach first, talk afterwards”.⁴⁹ The promisor is able to breach as of right. He is likely to take too few precautions, and choose to commit breach.⁵⁰

A legal system and the contract law seek to protect reliance on promises. They must ensure that expectations generated by promises must be fulfilled. That encourages faith in contracts. A system where a promisor is able to escape his promise because it is no longer profitable, renders difficult planning for contractual performance. Breach of a contract should be discouraged because it impedes smooth functioning of the role of contracts in a legal and economic system.

Where the remedy is more dependent on the facts and factors in the context of each case, it might be thought to undermine the ability to provide clear legal advice to parties entering into such obligations in the future.⁵¹ Where a promisee has the option to seek specific performance as of right, he can also make contract-specific investments, because he can plan with the confidence that he will realise the value of the contract by performance or enforcement. Under the present regime, there is considerable uncertainty of obtaining specific performance even in cases of contracts for transfer of immovable property, and other contracts that satisfy the inadequacy test. This prevents a plaintiff from seeking specific performance. Where specific performance is the primary or routine remedy, a plaintiff can be more assured of getting that relief at final judgment.

⁴⁴ Stephen A Smith, ‘Performance, Punishment and the Nature of Contractual Obligation’ [1997] Mod LR 360, 377: [C]ontractual obligation is based on the moral duty to keep your word.

⁴⁵ P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979); Stephen A Smith, ‘Performance, Punishment and the Nature of Contractual Obligation’ [1997] Mod LR 360, 362.

⁴⁶ Introductory note to Chapter 16 of the Restatement (Second) of Contracts (1979).

⁴⁷ Fionnghuala Cuncannon, ‘The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand’ (2004) 35 VUWLR 657, 657.

⁴⁸ Alan Schwartz, ‘The Case for Specific Performance’ (1979) 89 Yale LJ 271, 305.

⁴⁹ Ian R Macneil, ‘Efficient Breach of Contract: Circles in the Sky’ (1982) 68 Va LR 947, 968.

⁵⁰ Melvin Eisenberg, ‘Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law’ (2005) 93 Cal LR 975, 980.

⁵¹ Basil Markensinis, Hannes Unberath and Angus Johnston, *The German Law of Contract, a Comparative Treatise* (2nd edn, Hart 2006) 396.

Protect performance interest of the promisee

‘Expectation interest’, a term coined by Fuller and Purdue in their seminal article analysing the remedy of compensation,⁵² is that interest which puts ‘the plaintiff in as good a position as he would have occupied had the defendant performed his promise.’⁵³ Specific performance is the most accurate method of fulfilling the promisee’s expectation interest, because this gives him the very thing he has purchased or has been promised.

The essence of contract is performance. Contracts are made in order to be performed,⁵⁴ and not “to win a law suit”.⁵⁵ The true right of the promisee is the right to have the contract performed. This is a primary right and can usually and easily be protected before the injury has occurred.⁵⁶ It imposes a primary duty on the promisor. It is a right that breach shall not occur.

A decree of compensation does not fully compensate

Although a decree of damages is stated to satisfy the compensation goal of remedies and to put the promisee in a position as if contract is performed, compensation in most cases does not fully compensate the promisee, because compensation cannot be fully ascertained. It is not possible to prove the amount of loss with certainty. When level of compensation is low, there are chances of excessive breach and expensive adjudication.⁵⁷ ‘The class of cases in which damage awards fail to compensate promisees adequately is broader than the class of Substitutional damages cannot be precisely estimated, and may be difficult to prove. The precise amount which promisee needs to obtain the substitute cannot be calculated. Identical or similar goods, though available, might not have the same features. They might come with different warranty terms, lower brand name recognition or lower quality. Differences in value arising out of such factors are difficult to evaluate and prove.’⁵⁸ Difficulty is greater when identical goods are not available because goods have become obsolete. A court’s estimate may not be accurate of the difference between the value to the promisee of the subject matter and the price of the closest substitute. A court might view as unforeseeable certain costs, viz

⁵² L L Fuller and William Purdue, ‘The Reliance Interest in Contract Damages’ (1936) 46 Yale LJ 52: this article does not analyse the remedy of specific performance.

⁵³ Term first appeared in L L Fuller and William Purdue, ‘The Reliance Interest in Contract Damages’ (1936) 46 Yale LJ 52, 54: its aim being ‘to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise’.

⁵⁴ Daniel Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 LQR 628, 629: ‘This is usually the one and only ground for their formation.’

⁵⁵ Fionnghuala Cuncannon, ‘The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand’ (2004) 35 VUWLR 657, 663; See UCC (2003) § 2-609 comment 1: ‘the essential purpose of a contract between commercial [actors] is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit.’; See also UCC (2003) § 2-609 comment 1: ‘a continuing sense of reliance and security that the promised performance will be forthcoming when due . . . is an important feature of the bargain.’

⁵⁶ Charlie Webb, ‘Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation’ (2006) 26 OJLS 41, 46: A remedy that compensates him to put him in a position as if contract is performed is a secondary right and protects his ‘compensation interest’.

⁵⁷ Thomas Ulen, ‘The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies’ (1984) 83 Mich LR 341, 365-66.

⁵⁸ Alan Schwartz, ‘The Case for Specific Performance’ (1979) 89 Yale LJ 271, 275-77; also Thomas Ulen, ‘The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies’ (1984) 83 Mich LR 341, 363.

arising from scarcity of products at a certain time.⁵⁹ Moreover, loss or amount of compensation is difficult to establish.

Incidental damages⁶⁰ are difficult to calculate in terms of money. Losses incurred in finding substitutes generally involve time and effort which cannot be easily calculated or established in terms of money. A decree of compensation will not fully compensate the costs of the promisee towards dispute settlement, time lost and the risk of promisor becoming unable or disabled from performing. They are especially undercompensatory because of passage of time from the date of breach until the date it will be enforced.

Calculation of losses often ignores loss of reputation, and the value of time and effort spent during continuance of contract, effect of taxation, impact of upsetting inflow and outflow of funds, upsetting schedule of availability of funds for the contract project, effect of upsetting tax planning etc. All losses arising from breach cannot be claimed, or effectively proved. There is also no assurance that losses claimed will be granted by the court. Doctrines of causation⁶¹ and remoteness,⁶² foreseeability,⁶³ and mitigation⁶⁴ which restrict compensation, are further hurdles to calculation and grant of full compensation, and also increase litigation costs.

A promisee may become unable to prove compensation because he is unable to obtain or collect persuasive evidence. Recovery of compensation is possible only to the extent that compensation is provable with reasonable certainty. Promisee's liability under other contracts made by him for completing his task or job, may not get fully reflected in the assessment of compensation. Specific performance will especially be desirable where breach of the contract will affect its many stakeholders.

