A COMPARATIVE STUDY OF THE CONTRACT REMEDY SYSTEMS
BETWEEN ANGLO-AMERICAN LAW AND CHINESE LAW

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This thesis presents a comparative study of the contract remedy systems between Chinese law and Anglo-American law. The main aim is to deepen the understanding of both contract remedy systems, particularly to enhance an understanding of the different principles and features of contract remedies in both legal systems.

The study centres on two major issues which are the most striking differences between the two contract remedy systems: the principle of specific performance in Chinese law versus the use of monetary damages in Anglo-American law; and the principle of punishment in Chinese law versus the principle of compensation in Anglo-American law.

The study strives not only to identify the differences, but also to look into the underlying reasons and implications of those differences. Special effort is made to illustrate these differences in the context of social, economic and cultural perspectives. Much of the discussion is devoted to examining and analyzing the relations and interactions between law and the social and economic environment, especially the great impact which the social system, economic structure, ideology and legal culture of a society have on its contract law.
The hypothesis is that legal principles and doctrines are but the expressions in legal forms of the conditions of social and economic life in a society. The principles of a contract remedy system are decided and significantly influenced by the social and economic factors of a society within which the remedy system operates. Therefore, the rules and principles of contract remedies differ substantially between a planned economy and a market economy. And the contrast reflects the different needs of the two societies and the different responses made at the level of law to those needs. In the Chinese context of a planned scarcity economy, contract remedy principles in particular serve to promote the purpose of contracts in implementing the state economic plan. Realization and guarantee of the state economic plan is the touchstone of contract remedies. However, in the context of a market economy, contract remedial rules emphasize a great degree of flexibility and choice to individuals, with minimal government intervention. It is believed that such flexibility and choices can maximize social welfare and promote the operations of a market economy.

The study also tries to make a brief critical reassessment of the specific performance principle and punitive principle of Chinese contract remedies in the changing situations of China which may call for specific reforms in the existing Chinese economic contract law.
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### SELECTED BIBLIOGRAPHY
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PART ONE: INTRODUCTION

A. The Objectives of This Study

This thesis is designed to present a comparative study of two important elements of the contract remedy systems in Anglo-American contract law and Chinese contract law. My primary focus will be on the basic principles and doctrines of contract remedies in both legal systems. It is important to point out that this study addresses commercial contract laws.

1 In the process of researching, the writer has noticed that there are limited books on contracts written by Canadians, instead, there are more books written by British and Americans. Many ideas in this study are drawn from British and American literature. In addition, domestically Canada is governed by common law except for Quebec. Canadian private law rules are largely inspired by British and American law. At the private law level, there is, as yet, little indigenous thinking or philosophy either in court decisions or writing. See J.G. Castel & D.M. Armand L.C., The Canadian Law and Practice of International Trade, (Toronto: Edmond Montgomery Publications, 1991) at 3. Not much difference will be found between the Canadian law of contracts and the law enforced in the courts of England, or indeed of any other common law jurisdiction in the commonwealth. With some exceptions, the same is true of the United States. (See J.E. Cote, An Introduction to the law of Contract, (Edmonton: Jurdiber, 1974) at 1.

Therefore, it is more precise to say that this comparative study is actually made between Anglo-American law and Chinese law.

2 Because so far, China doesn't have a general contract law, she only has her economic contract laws. Therefore, for comparison purpose, the writer has to narrow this study on the comparison between Chinese economic contract law and its Anglo-American counterpart.
The purpose of comparative study is not to declare the superiority of one legal system over another, but to call attention to the differences of principles in the legal systems and their institutions according to their social context and purposes.\(^3\) The main aim of this comparative study is to deepen the understanding of both contract remedy systems, particularly to enhance an understanding of the different features and approaches of contract remedies in both legal systems.

On the practical level, the disclosure of differences is more useful than uncovering similarity. The disclosure of differences enables one to see other solutions to a problem, to take account of what is best in such solutions, or to evaluate the correctness of one's own solutions.\(^4\) In my view, it is often the differences rather than the similarities that need to be examined and understood in order to find out something new and valuable for our own. Of course, similarities will be referred to sometimes in the course of the comparison.

However, we cannot reach conclusions merely by identifying the differences between the two systems. Usually the causes of the differences are deeply hidden. Therefore,


\(^4\) Ibid.
in order to understand fully why the differences exist and to understand why a legal institution has developed in a particular way, we have to go beneath the surface, to investigate the underlying social, political and economic foundations behind the laws. Insights are often to be gleaned from a comparison of legal systems which have widely divergent approaches to issues.

Law in all its aspects is a cultural and sociological phenomenon. Its institutions, principles and rules must be understood as the result of interaction between past experience and attitudes, on the one hand, and contemporary perceptions and needs, on the other.\(^5\) Law and legal institutions are products of their social and economic environment.\(^6\) One cannot study legal phenomena disregarding the respective social and economic backgrounds. The beginning of understanding the institution of contracts lies in its historical roots, its development, and its relation to the economic systems of which it has been an integral part.\(^7\) Accordingly, this study not only tries to identify the differences between the two contract remedy institutions, but also tries to look into and disclose the underlying reasons


\(^7\) Ibid.
and implications of those differences. Special effort will be made to illustrate the existence of the differences from social, economic and cultural perspectives.

The primary focus of this thesis is the question of why the contract remedy systems are different, not merely the question of how they are different. Much of the discussion is devoted to examining and analyzing the relations and interactions between law and social and economic elements, with particular attention to the great effect which the social system, economic structure, ideology and legal culture of a society have on its contract law. The institution of contracts is shaped by the social and economic context of certain society in which it grows. Legal doctrines and principles are but the expressions in legal forms of the conditions of social and economic life in a society. Different social and economic structures and different culture settings may result in different legal doctrines and principles of contract law. A society will usually produce a legal mechanism which is consistent with the inner structure and demand of that society, and which in its turn sustains that society. It seems futile to regard one institution as better than the other, since different social and economic models lie behind them and they in turn determine the positions.

As an essential element of a culture, law is heavily influenced by the distinguishing features of the overall culture of a society. For example, the growth of Chinese
contract law has been influenced by Chinese traditional legal culture and legal history. The features and principles of Chinese economic contract remedy system reflects, to a great degree, the continuing impact of Chinese feudal legal culture on Chinese existing legal system. In ancient China, there was no distinction ever developed between civil liability and criminal liability. All legal transgressions were handled with criminal punishment. China traditionally emphasized the coercive nature of law and viewed forced obedience as one of the essential elements of law. Consequently, law was primarily perceived as a tool of governing, not as a tool of protecting individual's rights and interests. By comparison, in Anglo-American notion, contract law is the child of commerce, and it has grown with the growth of industry and commerce. Moreover, contract law has developed in accordance with the basic premise that law is considered to be the guarantor of rights and the measure of freedom. The Anglo-American position tends to associate contracts and contract law with individualism, autonomy and private agreement which are perceived to be the characteristics of a market economy, rather than with restrictions or prohibitions of people's behaviours. Contract law has been primarily perceived as an instrument of facilitating private transactions, allocating economic sources and risks, and protecting and guaranteeing individual's rights and interests.

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8 See Anson's Law of Contract, supra, at 1.
Therefore, when we study a legal institution, we should study it in a larger context. To look merely at the formal provisions of the legal systems is to see the trees but not the forest. Only when we situate the laws in their social, economic and cultural settings, can we really understand them.

And often, it is the feeling of dissatisfaction with the solutions in one's own system which drives one to inquire whether other legal system may have produced something more effective. The knowledge of what is going on in other countries and a comparative study with our own are indispensable if we would make our own legal institution the best possible instrument of justice. As we know, the basic function of law is to regulate social relations and to solve disputes. Therefore, on a practical level, to find out the differences between different legal institutions is actually to find out the different approaches and measures with which different countries tackle the same kind of problems. Since, for historical reasons, China's institution of contract remedies is far from complete, it needs to be developed, both through accumulating its own experience and assimilating ideas critically from others, including from Anglo-American law. Thus, it is also the writer's hope to assimilate ideas from this research for application in China.

In addition, the ever-expanding international trade in the world today calls for managing the differences and cooperating between different countries and different legal
systems. A comparative study on the contract law of China and its Anglo-American counterparts will therefore be of academic and practical significance. It will be helpful and provide an incentive to China to make improvements in China's contract law to meet the needs of her ever increasing international trade.

B. Specific Scope of This Study

The significance of the role played by contract in any economy system can scarcely be denied. Contracts play a key role in every economic sphere. Although there are many interesting topics in contract law which are worth making an inquiry into, my attention is drawn to the important role and position of contract remedies. As Professor Farnsworth said, no aspect of a system of contract law is more revealing of its underlying assumption than is the set of rules that prescribe the relief available for breach. Remedial questions pervade every part of the law of contracts. Also, since considerations of time and space preclude a full account of the whole remedy system, the scope of this study is confined to the comparison and analysis of the fundamental legal principles governing the contract remedy institutions between Anglo-American law and Chinese law.

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9 See E.A. Farnsworth, "Damages and Specific Relief" (1979) Vol. 27, American Journal of Comparative Law, at 247.

Contract remedies in both Anglo-American law and Chinese law show clearly a certain degree of similarity. The inventory of contract remedies is basically the same. For example, it mainly consists of damages, specific performance, terminations, etc. However, the configuration of the remedies, i.e. the preference of the remedy forms of each legal system, and the detailed rules or preconditions governing the availability of each remedy form are discernibly different from each other. Among all the differences, the most remarkable ones are: the principle of specific performance in China versus the use of monetary damages in Anglo-American law; and the principle of punishment in Chinese law versus the principle of compensation in Anglo-American law. The discussion in this study will centre on these two central issues, focusing on the differences between the two systems in the context of social, economic and ideological factors.

C. The Structure of This Thesis

This thesis contains four parts. Part One is the introduction.

Part Two will centre on the comparison and analysis of the different preference on the forms of remedies for breach of contract between Anglo-American law and Chinese law. The study will examine and analyzes the reason why Anglo-American law puts special emphasis on monetary damages, regarding
monetary damages as the primary remedy under normal conditions; and why China, on the other hand, tends to stress specific performance of contractual obligations, with monetary damages as only a supplementary form of remedy. The analysis will focus on the effect of China's planned economy, and on the effects that socialist public ownership and socialist ideology have had on China's contract remedy institution and her configuration of the forms of remedy for breach of contracts.

Part Three will focus primarily on the analysis and comparison between the principle of punishment in China and the principle of compensation in Anglo-American law. The study will examine why Chinese contract law focuses on the punitive function of damages; and why Anglo-American law focuses on the compensation function of damages. After a general observation, the study proceeds to look at the reasons for the differences from three aspects: different notions of breach result in different legal treatment toward breach; different legal objectives of contract remedy systems lead to different principles of damages; and different traditional influences have different influence on the existing legal systems and their principles.

Part Four is the conclusion. After a brief summary of the comparison and analysis, a critical attempt will be made to re-assess the reliance on the role of specific performance and punishment in the Chinese contract remedy system.
PART TWO: COMPARISON AND ANALYSIS OF SPECIFIC PERFORMANCE
IN CHINESE LAW AND ANGLO-AMERICAN LAW:
Specific Performance Versus Monetary Damages

A. Theory and Practice of Specific Performance in China

1. Concept of Specific Performance

Specific performance is the most conspicuous and characteristic feature of the system of contractual remedies available in socialist legal system.¹ The principle of specific performance is a very important basic principle in Chinese Economic Contract Law.² (hereinafter cited as CECL)

² See, The Interpretation of The Provisions of Chinese Economic Contract Law, by the Legislation Research Centre of the State Council of China, (Beijing: Legal Publishing House, 1982) at 4. China's Economic Contract Law (hereafter called CECL) is the most important source of the law governing commercial transactions in China. It was promulgated in Dec. 1981 and went into effect in June 1982. The law specifically regulates domestic economic transactions between state-owned enterprises and other domestic economic entities, including contracts between individuals and all such economic entities, but not those solely between individuals. Interpersonal contracts, as well as contractual obligations arising from harms inflicted on others, and many other legal questions, including those relating to property, are dealt with in the broad General Principles of Civil Law. (see footnote 8.) The CECL is applied to virtually all types of economic transactions in China and it contains the rules for ten specific contract types, such as contracts of sale, construction, insurance, loan, transportation, and so on.
Specific performance, (it is also called "continue to perform" in China) is a decision made by the court to force the breaching party to perform the contract which he has made, and in accordance with its terms.³

2. Relevant Legal Provisions and the Implications

According to article 35 of CECL:

If a party breaches an economic contract, it shall pay breach of contract damages⁴ (liquidated damages) to the other party; if the breach of the contract has already caused the other party to suffer losses that exceed the amount of the breach of contract damages, the breaching party shall pay compensation and supplement the breach of contract damages by the insufficient amount. If the other party demands specific performance of the contract, the breaching party shall continue to perform.⁵

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⁴ Breach of contract damages in Chinese contract law and practice is actually the counterpart of liquidated damages in Anglo-American contract laws, for both kinds of damages are pre-fixed sums of money to be paid when breach occurs. However, they are quite different from each other in nature. Chinese liquidated damages are punitive in nature, while in Anglo-American law, liquidated damages are only compensatory in nature. It is perhaps just because of the fact that Chinese liquidated damages are punitive nature that some Western scholars have translated Chinese liquidated damages into "breach of contract damages" in order to distinguish them from the liquidated damages in Anglo-American law which are purely compensatory in nature. The sharp contrast between the two will be one of the focal points of the discussion in part III of this thesis. However, for easy reference and comparison, such relief will be called by its Anglo-American law name of liquidated damages in my discussion.

The implication of this provision is that payment of liquidated damages or compensation damages cannot replace specific performance of the contract.\(^6\) Specific performance should be strictly carried out, provided the innocent party demands to do so and the breaching party is capable of doing so.\(^7\)

Article 111 of the General Principles of Civil Law of China\(^8\) also provides:

When a party does not perform its contractual obligations, or does not comply with the agreed terms in its performing its contractual obligations, the other party shall have the right to demand specific performance or the adoption of remedial measures, and it shall also have the right to demand compensation for

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\(^7\) Ibid.

\(^8\) General Principles of the Civil Law of the People's Republic of China (hereafter called GPCL) adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, provides a body of basic norms of conduct governing civil relations entered into and activities performed by individual citizens and legal persons. In a comprehensive and summery way, the GPCL sets out specific types of civil rights and liabilities, with special emphasis on the affirmation, normalization and institutionalization of those economic relations and principles governing economic activities which have been proven effective in the restructuring of the economic system. As the pattern of legislation stands now in China, the CECL is a specialized branch of Civil Law. The relationship between the two is one between a basic law and a special law. Many of the fundamental principles and regimes enshrined in the CECL are regulated and constrained by the GPCL.
losses.⁹

It should be noted that, according to the above legal provisions, specific performance at this stage is no longer performance within the original meaning in contract. In fact, it is an independent and substantial compulsive measure for liability for breach of contract.

According to the legal provisions and the Opinions of The Supreme People's Court of China¹⁰:

The breaching party, having paid the damages or/and compensation, is still obliged to perform its contractual obligations in accordance with the contract terms, if the injured party demands.

In other words, payment of liquidated damages or compensation damages by the breaching party does not affect the injured party's right to demand specific performance, if he prefers. That is, if the injured party demands specific performance, under normal conditions, the breaching party is obliged to perform his or her contractual obligations.

Article 35 of CECL sets forth two basic principles governing the question whether or not specific performance should be enforced when breach occurs:

i) In principle, the law obliges the breaching party to continue to perform its contractual obligations. Payment of damages and liquidated damages cannot relieve the breaching

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¹⁰ See, Minshi Falu Shivong Daguan, (Collection of Civil Law Provisions For Practical Use), supra, at 353.
party of the duty to perform its contractual obligations. That is, specific performance cannot be substituted by damages or liquidated damages.

ii) The innocent party has discretion to decide whether or not to demand specific performance. To the innocent party, to demand specific performance is a right; to the breaching party, specific performance is an obligation. The breaching party has to perform the contract so long as the innocent party demands specific performance and specific performance is still possible and necessary.

3. Exceptions

However, although the innocent party has the right to demand specific performance, it does not necessarily mean that the court is bound to enter judgment for specific performance if the innocent party demands it. There are some exceptions. Since Chinese law recognizes specific performance as the breaching party's obligation despite payment of damages

11 See, Zhou Li-bin, *Bijiao Hetongfa* (Comparative Contract Law) (Lan Zhou: The Publishing House of Lan Zhou University, 1989); also see Yue Li & Liu Jun, "Importance Should be Attached to Specific Performance" (Sept. 30th, 1991) Fazhi Ribao (Chinese Legal System Daily).


13 Ibid.

or liquidated damages, generally there are no restrictions or limitations for demands of specific performance in Chinese contract law. Instead, however, the law provides several exceptional situations in which the courts may refuse specific performance. This practice is quite different from that of Anglo-American law, which usually provides under what circumstances the courts can award specific performance.

According to CECL, only under the following circumstances can the breaching party be relieved of his duty of specific performance, and the courts reject specific performance:

(i) If both parties agree through consultation, and if such modification or rescission would not damage the interests of the State or affect the implementation of the State plan;
(ii) If the State plan on the basis of which the economic contract was concluded is amended or cancelled;
(iii) If one party closes down, stops production or changes its line of production and truly has no means of performing the economic contract; 15
(iv) If force majeure or some other cause that a party, although not negligent, can not prevent makes it impossible to perform the economic contract;
(v) If the breach of contract by one party makes performance of the economic contract unnecessary. For example, delayed delivery of seasonal goods which slipped the selling season. 16

Thus, we can see that, in principle, specific performance is the primary remedy for breach of contract in

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15 Usually, one party's cessation of production is subject to the State economic plan. This also means that the State economic plan has been changed and the party (the economic enterprise) has no choice but to obey the state administrative order.

