BOOK REVIEW

Janwillem Oosterhuis *Specific Performance in German, French and Dutch Law in the Nineteenth Century – Remedies in an Age of Fundamental Rights and Industrialisation*

(Martinus Nijhof, Leyden, 2011, pp 635,
ISBN 9789004202283, US $172)

It is often stated in comparative essays and studies that one of the fundamental differences between the common law and civil law with regard to obligations lies in the remedy of specific performance. According to this view, specific performance is the primary remedy in civil law where there has been a breach of contract, since the innocent party has a right to fulfilment of the contract. In the common law, on the other hand, specific performance is a secondary remedy, the primary remedy being a claim for damages. Against this background, this historical analysis by Oosterhuis is an important addition to the body of work on this subject in the English language. The author also gives an in-depth account of changes to this remedy during the nineteenth century, which was a very formative time for the civil law in Europe, especially the three countries studied in this work.

The description on the book's cover very aptly summarises its contents as follows:

> The current French, German and Dutch law of contract each offer a remedy of specific performance to creditors suffering from breach of contract. This book analyses the alterations to this remedy during the nineteenth century on the substantive, procedural and enforcement levels. Fascinatingly, there is a link between changes to the remedy and the development of early human rights and the mass industrialisation of society. The latter had the effect of actually converging the national remedies of specific performance in the examined systems: damages and rescission became more accessible as remedies at the cost of specific performance. The book demonstrates the interdependency between law and society and

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provides vital background information to the harmonisation of a controversial concept in the European Law of Obligations.

The book is a reworked version of the author's doctoral thesis. Unlike many such works, this one does not read like a typical thesis and has been successfully transformed from a thesis to a monograph, even though it remains a challenging read.

In his introduction, Oosterhuis remarks quite correctly that the choice of remedy for breach of contract will depend on a variety of factors such as the particular rules of the applicable legal system, difficulty of enforcement, the effectiveness of enforcement apparatus in the particular legal system, relative impossibility, social and economic conditions, the scarcity and value of the goods or performance, and lastly the uniqueness of the goods. He then argues that the preference for a particular remedy and how often it is applied in practice may eventually affect its legal functioning and status as a remedy in a particular legal system. This important hypothesis is dealt with in detail, and amply proven in chapters four and five.

Chapter 2 starts with an overview of the remedy of specific performance before the nineteenth century. There is a brief but informative account of it in Roman law, and during the periods of the glossators, commentators and canonists. The author also traces its use in customary European law, especially in France, and developments in Roman-Dutch and Roman-Frisian law. Finally, there is an account of it in early modern natural law and the *usus modernus*. The chapter ends with the conclusion that two conflicting principles had emerged at this time: The first was that all obligations, regardless of their nature or intended object, had to be performed *in specie*. This was the primary remedy. The second principle was that certain obligations were from the outset excluded from the scope of specific performance. The first principle emerged under the influence of early modern natural law; the second under the influence of burgeoning humanism. The first principle also found its way into several codifications and drafts at the end of the eighteenth century.

The third chapter deals with the formative influence of the fundamental changes to society and the economy in Europe during the nineteenth century. Oosterhuis convincingly argues that rising awareness of fundamental rights and the right to personal freedom, as well as the increase in trade through industrialisation of the economy, diminished the status of specific performance as the primary remedy, even though it remained entrenched in practice. However, the discussion of the influence of fundamental rights promised in the title of the work does not fully materialise. This chapter first shows that at the beginning of the nineteenth century, specific performance was regarded as the primary remedy in the three countries that are compared in the book. It then describes how that paradigm came under increasing pressure during the course of the century because of the changes mentioned above. At first, only a few very restricted exceptions were recognised, and the remedy was widely applied in practice. Despite some doctrinal differences in the three systems,

commentators seemed generally agreed on the primacy of the remedy, in accordance with the first principle mentioned above.

Chapter 4, entitled "Damages as Rule", describes how in the course of increasing change in society and the economy, there was a gradual shift from the strict application of specific performance as the primary remedy to the stage where more exceptions were allowed; and the increasing importance of damages as a remedy started to diminish the role of specific performance in practice. During this period, cancellation of the contract together with a claim for damages became the preferred remedy for late performance, particularly in commercial sales law. Oosterhuis remarks that "timely delivery became more important than delivery itself". He traces the development of a choice of remedies in German law under the *Allgemeines Deutsches Handelsgesetzbuch*. In the case of late performance, however, a creditor had to afford the debtor a reasonable period of time (*Nachfrist*) to perform. This particular construction has survived into modern times and even found its way into the provisions of the Vienna Convention for the International Sale of Goods, 1980. The increasing importance of damages as a remedy in France and the Netherlands during this period, despite the prevailing doctrine at the beginning of the century, is also described. In practice it also became commonplace in trade sales to include a specific date for performance, with the intention that the creditor would be entitled to rescind the contract immediately upon default. Increasingly the courts came to recognise and enforce this approach. This review can hardly do justice to the detailed and nuanced discussion in this chapter and the richness of the text. It concludes with the finding that in the course of the societal and especially economic changes during the nineteenth century, damages became the primary remedy in practice, particularly in respect of generic goods. In time, the influence of these practices in the law of sale permeated to other areas in the law of contract as well. Oosterhuis remarks that the change was most obvious in German law, although similar trends could be observed to a lesser extent in French and Dutch law.

Chapter 5 shows that specific performance became an exceptional remedy during the latter part of the nineteenth century. In French and Dutch legal doctrine, specific performance was still viewed as the primary remedy, but no longer in practice. However, specific performance continued to be important in two areas, namely in respect of unique goods and in respect of personal acts. This chapter also describes changes during this period, when awarding damages became increasingly important and sophisticated, not only in practice but also in doctrine. The approaches in the three different systems under review became increasingly diverse, and Oosterhuis manages to convey effectively what he describes as the disintegration of the law of obligations during this period.

The book concludes with a handy summary of the contents and findings. In a way, this overview is a good starting point for the reader who might otherwise get lost in the complex and detailed discussions in chapters 2 to 5. The conclusions

are consistent and provide a fitting end to a fascinating study. I fully agree with the following remarks by Jacques du Plessis (University of Stellenbosch) about this book *(http://www.brill.com/specific-performance-german-french-and-dutch-law-nineteenth-century)*:

> This work contains very interesting insights about the relationship between law and practice, as illustrated by the history of the remedy of specific performance in certain private law systems in the nineteenth century. It is of particular significance that the study is not confined to a mere analysis of statutory provisions and academic literature, but also contains detailed discussions of the relevant case law.

John MacLeod (University of Glasgow), in another review, states correctly ((2012) 16 *Edinburgh LR* 285) that the title of this work sells the range and depth of this study rather short, since its scope is not restricted to the nineteenth century, and the analysis goes beyond mere contract law, in that it also considers relevant aspects of property and civil procedure. There is certainly a depth and breadth of discussion in this book, making it a valuable but challenging read.

It is a valuable contribution to our understanding of modern contract law, and more specifically the remedies that are available, even in South Africa. It will certainly be a valuable read for anyone interested in the law of contract, especially since the remedies for breach have not been as well researched and debated as has contract formation.

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