Where the quantum of compensation is to be estimated on the basis of evidence, there is a possibility of error in estimating and deciding compensation, viz. cost of buying substitutes, or amount of difference between the contract and purchase price, or other losses. This risk is higher in cases of sales across diverse markets, viz. international sales, or in cases where identical goods are not available.

Subsequent events do not affect promised performance

Compensation is calculated with reference to the date of breach. Moreover, interest on compensation is rarely awarded.⁶⁵ If the promisee succeeds in establishing breach, but is not granted specific performance, he gets compensation calculated at the time of breach

⁵⁹ Amy Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 Wash LR 607, 615, footnote 45.

⁶⁰ viz. costs of finding the substitute, loss of time in doing so.

⁶¹ The Indian Contract Act 1872, s 73 para 1: The promisee must show that his loss is caused by the breach.

⁶² The Indian Contract Act 1872, s 73 para 2: Compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

⁶³ The Indian Contract Act 1872, s 73 para 1: compensation can be awarded only for such losses as were known to parties when they made the contract, to be likely to result from the breach.

⁶⁴ The Indian Contract Act 1872, s 73 Explanation: compensation cannot be recovered to the extent the promisee could have avoided the loss.

⁶⁵ see *Aditya Prasad v Chhote Lal* AIR 1924 Oudh 319; *Ratanlal Khushalrai v Brijmohan Pralhadka* AIR 1931 Bom 386; *Sri Sri Sri Palahari Mahant Raja Ram Doss Bavaji v Sri Sri Sri Gajapathi Krishna Chendra Deo Garu* AIR 1933 Mad 729; *Syed Shah Masood Ahmad v Bikan Mahuri* AIR 1941 Pat 6; *Sheikh Mehtab v Dharmrao Bhujangrao* AIR 1944 Nag 330.

diminished in value on account of inflation, whereas the promisor retains the benefit of appreciation of property.⁶⁶ This is avoided where the promisee gets specific performance.

Avoids limitations relating to award of compensation

A promisee in a broken contract can claim those losses which were foreseeable *at the time of making the contract*; this, it is suggested, is strange. If a contractual obligation is mandatory and non-optional (unless excused), and its promisor elects not to perform, he ought to be liable for all loss which arises as a consequence. Applying the principle of foreseeability to the date of breach 'reflects the idea that breach is a wrong for which the promisor must take responsibility'.⁶⁷ The principle of foreseeability, if it should, limit liability with reference to what was foreseeable at the time of breach rather than formation.⁶⁸ A decree of specific performance will give the promisee full relief unfettered with the limitation of foreseeability.

A promisee is put into a dilemma when specific performance is not available as of right.⁶⁹ This is because when the promisee is able and expected to mitigate, there is no right of specific performance. Conversely, when specific performance is available to remedy a breach, there is usually no duty to mitigate. Thus if the promisee attempts to mitigate, he may undermine his chances of obtaining equitable relief and that remedy is ultimately denied, his compensation may be reduced by the amount of the avoidable loss. If he decides to keep the contract alive and seek specific performance, he will be unable to claim entire losses for his failure to mitigate if the court denies specific performance and awards compensation.⁷⁰ The remedy of specific performance avoids this dilemma if it is routinely granted.

Compensation must be pleaded. A plaintiff must prove, in addition to the terms of the contract and its breach, also the items of his loss, and the quantum. Deficient pleadings might deprive a plaintiff from a full compensation of the loss he has suffered. Where specific performance is the rule, such difficulty is avoided.

Enables parties to choose remedy

Where remedies of specific relief are not exceptional, the promisee gets to choose his remedy. Since a plaintiff is the one injured, he should be able to choose his remedy, whether specific performance or compensation. He can decide for himself whether compensation will suffice; if so, he will seek an order of compensation rather than performance. If it would not be sufficient, he will seek specific performance.

Where specific performance is the primary remedy, the system permits the promisee to decide whether a decree of compensation will fully compensate any loss. Promisees have better information than courts as to the requirements of trade, expectations of parties under the contract, about the promisor's personal information, adequacy of compensation and difficulties of coercing performance, and of costs that any breach imposes on them and their

⁶⁶ See for example *Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel* AIR 2001 SC 1462 in which a concurrent decree of specific performance was set aside in the Supreme Court. However compensation was not ordered because it was not claimed. For a comment about the case, see Nilima Bhadbhade, 'Supreme Court on a Development Contract: an Analysis based on Principles of Contract and Specific Relief' (2006) AIR Jour 177.

⁶⁷ Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harv LR 708, 724.

⁶⁸ Melvin Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 Cal LR 975, 994-995.

⁶⁹ Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little Brown 1989) 181.

⁷⁰ Donald Clark, 'Will That Be Performance . . . Or Cash?: Semelhago v Paramadevan and the Notion of Equivalence' (1999) 37 Alb LR 589.

promisors. Promisees can predict whether decree of specific performance would induce their promisor to render satisfactory performance.⁷¹ 'If the matter, or rather the meaning of the word "adequate" is to be judged from [the plaintiffs'] point of view, then it is clear that they do not consider it adequate, otherwise they would ask for the money and not for specific performance.'⁷² Neither will a party seek, nor will he be advised specific performance where goods are available in the market. Hence the promisee must be allowed to choose specific performance. It has been stated: 'The very fact that a promisee requests specific performance thus implies that compensation is an inadequate remedy.'⁷³

Favour victim of breach

The present system takes a promisor-centred approach. The contract law, particularly relating to remedies, is directed to give relief to the promisee to redress breach, rather than compel a promisor to prevent breach.⁷⁴ The existing law focuses on attempting to make the promisee whole, rather than compelling the promisor to abide by his promise. It favours the contract breaker. It is suggested that law should err on the side of protecting the promisee rather than the promisor.⁷⁵

Promisor will not defeat promisee's rights pending suit

Where specific performance is not available as of right, but based on the court's finding about inadequacy or satisfaction of other criteria for grant of equitable relief, the plaintiff can never be sure about the remedy. Moreover, when the defendant can change the situation and make transactions pending litigation, enforcing an order of specific performance becomes more difficult. Many a defendant has pleaded rise in prices as a defence in a suit for specific performance.⁷⁶ The defendant can create circumstances in such manner that a plaintiff's rights can be defeated by events after the suit. When specific performance is routine, promisors will refrain from changing the situation pending proceedings.

Burden of proof will lie on contract breaker

The present approach to remedies places a double burden on the promisee of proving his entitlement of remedy.⁷⁷ Having proved the terms of the contract and breach, he is also required to prove that loss has occurred, and its value in money terms. There may be difficulties in proving both these things. Making specific performance a routine remedy avoids these difficulties.

The concerns of effective enforcement

⁷¹ Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale LJ 271, 277.

⁷² *Brij Ballabh Das v Mahabir Prasad* AIR 1924 All 529.

⁷³ Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale LJ 271, 277.

⁷⁴ E Allan Farnsworth, 'Damages and Specific Relief' (1979) 27 AJCL 247; Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale LJ 271, 297.