16 See article 27 of CECL.
China's economic contract law. Only when specific performance becomes unnecessary or impossible, can the breaching party be relieved of the duty of specific performance. And what is more, the most crucial pre-condition is that such relief of specific performance should not damage the interests of the State or affect the implementation of the State economic plan. In addition, specific performance prevails over liquidated damages or compensation except for the few exceptions mentioned above. It cannot be replaced by monetary compensation under normal conditions even where damages can provide adequate relief.

4. Challenge to Traditional Theory

However, the interesting thing is that China's Foreign Economic Contract Law (hereinafter cited as FECL) has taken a quite different approach from CECL. Unlike CECL, FECL takes damages as the first and basic remedy for breach of

17 See Yang Zihuan & Xu Jie, Jingji Faxue (Science of Economic Law), (Beijing: Beijing University Publishing House, 1990) at 511.

18 China's Foreign Economic Contract Law was promulgated on March 21, 1985. This contract law specifically regulates the commercial legal relations between Chinese economic organizations and foreign economic organizations or individuals. The promulgation of this contract law marked an important stage in the development and improvement of the contract legislation of China, encouraged by the policy of "opening door to the outside world." it is an good example of China's effort to keep her foreign trade legislations up with the international standards.
contract.  It is notable that specific performance, which enjoys priority in China's domestic contractual theory and practice, no longer appears directly in FECL, even though the "other reasonable measures" stated in article 18 of FECL may include specific performance.

Such a fundamental change deserves our close attention. The policy underlying article 18 is that FECL regards damages as the primary remedy for breach of contract, other remedial measures including specific performance might be decreed if they are reasonable, i.e. if they are appropriate. Thus we can see here, the configuration and approach of remedies in FECL is completely different from the traditional notion of Chinese contract law theory. Instead, it is closer to the way of Anglo-American law. It is a challenge to Chinese traditional legal theory under state planned economy.

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19 Article 18 of FECL provides: If a party fails to perform the contract or its performance of the contractual obligations does not conform to the agreed terms, which constitutes a breach of contract, the other party is entitled to claim damages or demand other reasonable remedial measures. If the losses suffered by the other party can not be completely made up after the adoption of such remedial measures, the other party shall have the right to claim damages.
B. Theory and Practice of Specific Performance in Anglo-American Law

1. Specific Performance in Anglo-American Law

a. Concept of Specific Performance in Anglo-American Law.

Specific performance is the judicial remedy which orders performance of a contract according to the precise terms agreed upon. Specific performance will be ordered where money damages would be inadequate compensation for the breach of an agreement. In such cases, the contracting party will be compelled to perform specifically what it has agreed to do. That is, a contract may be specifically enforced by a court order telling the breaching party actually to perform its undertakings. Such an order may be positive or negative according to the terms of the undertaking which has been breached. Specific performance is by definition limited to the enforcement of contract duties and is one of the major alternatives to the award of damages as means of enforcing

21 Ibid. at 1138.
contracts.\textsuperscript{23} By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as is possible, the same effect as if the contract had been performed.\textsuperscript{24}

\textbf{b. The Characteristics of Specific Performance in Anglo-American Law.}

\textbf{(1) An Equitable Remedy}

In Anglo-American law system, specific performance is an equitable remedy, and only available at the discretion of the court.\textsuperscript{25} Specific performance originated in courts of equity, and its use is within the discretion of the court.\textsuperscript{26} It could not have been made in common law courts in the days when the common law and equity were administered in separate courts.\textsuperscript{27} This point still retains some significance today in that the remedy may be refused on "equitable" grounds, such as unfairness or hardship, which would not be a defence to an

\begin{footnotes}
\item[26] See Restatement of the Law Second, Contracts 2nd., Vol. III, supra, at 162.
\end{footnotes}
action for damages.\textsuperscript{28}

\textbf{(2) Within the Discretion of the Court}

Specific performance is generally granted in the discretion of the court against a party who has committed or is threatening to commit a breach. As in the case with all equitable remedies, the decision whether to award specific performance is discretionary, although discretion is exercised according to the established principles.\textsuperscript{29} It follows that specific performance will not necessarily be granted merely because the aggrieved party demands it or damages are not an adequate compensation.

For example, specific performance may be refused if the remedy causes severe hardship to the other side.\textsuperscript{30} No plaintiff is, therefore, entitled to specific performance as of right.\textsuperscript{31} The court gives specific performance instead of damages "only when it can by that means do more perfect and

\begin{itemize}
\item \textsuperscript{28} Ibid.; and also see E.A.Farnsworth, \textit{Farnsworth on Contracts}, supra, at 161, 152; \textit{Anson's Law of Contract}, 26th ed., supra, at 516, 517.
\item \textsuperscript{30} See Malins v. Freeman (1837), 2 Keen 25; \textit{Denne v. Light} (1857), 8 De G.M. & G.774; also see Handley Page, Ltd. v. Commissioners of Customs and Excise, [1970] 2 Lloyd's Rep. 459.
\end{itemize}
complete justice".\textsuperscript{32} Since the chancellor was to act according to "conscience", relief be withheld if considerations of fairness or morality dictated.\textsuperscript{33}

In granting specific performance, as well as denying it, a court may take into consideration the specific circumstances of each case, and usually the courts would consider whether it would be fair to grant the remedy\textsuperscript{34} and refuse it in circumstances which would not justify a refusal of the common law remedy of damages. Disobedience of an order of specific performance constitutes contempt of court and is punishable by fines (payable to the state) and imprisonment.\textsuperscript{35}

2. Availability of Specific Performance in Anglo-American Law

Is specific performance a normal or an exceptional remedy? That is, is specific performance available in principle or only in special circumstances? As E. A. Farnsworth states:" In our legal system, specific relief is

\begin{footnotes}
\item[33] See E.A.Farnsworth, Farnsworth on Contracts, Vol.III, supra, at 161.
\item[34] See Shell UK Ltd. v. Lostock Garages, Ltd., [1976] 1 W.L.R. 1187.
\end{footnotes}
the exception rather than the rule." The basic approach of Anglo-American law is that the primary remedy for breach of contract is an action for money compensation called damages, and specific performance is only rarely available. Usually a court grants the promisee substitutional relief by awarding a sum of money intended to compensate for the harm to the promisee's interests caused by the promisor's failure to perform the promise.

a. General Rules

The equitable remedy of specific performance is a limited remedy. As a general rule, an order for specific performance will not be made in any case where damages are an adequate remedy. Thus it can be seen that traditionally "inadequacy of damages" is a precondition of granting specific performance.

The development of this rule has been much influenced by its history. This principle is the product of the historical


38 See E.A. Farnsworth, Farnsworth on Contract, Vol. 1, supra, at 27.


division of jurisdiction between common law and equity. It was originally adopted to minimize the conflict between common law courts and courts of equity, the latter only intervening where the former could not give satisfactory relief.\footnote{See International Encyclopedia of Comparative Law, Vol.7, c.16, supra, at 17; also see Restatement of the Law Second, Contracts 2nd. Vol.3, supra, at 162.}

In judicial practice, the courts decree specific performance only where the chattels sold are of unique value to the buyer or possess special beauty, rarity or interest.\footnote{See Anson's Law of Contract, 26th ed., supra, at 517; also see Holroyd v. Marshall (1862) 10 H.L.Cas.191, at 209; Falcke v. Gray (1859) 4 Drew. 651, at 658.\footnote{See North v. Great Northen Rly Co., (1860) 2 Giff 64; also see Sky Petroleum Ltd. v. VIP Petroleum Ltd.,(1974) 1 WLR 576.\footnote{See Thorn v. Public Works Comrs, (1863) 32 Beav 490.}}}

For example, goods which are either "commercially unique" such as goods for which the buyer has a very urgent or special need which cannot be readily obtained elsewhere;\footnote{See North v. Great Northen Rly Co., (1860) 2 Giff 64; also see Sky Petroleum Ltd. v. VIP Petroleum Ltd.,(1974) 1 WLR 576.} or "characteristically unique" such as a painting by a famous artist or a heirloom.\footnote{See Thorn v. Public Works Comrs, (1863) 32 Beav 490.}

Therefore, as a general rule, specific performance will not be ordered where the plaintiff can be adequately protected by an award of damages. Obviously, this will generally be the case where the subject matter of a contract is generic goods which are available in the market. Upon the seller's default, the buyer can enter the market, purchase a substitute, and recover any extra cost by way of damages.
b. Main Limitations on the Scope of Specific Performance.

Unlike the common law remedies which have general governing rules or principles, equitable remedies tend to be context dependent. That is, the courts have to take into consideration the specific circumstances of each case. Sometimes even where damages are inadequate, specific performance will not necessarily be ordered. In Anglo-American law, the availability of specific performance is also restricted by a group of other factors which relate to the desirability of granting this form of relief and to the practicability of enforcing the court's decree. For example, it has been regarded as undesirable in Anglo-American law specifically to enforce a contract which requires one party to render services of personal nature. In addition, a court will not order specific performance that has become impossible, unreasonably burdensome, or unlawful.

There are some specific situations in which the courts will refuse to grant specific performance where damages would not be an adequate remedy: First, the court will not not

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specifically enforce a contract of personal services.\textsuperscript{47} The traditional reason for this rule is that to order the servant to work would unduly interfere with his or her personal liberty.\textsuperscript{48} Second, specific performance is sometimes refused on the ground that the defendant is bound by continuous duties, the performance of which the court can not supervise.\textsuperscript{49} Because specific performance of all contracts would impose too great a human and financial strain on the administration of justice. As well, it would not always be feasible for the court to supervise the conduct of the parties in order to ensure obedience to the court's decree. Anglo-American law has a long tradition of distrust for specific performance, in large part because of sensitivity to the enforcement problems that will confront the court.\textsuperscript{50} Third, the court will not order specific performance where performance of the contract is impossible\textsuperscript{51}--for example, where the subject matter of the contract has been destroyed or lost. Finally, the so-called doctrine of mutuality of remedy


\textsuperscript{49} Ibid.


\textsuperscript{51} Ibid.
asserts that specific performance will not be ordered at the suit of one party if it could not equally have been ordered at the suit of the other.\footnote{Ibid.}

3. A Tendency to Enlarge the Scope of Specific Performance in Anglo-American Law

As mentioned above, in Anglo-American law, specific performance of contract will be granted only where damages (or other common law remedies) cannot offer adequate protection to the injured party. The traditional goal of the law has not been compulsion of the promisor to perform its promise but compensation of the promisee for the loss resulting from breach.\footnote{See, Restatement of the Law Second, Contracts 2nd., Vol. 3, supra, at 100.}

However, as some Western scholars have noticed there is a growing tendency to modify this traditional rule.\footnote{See A.S. Burrows, Remedies for Torts and Breach of Contract, (London:Butterworth,1987) at 337.} There is a growing tendency to liberalize the granting of equitable relief by enlarging the classes of cases in which damages are not regarded as adequate remedy.\footnote{See Restatement of The Law Second, Contracts 2nd., Vol. 3, supra, at 169.} That is, specific performance should be ordered when it is the most appropriate
remedy\textsuperscript{56}, even though damages may be an adequate remedy. This tendency has been encouraged by the adoption of the U.C.C., s.2-716(i)\textsuperscript{57}, which seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.\textsuperscript{58} The stress is rather on the appropriateness of specific performance than on the "adequacy" of damages.\textsuperscript{59} Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice.

There are also some indications that English courts are more prepared to accept that specific performance should be more freely granted and to reject case authority which inhibits their discretion to do so.\textsuperscript{60} Specific performance should be decreed if it is the appropriate remedy.\textsuperscript{61} The


\textsuperscript{57} U.C.C. S.2-716 (i) provides that specific performance may be decreed where the goods are unique or in other proper circumstances.

\textsuperscript{58} Ibid.


\textsuperscript{60} See Gareth Jones & William Goodhart, \textit{Specific Performance}, supra, at 3.

American courts have been moving towards that position for some years, and now give less consideration to the requirement that specific performance should be granted only if damages are inadequate.\textsuperscript{62} That is, the courts tend to give less weight to the traditional principle of adequacy of damages and put more emphasis on the test of the propriety of specific performance.\textsuperscript{63} Such growing tendency implies some criticism of the traditional response. It is said that the focus of the traditional response on the pecuniary aspects of breach fails to take account of actions of the sanctity of contract and the resulting moral obligation to honour one's promises.\textsuperscript{64} In addition, according to some scholars, if the damages rule encourages breaches without consultation, whereas the specific performance rule encourages consultation and mutually beneficial agreement, costs will be lower under a specific performance rule.\textsuperscript{65}


\textsuperscript{63} English law has been reluctant to recognize the specific enforceability of contracts for the sale of goods other than specific goods. But in the United States, the courts have extended the remedy of specific performance even to buyers of generic goods whose need for the actual supply is particularly urgent, or who would in fact be unable to get a substitute. (See, \textit{International Encyclopedia of Comparative Law}, Vol. 7, c. 16, supra at 18.)

\textsuperscript{64} See \textit{Restatement of the Law, Second, Contract 2nd.}, supra, at 100.

\textsuperscript{65} For a detailed discussion, see Ian R. Macneil: "Efficient Breach of Contract: Circles in the Sky"(1982) Vol. 68, Virginia Law Review, at 946. In this article, the author tries to examine the fallacy in the simple-efficient breach
This modern trend is clearly in favour of the extension of specific performance at the expense of the traditional primacy of damages. The contemporary approach is to compare remedies to determine which is more effective in affording suitable protection to the injured party's legally recognized interests, which is actually his expectation interest.

C. Comparison and Analysis of Specific Performance between Anglo-American Law and Chinese Law

From the above brief description of the basic theories and practices of specific performance in both legal systems in section A and section B of this part, remarkable differences between the two legal systems can be easily seen both in theory and practice. Therefore, the focus of this part is on the contrast of the different configurations or preferences of remedies between Anglo-American law and Chinese law.

66 See Farnsworth on Contracts, Vol. III, supra, at 163; also see Robert J. Sharp, "Specific Relief for Contract Breach", in Reiter & Swan, Studies in Contract (Toronto: Butterworth, 1980) at 124. In this study, Professor Sharp examines the contemporary law governing the awarding of specific performance. He studies the historical limitations on the availability of the equitable remedy, notes a modern predisposition to awarding specific performance in a broader range of cases and assesses arguments for expanding the range even more, or alternatively, for restricting it substantially.

67 Ibid. at 168.
1. Different Preferences between Anglo-American Law and Chinese Law

As mentioned above, in Chinese contract law, at least theoretically, specific performance prevails over monetary compensation with only a few exceptions. Specific performance cannot be substituted for by monetary compensation under normal conditions, even where damages can provide adequate relief. In short, specific performance enjoys priority and tends to be much stressed in China. The Chinese position is that there is a general right for the innocent party to have the contract specifically enforced, but the court may, in certain circumstances, refuse the remedy. Chinese law, compared with Anglo-American law, favours a claim for specific performance.

Although during the last ten years, along with the economic reform in China, monetary compensation, i.e. damages, have more often been awarded by the courts, in judicial practice, the basic principle that specific performance cannot be replaced by damages is still deep-rooted, particularly for those economic contracts based on a state mandatory economic plan. It has much to do with the present existing social, political and economic structures of China.

Chinese Economic Contract Law provides for specific performance in principle. An innocent party has the right to bring a claim for performance of a contract and to obtain a judgement ordering the breaching party to fulfil it. See, article 35 of CECL; and also see, The Official Opinions of the Supreme People's Court of China Concerning a Number of Questions in Carrying out the CECL, 1984.

A research survey shows that monetary remedies were seldom imposed in cases of non-performance. Specific performance is the primary remedy in the case of contract non-performance. Of the forty-six disputes of the survey
The strong preference of Anglo-American law for substitutional relief stands in sharp contrast to the preference of Chinese law for specific performance. The jurisdiction to order specific performance is supplementary to the common law remedy of damages.\textsuperscript{71} Monetary damages is the primary remedy under normal conditions. As a general rule, an order for specific performance will not be made in any case where damages are an adequate remedy.\textsuperscript{72} It is the courts rather than the innocent party who have much discretion in deciding whether or not to grant specific performance.

It is quite obvious that one of the leading distinctions between the two legal systems so far discussed is whether specific performance is in principle recognized as a right of the aggrieved party. Chinese law in principle recognizes the right of the non-breaching party to enforce actual performance, while Anglo-American law doesn't recognize it as involving pre-CECL contracts where a remedy was specified, 33 resulted only in an order requiring specific performance. And there was a continued reluctance to impose monetary damages. Of the 19 disputes over post-CECL commercial or industrial contracts where a final result was reported, 15 resulted in either specific performance or some other remedy that did nothing to compensate for the aggrieved parties' losses. (See P. Potter, The Economic Contract Law of China,(Seattle: University of Washington Press, 1992) at 99, 108. \textsuperscript{71} See, Harnett \textit{v.} Yelling (1805) 2 Sch.\& lef.549, at 553; \textit{Ryan v.} Mutual Totine Westminster Chambers Association, (1893) 1 ch. 116, at 126. \textsuperscript{72} See Anson's \textit{Law of Contract}, 26th ed., supra, at 365.
a right of the innocent party to enforce actual performance.\textsuperscript{73} That is, Anglo-American law regards an award of monetary damages rather than specific performance as the primary remedy, and recognizes damages as the right of any innocent party of a breach of contract.\textsuperscript{74}

Why does China attach so much importance to specific performance both in legal theory and practice, regarding it as the obligation of the breaching party and not replaceable by monetary compensation? And why should Anglo-American law choose the route that specific performance is only an exceptional remedy and that will only be ordered where damages or other common law remedies afford inadequate protection to the injured party? In order to answer this question and to illustrate the existence of this legal phenomenon, we can broaden our perspective and focus our investigation on the relations and interactions between law and related social and economic structures--that is, we can trace the different principles governing specific performance back to their different social, economic and ideological roots.