⁷⁵ Fionnghuala Cuncannon, 'The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand' (2004) 35 VUWLR 657, 680.

⁷⁶ *Gaya Prasad v Surendra Bahadur Singh* AIR 1987 SC 925; *S V R Mudaliar v Rajabu F Buhari* AIR 1995 SC 1607; *Kanshi Ram v Om Prakash Jaiswal* AIR 1996 SC 2150; *K S Vidyadnam v Vairavan* AIR 1997 SC 1751; *Gobind Ram v Gian Chand* AIR 2000 SC 3106; *V Pechimuthu v Gowrammal* AIR 2001 SC 2446; *Nirmala Anand v Advent Corporation (P) Ltd* AIR 2002 SC 3396; *P S Ranakrishna Reddy v M K Bhatyalakshmi* AIR 2007 SC 1256; *Lala Sumer Chand Goel v Rakesh Kumar* AIR 2002 All 82.

⁷⁷ Randy Barnett, 'Contract Remedies and Inalienable Rights' (1986) 4 Soc Phil & Pol 179.

The prestige, honour and authority of courts and judges must be preserved. Ineffective or inexecutable orders erode faith of public in the court system, and ultimately in the legal system. The perception that orders will be obeyed also makes persons law-abiding. A court's ability to enforce effectively any judgment is an important factor in granting relief of specific performance or injunction. This is the test of effective enforcement.⁷⁸

In cases where the test of inadequacy is met, an important basis of restricting the relief of specific performance (or injunction) is that the relief, if granted, will be useless, undesirable, difficult or impractical to enforce on various grounds.⁷⁹ This constraint will restrict grant of specific performance even if it was a routine or primary remedy.

The problem of effective enforcement arises where the contract terms are such that they do not enable formulating a decree, or that enforcing their performance would entail constant supervision or other difficulties. Compensation remains the only practical remedy in such cases. There are other cases where compensation is a better remedy than specific performance, because it serves the interests of both, the promisor and the promisee.

There are three reasons for such a limitation: (i) compelling a recalcitrant promisor into performing will not be in promisee's interest, (ii) judicial prestige will suffer if orders are flouted, and (iii) courts should not waste judicial resources.

Any order of a court must be capable of effective enforcement. Courts would want to and must ensure performance. Enforcement involves costs on the party seeking enforcement and upon the administrative system. Enforcement is therefore effective where it balances the costs incurred by the promisee and by the legal system. There is no fixed, absolute or objective level of ease of enforcement.⁸⁰

Practical difficulties of enforcement and cost-effectiveness of remedies is of universal concern across all legal systems. Contracts will not be enforced for this reason where the obligation requires rendering personal service,⁸¹ or employing someone in personal service,⁸² or the contract involves giving services of a personal character;⁸³ or where costs of supervision of a court's order are disproportionate to the advantages of enforcement or harm suffered by its denial;⁸⁴ or where performance is not possible,⁸⁵ or is impracticable;⁸⁶ or

⁷⁸ The term 'enforcement' is broader than 'execution' which is the means of enforcing the decree or order.

⁷⁹ found in section 14 of the Specific Relief Act 1963.

⁸⁰ Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little Brown 1989) 48: 'the key to understanding practical limitations ... lies in the recognition that no fixed or absolute level of ease of enforcement or certainty is required for specific performance or an injunction.'

⁸¹ Principles of European Contract Law, art 4.102; UNIDROIT Principles, art 7.2.2; the Maryland Code, art 22-811; the California Code, art 3390; the Massachusetts General Laws, art 1A of Chapter 214; the Ethiopian Civil Code, art 1776: (if it can be enforced without affecting personal liberty of the promisor).

⁸² The California Code, art 3390.

⁸³ Swedish law: Jan Hellner, 'Specific Performance in Swedish Contract Law', *Scandinavian Studies in Law*, (1999) Vol 38, 13.

⁸⁴ Restatement (Second) of Contracts (1979), § 366.

⁸⁵ German law: Dagmar Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart 2005).

⁸⁶ The Louisiana Civil Code, art 1986; see also John Fitzgerald, 'CISG, Specific Performance and the Civil Law of Louisiana and Quebec' (1997) 16 JLC 291.

where terms of the contract are not certain;⁸⁷ or where enforcement affects the liberty of the promisor.⁸⁸

By the very nature of remedy, a decree of injunction does not suffer this constraint.

Factors that influence effectiveness of enforcing a decree of specific performance are:

1. ability to define with precision the terms of a decree,
2. protecting the essential liberty of the promisor,
3. extent of cooperation required of the promisor in enforcing performance,
4. extent of court's supervision expected that will ensure full compliance by the promisor,
5. possibility of repeated breaches by the promisor,
6. possibility of achieving full satisfaction of the order of specific performance.

In the Indian law, these limitations are enumerated in Section 14 of the Specific Relief Act 1963. These are:

1. a contract for the non-performance of which money is adequate relief; however, an agreement to execute a mortgage deed can be enforced;
2. a contract which runs into minute or numerous details;
3. a contract which involves performance of a continuous duty⁸⁹ which the court cannot supervise, viz. promise to do business,⁹⁰ to construct a building;⁹¹
4. a contract dependent on personal qualifications or volition of the promisor,⁹² viz compelling an artist to paint or an author to write; especially contracts of employment;⁹³
5. a contract which is determinable,⁹⁴ i.e., a contract which can be terminated by a party at any time;
6. the contract is such that otherwise from its nature, the court cannot enforce specific performance of its material terms;⁹⁵ viz, it is vague, i.e. certain enough to enforce, but material terms are not specified as would enable a decree on those terms,⁹⁶ or the decree would require enforcement outside India.⁹⁷

The inadequacy test in Indian law

⁸⁷ The California Code, art 3390 (not sufficiently certain to make the precise act which is to be done clearly ascertainable).

⁸⁸ The Ethiopian Civil Code, art 1774; for Finnish law: see Jussi Koskinen, 'CISG, Specific Performance and Finnish Law' (1999) Publication of the Faculty of Law of the University of Turku, Private law publication series B:47.

⁸⁹ *Nathu Lal v Munni Lal* AIR 1927 Lah 898; *Vipin Bhimani v Sunanda Das* AIR 2006 Cal 209.

⁹⁰ *Karri Venkatareddy v Kollu Narasayya* (1908) 1 IC 384 (Mad).

⁹¹ *Ramchandra Ganesh Purandhare v Ramchandra Kondaji Kate* (1898) 22 Bom 46; *K M Jaina Beevi v M K Govindaswami* AIR 1967 Mad 369.

⁹² *Makharia Brothers v State of Nagaland* AIR 1999 SC 3466; *Najibulla Sardar v Harimohan Mitra* AIR 1932 Cal 481; *In the matter of Gunput Narain Singh* (1875) 1 Cal 74.