\textsuperscript{73} See Gareth Jones & William Goodhart, \textit{Specific Performance}, supra, at 1; also see \textit{Wilson V. Northampton and Banbury Junction RLY Co.} [1874] 9ch. App279 at 284, per Lord Selborne.

\textsuperscript{74} See \textit{Anson's Law of Contract}, 26th ed., supra, at 391.
2. The Priority of Specific Performance in Chinese Contract Remedies and the Chinese Planned Economy

The law of contract could not have developed in total isolation from the political, economic and social values of the society. The social, economic and political structures of one society have great impact and restraint on its contract law.

The institution of contract is shaped by the social, economic and ideological context of a society in which it grows. So is its contract remedy system. Therefore, the key to comprehending the distinctively national character of a contract remedy institution is to consider broadly the social, economic structures and the entire legal system.

This part tries to explore the rooted cause of the differences and to examine the underlying economic relations upon which the law operates. When we study closely the concrete social, economic systems and culture settings of China, the reasons becomes clearer for why specific performance tends to be more intensively stressed in China than in the counties of the Anglo-American law system. The importance of specific performance results from the socialization of the national economy and the planned economy

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in China. The willingness to stress and to enforce specific performance in China's legal theory and judicial practice reflects China's focus on contracts primarily as a means of realizing or fulfilling the state economic plan.

To better understand the rules of a contract remedy institution, the social functions of the contract institution may be of great significance. The first question to be asked in analyzing Chinese contract remedy system concerns the functions of contracts in Chinese reality. Contract institutions can function quite differently in different social, economic structures and different culture settings.

In China, economic contracts have been used as an instrument in planning, organizing, distributing and implementing the state general economic plan under government control. Contract is mainly perceived as a means for the government to administer its economy, and the main function of contract is to promote the realization of the state economic plan. The CECL makes clear the purpose and the main theme from the very beginning:

This law is formulated for the purpose of protecting the lawful rights and interests of parties to economic contracts, safeguarding the social economic order, increasing economic benefits, guaranteeing fulfilment of

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77 See Zhou Libin, Comparative Contract Law, supra, at 6.
the state economic plan and promoting the development of socialist modernization.\textsuperscript{78}

Accordingly, the economic contract law is an important means for the state to administer its economy.\textsuperscript{79}

\textbf{a. Relationship Between State Economic Plan and Economic Contracts in China}

First of all, it is necessary for us to deal briefly with the relationship between state plan and economic contracts, for this relationship is the basis for the functioning of the system of contract in China.

The contract institution based on the system of socialist public ownership of the means of production\textsuperscript{80} is an instrument for developing the national economy in a planned way and maintaining the order of the socialist exchange system.\textsuperscript{81} As we know, after the founding of the People's Republic of China, especially after 1956, China has been

\textsuperscript{78} See, article 1 of CECL, 1982.

\textsuperscript{79} See, The Interpretation of the Provisions of the CECL, supra, at 6; also see, Gu Ming: Explanation on the Draft of Economic Contract Law of People's Republic of China, at the fourth session of the fifth People's Congress, 1982.

\textsuperscript{80} For detailed information please see Ma Hong et al., Xiandai Zhongguo Jingji Shidian (Modern Chinese Economic Dictionary) (Beijing: Chinese Social Science Publishing House, 1982) at 16-20.

operating as a planned economy. Economic contracts in China are ultimately instruments of the state direction of the economy. Their main function is "to contribute to the fulfilment of the national economic plan".

Under the model of planned economy, the state economic plan holds a central position. It expresses the government's economic policies and fixes the course of the country's economic development. The function of the contracts, in turn, is to materialize in detail the directives of government economic policies as expressed in the plan. Economic contract is the important form to materialize and implement the state plan, and is also the important basis and

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82 In the planned economy, high degree of government intervention and central planning is adopted as a basic form of economy. All economic activities of the country are directed by a central administration in pursuit of top priority political goals determined by the government; the central administration demands a stipulated output from the individual units of production, for which purpose it allocates quantities of materials and labour to them; and it distributes the product to other businesses or to consumers in accordance with a detailed scheme. There is no room in this economic model for the persons or businesses involved to use their own initiative or advance their own interests.


84 The State economic plan is the general strategy and arrangement made by the central government for the development of the state economy and the whole society. Such a state plan is enforceable. See, The Interpretation of the Provisions of the Economic Contract Law of China, supra, at 17.

necessary foundation for the state's economic plan making.\textsuperscript{86} In short, economic contract must serve and guarantee the fulfilment of the state economic plan.\textsuperscript{87} So, for this general purpose, the CECL provides in its general provisions part that:

\begin{quote}
In concluding an economic contract, the parties must comply with the laws of the state and must conform to the requirements of the state economic policies and plans.\textsuperscript{88} No units or individuals may use a contract to undermine state economic plans.\textsuperscript{89}
\end{quote}

The Contract law further provides that:

\begin{quote}
economic contracts that concern economic dealings in products or projects under a mandatory state economic plan\textsuperscript{90} must be concluded in accordance with the state-
\end{quote}

\begin{flushright}
\textsuperscript{86} See, \textit{The Interpretation of The Economic Contract law of China}, supra, at 3.
\end{flushright}

\begin{flushright}
\textsuperscript{87} See, article 1 of CECL; and also \textit{The Interpretation of The Provisions Of CECL}, supra, at 3.
\end{flushright}

\begin{flushright}
\textsuperscript{88} See, article 4 of CECL.
\end{flushright}

\begin{flushright}
\textsuperscript{89} See, article 4 of CECL.
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\begin{flushright}
\textsuperscript{90} There are two kinds of economic plan. One is called a mandatory economic plan, the other is called a guidance plan. (See \textit{The Interpretation of the Provisions of the Economic Contract Law of China}, at 30.)
\end{flushright}

A mandatory economic plan is one of the forms of the state economic plan. It is the plan for the production, construction, circulation and distribution of the essential products and projects important to the national economy and the people's livelihood. A mandatory economic plan is enforceable. Every economic unit must strictly act in accordance with this kind of plan and has a duty to fulfil it. And the prescribed quota can not be broken through. That is, each economic unit must meet this quota exactly, neither exceeding nor falling short.

\begin{flushright}
Targets in the mandatory economic plan are formulated by the State Planning Commission on the basis of projected needs and possibilities of economic and social development and are subject to the approval of the State Council. Those targets cover the purchase and allocation of
\end{flushright}
issued targets; economic contracts that concern economic dealings in products or projects under an guidance state economic plan91 shall be concluded after taking account of state-issued target and linking them to the actual conditions of the units involved.92

The content of the economic contracts reflects not only the state economic plan, but also the state economic policy.93 Therefore, performance of contracts is just the realization of state economic plan and state economic

key produce and products of agriculture, forestry, animal husbandry, side-line production and fishery; the production, procurement, distribution and allocation of key industrial products; fixed assets investment; the volume of key materials transported by rail; prices of key commodities and general price indexes; and major national scientific research projects and technology extension programs, etc. Economic contracts governed by those targets must confirm to such targets in terms of object, volume, price and allotted time for performance. Parties to such contracts are obliged to rigorously execute the plan by ensuring performance of those contracts.

Guidance plan is also issued by the central government. Such plan plays a guidance role in the relevant national economic activities. Unlike the mandatory plan, the guidance plan is not enforceable. Targets in the guidance plan have less decisive influence on economic contracts as compared with those of the mandatory plan. They serve as a frame of reference in the process of contract formation without any compulsory binding effect on the parties. It is comparatively flexible. It allows the economic units to make some appropriate adjustment based on the actual situations or needs of the economic units. In other words, they provide a course of action for economic units instead of directly placing them under obligations to enter into certain contractual relations.

91 See supra footnote 90.

92 See, article 11 of CECL.

93 See Wang Jiafu & Xie Huashi, Contract Law, supra, at 172.
policies.\textsuperscript{94}

Thus we can see clearly the close relationship between economic contracts and the state economic plans and policies in China. The state economic plan, especially the mandatory state economic plan, is the basis of the relevant economic contracts, and the economic contracts made between economic units serve as a vehicle to materialize and realize the state economic plans.\textsuperscript{95} The ultimate purpose of the economic units in forming economic contracts is to fulfil the state economic plan assigned to them.\textsuperscript{96} For example, in China, especially before 1980, nearly all the economic contracts made between state-owned enterprises were based on state economic plans.\textsuperscript{97} Even though today the situation in China is changing, the state economic plan still plays a predominant role in China's economy. Economic contracts made between state-owned enterprises, especially for the key production materials, such as coal, steel, iron and ect., are still under the control of the State economic plan.

\textsuperscript{94} Ibid. at 172, 173; also see the Editorial, "Jingji Guanxi Zhong De Zhongyao Zhunze" (The Important Principles Governing the Economic Relations) Dec. 17th, 1981, People's Daily.


\textsuperscript{96} Ibid.

\textsuperscript{97} See, The Interpretation of The Provisions of The Economic Contract Law of China, supra, at 73.
b. Contracts are Perceived as An Instrument to Organize, Distribute and Implement the State Economic Plan

(1) Economic Contracts are Assimilated Administrative Orders in China

The obligation of the economic units to implement the state economic plan and to satisfy the needs recognized by the plan is the original and principal reason behind the rule of specific performance. 98

In China, the impact of the planned economy on the conclusion and enforcement of contract actually results in a peculiar mixture of civil law and administrative law. (In the West tradition, it is called private law and public law). 99

Under the State economic plan, since the economic units are


99 Private law refers to the portion of the law which defines, regulates, enforces and administers relationships among individuals, associations and corporations. See Black's Law Dictionary, 6th ed., at 1196.

Public law refers to the portion of the law that defines rights and duties with either the operation of government, or the relationships between the government and individuals, associations and corporations. See Black's Law Dictionary, 6th ed., at 1230.

And CECL includes both public and private law elements within it. Chapter II to V of CECL are the provisions regulating the relationship among Chinese enterprises and economic units. Chapter VI is the provision related to administration of economic contracts by the government.
usually directly placed under obligations to enter into certain contractual relations by the State economic plan and are obliged to execute the plan, contracts in China, especially the conclusion and enforcement of contracts, remain largely in the realm of administrative law, and that makes economic contracts a hybrid institution of administrative law and civil law.

In China, especially before 1980, contracts served primarily to reflect and implement the state economic plan at lower levels. Thus there is little room for the exercise of freedom by the contracting parties with respect to major and important terms of the contract. The state economic plan is just like an administrative order by the state to instruct economic units, especially the state-owned enterprises, to use certain amounts of materials to produce certain kind or amount of goods. Economic units are supposed to be executors of state economic plans, and they must always conform to the state economic plans in the formation, performance, modification or rescission of contracts. Contracts are then signed between the units to implement the state plan

100 See Tong Rou & Wang Liming, Chinese Civil Law, supra, at 3; also see Wang Jiafu & Xie Huaishi, Contract Law, supra, at 9-10.

assigned to them.\textsuperscript{102} Here, the private ordering function of contracts is largely reduced, for many decisions about what to produce and possibly what prices to charge are all fixed by the state plan. Enterprises have hardly any options or alternatives in choosing business partners or in the terms of their contracts. Economic contracts are assimilated administrative orders.\textsuperscript{103} This means that economic contracts are a kind of mandatory appointment or assignment. They are instruments to plan, organize, distribute and implement the state economic plan rather than private mutual agreements between individuals entered into on the basis of voluntariness and consensus.\textsuperscript{104} To great extent, contracts are subject to the dictates of the state economic plan and policies rather than to the objectives of individual economic actors. All economic units must strictly carry out the contracts and produce in accordance with their contract demands which is based on or assigned by the state economic plan.\textsuperscript{105}

What is more, according to article 32 of CECL, when a

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{102}] See Li Zhuguo, "Specific Performance of Economic Contract", supra, at 245.
\item[\textsuperscript{103}] See Wang Jiafu & Xie Huashi, \textit{Contract Law}, supra, at 10.
\item[\textsuperscript{105}] See Wang Jiafu & Xie Huashi, \textit{Contract law}, supra, at 153, 184.
\end{enumerate}
\end{footnotesize}
breach occurs, if an individual is directly responsible for the dereliction of duty to fulfil the state economic plan, or other unlawful conduct that gives rise to a major accident or severe economic losses of the State, he is subject to investigation for economic and administrative liability, and even criminal liability.\textsuperscript{106} Thus the economic liability in Chinese economic contract law covers both liability for breach of contract itself and liability towards the State. This administrative element and even criminal element in China's contract liability further make the contract more akin to an administrative order rather than a self-defined agreement between individuals. Under such circumstances, the so-called contract relation is virtually an administrative legal relation in economic contract clothing.\textsuperscript{107} The contracting party has no choice but to carry out the order. And the principle of the specific performance embodies that element of such legal relations.\textsuperscript{108}

Thus, we can see that in China's planned economy, contract performance is of the utmost importance, because it is tightly related to the state economic plan. The principle of specific performance is the result of China's overemphasizing instrumental facets of economic contracts and

\textsuperscript{106} See, article 32 of CECL


\textsuperscript{108} Ibid.
contract law.

(2) Specific Performance is Crucial to the Fulfilment
of State Economic Plan and the Maintenance of the
Planned Economic Order

Unlike a free, competitive economy where risk is divided
among many independently operating and self-adjusting economic
units, a planned economy does not have a great flexibility.

The centralized planned economy works just like a chain
without any ability to adjust it, which is very sensitive to
every disturbance. It is through the legal means of economic
contract that the government establishes an overall chain of
economic relations among the economic units.\footnote{See The Editorial: "Jingji Guanxi Zhongde Zhongyao Zhunze" (The Important Principles Governing the Economic Relations) Dec. 17th, 1981, People's Daily.} The
performance of one single contract is not merely to fulfil
that contract itself, it is also very important to the
fulfilment of the subsequent contracts and thus ultimately to
the fulfilment of the state economic plan. And since the
economic plans usually cover the most important key products
and key economic units, such as steel, coal, iron, the
coordinating function of the economic contracts becomes
essential and more important to the realization of the state
economic plan. Failure to perform one single contract may
cause a chain of reactions.\textsuperscript{110} That is, breach of one contract may seriously affect the subsequent contracts or even the entire social economic order.\textsuperscript{111} For example, an economic unit's failure to obtain the essential raw production materials may directly cause it to stop its production, and that will surely affect its subsequent contracts for selling its products to other units.

Moreover, as a consequence of planning, the goods which could not be produced as the result of a breach of contract are missing in the final balance of the plan, or may be produced only at the expenses of other goods. Therefore, signed economic contracts, especially those based on the mandatory state economic plan, must be strictly carried out. Violation of one economic contract may disrupt the state economy as a whole. In such a rigid planned economic structure, payment of damages can by no means compensate completely the damages incurred, for every breach of contract disturbs a certain planned economic relation pattern and demands increased efforts to overcome its consequences to restore the previous order. As a result of the planning character of the economic contract in China, the requirement of specific performance of the contract is inevitably more

\textsuperscript{110} See \textit{The Interpretation of The Provisions of CECL}, supra, at 16.

intensive. It is believed that specific performance can ensure that the state plan is executed according to its terms so that other transactions that are planned in reliance on such transaction also will be able to go forward. Therefore, compensation damages are not a desired goal either by the injured party or the court. On the contrary, specific performance is much more preferable.

Besides, according to socialist theory, in a socialized economy, the immediate purpose of the production is to satisfy the social needs which are fixed by the national economic plan for a given period.\textsuperscript{112} Such social needs can not be satisfied if one state-owned enterprise pays damages to the other.\textsuperscript{113} In other words, damages will not satisfy the production needs of the injured party to fulfil the state economic plan. Only by specific performance of contractual obligations, can the plan be fulfilled. For example, the task of manufacture imposed on a state-owned enterprise by the government plan can only be accomplished if the enterprise receives the specific raw materials that it has been promised for production, monetary damages are not an adequate substitute. And also because the economic contracts are based on the state economic plans, usually they can not be altered or rescinded unless the state plan has been amended,


\textsuperscript{113} \textit{Ibid.} at 179.
or the special authority in charge that issued the plan has approved the alteration. As a consequence, when breach occurs, the foremost concern to the injured party is how to fulfil the state economic plan assigned to him rather than the economic losses he suffers due to the breach. It seems that in a planned economic model fulfilment of those economic contracts almost always implies reliance on specific performance of contracts for goods or services which for all practical purpose may not be easily available elsewhere. Substituted remedies---damages---will not satisfy the production needs as well as the ultimate purpose of the injured party to fulfil the state economic plan.

Obviously, China emphasizes the social functions of contracts in China primarily as a device for implementing and supplementing the state economic plan. In order to guarantee the realization of the state economic plan, especially the mandatory state plan, specific performance takes precedence over compensatory damages. And since primary importance is given to the centralization of the state and maintenance of a planned economy order, the state's interest in the performance of each contract is increased. So, as a general rule, specific performance will be enforced whenever such

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114 Article 29 of CECL provides that if the modification or rescission of an economic contract involves products or projects under a mandatory state economic plan, before the agreement is signed the party shall report it for approval to the specialized department in charge that issued the plan.
 enforcement is in the best interests of the state.

(3) A Recent Tendency to Attach Additional Importance to Specific Performance

It should be pointed out that, before 1980, China practised a complete centralized planned economy. Specific performance was much more stressed and enforced in judicial practice. But after 1980, with the economic system reform, the gradual decentralization of economic power, the expansion of enterprise autonomy, and the increasing availability of a relative abundance of goods, specific performance has not been stressed and enforced so much as it used to be both in China's judicial practice as well as legal theory.

Recently, however, there is a trend in China which deserves attention, calling for paying more importance to specific performance in judicial practice.¹¹⁵ The basis of that trend is that, in recent years of China's judicial practice, there is a tendency that more and more large and key state-owned enterprises go to People's Courts for settlement

¹¹⁵ There is an article titled: Importance Should Be Attached to The Principle of Specific Performance. The article criticizes the modification of specific performance in China's judicial practice in recent years. This article was written by Yue Li & Liu Jue and published in Chinese Legal System Daily, Sept. 30, 1991. It won the third prize in the prize contribution named: The Economic Judgement During the New Period. The prize contribution was sponsored by the Supreme People's Court and Chinese Legal System Daily. It seems to me that the fact that the article won the third prize indicates the preference of China's recent judiciary as well as legal theory, because the propaganda in China always reflects the intention of the central authority.
of disputes, and some of the disputes directly involve matters of fulfilling the state economic plans, especially the mandatory state economic plan. Liquidated damages and monetary compensation can, to certain extent, make up for the actual losses, but such compensation still can not replace specific performance. Specific performance plays an uniquely important role in realizing the ultimate goal of socialist economic contract, which liquidated damages and compensation can not play. The authors attach great importance to specific performance of contractual obligations and regards specific performance as an effective means to fulfil the state economic plan.

Such a preference is also decided by the reality of China. That is, although nowadays owing to the economic system reform the state-owned enterprises enjoy more autonomy in their dealings, the framework of their economic activities is still determined and channelled by the owner—the state, mainly through the national economic plan. Enterprises can only enjoy autonomy in their dealings on condition that the autonomy will not affect the implementation of the state


117 Ibid.

118 Ibid.
Thus it can be seen, fulfilment of the state economic plan is still the overwhelming task of the national economic activities, especially for the state-owned enterprises.

c. Responses to the Problems of the Public Ownership

In an economy where all the major enterprises are state property, it seems inconceivable that the main purpose of remedies for breach of contract could be the compensation of losses.\(^{120}\)

As we know, China practises socialist public ownership and all the state-owned enterprises are state properties.

\(^{119}\) Before the economic system reform, enterprises could only produce products and conclude contracts exactly according to state economic plan. Their production could not exceed the quota assigned to them by the state, even though their production capacity was beyond the quota. And they could not sell their products to other economic units but to the units assigned by the state economic plan. That is, they were totally confined by the state economic plan and had no flexibility and choices in their economic activities.

After the economic system reform, economic units enjoy certain degree of autonomy. They are allowed to produce more products than the assigned quota and they can sell the extra products to other economic units. However, the precondition is that first of all they still have to complete the state economic plan and their decisions or choices have to be accord with the state economic plan. For example, they can not change their products freely according to the demand of market; they can not sell their products to other units leaving state economic plan uncompleted; and for certain products, they are not free to raise or lower their prices according to the demand of market.

Under public ownership, economic contracts among state-owned enterprises are not, in a sense, true contracts in the Anglo-American sense, for the contracting parties have the same owner—the state. Being the property of the state, economic enterprises, especially state-owned enterprises have no independent economic status, and thus no independent economic interests. Therefore, it is not necessary for them to bear the responsibility of economic gains and loss or the operation of the enterprises. Whether breach occurs or not, the profits or the losses go to the state. As a matter of a fact, the economic contract relation between economic enterprises could be better said to be a relationship of allocation and distribution of the products and materials of the state, rather than a relationship of real exchange of commodities where resources are allocated based on value. Consequently, it is less important and less necessary that the main purpose of remedies for breach of contract could be the compensation of economic losses, for the payment of the damages from one state-owned enterprise to another simply results in a transfer of the financial resources of the state from one economic unit to another. Metaphorically speaking, it is just like that a person takes his money out of his right pocket and then puts it into his left pocket. Damages are less attractive to the contracting parties as well as to the realization of the state plan. The planned allocation and the distribution of the state raw materials and products among state-owned enterprises
largely implies the reliance on specific performance. And this may further illustrate the reason why specific performance is much more preferable when breach occurs in China.

Of course, it cannot be denied that since 1980, China has tried various measures to decentralize economic power and has made an attempt to give more scope to individual initiatives of economic enterprises. Early in July 1978, the Central Committee of the Chinese Communist Party (CCP) issued the "30-points Decision on Industry "121 which summarized the broad political tasks and economic policies for the current period. The decision opened the way for substantial changes in enterprise management policy, by giving each state-owned enterprise a greater independence and by making it responsible for its operations. That is, it made the state-owned enterprises responsible for their own profits and losses, and separated the state-owned enterprises from the bureaucracy that supervises their activities.

However, it is quite clear under the socialist public ownership, that the enterprise's autonomy and independence are still quite limited. Even under the economic reform where state-owned enterprises enjoy more autonomy in their

dealings, the framework of their economic activities is still subordinate to the state general economic plan. After all they are the property of the state. They don't really have much independent economic interest to care about. It is obvious that in a society still dominated by state ownership of enterprises, contract remedies based on the payment of damages necessarily are weak and ineffective.122

And in the last decade, there has been a keen and intense discussion among Chinese legal scholars and practitioners as how to solve the problem of the independent status and necessary economic autonomy of the state-owned enterprises under the socialist public ownership. One theory is to separate the right of management from the state ownership so as to make the state-owned enterprises become comparable—at least to certain extent—to independent private-owned enterprises. The policy behind this is that a

122 Under the socialist public ownership, since state-owned enterprises are the property of the state, they are actually run by the state. It is the state (the owner of the enterprises) rather than individual enterprises that is responsible for the operation of the enterprises. That is, the state is responsible for losses and benefits of the enterprises. If state enterprises lose money, the state is expected to replenish its capital in order that it can continue its production. Therefore, when a state enterprise is ordered to pay damages, the enterprise simply turns around and asks the state (the owner) to make up losses. Similarly, if an enterprise recovers damages, the damages go to the state (the owner). In such cases, money goes in and out of the same pocket with little impact on the enterprises. As a matter of fact, the state is the damages receiver as well as the payer. Damages seems meaningless. See Lucie Cheng & Arthur Rosett, "Contract with a Chinese Face: Socially Embedded Factors in the Transformation From Hierarchy to Market, 1978-1989" at 242.
higher overall efficiency of the economy could be achieved only by giving each state-owned enterprise a greater independence and by making it responsible for its operations. However, whether or not such theory and practice will be successful still remains to be seen.\textsuperscript{123}

d. The Role of Scarcity in China's Planned Economy

There is another feature in China's economy that makes specific performance preferable both to the contracting parties and the courts. That is the scarcity of resources of the planned economic market.

In China, especially before 1980, the economy was one of great scarcity. Instead of efficient markets, key production materials, equipments and capital were— and still are—

\textsuperscript{123} The reconciliation of the need for decision-making autonomy of individual enterprises with the public ownership and the state interests is one of the fundamental problems of the present stage of China. Change of status of the enterprise means confirmation of enterprise autonomy in decision-making and recognition of its own interests so as to transform it from a dependent of the state into an independent legal person with autonomous decision-making power. It also means the transformation of the existing economic relations between enterprises and between the enterprises and the state into ones of economic exchanges between equal subjects, i.e., contractual relations in the sense of Western law, instead of relations of administrative subordination.

under the total control of the government. With the policy of planned purchase and planned supply, the government controls the allocation and distribution of raw materials, products and credit. Most of the production materials, equipment and capital are allocated to economic units according to the state economic plan. Little capital and key materials are available to enterprises outside the plan. Therefore, with limited access and exchange of goods, goods are not freely available and money may not be easily convertible into desired goods. In addition, since the market is not sufficiently developed, it is also rather difficult for the innocent party to obtain substitute goods from somewhere else to mitigate losses when breach occurs. In such a planned and scarce economy where goods do not circulate freely, there are very rarely alternative sources of supply.

So, a purchaser whose supplier breaches a contract cannot purchase the same kind and amount of goods from another supplier or other sources due to scarcity of market and the fixed production and supply plan. This can be mostly clearly seen in the context of the supply type of contracts.\textsuperscript{124} Therefore, as a natural result, a purchaser always has a vital interest in the specific performance of the contract. It does

\textsuperscript{124} A supply contract is a kind of rigidly planned contract based on state production and distribution plans. The conditions of supply are set jointly on an annual basis, normally by the Consuming and Supplying Ministry. The contracting parties usually have little room for private negotiation. The making of a supply contract not in accordance with the state plan is punished by the state.
make a great difference to the purchaser if it receives from the seller the goods needed for production rather than the money value of the goods, for only by getting the goods needed for its production can the purchaser go on to fulfil the state economic plan. By comparison, damages will not satisfy the ultimate production needs of the units under such conditions. So, due to the rigid control of the production and circulation of the goods, it is impossible as well as impracticable for the economic units to have much flexibility, which is quite common in Western free market world.

Of course, over the last ten years or so, China has tried to transfer from centralized planned economy to planned commodity economy, and has attempted to employ market mechanisms and bring into play market determined price in order to establish and expand a commodity market while narrowing the scope of the centrally-controlled market in a planned way. However, as things stand now, the desired commodity market is still notably weak in China. Much work remains to be done to strengthen and improve it. An open market exist only for some, but not all commodities. In such circumstances, if a breach occurs, the disappointed party may not have any practical way to purchase a substitute if awarded damages.

As a consequence, one possibility and the most common practice is to emphasize specific performance. That is, the court will order the performance of the agreement rather than
award damages for the breach, because the tasks imposed upon the enterprises by the state economic plan cannot be accomplished when the enterprises receive money instead of the goods they need desperately for production. Even though damages may sometimes have an adequate compensatory effect on aggrieved party, the interests of the national economy are not satisfied. Obviously, specific performance is of great universal and practical significance in China's planned economy.

e. Influences of Socialist Ideology

We can also trace every legal provision right back to its ideological roots. The growth of contract remedy institution is also influenced by cultural values. And any ideological change sooner or later finds its expression in even the most remote legal provision.

In China, socialist ideology emphasizes the centrality and overwhelming importance of the state and collective economy based on the public ownership of the means of production, with less respect to the material interests of individuals. Fulfilment of state economic plan takes precedence over individual economic rights. It is reflected in the belief that individual interests must submit to state

125 See Bernhard Grossfeld, "Money Sanction For Breach of Contract in A Communist Economy", supra at 1345.

126 Ibid.
interest and collective interests. The interests of the state prevail over either collective interests or individual interests. That is, state interests should outweigh the collective interest, and collective interest should outweigh individual interest. Personal interests should always conform to those of society. Accordingly, great supremacy is given to the state interest and collective interest. If individual interest is in conflict with the interest of the state, then individual should give way to state interest. The state interests should be first protected and the courts should enforce this principle.\textsuperscript{127}

The basic socialist principle in China is that all economic contracts made between the economic units must be for the purpose of increasing the interests of the "public" as well as of the state.\textsuperscript{128} However, this supremacy of the state interests in China may sometimes mean subordinating the interests of individual economic units to the needs of the State so that the State can continue to function properly. Obviously, this kind of concern might come into conflict with ideas of individualism and individual rights, which are much stressed in the Western world. And the reflection of this socialist ideology in economic contract law is that the law

\textsuperscript{127} See Wang Chang-yin: "Yange Zhifa Fangshui Yangyu" (To Enforce The Law Strictly And Letting the Water out to Breed the Fish), (Dec. 12, 1992) Chinese Legal System Daily.

\textsuperscript{128} See, Interpretation of The Provisions of the Economic Contract Law of China, supra, at 23.
tends to emphasize protecting the interests of the state and guaranteeing the realization of the state plan, consequently with less respect to the material interest of individual economic units or sometimes even at the expense of individual interests.

In addition, in Chinese judicial practice, the work of the courts is an aspect of the work of the government in achieving its purposes and carrying out its policies. Therefore, economic dispute resolution involves a great degree of government intervention. The courts tend to favor the needs of state plan over the right of contracting parties. Specific performance is believed to be able to ensure the realization of the state plan and thereby to increase the interest of the state. Sometimes even when the innocent party doesn't want specific performance, the court would still order specific performance out of concern to guarantee of the state economic plan. That shows that Chinese courts interpret and enforce law based on the expectation of the Chinese government. This is substantially different from the role of the courts in a capitalist market economy country.

As the foregoing analysis suggests, Chinese contract

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In the planned economic model, in order to guarantee the realization of the state economic plan and to strengthen contract discipline, a seller can be awarded specific performance, although the buyer rejects the goods. See case: Jingji Hetong Yingdang Quanmian Shiji Luxing, (Economic Contracts Should be Performed Completely and Specifically) in Niu Baiqian & Xu Zhen, Jingjifa Jiaoxue Anli Xuanbian, (Collection of Cases for Economic Law Research) Vol. 1, (Beijing: People's Court Publishing House, 1987) at 43.
law is shaped by the social, economic and ideological context of China in which it grows. Accordingly, the preference of specific performance in Chinese contract law is decided by the concrete social and economic settings in China and naturally reflects the social and economic characteristics and the demands of Chinese society. In the Chinese context of a planned and scarce economy, the state economic plan is the core of all the economic activities. Remedial rules in particular serve to promote the purposes of contracts in implementing state economic plans. Accordingly, as a principle, specific performance of contract will be enforced whenever such enforcement is in the best interest of the state plan realization. And at the same time, compensatory damages are provided to compensate for the losses suffered by the innocent party. It might be concluded that the importance of specific performance results from the socialization of the

130 It should be pointed out that although in Civil Law system, specific performance is also available in principle, it is quite different from the Chinese principle respecting the ends to be served by remedy. Civil law's theoretical position derives ultimately from the proposition that specific relief gives maximum protection to the obligee's expectation interest and ensures a high degree of "contractual discipline" without violating the postulate that remedies are to compensate the obligee, not punish the obligor. (See, The International Encyclopedia of Comparative Law, Vol.7, chapter 1, supra, at 103.) They don't go as far as Chinese law which provides that even after paying the damages and liquidated damages, the breaching party is still obliged to perform the contract if the innocent party so demands. (See, article 35 of CECL.)
national economy and the central planning system.\(^\text{131}\)

And also due to the little wealth and weak market, alternative contractual performance is usually unavailable. The task of manufacture imposed on a state enterprise by the government plan can only be accomplished if the enterprise receives the specific raw materials that it has been promised for production. Monetary damages are not an adequate substitute.

It is also noteworthy that the reason why China's FECL takes damages as primary remedy, with specific performance as a reasonable, supplementary remedy, is not merely because that China wants to promote her foreign trade with Western countries and so she has to respect and follow the international commercial customs and usual practice. It is also because that the situations in international commercial transactions are completely different from those in domestic China. This shows that Chinese foreign trade organizations operate in world market in very much the same way as capitalist enterprises. Those contracts are real commercial transaction contracts in a flourishing market with an abundant availability of goods and services in the market. With a few exceptions, in normal conditions, when breach occurs, the innocent party can easily cover or resell. Therefore, it is no longer necessary for the breaching party to place a very

high value on specific performance. Thus it can be seen much more clearly that specific performance principle in China is mainly the objective result of her planned economy structure. It reflects the great degree of governmental control and interference over economic contracts. In China, contracts are the linking ties of the production, circulation and consumption of the state planned economy; contract actually is the main legal tool by which the government materializes and realizes its economic plan as a whole.\textsuperscript{132}

3. The Priority of Monetary Damages in Anglo-American Law and the Western Market Economy

By contrast, in a free market economy, specific performance seems not so attractive, instead, monetary damages are much more appealing. The factors that have made specific performance so attractive in a planned economy are plainly absent in a free market economy. The notion of Anglo-American law is also the product of its social and economic environment. Its preference of monetary damages to specific performance is also decided by the concrete social and economic settings in Anglo-American countries.

In the Anglo-American context of a free market economy with a variety of alternative goods, remedial rules in particular serve to compensate the aggrieved party for the

\textsuperscript{132} See \textit{The Interpretation of the Economic Contract Law of China}, supra, at 10.
damage, loss or injury he has suffered due to that breach.\textsuperscript{133} The willingness of the Anglo-American courts to award monetary damages for breach, instead of requiring performance in strict compliance with the terms of the contract, reflects the underlying economy in which the market places a value on products and in which like products normally can be obtained for like value.\textsuperscript{134} That willingness also reflects the society's focus on contracts primarily as a means of facilitating private transactions and its relative disinterest in enforcing remedies not required by that idea.\textsuperscript{135}

In a free market economy, contracts are primarily regarded as a means to facilitate the operations of the market.\textsuperscript{136} And the law of contract has been evolved mainly to serve the needs of trade and commerce.\textsuperscript{137} That is, the law of contract is perceived as a device for enabling private individuals to make their own arrangements.\textsuperscript{138} The market economy can be conceived of as a regulatory institution. It

\textsuperscript{133} See Anson's Law of Contract, 26th ed., supra, at 391.

\textsuperscript{134} See R.M. Pfeffer, Understanding Business Contracts in China, supra, at 36.

\textsuperscript{135} Ibid.


\textsuperscript{138} See P.S. Atiyah, The Rise and Fall of Freedom of Contract, supra, at 408.
reflects an implicit political decision to decentralize economic power to private firms and individuals who assume responsibility for the production and distribution of goods and services in society.\textsuperscript{139} Contracts, organized and structured through contract law are the specific vehicles through which these innumerable decentralized "private" choices allocate resources to their most valued uses— that is, both allocative and distributive functions of the market as a regulatory vehicle are performed through privately designed consensual arrangements.\textsuperscript{140}

In a free market economy, the major objectives of corporations, according to Western economic philosophy, is to maximizes profit or wealth. People generally enter into commercial contracts for purely economic reasons. That is, the businessmen are only concerned about benefits. Therefore, when breach occurs, what the injured party is concerned most is the compensation of his economic losses caused by the breach. Usually it makes no difference to the injured party whether he receives the goods he contracted for or their money value, so long as he can be fully compensated.\textsuperscript{141}

Additionally, in a free and competitive market economy

\textsuperscript{139} See D. Cohen, \textit{A Transactional Analysis of Commercial Relations} Vol. 1 (unpublished), (Faculty of Law, University of British Columbia, 1992) at 1.