⁹³ *Vidha Ram Misra v Managing Committee Shri Jai Narain College* AIR 1972 SC 1450; *Nandganj Sihori Sugar Co Ltd v Badri Nath Dixit* AIR 1991 SC 1525.

⁹⁴ *Indian Oil Corporation Ltd v Amritsar Gas Service* (1991) 1 SCC 533; *Airport Authority of India v Dilbagh Singh* AIR 1997 Del 340.

⁹⁵ *Mohunta Bhagwan Das v Surendra Narain Singh* (1917) 42 IC 521; *Naresh Chandra Roy v Union of India* AIR 1987 Cal 147.

⁹⁶ *Pratibha Singh v Shanti Devi Prasad* AIR 2003 SC 643.

⁹⁷ *Suresh Jindal v Rizsoli Corriere Della Sera Prodzioni* AIR 1991 SC 2092.

The inadequacy test⁹⁸ is the primary test any plaintiff must satisfy for seeking specific performance or injunction. Specific performance is not granted unless proper relief cannot otherwise be obtained. Even where the contract provides for a remedy, specific performance is available if such remedy is inadequate.⁹⁹ Remedy is generally considered inadequate when money relief will not be adequate. A plaintiff is therefore required to show at the threshold that compensation will not give him adequate relief. This is a feature of legal systems following the common-law tradition. This ‘adequacy-of-alternative-remedies’ test is described as the ‘first hurdle a claim for equitable relief must overcome’.¹⁰⁰ Specific performance becomes an exceptional remedy primarily because of the inadequacy test.

The Indian law applies the inadequacy test to suits for specific performance of contracts, and to injunctions for enforcing obligations arising from contracts. Specific performance of a contract can be claimed in two cases: firstly when compensation *cannot be ascertained*; and when compensation would be *inadequate*. This threshold test of inadequacy is found in section 10 of the Specific Relief Act 1963, which provides:

- ...the specific performance of any contract may, in the discretion of the court, be enforced-
- (a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or
 - (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Two rebuttable presumptions operate upon the question of inadequacy:¹⁰¹

1. in cases of contracts to transfer immovable property, there is a presumption that compensation will not be adequate;
2. in cases of contract to transfer movable property there is a presumption that compensation is an adequate remedy.

Other systems

In the English law, specific performance cannot be granted where a money payment affords an adequate remedy.¹⁰² In general specific performance of a contract relating to land is granted as a matter of course.¹⁰³ Specific performance for contract to sell or purchase goods may be granted if these are not easily available in the market, or are unique or of special character, or are not an ordinary article of commerce, or if substantial delay and loss of profit will be involved in obtaining a substitute; also if there is a doubt whether a judgment for compensation will be satisfied.¹⁰⁴ It has, however, been said that the test is now whether it is just to confine a plaintiff to compensation,¹⁰⁵ indicating that courts might take an approach of comparing remedies, rather than requiring the threshold bar of inadequacy.

⁹⁸ also referred as the ‘adequacy test’: see Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little Brown 1989) 25; E Allen Farnsworth, *Contracts* (3th edn, Aspen 1999) 767.

⁹⁹ The Specific Relief Act 1963, s 23: provision in the contract for liquidated damages is no bar to specific performance.

¹⁰⁰ Edward Yorio, *Contract Enforcement: Specific Performance and Injunctions* (Little Brown 1989) 25.

¹⁰¹ The Specific Relief Act 1963, explanation to s 10.

¹⁰² *Halsbury’s Laws of England* (4th edn, Reissue) Vol 44(1), para 813.

¹⁰³ *Halsbury’s Laws of England* (4th edn, Reissue) Vol 44(1), para 825.

¹⁰⁴ *Halsbury’s Laws of England* (4th edn, Reissue) Vol 44(1), para 814.

¹⁰⁵ *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 (CA) [1005] (Sachs LJ); reversed on the question of assessment of damages [1976] 2 Lloyd’s Rep 17 (HL).

In the USA, specific performance is available if the plaintiff has no adequate remedy at law for breach of contract.¹⁰⁶ It will not be granted unless proper relief cannot otherwise be obtained.¹⁰⁷ This equally applies to a contract providing remedy for its own enforcement; if it is inadequate, specific performance can be given. There is an increasing disposition to find that compensation is not adequate, and the courts take a liberal approach.¹⁰⁸

In respect of transaction of goods, Article 2 of UCC¹⁰⁹ provides: ‘Specific performance may be decreed where the goods are unique or *in other proper circumstances*.’¹¹⁰ The Official Comment explains the article. Specific performance is no longer limited to specific or ascertained goods. The test of uniqueness must be made in terms of the total situation which characterizes the contract. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted “in other proper circumstances”. This provision has liberalised the availability of specific performance as a remedy. The use of the phrase “other proper circumstances” provides flexibility necessary to judge the constantly changing commercial contracting practices. Proper circumstances have to do with replaceability. The inability to cover may be strong evidence of such circumstances. The plaintiff has to prove difficulty of cover.¹¹¹

In the State of California in the USA,¹¹² the Civil Code from the California Codes provides for the remedy of specific performance. It can be compelled if ‘it would otherwise be an appropriate remedy’. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is *conclusive*. In all other cases, this presumption affects burden of proof. As regards contracts to sell or lease goods, specific performance can be decreed if goods are unique or in other proper circumstances.

In the civil law countries, specific performance is the primary remedy. However, the circumstances that compensation will be sufficient relief can be considered by the court, and a court will refuse specific performance in the same circumstances as any court in the common law system.¹¹³ Thus, possibility of cover or availability of substitutes might restrict the right of the promisee to seek specific performance, or the power of a court to grant it.

The PECL and UNIDROIT Principles give a clear right of specific performance, yet the remedy is not available where the promisee may reasonably obtain performance from another source.¹¹⁴ These, therefore, do not require the threshold test of inadequacy, but nevertheless do not recognise the right to performance where the promisee can obtain cover.¹¹⁵ The CISG

¹⁰⁶ 81A CJS *Specific Performance* § 1 (2006).

¹⁰⁷ 81A CJS *Specific Performance* § 5 (2006).

¹⁰⁸ Restatement (Second) of Contracts (1981), Chapter 16, Introductory Note.

¹⁰⁹ UCC § 2-102.

¹¹⁰ UCC § 2-716 (1).

¹¹¹ *Magellan International Corporation v Salzgitter Handel GmbH* 76 F Supp 2d 919 (ND Ill 1999).

¹¹² The California Civil Code, ss 3384, 3395, 3386, and the California Commercial Code, ss 2716 and 10521.

¹¹³ See John Fitzgerald, ‘CISG, Specific Performance and the Civil Law of Louisiana and Quebec’ (1997) 16 JLC 291. See also William Jaynes, ‘Obligations--Specific Performance of Obligations to Do or Not to Do in Louisiana’ (1983) 57 Tul LR 1577, 1583 (Note); Ole Lando, ‘Article 28’, *Bianca-Bonell Commentary on the International Sales Law*, (Giuffrè, Milan 1987) 232, 233.

¹¹⁴ Principles of European Contract Law, art 9:102; UNIDROIT Principles, art 7.2.2.

¹¹⁵ Principles of European Contract Law, comment below art 9:102.

also gives the right to require performance to both the seller and the buyer.¹¹⁶ The Convention thus favours specific performance when it provides by way of general principle that a party is entitled to require performance by the other party, though this is curtailed by the provision that a court may not grant performance unless it would under its own law in respect of similar contracts.¹¹⁷

Meaning of ‘inadequate’

The term ‘inadequacy’ of compensation has a number of possible connotations.¹¹⁸ These are as follows:

Difficulty of proving loss

Difficulty of proving loss or compensation renders the remedy of compensation inadequate. Under the Specific Relief Act 1963, specific performance can be granted where there is *no standard to ascertain actual damage* caused by the non-performance of the act agreed to be done. This refers to cases where there is no criterion, benchmark, model or measure for finding, establishing or determining the loss caused by non-performance. Loss caused by the breach in such cases is too difficult to determine with reasonable certainty and cannot be easily established by evidence.

This refers to cases where there is uncertainty in calculating compensation, as they depend much on conjecture, viz in cases where subject-matter of the contract is unique;¹¹⁹ or the promisee has special interest or value in performance of the contract,¹²⁰ or where losses arising from breach would be of a speculative nature, or breach affects an interest which cannot be valued. The contract may affect a personal or a commercial interest.

Unique subject matter

A subject-matter will be unique when it possesses important physical characteristics that other available goods do not possess,¹²¹ it is something unique in character that cannot be duplicated,¹²² or where a substantial equivalent will involve difficulty, delay and inconvenience.¹²³ For example, a work of art is considered unique, compensation being unascertainable. In addition, it is difficult to assess compensation in such cases because there may not be similar objects in the market to compare the work of art and estimate a value. In *Falcke v Gray*,¹²⁴ the court granted specific performance of a contract to transfer two ‘Oriental jars with great ugly Chinese pictures upon them’ because it was ‘altogether doubtful

¹¹⁶ CISG, arts 46 and 62.

¹¹⁷ CISG, art 28.

¹¹⁸ Possible six meanings of its counterpart term ‘irreparable harm’ : Jeffrey Berryman, Vaughan Black, Jamie Cassels, Michael Pratt, Kent Roach and Stephen Waddams, *Remedies: Cases and Materials*, (5th edn, Emond Montgomery Publication 2006).

¹¹⁹ Illustration of clause (b) to section 12 of the Specific Relief Act 1877 (now repealed); Restatement (Second) of Contracts (1981), § 360 note b.

¹²⁰ although this is considered as a case of inadequacy rather than unascertainability: see the Specific Relief Act 1963, s 10 explanation cl (ii) s-cl (a).

¹²¹ Andrew Burrows, ‘Specific Performance at the Crossroads’ (1984) 4 LS 102, 103.

¹²² Anthony Kronman, ‘Specific Performance’ (1978) 45 U Chi LR 351, 358.

¹²³ Anthony Kronman, ‘Specific Performance’ (1978) 45 U Chi LR 351, 358.

¹²⁴ (1859) 29 LJ 28, (1859) 4 Drew 651, (Kindersley VC).

what price they will fetch.’ Universally,¹²⁵ specific performance of a contract relating to land is granted as a matter of course.

Special value to plaintiff

Specific performance will be granted if the subject-matter of the contract, i.e. act of which performance is sought, is valued by the promisee, though the object may have very small intrinsic value or no value for any other person. The promisee will have lost something more than what money will be able to compensate. This promisee seeks the very thing promised because his taste or sentiment are involved. It may be special to him, because of affection, special association, special taste, which gives such a thing a value for him much beyond its intrinsic value. It is his “idiosyncratic interest”.¹²⁶

For example, *P* promises to sell to *Q* a specific used and worn garment, but fails to deliver it. Seen objectively, compensation for non-performance is ascertainable and adequate, and might be equal to price of the garment. If the garment once belonged to a well-known personality, it is unique, and not obtainable in the market, and hence compensation is not ascertainable. If it once belonged to an ancestor of *Q*, it is of special value to *Q*. Similarly, a currency note is an easily available article. But the first one which the business has earned is special.¹²⁷

In some cases goods, otherwise available from sources, are peculiar because they serve the buyer’s purpose, viz. he wants all existing machines of a factory with its parts, because he finds the particular machines reliable.¹²⁸ The special value to the promisee may be security without which the promisee will not have the advantage of people entering into agreements with him. Without specific relief, viz. injunction, the promisee would not have made the agreement at all, and would not have an adequate remedy.¹²⁹ The promisee may have special value because completing the agreement gives him benefits other than completion of the contract, or because his not completing it deprives him of an advantage.¹³⁰

Difficulty of obtaining a suitable substitute performance:

‘Damages are most obviously an adequate remedy where the claimant can get a satisfactory equivalent of what he contracted for from some other source’.¹³¹ Compensation is not inadequate if substitutes are available, if the promisee can have his promise performed through alternative sources. Where the goods or services promised can be obtained from alternative sources, compensation can be easily calculated as (i) the difference between the contracted price and the price at which these are available in the market or from alternative sources, and (ii) expenses incurred in finding and obtaining substitutes.

¹²⁵ *Halsbury’s Laws of England* (4th edn, Reissue) Vol 44(1), para 825; 81A CJS *Specific performance*, § 56 (2006).

¹²⁶ Peter Linzer, ‘On the Amoralism of Contract Remedies – Efficiency, Equity and the Second Restatement’ (1981) 81 Colum LR 111, 131.

¹²⁷ Melvin Eisenberg, ‘Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law’ (2005) 93 Cal LR 975, 1038.

¹²⁸ Melvin Eisenberg, ‘Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law’ (2005) 93 Cal LR 975, 1033.

¹²⁹ *South Indian Export Co v A Subba Naidu* (1910) 7 IC 243 (Mad).

¹³⁰ *Frank Simoes Advertising (P) Ltd v Hada Leasing and Industries Ltd* AIR 1988 Del 362 (loss of accreditation).

¹³¹ Guenter Treitel, *The Law of Contract* (10th edn, Sweet and Maxwell 1999) 950.

The same principle is applied to contracts with such other subject-matter for which there is no available substitute. In *Jabalpur Cable Networks Pvt Ltd v ESPN Software India Pvt Ltd*,¹³² first held that satellite signals for transmission to cable-operators were ‘goods’, and then observed that they were not ordinary article of commerce, nor were easily obtainable in the market; nor was there any standard of ascertaining loss caused signals were not available.

Two questions arise in this context: (i) are alternatives available, (ii) are these effective substitutes? Compensation will be effective remedy only where alternative sources will give an effective substitute for the subject-matter promised.