\textsuperscript{140} \textit{Ibid.}

\textsuperscript{141} See B. Grossfeld, "\textit{Money Suctions for Breach of Contract in a Communist Economy}" , supra, at 1331.
with rich variety of goods and products and with free access and exchange of goods, nearly all the goods can be evaluated and replaced by a certain amount of money. Similarly, money can be easily converted into desired goods and goods can be easily converted into money value. As discussed above, in such circumstances, breach of contract can be fully redressed by monetary damages. The basic assumption is that with rare exceptions for such "unique" items as heirlooms and objects of art, substitute similar goods are available elsewhere.  

Substitute contract performance is always available in the market. For example, on the seller's default, the buyer can go into the market, get a substitute, and recover any extra cost by way of damages. Therefore, damages are always available as the primary remedy for breach of contract. 

Thus in Anglo-American contract practice, usually a purchaser does not have a vital interest in specific performance of contracts except for a few special cases. Monetary damages in most circumstances can provide effective and adequate protection for the interests of the innocent parties. Specific performance is only available under certain limited circumstances where no satisfactory substitute is obtainable.

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In addition, some modern commentators believe that an award of damages reflects normal commercial expectations and ensures a more efficient allocation of economic resources.\textsuperscript{145} I will discuss this point of view in more detail in Part Three.

And also with the subjective notion of value and the reliance on autonomous ordering in a free market economy, it has been commonly accepted that economic efficiency is served by not giving specific relief where the expectation interests can be accurately measured and fully compensated by money damages.\textsuperscript{146} The aggrieved party normally has no interest in specific performance if he can at once replace on a well-functioning market the performance that is in default.

Moreover, the existence of a well-developed market increases the likelihood that the promisor will usually receive alternative offers before he has performed the contract, the promisor will therefore be anxious to retain the freedom and flexibility enjoyed under a money damages rule.\textsuperscript{147}

The preference of monetary damages to specific performance in Anglo-American law has also been influenced by


Anglo-American legal traditions and ideology. In Anglo-American law, the legal traditions and ideology have a strong commitment to certain values, such as individual liberty, freedom of contract and equality. Individualism as a value has traditionally been held in the highest respect in Western democratic States, and continued to be so held. The Anglo-American position tends to associate contract and contract law with individualism, autonomy and private agreement which are perceived to be the characteristics of free market economy. The traditional philosophy of the market economy emphasises the equal freedom of everybody before the law and in the market place.

In addition, the courts are reluctant to use the process of contempt of court to redress private wrongs where less drastic methods of enforcement could do adequate justice to plaintiff. Specific performance is often felt to be too strong a measure when the aggrieved party could for most practical purposes be put into almost as good a position by the award of a sum of money. For example, specific performance


would be too harsh a remedy imposing unduly onerous personal obligations on a defendant who is not willing to perform in circumstances where a plaintiff would be adequately compensated by an award of damages.\textsuperscript{152} This reluctance is consistent with the limited role of judicial institutions in Western free market economy. In Anglo-American judicial practice, it is thought that it is not the court's business to interfere with private business affairs. Courts are not pre-disposed to create or impose obligations on anybody derived from its own sense of justice.\textsuperscript{153}

Obviously, without the compulsion supplied by the context of a planned and scarce economy, the Anglo-american law adheres to the principle that compensation damages generally are the adequate and proper remedy.\textsuperscript{154}

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\item See P.S.Atiyah, \textit{The Rise and Fall of Freedom of Contract}, supra, at 404.
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4. Uniqueness as a Common Ground for Consideration but Different in Content.

a. "Unique Importance" is the Common Basic Ground for Specific Performance in Both Legal Systems

When we look into the different principles of specific performance in the two legal systems carefully, we may observe that specific performance in Anglo-American law and Chinese law are similar to some degree. In both legal systems, the ultimate aim of specific performance is to meet effectively the aggrieved party's special need for or interest in the subject matter of the contract. In other words, the subject matter of the contract is of "unique importance" to the aggrieved party.

Such factor of "uniqueness" of the goods is the common ground for considering applying specific performance in both legal systems. For example, in Anglo-American law, specific performance may be decreed where the goods are unique.¹⁵⁵ That is, specific performance would be ordered only in the cases where no satisfactory substitute is obtainable. The most important common feature is the central role played by the idea of "uniqueness".¹⁵⁶ And the most obvious and typical application of specific performance is in relation to


¹⁵⁶ See A.T.Kronman, Specific performance in the Economics of Contract Law, supra, at 183.
"unique" goods\textsuperscript{157}, ie. goods for which the buyer has a very urgent or special need, or for which no substitute is available. The assumption in Anglo-American law is that the ultimate purpose of the contracting party to enter into commercial contracts is to get the expectation interest they contracted for. Therefore, when breach occurs, if the subject matter of the contract is unique and can not be replaced by other goods, the aggrieved party's expectation interest can be protected by specific performance. That the courts will order specific performance for the sale of physically unique goods is well established.\textsuperscript{158}

And in Chinese law, "uniqueness" of goods is not explicitly stated by legislation and legal rules or principles, but it does underlie the principle of specific performance in China. As analyzed above, in China, due to planned economy, controlled purchasing and selling and scarcity of market, more often than not, the aggrieved party has a special interest in or special need for the goods contracted for. And what is more, the importance of specific performance is, to great degree, due to the "uniqueness" of the obligation of the contracting party to fulfil the state economic plan assigned to him, especially in the case where contracts are made based on the state mandatory economic plan.

\textsuperscript{157} See A.S. Burrows, Remedies for Torts and Breach of Contract, supra, at 297.

\textsuperscript{158} Ibid. at 297.
Since such obligations to implement the state economic plan are usually fixed by the state and can not be altered freely by the economic units, the economic unit can hardly have options or alternatives but to perform the contract. In other words, the economic units usually have a special "unique" expectation interest in the goods contracted for. The special "unique" expectation interest in the goods is to fulfill the production task assigned to it. Units can hardly fulfill the state economic plan assigned to them without the very goods they contracted for. And the fact that they cannot get substitute goods from other resources out of the state plan makes the performance even more important to the buyer. In such a sense, specific performance of economic contracts is uniquely important in fulfilling the state economic plan. It is just the "unique interest" that the non-breaching party as well as the state has in the specific performance of contracts that is the original and principal reason behind the rule of specific performance in China.

An example will help to illustrate this point better. Suppose tractor factory A has concluded a contract with a steel factory B for certain amount of steel which is the crucial material for tractor making. Under the state economic plan, tractor factory A is only allowed to conclude a contract for steel materials with none-other than steel factory B. In such circumstances, the fulfillment of the tractor production quota assigned by the state economic plan
entirely depends on the performance of the contract by the steel factory. If the steel factory fails to perform the contract, the tractor factory cannot get the steel supply from elsewhere. And since it cannot get the materials needed for its production, it can hardly fulfil the production quota assigned by the state economic plan. As a consequence, the state economic plan will not be fulfilled completely, leaving that quota undone. It is just in this sense that the specific delivery of the steel material for the production of the tractors is "unique" to the tractor factory as well as to fulfilling the economic plan. In such a case, damages will not satisfy the production needs of the tractor factory. Only by specific performance, can the needs be met and the plan be fulfilled. Thus we can see, the "unique importance" of the subject matter of the contract to the aggrieved party is the common basic ground for specific performance in both legal systems.

b. "Unique Importance" Has Been Given Different Content due to Different Social and Economic Settings

However, when we look into the matter further, we shall quickly realize that the similarity is only apparent. The word "uniqueness" of goods is the same, but the content and connotation of "uniqueness" is quite different between the two legal systems.

In Anglo-American law, specific performance is the
exception rather than the rule.\textsuperscript{159} The typical situation in which specific performance would be ordered is that in which no satisfactory substitute is obtainable.\textsuperscript{160} One of the rules in Anglo-American Law is that specific performance will be ordered where the subject matter of the contract are the goods which are of "commercially unique" or "characteristically unique" and which can not be readily obtainable from other sources.

For example, a steel company enters into a contract to ask company B to build a specially designed equipment, and it is really very difficult for the steel company to find another company which is capable of producing the specially designed machine due to technical reasons. In this case, the specially designed machine is of both characteristic and commercial uniqueness to the buyer. If company B fails to perform, the expectation interest of the steel company can hardly be protected fully by damages, for no satisfactory substitute can be readily obtained else where. Here, damages can not provide adequate protection to the buyer. Obviously, in Anglo-American law, the content of "uniqueness" usually refers to either the specific qualities of the goods themselves (characteristic uniqueness) or the special commercial interest or need the aggrieved party has in the goods (commercial uniqueness).

\textsuperscript{159} See, Allan Farnsworth: \textit{Farnsworth on Contracts}, Vol. I, supra, at 28.

uniqueness). And usually such "uniqueness" can offer the aggrieved party special benefits or interests which other substitutes cannot offer. The aggrieved party is concerned that if he can obtain such special economic benefits or interests he expected for. That goes consistently with the Anglo-American notion that the ultimate purpose of entering commercial contracts in a free market economy is purely for economic benefits. Therefore, only when damages cannot offer adequate compensation for the special benefits, specific performance should be applied.

While in China, the content of "uniqueness" mostly refers to the indispensable need of the goods in fulfilling the state economic plan and the deficient sources to get it rather than the specific qualities of the goods or special commercial interest in the goods both of which can offer the aggrieved party special economic benefits. In other words, the goods may not be physically unique, but buying a substitute would be so difficult or would cause so much delay that the other party's fulfilment of state economic plan would be seriously disrupted. To certain extent, we might call it a kind of "inflexibly monotonous uniqueness".\footnote{This term is created by the writer. It means under the rigid state planned economy and the system of unified control of sell and purchase, the economic units have little freedom of contract activity.} And such "inflexibly monotonous uniqueness" is the product of the rigidity of planned economy as well as the scarcity of the
commodity in China. What concerns the aggrieved party most is whether he can get the goods he needs for his production so that he can fulfill the state economic plan assigned to him. That is consistent with the Chinese notion that the ultimate purpose of entering commercial contracts is to fulfill the economic plan. Therefore, as a general rule, specific performance will be enforced whenever such enforcement is in the best interest of state economic plan realization.

Thus we can see, the original intention or starting point of specific performance in both legal systems are similar—it is intended to meet the special need or interest of the aggrieved party for or in the subject matter of the contract. However, we also see, in different social, economic structures, "uniqueness" of the goods has been given different content and connotation due to the different social functions of contracts as well as different social, economic settings. And, it is these great differences in content and connotation of uniqueness that leads to the different principles about specific performance in the two legal systems. In other words, different principles of specific performance embodies different standards and contents of "uniqueness" of goods in different social, economic structures.

5. Brief Summary

The foregoing discussion suggests that Chinese law and
Anglo-American law start with different theories which are based on different social and economic conditions. The priority of specific performance in Chinese contract remedies is the logical necessity of China's planned and scarcity economy and its socialist ideology. It has been decided by the social and economic reality of China. The willingness to attach great importance to specific performance in China's legal theory and judicial practice reflects China's focus on contracts primarily as a means of fulfilling the state economic plan.

The preference of monetary damages to specific performance in Anglo-American law is also influenced by the concrete social and economic settings in Anglo-American countries. Such preference of monetary damages reflects the Anglo-American society's focus on contracts primarily as a means of facilitating operations of market and private economic activities. It also reflects the underlying economy in which the market places a value on products and in which like products normally can be obtained for like value.
PART THREE: COMPARISON AND ANALYSIS OF DAMAGES IN CHINESE LAW AND ANGLO-AMERICAN LAW:

Punitive Principle Versus Compensation Principle

A. Basic Theory and Practice of Monetary Remedies in Chinese Contract Law


Apart from specific performance, there are also monetary remedies in Chinese contract law, such as compensation damages and liquidated damages. However, the nature, principle, interpretations and applications of these monetary remedies in China are quite different from those of the Anglo-American law.

According to article 35 of CECL:

If a party breaches an economic contract, it shall pay liquidated damages to the other party. If the breach of contract has already caused the other party to suffer losses that exceed the amount of the liquidated damages, the breaching party has to pay compensation damages to supplement the liquidated damages by the insufficient amount.

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1 See article 35 of CECL; also see article 106 of The General Principles of Civil Law of China, (1986); article 13 of Regulations on Contracts for the Purchase and Sale of Agricultural By-products(1984); article 34 of Regulations on Contracts for the Purchase and Sale of Industrial and Mineral Products(1984); article 43 of Measures for the Implementation of Contracts for the Purchase and Sale of Hardware, electrical Hardware, Domestic Electrical Goods and Chemical Commodities(1986) in J.A.Cohen, Contract laws of The People's...
From this provision we can see, there are actually two types of monetary remedies in Chinese contract law: one is liquidated damages; the other is compensation damages.

a. Liquidated Damages in Chinese Contract Law

(1) Concept of Liquidated Damages in China

Liquidated damages which are also called breach of contract damages are certain amount of money which has to be paid to the innocent party by the breaching party on breach in accordance with either the provisions of law or a term of contract agreed by both parties, regardless of the fact of whether the breach has caused any actual losses or not.³

In some influential Chinese contract textbooks, liquidated damages are even defined as a certain amount of money which has to be paid to the innocent party by the breaching party once breach occurs.⁴ Some legal scholars go

Republic of China, (Hong Kong: Longman, 1988)

² See footnote 4 in part II.


even further. According to them, liquidated damages are actually a legal penalty for breach of contract or a fine for breach of contract.\(^5\)

(2) Types of Liquidated Damages in China

In China, liquidated damages can also be of two kinds: one is statutory liquidated damages (or we may call it compulsory damages), and the other is pre-agreed liquidated damages.\(^6\)

(a) Statutory Liquidated Damages

Statutory liquidated damages, as the term suggests, are stipulated or fixed by laws or regulations. For example, article 35 of Regulations on Contract for the Purchase and Sale of Industrial and Mineral Products provides:

The supplier shall pay breach of contract damages to the requisitioning party if it fails to deliver the goods. Breach of contract damages for general purpose products shall be 1 to 5 percent of the total value of the portion of the goods that the supplier fails to deliver; breach of contract damages for special purpose products shall be 10 to 30 percent of the total value of the portion of the goods that the supplier fails to deliver. A party that is liable for failure to deliver goods or make a payment on time shall, in addition to paying compensation for the losses suffered by the other party, pay liquidated damages for overdue performance


\(^6\) See The Official Opinions of the Supreme People's Court of China Concerning Several Questions in Carrying out the Economic Contract law of China (1984), supra.
equal to 0.1% of the total amount overdue for every day overdue.\(^7\)

Statutory damages are a kind of mandatory norm and sanction, and reflect a great degree of government intervention.\(^8\) The contracting parties are not free to change, by private agreement, the amount or the rate of the liquidated damages provided by laws or regulations.

(b) Pre-agreed Liquidated Damages

Pre-agreed liquidated damages are fixed through agreement by both contracting parties when a contract is made. That is, the contracting parties may agree in a contract that in the event of breach, the breaching party should pay the other party a special amount of money. They may also agree in the contract upon a method of computing the amount of compensation for losses arising from a breach of contract.\(^9\)

So, although laws or regulations have provisions for liquidated damages, at the same time, the laws or regulations

\(^7\) See article 21 of The Provisions of the Shenzhen Special Economic Zone on Economic contracts Involving Foreign Interests (1984); also see article 36(1) of regulations on Contract for the Purchase and Sale of Industrial and Mineral Products (1984); article 17(1), (2), (4) article 18 (1), (2) of Regulations on Contract for the Purchase and Sale of Agricultural by-products (1984); article 21, 22 of the Regulations on Processing Products (1985); for detailed provisions see Jerome A. Cohen, Contract Laws Of The People's Republic of China, (Hong Kong: Longman, 1988)

\(^8\) See Wang Jiafu & Xie Huashi, Contract Law, supra, at 486.

also allow contracting parties to pre-fixed liquidated damages by mutual agreement. For example, according to article 25 of Rules for the Implementation of Storage and Safekeeping Contract (1985):

If a party violates the provisions of article 9 and the second paragraph of article 22 of these rules, except where the contract stipulates otherwise, it must pay liquidated damages to the other party. The amount of the liquidated damages shall, except where the contract stipulates otherwise, be three months' safekeeping fees (or rate) for that part of the goods affected or three times the labour and service fees.10

In such circumstances, the pre-agreed liquidated damages take precedence over mandatory damages. If there is no liquidated damages clause in a contract, then the rate or amount provided by laws or regulations would apply. If the relevant laws or regulations have no provisions for the rate or amount, and the breach has not caused any losses to the other party, then it can be dealt with according to the actual situations.11 Even though the breach has not caused any

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10 See Jerome A. Cohen, Contract Laws of the People's Republic of China, supra, at 149.

11 See The Official Opinion of the Supreme People's Court of China on Several questions in Carrying out the Economic Contract Law, supra, (1984).

The implication of this explanation of the Supreme People's Court is that breaching party should be punished in any way. It typically shows that China focuses on the principle of punishment. The breaching party cannot go without any punishment even though there is no actual loss and no liquidated damages provided by laws or agreed by the contracting parties. Once breach occurs, punishment is due. The "actual situations" usually refer to the intention of the breaching party and the financial capability of the breaching party. Based on the actual situations, the courts will make decisions.
losses to the other party, the breaching party still has to pay liquidated damages.\(^\text{12}\)

(3) The Nature of Liquidated Damages in China

In China, liquidated damages have a dual nature\(^\text{13}\), ie. they are punitive in nature on the one hand, and compensatory on the other.\(^\text{14}\)

(a) Primarily Punitive in Nature

The punitive nature of liquidated damages is an important feature of China's Economic Contract Law. According to article 35 of CECL, when one party breaches a contract due to fault, it still has to pay liquidated damages even if no loss was caused to the other party.\(^\text{15}\) In such a case, the liquidated damages are obviously punitive in nature,

\(^{12}\) Ibid.