The Specific Relief Act 1963 provides that specific performance can be given when the act agreed to be done is such that for its non-performance *compensation in money would not afford adequate relief*. Specific performance of a contract to transfer land is granted for this reason, because it is presumed that compensation will not be adequate relief for its non-performance. Clause (ii)(a) of Explanation to section 10 of the Specific Relief Act 1963 refers to two situations: (i) where goods are not an ordinary article of commerce, and (ii) where these are not easily obtainable in the market.

Not an ordinary article of commerce

An ordinary article of commerce is one that is ordinarily offered for sale. It is an article or product that can be used for commerce, or is traded. It is easily replaceable.¹³³ It has been held that the words ‘property which is not an ordinary article of commerce’ in cl (ii)(a) of the Explanation to section 10 of the Specific Relief Act 1963 do not contemplate an article manufactured or prepared at the instance or specification of a contracting party,¹³⁴ but mean certain rare things which could not be produced or manufactured even at the specification or behest of the contracting party. Goods are not ordinary articles of commerce merely because they are available only in certain locations, viz. minerals from mines.¹³⁵

Not easily obtainable in the market

There may be situations in which the goods contracted for are not unique but it is very difficult or costly for the promisee to buy the goods elsewhere. Clause (ii)(a) of the Explanation to section 10 of the SRA refers to substitute goods that are available but are “not easily obtainable in the market”. Specific performance can be granted in cases where the subject matter is available in the market, but not easily available.

Reference to goods “not easily obtainable in the market” was introduced into the Specific Relief Act 1963 after the recommendation of the Law Commission of India in its 9th Report,¹³⁶ which observed:

The last exception has been specially developed in the United States’ Courts have enforced specific performance of contracts to furnish gas, water or other necessary materials to a manufacturing establishment, where the thing contracted for is not immediately available from other sources and a breach of the contract would stop the operations of the plaintiff’s establishment. The same principle is applied where the goods are such that they can be supplied by no one except the defendant. A contract to

¹³² AIR 1999 MP 271.

¹³³ Jeffrey Berryman, Vaughan Black, Jamie Cassels, Michael Pratt, Kent Roach and Stephen Waddams, *Remedies: Cases and Materials*, (5th edn, Emond Montgomery Publication 2006) 693.

¹³⁴ *Maheswari & Co Pvt Ltd v Corporation of Calcutta* AIR 1975 Cal 165; *Rajasthan State Electricity Board v Hindustan Brown Boveri Ltd* AIR 1969 Raj 212.

¹³⁵ *Vijaya Minerals Pvt Ltd v Bikash Chandra Deb* AIR 1996 Cal 67.

¹³⁶ Law Commission of India, *Ninth Report* (1958) para 23.

furnish stone from a certain quarry for building was enforced where the stone was a peculiar colour and the building was partially constructed from the stone already furnished. Even a contract for the delivery of a motion picture film to an exhibitor has been enforced.

In view of the vast economic developments which are taking place in India, we would recommend the adoption of this exception from the American law.¹³⁷

Thus, not mere availability of similar goods, but other issues concerning the supply must also be considered, viz. transport facilities, availability without interruption, regular supply, delay in procurement etc. In *Jairam Valji v Indian Iron & Steel Co.*,¹³⁸ the defendant, one of the two steel works in India, agreed to purchase its entire requirement of dolomite and limestone from the plaintiff, and no one else. Granting injunction, the court observed:

The fact that the contract is a permanent one, and the uncertainty whether new processes of manufacture may not reduce the defendants' requirements on the one hand, and on the other whether war conditions may not be productive of increased orders make damages impossible to calculate. It was said and not challenged that the only steel works in this country are those of the defendants and Messrs Tatas. It appears therefore that the plaintiff is unlikely to find an alternative market for his goods if the defendants cease to take them.¹³⁹

Applying the inadequacy test

The promisee who seeks specific performance, whether as final or interim relief, must show his entitlement to the relief, i.e. that compensation is unascertainable or inadequate. When he seeks specific performance or injunction, he will plead inadequacy. He must also prove inadequacy. If he has the benefit of one of the presumptions applicable to contracts to transfer immovable or movable property, he must plead and prove the circumstances that will give him the benefit of that presumption.

Although the plaintiff alleges and brings evidence that indicates that compensation is an inadequate remedy, the fact of inadequacy of compensation is a matter of inference to be drawn by the court from the true nature of the contract, the promises made, and other circumstances arising from the case before it. Where there exists a presumption, the plaintiff will establish facts and circumstances that will enable the court to draw the presumption. The defendant, whether to rebut the presumption or otherwise, will seek to establish that compensation is an adequate remedy. Thus, factors that establish adequacy of compensation, or inadequacy, become relevant in each case relating to specific performance. In a proceeding for specific performance, if the plaintiff seeks to establish inadequacy, the defendant can seek to establish the reverse.¹⁴⁰ It is for the judge to decide inadequacy.

Aspects of procedure

Establishing inadequacy in a suit involves identifying the obligation to be enforced, its categorisation (to enable applying of presumptions), and applying the presumption, else proving factors that show that compensation is inadequate, viz. uniqueness, subjective preference of the plaintiff, non-availability of substitutes, difficulty of ascertaining losses. The difficulties and concerns involved in establishing these factors are also discussed.

¹³⁷ Law Commission of India, *Ninth Report* (1958) 10.

¹³⁸ AIR 1940 Cal 466.

¹³⁹ *Jairam Valji v Indian Iron & Steel Co* AIR 1940 Cal 466.

¹⁴⁰ See the Indian Evidence Act 1872, s 5: 'Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue ...'.

Identifying the contract

A question arises whether the inadequacy test is to be applied with reference to a category of contracts to which the contract in question belongs, or to the contract in question as a whole, or to the precise promise within the contract which the plaintiff wishes to enforce ?

Section 10 of the Specific Relief Act 1963 provides:

10. Cases in which specific performance of contract enforceable
Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-
- (a) when there exists no standard for ascertaining actual damage caused by the non-performance of *the act agreed to be done*; or
 - (b) when *the act agreed to be done* is such that compensation in money for its non-performance would not afford adequate relief. ...
- (emphasis added)

Section 10 refers to a standard for ascertaining actual damage for the non-performance not of the contract as a whole, but ‘the act agreed to be done’, and likewise for ascertaining whether compensation in money will be adequate relief.¹⁴¹ This stands in contrast with the language of the Explanation of Section 10, and with Section 14. Thus the promises sought to be enforced by plaintiff deserve to be analysed individually.¹⁴² Hence the inadequacy test ought to be applied with reference to the precise act of which specific performance (or injunction) is sought. Analysis of contractual obligations with reference to acts or promises, rather than contracts or classes of contracts, ought to be done

Categorising

The contract or obligation, and the subject-matter of that obligation, must be categorised for deciding whether to apply or not the presumptions available in the Act, viz. whether the subject matter is immovable or movable property, and whether the contract involved is one of transfer of such property. Thus where the suit is for specific enforcement of a contract for sale of goods, the court would first find as a matter of course that the contract is for sale of goods, and hence proceed to apply the presumption that compensation will be adequate. There may be difficulties, viz. of placing the contract in question into a specific category; also of categorising the contract as one involving movable or immovable property.