\(^{13}\) This dual function of liquidated damages was originally adopted from the Soviet Union. For further information see Z.L. Zile, Remedies for Breach of Contractual Obligations in Soviet Law, (student paper, Harvard Law School, comparative legal research, 1960) at 38; and also see The Interpretation of the Provisions of CECL, supra, at 83; also see Tong Rou & Wang Liming, Chinese Civil Law, supra, at 366; Cheng Xinhe, "Jingji Hetong Xin Fazhan" (The New Development of the Economic Contract law), (1988) No.2 Zhongguo Faxue at 58.


\(^{15}\) See the Interpretation of the Provisions of CECL, (1982) supra, at 83.
because its payment is not conditional on actual loss. It is clear that the aim of liquidated damages is not to compensate for the losses caused by the breach, but to punish the breaching party for its wrongful conduct in committing a breach. Such liquidated damages are intended as a kind of economic sanction against the breach itself rather than a pre-estimate of the potential loss that a party will sustain in the event of breach.\textsuperscript{16} Whether or not the breach has caused any loss to the other party is immaterial.\textsuperscript{17} Once a party breaches the contract, he has to pay the liquidated damages. Therefore, it is not surprising that some Chinese legal scholars even regard liquidated damages as a security for performance of contractual obligations.\textsuperscript{18}

The punitive nature can be seen even more clearly in statutory liquidated damages in Chinese contract law, for the amount or rate of the statutory liquidated damages are simply set up by laws and their payment has nothing to do with an assessment of actual losses or the concrete circumstances of individual cases. Statutory liquidated damages are simply intended to induce performance of contracts and to prevent

\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} See Li Youyi & Zheng Li, Science of Civil Law, supra, at 626; also see Zheng Li & Yao Hui, "Lun Weiyuejin De Danbao Shuxin" (Discussion on the Security Nature of The Liquidated Damages) (1990) No. 6, Falu Xuexi Yu Yanjiu at 25-27.
breaches by imposing economic pressure on the parties.\footnote{See Gao Min, "Guanyu Weiyuejin Zhidu De Tantao" (Discussion on the System of Liquidated Damages) (1989) No.5 Zhongguo Faxue at 100.} In some sense, statutory liquidated damages in Chinese contract law serves as a device for carrying out administrative supervision of economic contracts. It reflects the great emphasis on the punitive aspect of damages and high degree of direct government involvement in contractual practice in China.\footnote{See Wang Jiafu & Xie Huashi, \textit{Contract Law}, supra, at 486-489.}

\textbf{(b) Supplemental Compensation}

On the other hand, under certain circumstances liquidated damages also serve a compensatory function.\footnote{See the \textit{Interpretation of the Provisions of CECL}, supra, at 83.} According to article 35 of CECL, when the breach of contract has caused the other party to suffer losses that exceed the amount of the liquidated damages, the breaching party shall pay compensation and supplement the liquidated damages by the insufficient amount.

For example, suppose A and B concluded a contract with a liquidated damages of $500. A breached the contract, and the breach caused $500 loss to the other party, and in such a case, the liquidated damages is only to compensate for the loss. And if the breach caused $700 loss to B, then apart...
from paying the $500 liquidated damages, A still must pay an additional $200 compensation damages to the injured party. Obviously, in such cases, liquidated damages are compensatory in nature,\textsuperscript{22} for in such a case, the liquidated damages are used to make good the loss the other party has suffered.

(c) Being of Different Nature under Different Circumstances

One interesting phenomenon is that, due to the dual nature of liquidated damages, liquidated damages in Chinese contract law can be of different nature under different circumstances. All together there are three possible circumstances:

First, where the innocent party suffers no loss, the liquidated damages are purely punitive in nature. In such a case, they are used to penalize the conduct of breach itself and to enforce contract discipline.\textsuperscript{23} In such case, liquidated damages are a pre-agreed economic sanction against breach and are punitive in nature.\textsuperscript{24}

Second, where the innocent party has suffered losses which are below the amount of the liquidated damages, the liquidated damages are compensatory as well as punitive in

\textsuperscript{22} Ibid. at 38.

\textsuperscript{23} See the Interpretations of the Provisions of CECL, supra, at 83.

\textsuperscript{24} Ibid.
nature. They are compensatory, because a certain amount of the damages are used to compensate for the actual loss sustained by the innocent party; they are punitive, because the amount still exceeds the actual loss, and the innocent party has received more than the actual loss.\(^\text{25}\)

Third, where the innocent party suffers losses which are equal to or exceed the amount of liquidated damages, the liquidated damages are purely compensatory in nature.\(^\text{26}\) In such a case, the liquidated damages are used simply to compensate the losses the other party has suffered. And in the event the amount of liquidated damages does not cover the losses suffered, the injured party can recover compensation damages to make up the differences.\(^\text{27}\)

However, it is very important to point out that the punitive function of liquidated damages is primary, and the compensation function is supplementary. Even in the third situation mentioned above, according to article 35 of CECL, if specific performance is claimed together with liquidated damages and compensation damages, it seems to me that the combination of liquidated damages and compensation damages are


\(^{26}\) See The Interpretation of the Provisions of CECL, supra, at 83.

\(^{27}\) See article 35 of CECL; also see "the Official Opinion of the Supreme People's Court of China on Several Questions in Carrying out the Economic Contract Law." supra.
clearly of punitive nature. Because in such a case, the injured party gets not only liquidated damages as well as compensation, but also specific performance of the contract.

(4) Availability of Liquidated Damages in China

The next question is under what circumstances the breaching party has to bear the responsibility for breach? In other words, what are the basic requirements in deciding whether a breaching party should be liable for the breach and have to pay liquidated damages?

In Anglo-American law, contract law is a law of strict liability, and the accompanying system of remedies operates without regard to fault. The situation in China is quite different.

Article 32 of CECL answers this question:

If, due to the fault of one party, an economic contract cannot be performed or can not be fully performed, the party at fault should be liable for breach of contract; if both parties are at fault, in accordance with the actual conditions, each party shall be commensurately liable for the breach of contract that is his responsibility.

Article 32 and 35 of CECL establish the fault principle as a general rule in deciding whether the breaching party should be liable for breach of contract. That is, some


29 See article 32 of CECL.

30 See The Interpretation of the Provisions of the Economic Contract Law of China, supra, at 79.
degree of "fault" is a condition of contractual liability. Under this principle, damages are actually limited by reference to the degree of the breaching party's fault. In other words, only when the breaching party is at fault, should he be liable for the breach. Therefore, "being at fault" is a prerequisite to liability for breach of contract in China's contractual theory and practice.\(^{31}\)

In Chinese contract practice, in deciding whether or not the breaching party should pay liquidated damages, two factors are taken into consideration: a) there must be a conduct of breach; b) the breaching party must be at fault for the breach.\(^ {32}\) That is, the breaching party will only be liable to pay liquidated damages, either mandatory liquidated damages or pre-agreed liquidated damages, if it is at fault. Hence, if force majeure, changes of state economic plan or government

\(^{31}\) The so-called "fault" refers to the subjective mental state of a person, including intention and negligence. Intention refers to the fact that the acting person clearly knows the harmful consequences of an act and deliberately hopes or lets such harmful consequences to happen. For example, a seller sends a buyer inferior goods instead of the superior goods the buyer contracted for, or sends imitation goods instead of real ones. Negligence refers to the fact that the acting person should have foreseen the harmful consequences of his act, but he failed to foresee it due to oversight or carelessness or mistake, so that the harmful consequences happened. For example, a seller sends the goods to a wrong destination by mistake; or sends a wrong model or type of the goods by mistake.

orders are the causes of the breach, the breaching party will not be liable to pay liquidated damages.

It should be remembered that whether or not the breach has caused any loss to the other party is irrelevant, because so long as the party breaches the contract, it has to pay liquidated damages.

So Chinese contract law starts with the general principle that some degree of fault is a pre-condition of the availability of contractual remedies. Moreover, "being at fault" is not only a pre-requisite for being liable for breach of contract, but also a standard in measuring the liability for breach of contract. And this is in sharp contrast with Anglo-American law, where fault is not in principle an element of contractual liability, nor is the degree of fault normally an element in measuring the extent of damages.

However, in China's judicial practice, China uses a "constructive fault principle". As we know, it is very difficult to judge the subjective mental state of people, and usually it is very complicated to tell if the breaching party is at fault or not. Therefore, in judicial practice, the

33 See article 32 of CECL.


"constructive fault principle" has been commonly used.\textsuperscript{36} Constructive fault principle means that as long as one of the parties breaches the contract without a reasonable excuse for exemption from liability, he is deemed to be at fault and thereby liable for the breach.\textsuperscript{37} And what is more, it is the breaching party rather than the injured party who bears the burden of proof.\textsuperscript{38} In other words, the breaching party is liable for the breach unless he is able to prove that he is not at fault.\textsuperscript{39} For example, if the breaching party can prove that his failure to perform an economic contract is due to force majeure or a change of government economic plan, he will not be liable for breach. The constructive fault principle is employed as a presumption to carry out fault principle more effectively.\textsuperscript{40}

b. Compensation Damages in Chinese Contract Law

(1) Nature of Compensation Damages in China

When a party does not perform its contractual obligations, or does not comply with the agreed terms in performing its contractual obligations, apart from the right

\textsuperscript{36} Ibid.

\textsuperscript{37} Ibid.


\textsuperscript{39} See Wang jiafu & Xie Huashi, \textit{Contract Law}, supra, at 481-482.

\textsuperscript{40} See Zhou Libin, \textit{Bijiao Hetong Fa} (Comparative Contract Law), (China: Lan Zhou University Publishing House, 1989) at 374.
to demand specific performance or liquidated damages, the aggrieved party also has the right to demand compensation damages for actual losses.\(^{41}\)

In the Chinese sense, compensation damages are an amount of money paid to the aggrieved party to compensate for his losses caused by the breach.\(^{42}\)

The nature and function of compensation damages in China are little different from that of liquidated damages. It is somewhat more complicated. Theoretically speaking, compensation damages, as the words suggest, are mainly compensatory in nature.\(^{43}\) The purpose of compensation damages is to make up for the losses the aggrieved party sustained due to the breach.\(^{44}\) Therefore, a party's liability to compensate as a result of its breach of contract shall be equal to the losses suffered by the other party as a result thereof.\(^{45}\) As a principle, compensation damages cannot exceed the actual loss. The aggrieved party cannot get more than the actual

\(^{41}\) See article 35 of CECL.


\(^{43}\) See Li Youyi & Zheng Li, Science of Civil Law, supra, at 624; Wang Jiafu & Xie Huashi, Contract Law, supra, at 484.

\(^{44}\) Ibid.

loss he sustained."\textsuperscript{46}

And also according to article 35 of CECL, where there is a liquidated damages clause in the contract or there is an amount or a rate of liquidated damages fixed by law, compensation damages are only designed to supplement the liquidated damages by the insufficient amount.\textsuperscript{47} If the liquidated damages are enough to cover the loss, then it is no longer necessary for the breaching party to pay compensation damages.\textsuperscript{48} Where there is no liquidated damages clause set in the contract or there is no mandatory liquidated damages set by law, the breaching party is liable to pay all the losses the injured party suffered due to the breach.\textsuperscript{49}

However, it should further be noted that in Chinese contract law, payments of compensation damages as well as liquidated damages by the breaching party do not release the breaching party from his obligation of specific performance. That is, after paying compensation damages as well as liquidated damages, the breaching party is still obliged to perform his contractual obligations, if the injured party

\textsuperscript{46} See Li Youyi & Zheng Li, Science of Civil Law, supra, at 624.

\textsuperscript{47} See article 35 of CECL; also see The Official Opinion of the Supreme People's Court of China on Questions in Carrying out the Economic Contract Law, in Minshi Falu Shiyong Daquan, supra, at 351.

\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid.
demands that he do so. This is a very remarkable feature of Chinese system of contract remedies which is totally different from its Anglo-American counterpart. As some Chinese legal scholars have argued, in circumstances where both compensation damages and specific performance are claimed at the same time by the injured party, compensation damages are surely of a punitive nature, too.

(2) Availability of Compensation Damages in China

In deciding whether or not the breaching party should pay compensation damages, at least four factors must be taken into consideration: a) there must be a breach of contract; b) the breach must have caused actual loss to the other party, and the actual loss must exceed the amount of the liquidated damages; c) the breaching party must be at fault for the breach; d) there must be a causal connection between the breach and the actual loss, i.e. the losses must be caused by the breach.

From the above prerequisites for the availability of

50 See article 35 of CECL.


52 See the Official Opinion of the Supreme People's Court of China on Questions in Carrying out the Economic Contract Law, in Minshi Falu Shiyoung Daquan, supra, at 351.

53 Ibid.
compensation damages it can be seen that, in order to establish a right to compensation damages, actual loss is a necessary element in obtaining compensation damages in Chinese contract law. In other words, only when the innocent party has suffered actual loss due to the breach, is he entitled to compensation damages. This requirement makes the difference between the availability of liquidated damages and the availability of compensation damages in Chinese contract law, because actual loss is not a prerequisite to obtaining liquidated damages. And in cases where there is a liquidated damages clause in the contract reached by the contracting parties or where there is liquidated damages fixed by law, only when the actual loss exceeds the amount of the liquidated damages, shall the injured party obtain compensation damages to supplement the liquidated damages by the insufficient amount.\textsuperscript{54}

B. Basic Theory and Practice of Damages in Anglo-American Law

1. Concept and Object of Damages in Anglo-American Law

a. Concept of Damages

Damages are money compensation sought or awarded as a remedy for breach of contract.\textsuperscript{55} The common law remedy for

\textsuperscript{54} See article 35 of CECL; also see The Interpretation of the Provisions of CECL, supra, at 83.

\textsuperscript{55} Black's Law Dictionary, sixth ed., at 389.
breach of contractual promises is that of damages. Every breach of contract entitles the injured party to damages for the loss he has suffered. In practice, the injured party's remedy is most commonly an action for damages to compensate him for the breach of contract.

b. The Object of Damages in Anglo-American Law

In Anglo-American law, damages for breach of contracts are designed to compensate the plaintiff for the damage, loss or injury he has suffered through that breach. The object of an award of damages for breach of contract is to place the injured party, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed.

According to Allan Farnsworth, in Anglo-American law, damages are usually awarded to protect three kinds of interests of the contracting party: a) expectation interests, ie. to put the promisee in the position in which


57 Ibid. at 419.


60 Ibid. at 495; also see Robison v. Harman, [1848], 1 Exch. 850, at 855.
the promisee would have been had the promise been
performed.61 b) reliance interests, ie. to put the promisee
back in the position in which the promisee would have been had
the promise not been made.62 c) restitution, ie. to put the
promisor back in the position in which the promisor would have
been had the promise not been made.63

2. Compensation Principle of Damages in Anglo-American
Law

a. Compensatory Nature of Damages

In Anglo-American law, damages for breach of contract
are given by way of compensation for loss suffered, and not by
way of punishment for wrong inflicted.64 That is, damages
cannot be used to punish a defendant, however outrageous its
conduct.65

The fundamental tenet of the law of contract remedies is
that, regardless of the character of the breach, an injured
party should not be put in a better position than had the
contract been performed.66 And as Holmes said: if a contract

62 Ibid.
63 Ibid.
65 Ibid. at 492.
is broken the measure of damages generally is the same, whatever the cause of the breach. The measure of damages is therefore not affected by the motive of the breach. "Vindictive" or "exemplary" damages have no place in the law of contract.

However, in Anglo-American law, punitive damages may be awarded in a tort action, and a number of courts have awarded them for a breach of contract that is in some respect tortious. Such punitive damages may be awarded not to compensate the plaintiff but to indicate the court's disapproval for the conduct of the defendant. For example, in a few states of the United States, punitive damages are allowed where the breach of contract is accompanied by a fraudulent act or some other intentional wrong or gross negligence. In those cases, punitive damages for breach of


72 Ibid., Vol.7, c.1, at 90.
contract may represent a surrogate for delictual relief. The American Restatement of the law, Contract Second (1979), section 355 provides that punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

As Lord Atkinson said:

There may be circumstances of malice, fraud, defamation, or violence which would sustain an action in tort as an alternative remedy to an action of breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages..., but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. And one of these consequences is that he is to be paid adequate compensation in money for the loss of what which he would have received had the contract been performed, and no more.

That is, in a pure contract context, the plaintiff could only recover what the contract provided and no more, unless he sues the defendant in an action of tort.


The general principle for the measurement of those damages is that of compensation based on the injured party's

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73 Ibid.


The principle that damages are compensatory in nature is one of the most notable features in Anglo-American contract law. Based on this principle, there are a number of general rules which govern awards of damages in Anglo-American law:

(i) Loss to the plaintiff is the criterion.\(^77\) That is, damages are based on loss to the plaintiff and not on gain to the defendant.\(^78\) The usual rules of damages in contract do not seek to make the defendant disgorge the profit he has made by the breach, and give it to the plaintiff.\(^79\) For example, what the plaintiff loses by the defendant's breach may be far less than what the defendant saves by not performing, but the court still awards the plaintiff only what he has lost.\(^80\)

(ii) Damages should not exceed loss. That is, an award of damages should not enrich the plaintiff. He cannot recover more than his loss.\(^81\)

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\(^76\) See Farnsworth on Contracts, Vol.III, supra, at 186.


\(^78\) Ibid.; and also see Teacher v. Calder [1889] 1F. (H.L.) 39.


\(^80\) Ibid.