Party seeking specific enforcement

The grant of relief of specific enforcement will not be available to all parties to the contract. Where promises in a contract are outstanding, granting specific performance will depend upon which party to the contract seeks it.¹⁴³ Thus, in a contract under which a X agrees to construct a building for a plot-owner Y, or where a painter X has painted Y’s portrait under his contract with Y, whether the contract can be enforced specifically will depend upon who seeks specific performance. Y can seek specific performance against X, in the first case subject to the conditions in section 14(3)(c), and in the second case because the completed

¹⁴¹ Compare other laws: UCC, § 2.716: the *subject-matter* must be unique; the Maryland Code, s 22.811: the *agreed performance* must be unique.

¹⁴² See the Specific Relief Act 1963, compare chapter heading before s 10: ‘Contracts which can be specifically performed’, with heading of s 10: ‘Cases in which specific performance of contract enforceable’.

¹⁴³ *Maheswari & Co Pvt Ltd v Corporation of Calcutta* AIR 1975 Cal 165 [168]; thus S 10 would apply at the instance of a purchaser of articles, and not the seller, decided with reference to s 58 of the Sale of Goods Act, distinguishing *James Jones and Sons Limited v Earl of Tankerville* [1908-10] All ER Rep Ext 1231.

portrait is a unique thing of special value to Y. But in both cases, X can merely seek compensation for breach of contract.

Establishing inadequacy

The party seeking specific performance, or injunction, usually the plaintiff, must bring before the court all facts showing his entitlement to the relief, viz. the contract itself, its terms, its nature, and that compensation is unascertainable or it will be inadequate.¹⁴⁴ Thus, the promisee will have to prove inadequacy,¹⁴⁵ and the existence of all factors which will help the court in coming to this conclusion.¹⁴⁶ The promisee may depose that the subject matter is not available in the market, or may examine as witness a person familiar with the trade; sometimes the nature of commodity will indicate that it is not readily available.

If the contract is one for transfer of property, two presumptions assist the plaintiff. Even in these cases, he is required to show and prove those facts that give rise to these presumptions. A plaintiff seeking specific performance of his contract for transfer of immovable property has the benefit of presumption that compensation is inadequate. If he seeks specific performance of his contract to transfer movables, he has to prove circumstances raising the presumption, viz that there is no substitute, or that the property is of special value to him. These presumptions are discussed below. In contracts other than for transfer of property, the plaintiff must allege and prove all those circumstance from which the court can conclude that compensation is inadequate. He will have to obtain sufficient and reliable information about availability or non-availability of substitutes. He must prove facts stating this information in the case. The initial burden therefore falls upon the promisee, the victim of the breach, rather than the promisor who has broken the contract.

Presumptions

Presumptions in section 10 of the Specific Relief Act 1963 apply to contracts for transfer of immovable and movable property. To apply the presumption, a court must categorise the subject matter,¹⁴⁷ and the nature of the contract involved. It is presumed that compensation would be inadequate in case of non-performance to transfer immovable property; and in case of transfer of movable property, that compensation would be adequate unless (i) the property is not an ordinary article of commerce, or (ii) is of special value or interest to the plaintiff, or (iii) consists of goods which are not easily obtainable in the market, or (iv) where the property is held by the defendant as the agent or trustee of the plaintiff. These are rebuttable presumptions.

Presumption re. immovable property

A promise for transfer of land will be specifically enforceable generally, or as a rule. This is a principle found in most legal systems. The principle that land is unique is so well accepted as to be beyond citation. It is stated that this 'exception swallows the rule'.¹⁴⁸

¹⁴⁴ The Indian Evidence Act 1872, s 101: Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

¹⁴⁵ *Brij Ballabh Das v Mahabir Prasad* AIR 1924 All 529.

¹⁴⁶ The Indian Evidence Act 1872, s 103: The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

¹⁴⁷ *Jabalpur Cable Networks Pvt Ltd v ESPN Software India Pvt Ltd* AIR 1999 MP 271: satellite signals for transmission to cable-operators were 'goods'; *Sagar Art Service v Municipal Corporation* AIR 1988 MP 46 at 57: right to put up advertisement boards on electric poles was not movable property.

¹⁴⁸ Richard Posner, *Economic Analysis of Law* (6th edn, Aspen 2003) 131.

In Indian law, a contract for transfer or any other dealing of immovable property will generally be specifically enforced. This is supported by a presumption. Explanation to section 10 of the Specific Relief Act 1963 provides:

Unless and until the contrary is proved, the court shall presume
(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; ...

The basis of this presumption is that compensation may not be a complete remedy to a purchaser to whom the land may have a peculiar and special value;¹⁴⁹ also that each tract of land or each piece of immovable property is unique.¹⁵⁰ If a seller of a house fails to sell, the amount of compensation is very difficult to assess, because the promisee may value the house more than the market does.¹⁵¹ It is significant that the Specific Relief Act 1963 regards such a contract as one for which compensation is inadequate, rather than as one for which compensation is unascertainable. The presumption gives to the promisee buyer of immovable property a right to specific performance, naturally and in due course, and dissuades the other party from proving the existence of an adequate remedy of compensation. This is a rebuttable presumption.¹⁵²

Presumption re. movable property

In the case of contracts to transfer movable property, the presumption is that compensation is adequate remedy. Such presumption arises from the fact that generally goods from another source can replace goods promised under a contract. The presumption of inadequacy applies therefore only in four circumstances in case of contracts to transfer immovable property:

- (i) it is not an ordinary article of commerce, or
- (ii) it is of special value or interest to the plaintiff, or
- (iii) it is not easily available in the market; or
- (iv) it is held by the defendant as an agent or trustee of the plaintiff.

Where the plaintiff seeks specific performance of a contract to transfer movable property, the burden lies on him to show that his case falls within one of the four circumstances indicated above.¹⁵³ He must plead inadequacy, viz. state that substitutes are not available.¹⁵⁴ He must also bring facts to prove those facts from which the court can infer that one of the four circumstances applicable in the case exist.¹⁵⁵ The burden then shifts on the defendant.¹⁵⁶ This presumption may be rebutted, for example, by showing that the plaintiff was a dealer and intended to purchase merely for the purposes of resale,¹⁵⁷ or investment.¹⁵⁸

¹⁴⁹ *A C Kunjumohammad v Govardhan Hathibai* AIR 1956 TC 93.

¹⁵⁰ See 81A CJS *Real Property* § 56 (2006).

¹⁵¹ Richard Posner, *Economic Analysis of Law* (6th edn, Aspen 2003) 131.