(iii) No punitive damages in pure contractual context.\textsuperscript{82} The purpose of damages for breach of contract is to compensate the plaintiff and not to punish the defendant.\textsuperscript{83} Therefore, as a general rule, punitive damages cannot be awarded in a purely contractual action.\textsuperscript{84} A leading case denying punitive damages is \textit{Addis v. Gramophone Co.}\textsuperscript{(1909)}.\textsuperscript{85} As laid down in the case, no exemplary damages can be awarded for breach of contract. The plaintiff had been wrongfully dismissed, but the House of Lords restricted damages to his pecuniary loss and refused to award any damages for the harsh manner in which he had been treated.\textsuperscript{86}

### 3. Availability of Damages in Anglo-American Law

In Anglo-American jurisdictions, the remedy of damages is always available when a contract has been broken. Damages are the primary remedy for breach of contract.\textsuperscript{2}

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\textsuperscript{83} \textit{Ibid}.


\textsuperscript{85} See \textit{Addis v. Gramophone Co.}, (1909) A.C.488(H.L);

The victim of a breach of contract is entitled to damages as a right. Even if he has not proved any loss, he is entitled to nominal damages.

a. Availability of Nominal Damages

In Anglo-American law, nominal damages are awarded even though the breach does not cause any loss. For example, where a plaintiff can show a breach of contract but no appreciable loss, it is customary to award him nominal damages in some small sum, such as one dollar. The award of such nominal damages constitutes a declaration of right and is not in substance inconsistent with the principle that damages are compensatory. Thus it can be seen clearly, breach of contract—the conduct itself, is the fundamental requirement for availability of nominal damages in Anglo-American law.

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89 Ibid.


Even if the plaintiff has not suffered or proved any loss, he is still entitled to nominal damages.93

b. Availability of Substantial Damages

However, if a plaintiff wants to get substantial damages, actual loss is a necessary element.94 In other words, only when the plaintiff has suffered actual loss due to the breach, can it get substantial damages.95 Besides, in order to establish a right to damages, the plaintiff also has to show that the loss which he has sustained was caused by the breach, ie. the causal connection between breach and loss is another pre-condition for substantial damages.96 Thus we can see, breach, actual loss and a causal connection between breach and actual loss are the three pre-conditions for of substantial damages in Anglo-American law.

c. A Law of Strict Liability

In the Anglo-American legal system, contract law is in its essential design a law of strict liability, and the accompanying system of remedies operate without regard to

94 Ibid.
95 Ibid.
Liability for breach of contract is strict, in the sense that the aggrieved party does not have to show that the breach was committed deliberately or negligently. Anglo-American courts claim to be blind to fault, and they purport not to distinguish between aggravated and innocent breach. It does not matter for the purposes of the law of contract whether the breach was deliberate or accidental.

Therefore, fault is simply immaterial to the availability of damages in Anglo-American law. Little attention has been devoted to the question of whether fault is a requirement of contractual liability. The general assumption probably is that there is no such requirement. It has been said that in relation to a claim for damages for breach of contract, it is, in general, immaterial why the defendant fails to fulfill its obligations and certainly no defence to plead that it has done its best. And the measure of damages is therefore not affected by the motives of

100 Ibid.
102 Ibid.; also see Raineri v. Miles [1981] A.C.1050, 1086;
the breach. Once a breach is established, it makes no difference, as a general rule, whether the breach is committed deliberately, negligently or innocently, or whether the party in default acts in good or in bad faith.

4. Liquidated Damages in Anglo-American Law

a. Liquidated Damages and Penalty

In Anglo-American law, the parties enjoy a wide freedom not only to provide for their primary rights but also to plan their own remedies.

It is not uncommon that the amount of money which will be recoverable on breach of contract is hard to predict and calculate, and sometimes losses cannot be recovered simply because the plaintiff can not meet the required standard of proof. Under such circumstances, the party may try to remove this uncertainty by providing that a fixed sum of money is to be paid on breach. Such a pre-determined sum of money to be paid on breach is known as "liquidated damages". In contracts of any sophistication it is a very common practice


for the parties to insert provisions which either add to or subtract from the remedies that the general law would otherwise provide.\textsuperscript{107} Even in relatively simple contracts it may make excellent sense to contract for a remedy which will avoid the need to go to courts.\textsuperscript{108}

Liquidated damages are pre-stipulated. However, it should be pointed out, it is not necessary that any pre-stipulated sum will be regarded as liquidated damages and enforceable. Pre-stipulated sums can fall into two classes: liquidated damages clause and penalty clause.\textsuperscript{109}

b. Rules for Distinguishing between Liquidated Damages and Penalty

The distinction between liquidated damages and penalties depends on the intention of the parties to be gathered from the whole of the contract.\textsuperscript{110} If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty;\textsuperscript{111} but if, on the other hand, the intention is to assess the damages for

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} See Cheshire Fifoot & Furmston's, Law of Contract, supra, at 620.
\textsuperscript{111} Ibid.
breach of contract, it is liquidated damages.\textsuperscript{112}

Liquidated damages represent a genuine pre-estimate of the expected loss that a party will sustain in the event of breach of contract, based on the facts at the time of contracting.\textsuperscript{113} Thus, a liquidated damages clause expresses the genuine intention of the parties that the pre-stipulated sum approximates expected losses and is reasonable under the circumstances.\textsuperscript{114} It is quite obvious that liquidated damages are purely for compensation purpose. The sum should be a reasonable estimate of the probable loss, and in such case, the clause is valid.

A penalty clause is not a genuine pre-estimate of the expected loss that a party will sustain in the event of breach of a contract, based on the facts at the time of contracting. Instead, it is inserted for the purpose of compelling performance of contractual obligations.\textsuperscript{115} A penalty is intended to bring pressure to bear on one of the parties in order to prevent or penalize a breach.

It is true that in many legal systems, the parties can

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} Ibid.; also see Law v. Redditch Local Board [1892] 1QB. 127 at 132, per Lopes.J.
\item \textsuperscript{113} See H.D.Pitch, Damages for Breach of Contract, (Toronto: Carswell, 1985) at 75.
\item \textsuperscript{114} Ibid.; see for example, Mackenzie v. D.M.Bruce Agencies Ltd., [1977], 21 N.S.R.(2nd) 688 (C.A.); Maxwell v. Gibsons Drugs Ltd., [1979], 16B.C.L.R. 97 (S.C.)
\item \textsuperscript{115} See H.D.Pitch, Damages for Breach of Contract, supra, at 76.
\end{enumerate}
\end{footnotesize}
agree to pay a penalty, in addition to full damages, in order to prevent or penalize a breach. An example is the liquidated damages in China. However, as we know, Anglo-American law focuses on the principle that damages are compensatory and punitive damages should not be awarded for a pure breach of contract. Since the court will exercise its equitable jurisdiction to intervene and set aside oppressive or unconscionable contracts, likewise, the courts will intervene to set aside an agreement fixing damages at an excessive and objectively unreasonable amount.\(^{116}\) That is, equity would relieve against penalties, cutting them down to the actual damages suffered.\(^{117}\) And this doctrine was later taken up and applied by the common law, and reinforced by statute, so that it has become the rule in both jurisdictions.\(^{118}\)

In judicial practice, if the court finds that the quantum of damages specified in the contract represents "liquidated damages", it will enforce the damages clause. In such a case, the injured party can not disregard the clause and sue for the actual losses, even though the actual losses exceed the stipulated sum.\(^{119}\)

\(^{116}\) Ibid. at 74.

\(^{117}\) See Anson's Law of Contract, supra, at 511.

\(^{118}\) Ibid.

\(^{119}\) See Anson's Law of Contract, supra, at 512; also see Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry [1925], Ltd., [1933] A.C.20; In this case, the appellants agreed to pay by way of penalty the sum of 20 pounds per week for every week they exceed 18 weeks in the delivery of certain
However, if the court classifies the pre-stipulated amount as a "penalty", the damages clause will generally be rejected and not enforced.\textsuperscript{120} As to the consequences of penalty, so far the courts have not adopted a consistent approach in determining whether such clauses will be rejected or upheld.\textsuperscript{121} Some take the view that the penalty clause, being invalid, must be rejected and disregarded so that the aggrieved party can cover the whole of his recoverable loss.\textsuperscript{122} Others argue for allowing the aggrieved party to recover no more than the stipulated sum on the grounds that the invalidity of penalty clause is based on their oppressive nature and that the party in breach can not be oppressed by a clause where it actually works in his favour.\textsuperscript{123} However, whichever point of view works, it still can be seen clearly that compensation, justice and fairness are the common basic machinery. Calculated on this basis, the damages recoverable by the respondents on breach amounted to some 600 pounds, but their actual loss amounted to 5850 pounds. They therefore claimed that they were entitled to disregard the penalty and sue for the damages actually suffered. However, the House of Lords held that the sum was not a penalty, but was merely the amount which the appellants had agreed to pay by way of compensation for delay, and that the damages must be limited to this agreed amount.


\textsuperscript{121} \textit{Ibid}, at 73.


\textsuperscript{123} \textit{Ibid}. 

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considerations for both points of view.

Can penalty be claimed together with performance or damages? As G.H. Treitel explains: so far it has been assumed that the penalty is payable simply on total non-performance of the principal obligation. In such a case, it is clear that the aggrieved party can not claim both the penalty and performance, or both the penalty and damages.¹²⁴

C. Comparison and Analysis between Punitive Principle in Chinese Contract Law and Compensation Principle in Anglo-American Contract Law

In this section, I will analyses and compare the punitive principle in Chinese contract law and the compensation principle in Anglo-American contract law. I shall reveal and illustrate the reason why Chinese contract law emphasizes the punitive function of damages, and why Anglo-American law emphasizes the compensation function of damages.

1. Contrast Between Punitive Principle and Compensation Principle

From the description of the basic theory and practice of damages in both legal systems, we can see that the strong

¹²⁴ Ibid. at 217.
punitive principle of damages in Chinese contract law\textsuperscript{125} stands in sharp contrast to the purely compensatory principle of damages in Anglo-American law.

Punitive principle can be seen throughout Chinese contractual legal theory and legislation. In particular, liquidated damages are intended to coerce the parties into performing their contract. It is thought that the fear of having to pay an amount of money by way of punishment will operate \emph{in terrorem} to urge the parties to carry out their undertakings.\textsuperscript{126}

The punitive principle in Chinese contract law is mainly embodied in the following three respects:

1) the government sets up mandatory liquidated damages through legislation.\textsuperscript{127} Such mandatory liquidated damages are not intended to compensate the injured party but rather to secure performance of contractual obligations or to penalize the breaching party for his conduct of breach. They reflect the direct intervention of the government in economic contractual relations. Under statutory liquidated damages, the contracting parties are deprived of the right to choose the form of compensation, and the amount or rate of liquidated


\textsuperscript{127} See supra note 7 for detail information.
damages is limited.\textsuperscript{128} And since the parties have no right to disregard or modify the fixed amount or rate, statutory liquidated damages are actually akin to an administrative fine provided by the government.\textsuperscript{129} Statutory liquidated damages add a new legal obligation to the contracting party.\textsuperscript{130} Statutory liquidated damages serve as a device for carrying out administrative supervision of contracts in a planned economy.\textsuperscript{131}

ii) Payment of either mandatory liquidated damages or pre-agreed liquidated damages is not on condition that the breach must have caused actual losses. In other words, actual loss is not a prerequisite in obtaining liquidated damages. Once breach occurs, liquidated damages are due.

iii) Recoveries to an injured party can go beyond mere compensation. That is, the loss sustained by the injured party is not the criterion for the amount of damages. The typical example is: after paying the liquidated damages and compensation damages, the breaching party shall continue to perform his contractual obligations, if the other party demands specific performance of the contract.\textsuperscript{132}

\textsuperscript{128} See Gao Min, "Discussion on Liquidated Damages System" (1989) No.5 Zhongguo Faxue at 101.
\textsuperscript{129} \textit{Ibid.}
\textsuperscript{130} \textit{Ibid.} at 99.
\textsuperscript{131} \textit{Ibid.} at 101.
\textsuperscript{132} See article 35 of CECL.
In sharp contrast, the concept of punitive damages is severely limited and confined in Anglo-American jurisdictions. Damages for breach of contract are in the nature of pure compensation, not punishment.¹³³ That is, damages for breach of contract are assessed on the compensatory basis. The general rule that punitive damages will not be awarded for breach of contract is well established in Anglo-American law.¹³⁴ Neither criminal nor civil penalties may be imposed for breach of contract.¹³⁵ The compensatory principle in Anglo-American law is mainly embodied in the following four respects:

i) There is no mandatory liquidated damages. Liquidated damages and the amount thereof are pre-agreed by the contracting parties and are intended to compensate the potential loss sustained by the injured party.

ii) The payment of substantial damages is on condition that the breach caused actual loss; otherwise, only nominal damages are available.

iii) Damages should not exceed actual loss, i.e. the loss to the injured party is the criterion of the amount of damages.

iv) Punitive damages can not be awarded in a purely

¹³⁵ Ibid, Vol.7, c.1 at 90.
contractual action. Punitive damages may only be awarded in respect of tortious conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, and malicious nature.\textsuperscript{136}

2. Different Notions of Breach Result in Different Legal Treatment Toward Breach.

As we know, social standards and social values can be quite different from society to society. Punitive principle in Chinese contract law and compensation principle in Anglo-American contract law are embedded in and reflect their different notions of breach of contract.

a. Chinese Negative Notion about Breach of Contract

The greater emphasis on the punitive aspect of damages in Chinese contract remedies reflects, to a great degree, its negative notion about breach of contracts and a higher degree of direct government involvement in the primary relationships between contracting parties. In Chinese contractual theory and practice, breach of contract is regarded as illicit conduct, therefore, the breaching party should be punished by

As discussed in Part II, China adheres to the state planning principle and uses economic contracts as an instrument to plan, organize, distribute and implement the state economic plan. The basic principle of a socialist planned economy is that any economic contract established between economic units or individuals must and is obliged to benefit the interests of the state and the public. Performance of economic contracts, particularly the contracts based on the mandatory state economic plan, is very important to the general social order and the state economic plan. To a certain extent, the performance of contracts based on a mandatory state economic plan is not only a contractual obligation between the contracting parties, but also an administrative obligation imposed on the contracting parties by the government. Breaches of economic contracts may bring serious harm or even destruction to the society which can hardly be adequately recovered by means of compensation damages. The party who fails to perform such an obligation


138 See The Interpretation of the Provisions of CECL, supra, at 23.

should bear the responsibility and be punished.\textsuperscript{140} And moreover, since economic contracts are designed to carry out state economic plan in which there is the plainest state and public interests, breaches of contract are, in most circumstances, regarded as illicit and socially harmful.

According to the provisions of CECL:

no economic units or individuals may use a contract to engage in unlawful activities, disrupt the State economic order, undermine State economic plans, or damage the interests of the State or the public interest, for the purpose of seeking illegitimate income.\textsuperscript{141}

Selling of economic contracts at a profit, using of an economic contract for speculation, subcontracting to profit at another's expense and some other acts are all regarded as unlawful activities which are thought to impair the interests of the state or the interests of the public, to disrupt social economic order, and to undermine the state economic plan.\textsuperscript{142}

Any illegitimate income or profit benefited from such illegal activities is to be recovered and turned over to the State Treasury.\textsuperscript{143}

Undermining the state economic plan, impairing the

\textsuperscript{140} See Yang Zixuan, \textit{Jingjifa Yuanli} (The Fundamental Principles of Economic Law), (Beijing: Beijing University Publishing House, 1987) at 43.

\textsuperscript{141} See article 7 & 53 of CECL.


\textsuperscript{143} See article 16 of CECL.
social economic order, and violation of contract discipline are usually attached to a party's failure to perform contractual obligations. Consequently, a breach of contract to seek profits is regarded as illicit and definitely prohibited by law. So in order to ensure the realization of the state economic plan and to uphold the sanctity of contracts, defaulters must be penalized for failure to perform contractual obligations.  

Punitive principle in Chinese contract law also rests on a deeply felt moral notion that promises should be kept. Ethical and social condemnation is also attached to a breach of contractual obligations. And Chinese tradition considers that promises have an inherent moral force, so that breach is an immorality and illegality. And concern for the morality of promise keeping is likely to lead to a legal system that will punish promise breakers.

In the realm where a breach of contract results in damages to the state economic plan, punishment is naturally justified as appropriate in strengthening contract discipline and guaranteeing the realization of state economic plans. It

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144 See Huang Xin, "Lun Jingji Hetong Weiyue Zeren De Jiben Yuanze" (Discussion about the Basic Principles of the Liability for Breach of Economic Contracts), (1984) No.2 Zhonghua Faxue 42 at 48, 49.

is through the punitive function of damages that the government seeks to stimulate the parties to live up to their contractual obligations and thereby to serve the national interests and to promote contractual discipline.  

b. Anglo-American Law's Positive Notion about Breach of Contract

However, as one legal scholar points out: contract discipline is also important in Anglo-American law countries where autonomous ordering through contract is central to the processes of production and distribution. Then why do the remedies for breach of contract accorded in those societies reject a penal element? Perhaps the answer lies in the belief that the interjection of a penal or coercive element can interfere with the optimal allocation of resources as understood by those societies. In other words, Anglo-American law has a completely different notion of breaches of contracts, and therefore has a different attitude towards breach.

The disaffection of Anglo-American law with punitive


148 Ibid.
damages in a purely contractual context reflects, to a great degree, its normative concept of breach of contract. Unlike Chinese contract law theory, which regards breach of contract as illicit conduct, Anglo-American contract law regards breach of contract with equanimity, and in some circumstances, even encourages efficient breaches. The liability rule permits a promisor to breach a promise provided compensation is paid to the other party by payment of money damages.