¹⁵² *Dave Ramshankar Jivatram v Bai Kailasgauri* AIR 1974 Guj 69.

¹⁵³ *Hemraj Kapoor v Seventeen Textile Traders (India)* AIR 1961 Pat 318: plaintiff to show that goods (machinery) were rare machines, and that they cannot be easily had from foreign countries; *Rajasthan State Electricity Board v Hindustan Brown Boveri Ltd* AI 1969 Raj 212.

¹⁵⁴ *Hemraj Kapoor v Seventeen Textile Traders (India)* AIR 1961 Pat 318.

¹⁵⁵ *U P State Electricity Board v Ram Barai Prasad* AIR 1985 All 265; See also *Gujarat Electricity Board v Maheshkumar and Co* AIR 1982 Guj 289; *Tej Singh v State of UP* AIR 1981 All 103.

¹⁵⁶ *Hari Krishna Agarwala v K C Gupta* AIR 1949 All 440.

¹⁵⁷ *Cohen v Roche* [1927] 1 KB 169, see also *Tej Singh v State of UP* AIR 1981 All 103.

¹⁵⁸ *Ramji Patel v Rao Kishore Singh* AIR 1929 PC 190.

Establishing non-availability of substitutes

The plaintiff is required to establish that substitutes are not available, unless he has the benefit of presumption applicable to immovable property. It must be assumed that the buyer has the ability to obtain the substitute. A court requires not only information about the availability of alternative sources, but such information must also be sufficient, precise and reliable.¹⁵⁹

Any plaintiff will be inclined to argue that he has been unable to arrange substitute or cover at the time of breach. Such statement is self-serving, and hence less reliable. It is not possible for a court to ascertain which transactions the plaintiff would regard as substitute, because that information is exclusively with the plaintiff.¹⁶⁰ The court has therefore to consider not his personal disability or inability, but whether obtaining substitute (cover) in the market is *objectively possible*. The word “adequately” implies adequate in the opinion of the court based on the facts proved on record, though the plaintiff may consider it to be inadequate.¹⁶¹ Thus, the fact that goods from alternative sources will be available only after a considerable delay of nine to twelve months was not enough to displace the presumption of adequacy.¹⁶²

Finding whether the amount necessary to fully compensate a plaintiff is equal to the amount he requires to obtain an appropriate substitute would require the court to determine what things he would require as substitutes, and then how much of any particular substitute would be required to compensate him for his loss. It has been suggested that the goal of compensation requires that an effort be made to determine the value the promisee places on the promisor’s performance, as distinct from what the promisee, or anyone else, has offered to pay for it.¹⁶³ Evidence can be given that goods are not available in India, and can be procured only from abroad.¹⁶⁴

A court is required to decide the fundamental question: ‘What is a substitute?’ Does one attempt to match the goods or subject-matter, the goods along with the other terms of the transaction, or the contract as a whole. The Specific Relief Act 1963 does not refer to a subject-matter, but requires the inadequacy test in respect to the ‘act required to be done’.

Any substitute must correspond to the promisee’s need. It must serve the purpose of the promisee. Assuming exactly same goods are available from alternative sources, these might not substitute where the reputation or brand of the promisor is important, or the goods are not available on comparable or convenient terms or warranties, or their supply will be incompatible with other commitments. These may be difficult to locate, their availability may involve such delay as to disrupt the promisee’s business, their price may be substantially higher than the contract price, or alternative manufacturers may not have comparable reputations for quality.¹⁶⁵ Diminution in value because of these factors is difficult to evaluate.

¹⁵⁹ Anthony Kronman, ‘Specific Performance’ (1978) 45 U Chi LR 351, 362: ‘volume, refinement and reliability of available information about substitutes’.

¹⁶⁰ Alan Schwartz, ‘The Case for Specific Performance’ (1979) 89 Yale LJ 271, 275.

¹⁶¹ *Brij Ballabh Das v Mahabir Prasad* AIR 1924 All 529.

¹⁶² *Societi des Industries Metallurgiques SA v The Bronx Engineering Co* [1975] 1 Lloyd's Rep 465.

¹⁶³ Anthony Kronman, ‘Specific Performance’ (1978) 45 U Chi LR 351, 361.

¹⁶⁴ *Hemraj Kapoor v Seventeen Textile Traders (India)* AIR 1961 Pat 318 (temporary injunction refused on the principles of specific performance).

¹⁶⁵ G H Treitel, ‘Specific Performance in the Sale of Goods’ (1966) JBL 211, 216; Amy Kastely, ‘The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention’ (1988) 63 Wash LR 607, 611.

Should we do away with the inadequacy test

In view of the difficulties in establishing inadequacy, and the uncertainty arising from its ambivalent application, it is proposed that the inadequacy test be removed.

Without the inadequacy test, the plaintiff will be required to establish the existence of the contract, its terms, and breach by the defendant, and will be able to seek the relief of his choice: specific performance or injunction, or compensation. In the latter case, he will also establish the loss suffered and its quantum. If he seeks specific performance, the burden will lie on defendant to show that substitutes or alternatives are available. The defendant will have information to establish this. His will be a burden to show a positive fact, a burden easier than that required to show the negative fact of non-availability of substitutes. This also appears just because the burden to avoid specific performance will lie on the contract breaker. Although this will not reduce the quantum of evidence brought before the court, it will shift the burden from the victim of breach to the person responsible for the breach.

The fact that the promisee had substitutes available when breach occurred should continue to restrict specific performance. The judgment would then be based on positive evidence of substitutes rather than inferences of inadequacy. The focus of attention in the matter (of parties and the court) will shift away from the factors that govern inadequacy that are difficult to establish. Attention will rest on one issue: 'Are substitutes or alternatives available?' The defendant will have the positive burden to show existence of substitutes. This will deter a promisee from using specific relief for selfish gains. This will also enable the court to balance all interests in the suit. Such a system will cast a burden on the defendant to show substitutes were available. The plaintiff seeking specific performance will have to answer (especially in his cross-examination) about alternative performance available.

In a legal regime where all remedies are equal, and the plaintiff has a choice, the promisee will ask for specific performance only when he can suspend his affairs and wait until the outcome of the suit. He will also be advised so by legal advisers. If he cannot, he will find a substitute promptly and decide to sue for his loss later. He will be able to choose wisely because he will have better information about his own business, his expectations, expectations of the promisor, the promisor's capacity to perform, the difficulties of coercing an unwilling promisor, and the costs that the breach and litigation he will have to bear. He will be the best judge to decide whether the decree for specific performance will induce the promisor to perform. The present regime preempts a promisee's choice. The suggested regime will leave it to the promisee to make his choice, and to take responsibility for his decision.

Such a regime will change contract behaviour and encourage performance of contracts. It will ease the burden of proof that presently lies on the promisee, who has suffered by the breach. It will also encourage parties to think en-ante about remedies, and make appropriate provisions in their contracts choosing remedies.