The theory of efficient breach, though still controversial in Western legal community, is very influential in the contemporary contract theory. Posner argues that contract law is a system of rules and principles furthering economic efficiency and hence overall social welfare. As Burrow described: expectation damages for bargain promises give the plaintiff no less and no more than the value he has placed on the defendant's performance, they provide the


defendant with an incentive to exchange resources with those who place the highest value on them; the efficient result is hereby promoted.\textsuperscript{153}

In a liberal-capitalist market economy, the institution of contract is the most important legal instrument for allocating resources, and its extensive use is itself an indication of a greater decentralization of economic decision making. The free market produces economic efficiency by moving resources to those who place the highest value on them.\textsuperscript{154} In order to support this, the law must permit and even encourage a defendant to break a contract where this will lead to resources passing to those who place a higher value on them.\textsuperscript{155} The Anglo-American position is that if the party in breach may gain enough from the breach to have a net profit, even though that party compensates the injured party for resulting loss, non-performance and the consequent reallocation of resources are desirable.\textsuperscript{156} Society as a whole benefits, since the breach tends to transfer resources to their highest valued, most productive uses and tends to maximize the efficient use of economic resources.\textsuperscript{157} Economic theory does not sanction but does encourage

\textsuperscript{153} Ibid.

\textsuperscript{154} Ibid. at 310.

\textsuperscript{155} Ibid. at 310.

\textsuperscript{156} See Farnsworth on Contract, Vol.III, supra, at 153.

\textsuperscript{157} See Farnsworth on Contract, Vol. I, supra, at 8.
To prevent such a so-called "efficient breach" by compelling performance would result in an undesirable wealth distribution, since the party in breach would lose more than the injured party would gain. Similarly, to prevent such a so-called "efficient breach" by imposing punitive damages or penalties on the party would also result in an undesirable allocation of resources. It is believed that preventing one party from breach might mean to force the party to waste his resources, with no economic benefit to himself as well as to the society. In other words, the "efficient breach" theory is incompatible with a punitive doctrine which would encourage a party to stick to a contract that it would be economically efficient for it to breach.

From an economic point of view, generally speaking, a party will breach a contract only if it is profitable to do so, and the innocent party will not be hurt because an award of damages will make it whole. For example, party A to a contract can, after compensating the other party B for B's lost expectancy, gain what is for A a significantly greater economic value than that which would be realized under the

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158 Ibid.
159 Ibid.
161 See A.S. Burrows, Remedies for Tort and Breach of Contract, supra, at 289.
contract, an increase in overall wealth is accomplished by allowing the breach and putting B in as good a position as he would have been in had the contract been performed. The theory of efficient breach suggests that promisors who breach increase society's welfare if their benefit exceeds the losses of their promisees.\textsuperscript{162} The opportunity cost of completion to the breaching party is the profit he would make from a breach, and if it is greater than his profit from completion, then completion will involve a loss to him. If that loss is greater than the gain to the other party from completion, breach would be value maximizing and should be encouraged.\textsuperscript{163}

Therefore, in Anglo-American law, selling economic contracts at a profit, using of an economic contract for speculation, subcontracting for profit at another's expenses and some other activities for profit seeking are regarded as reasonable and are not prohibited by laws. It is accepted that to penalize breach of contract might discourage the efficient reallocation of community resources.\textsuperscript{164} Naturally, no coercive and punitive legal measures are necessarily taken to punish breaches of contract, for they would compel contracting parties to perform their contractual obligations


obligations when breach would be socially more desirable.\textsuperscript{165}

Some people may argue that, in efficient breach, what the injured party loses due to the breach may be far less than what the breaching party saves by breach; nevertheless according to compensation doctrine, the court still awards the injured party only what he has lost. Thus, the breaching party may make a profit by breaching contract. It may seem to Chinese Lawyers that the compensation doctrine and the theory of efficient breach acting together result in a premium on wrongdoings. But, as J.E. Cote argues in his book: to the extent that the profits and losses may be accurately weighed in terms of money, no one really suffers.\textsuperscript{166} And if the defendant after paying compensation still save money, is the plaintiff any worse off for that? It may be that in such a case society as a whole may be better off if the contract goes unperformed.\textsuperscript{167} At least some Western economic law scholars think that since the law of contract has been evolved mainly to serve the needs of trade and commerce, considerations of morality or equity are, to certain degree, subsidiary to consideration of Pareto-efficiency.\textsuperscript{168} Therefore, punitive

\begin{flushleft}
\textsuperscript{165} See \textit{Farnsworth on Contract}, Vol.III, supra, at 155.
\textsuperscript{166} See J.E.Cote, \textit{An Introduction to the Law of Contract}. (Edmonton: Juriliber,1974) at 234.
\textsuperscript{167} \textit{Ibid}.
\end{flushleft}
measures should not be taken to penalize breaches, because they will discourage efficient reallocation of community resources and encourage performance when breach would be socially more desirable.\textsuperscript{169}

Freedom of contract is also the fundamental basis of contract law in Anglo-American law, and freedom of contract involves freedom to breach contracts. The classic argument put forward for limiting curial jurisdiction to order specific performance is that the court should respect individual freedom,\textsuperscript{170} The time-honoured phrase is 'The law of England will not permit any man to enslave himself by contract,' so the courts should not order "enslavement", that is, specific performance, for breach. Anglo-American law emphasizes the private nature of commercial contracts and restricts government and judicial interference. State compulsion is not

However, it is worthy to point out that although according to some economic law scholars, consideration of morality should be subsidiary to consideration of Pareto-efficiency, it does not necessarily mean that morality has been ignored or disregarded in the reality of market economy. As a matter of fact, in a market economy, business competition is very keen, and in order to compete for market, businessmen and enterprises do care about their own reputations---commercial morality. However, according to Anglo-American assumption, it is not the business of contract law to force people to behave themselves well, but to redress the consequences of breach, aiming at justice, fairness and efficiency.

\textsuperscript{169} See \textit{Farnsworth on Contracts}, Vol.III, supra, at 155.

\textsuperscript{170} See D.Cohen, "The Relationship of contractual remedies to Political and Social Status: A Preliminary Inquiry"( 1982) 32 University of Toronto Law Journal, footnote 9, at 76.
frequently found in the common law of contract.\textsuperscript{171} There is a tradition of economic liberalism among the Anglo-American lawyers, dating back to Sir Edward Coke, and perhaps even beyond.\textsuperscript{172} Their position is that the failure to perform a private obligation is not usually a matter of sufficient public concern to justify the punishment of the defaulting party.\textsuperscript{173}

In conclusion, Anglo-American law encourages efficient breach, emphasizing the pecuniary benefits from breach for the whole society. Efficient breach is regarded as a movement towards Pareto Optimality;\textsuperscript{174} therefore, punishment should not be imposed for breach of contract. This is totally different from the Chinese approach where breach of contract is regarded as illicit and is therefore prohibited by law. Punitive and compulsive measures have to be taken to punish the defaulting party so as to enforce contractual disciplines.

\textsuperscript{171} Ibid. at 64.


\textsuperscript{174} An allocation of resources is optimal only if no one may be made better off, in his own estimation, without simultaneously making someone else worse off; and a change in the allocation is optimal only if it makes at least one person better and no one worse off. See R.A.Posner, Economic Analysis of Law, supra, at 12; International Encyclopedia of Comparative Law, Vol. 7, c.1, supra, at 87.
3. Different Legal Objectives of the Systems of Contract Remedies Lead to Different Principles

When we go deeper in our comparison and analysis, it is not difficult for us to see that the legal aim of the system of remedies in Chinese contract law is different from that in Anglo-American law. The fundamental difference is that, in Chinese contract law, the system of remedies is ultimately designed to prevent potential breaches by punishing and educating the breaching party. It puts much emphasis on the liability of the breaching party for the breach and inflicts punishment on the breaching parties. In Anglo-American law, the system of remedies is designed to redress breaches by compensating the injured party. It puts much emphasis on the economic interests of the injured party and redresses breach by compensating the injured party.

a. Chinese Contract Remedies Aim at Punishing and Preventing Breach of Contract

As mentioned before, in China, with its planned economy, the ultimate aim of Chinese contract law is to maintain and guarantee the realization of the state economic plans. And the accompanying system of remedies serves this ultimate goal.

Therefore, the main objective of the system of remedies in

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175 See articles 1 & 2 of CECL, in J.A.Cohen, Contract Laws of P.R.C. (HongKong: Longman, 1988) at 50; also see the Interpretation of the Provisions of CECL, supra, at 11.
Chinese contract law is to punish the breaching party for his outrageous conduct and to deter him and the others like him from similar conduct in the future.\textsuperscript{176} That is, China emphasizes the punitive aspect of contract remedies as well as the educational value of law. And it is through punitive damages, particularly through statutory liquidated damages, that the government tries to increase the cost of breach of contract and to spur the contracting parties (usually the economic units) to perform their contractual obligations. By doing so, the government tries to prevent potential breaches of contract, and thereby to guarantee the realization of the state economic plans.\textsuperscript{177}

The justification for the punitive principle rests ultimately on the notion that breach of contract is not only an infringement to the economic right of the other party, but is also a disturbance and may even cause damage to the state economic plan and the social economic order.\textsuperscript{178} Therefore,


\textsuperscript{177} See Gao Min, "Discussion on Liquidated Damages System" (1989) No.5 Zhongguo Faxue 98 at 101.

once a party breaches a contract, there is an obligation to compensate the other party for loss, but there also must be economic punishment. That is, to make the breaching party lose certain economic interests.\textsuperscript{179} It means that the breaching party must pay for its wrongdoings. Put another way, if the state economic plan and social order are disrupted, punishment is due. Mere compensation without punishment is thought not sufficient to urge or press the contracting parties to fulfil their contractual obligations.\textsuperscript{180} Only punitive measures can have a strong enough deterrent effect on the contracting parties to prevent breach. It is believed that the fear if having to pay an amount of money by way of punishment will operate \textit{in terrorem} to compel the contracting parties to carry out their undertakings.\textsuperscript{181}

It is a practical need of the planned economy to resort to punitive measures to compel economic units to perform their contract obligations, and to prevent them from breaching

\textsuperscript{179} See He Yue, " Guanyu Jinji Hetong Weiyuejin Xingzhi De Yidian Yiyi" (A Different Opinion about the Nature of the Liquidated Damages in Chinese Economic Contract Law) 1987) 3 Hebei Faxue at 64; also see Huan Xin, "Discussion on the Basic Principles of Economic Contract Remedies" (1984) No.2 Zhongguo Faxue at 45.

\textsuperscript{180} See He Yue, " Guanyu Jingji Hetong Weiyueji Xingzi De Yidian Yiyi" (A different Opinion about the Nature of Liquidated Damages in Chinese Economic Contract law) supra, at 64.

contracts. That is, coercive methods have to be employed to prevent potential breaches that would likely destroy the national plan or disrupt the socialist economic order. Punishment of breaches is the primary means by which breaches of contracts are prevented.\textsuperscript{182} Punitive and coercive measures are thought necessary and effective in preventing breach of contract.

Thus, it can be seen that punishing the breaching parties and preventing breaches of contracts so as to guarantee the realization of state economic plans is the ultimate goal of the system of remedies in Chinese contract law.

b. Anglo-American Contract Remedies Aim at Redressing Breach and Relieving the Injured Party

In sharp contrast, the system of contract remedies in Anglo-American law aims at relief to the innocent party to redress breach rather than at compulsion of the breaching party to prevent breach.\textsuperscript{183} It is concerned with ensuring that one individual does not harm another individual. The central objective behind the system of contract remedies is


\textsuperscript{183} See E.A. Farnsworth, "Legal Remedies for Breach of Contract" (1970) 70 Colum. Law Rev. 1143 at 1215.
compensation, not punishment. Punishment of a party for having broken his promise has no justification on either economic or other grounds. Anglo-American contract law and theory attach great emphasis to compensation and to the allocative functions of the system of contract remedies, rather than to the punitive and preventive functions of the system of contract remedies. At a general level, the primary goal of contract remedies is to relieve the innocent party rather than to punish the breaching party.

As discussed before, Anglo-American law expressly rejects the notion that remedies for breach of contract have punishment as a goal, and with rare exceptions, refuse to grant "punitive damages" for breach of contract. The purpose of awarding contract damages is to compensate the injured party. For this reason, courts in contract cases do not award damages to punish the party in breach or to serve an example to others unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. As Lord Atkinson pointed out in Addis: damages for breach of

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185 Ibid.

186 Ibid. at 1146.

contract were in the nature of compensation not punishment.\(^{188}\)

According to Anglo-American position, one important function of contract is to ensure that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid for its breach.\(^{189}\) The purpose of contract law is often stated as the fulfilment of those expectations which have been induced by the making of promise.\(^{190}\) Therefore, the leading and well-accepted principle is that damages for breach of contract usually aim to fulfil the plaintiff's expectations by putting him into as good a position as he would have been in if the contract had been performed.\(^{191}\)

Justice, fairness and equity are values to which Anglo-American law has aspired and which it will seek to achieve for eternity.\(^{192}\) The primary aim of contractual remedies is to redress the consequences of breaches and to allocate losses more effectively and reasonably, and thereby to serve the end


\(^{192}\) See D.Cohen, "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" supra, at 35.
of social justice and fairness. Basic contractual justice in Anglo-American law requires that one party's breach should not reduce the other party's wealth.\textsuperscript{193} Similarly, an injured party should not be put in a better position than he would have been had the contract been performed.\textsuperscript{194} And since the injured party of breach can be made whole for his losses by compensation, contractual justice has been realized.\textsuperscript{195}

As J.E. Murray explains in his book: The Anglo-American legal system does not compel the fulfilment of promises. Rather, it provides redress in the form of compensation to injured promisees when a promise is breached.\textsuperscript{196} It is conceivable however, for a legal system to compel the performance of promises through its criminal law or at least to allow recoveries to injured promisees which go beyond mere compensation. But the Anglo-American legal system has not chosen this route.\textsuperscript{197} It has chosen to attempt to place the injured party in the position he would have occupied had the promise been performed(expectation interests) or to restore him to the position he was in before the promise was

\begin{itemize}
  \item \textsuperscript{193} See \textit{International Encyclopedia of Comparative Law}, Vol., 7, c. 1, supra, at 101.
  \item \textsuperscript{194} See \textit{Farnsworth on Contracts}, Vol., III, supra, at 189.
  \item \textsuperscript{195} See Posner, \textit{Economic Analysis of law}, supra, at 89-90.
  \item \textsuperscript{196} See Murray, J.R. \textit{Murray on Contract}, supra, at 438.
  \item \textsuperscript{197} Ibid.
\end{itemize}
made (reliance and restitution interests). The Anglo-American position is that enforcement of punitive damages would allow the parties to depart from the fundamental principle that the law's goal on breach of contract is not to deter breach by compelling the promisor to perform, but rather to redress breach by compensating the promisee.

Evidently, the system of contract remedies in Anglo-American law is not directed at compulsion of promisors to prevent breach, rather it is aimed at relief to promisees to redress breach. The preoccupation of Anglo-American law is not with the question: how can promisors be made to keep their promises? Its concern is with a different question: how can people be encouraged to deal with those who make promises? Perhaps it is more seemly for a system of free enterprises to promote the use of contract by encouraging the promisees to rely on the promises of others, rather than by compelling promisors to perform their promises out of fear that the law will punish their breacher. In the result, this at least adds to the celebrated freedom to make

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198 Ibid.
contracts, a considerable freedom to break them as well.\textsuperscript{203}

Thus we can see that the system of remedies for breach of contract in Anglo-American law has compensation as its main goal. By compensating the party injured by a breach, the law tries to guarantee and protect his expectation interests and reliance interests, and thereby to encourage promisees to rely on the promises of others. In so doing, contract law regulates and facilitates the operation of commercial transactions in a market economy.

Again, take liquidated damages as an example. In Anglo-American law, liquidated damages are intended merely as a convenient method of determining the amount to be paid in case of breach.\textsuperscript{204} They are intended to reduce the inconvenience and cost of proof, to save time, to cut the expense of litigation and sometimes to limit the amount of the loss to be born by the promisor.\textsuperscript{205} In short, the accepted important function of liquidated damages is to avoid difficulties of assessment and actual loss proving. Payment of liquidated damages automatically ends the breaching party's obligation to perform the contract.

In contrast, in China, as discussed before, liquidated damages embraces an element of penalty and often are referred to as fines. Liquidated damages are intended primarily to

\textsuperscript{203} Ibid.

\textsuperscript{204} See \textit{Farnsworth on Contract}, Vol. 3, supra, at 283.

\textsuperscript{205} Ibid.
prevent contracting parties from breaching contract and to
punish the breaching party.\textsuperscript{206} It is intended to coerce the
promisor into performing his contract by imposing and
increasing the liability for breach of contract. In
particular, statutory liquidated damages are related to the
function of the state in managing its economy. To a great
degree, it is a government (official) sanction against the
breaching party.\textsuperscript{207} It is punitive in nature. Payment of
liquidated damages does not end the breaching party's
obligation to perform the contract.

The sceptical readers may well argue that the system of
c contract remedies in Anglo-American law also has a role in
preventing breach of contract. However, as Farnsworth points
out: this result is only the incidental effect of a system
designed to serve other ends.\textsuperscript{208} That is, the preventive
effect is achieved as a byproduct of redressing breaches by
compensating the injured party. Compensation is still the
primary rationale of damages in Anglo-American law.

\textsuperscript{206} See He Yue, "Dui Woguo Jingji Hetong Weiyuejin
Xingzhi De Yidian Yiyi" (A Different Opinion about Liquidated
Faxue at 33-35.

\textsuperscript{207} See Yang Zixuan, Jingjifa Yuanli (Principle of
Economic Law), (Beijing: Beijing University Publishing House,
1987) at 129.

\textsuperscript{208} See Farnsworth on Contract, Vol.III, supra, at 146.
4. Different Traditional Influences

Law is sometimes said to be the product of a nation's past history and cultural mentality.\textsuperscript{209} As an essential element of a culture, law is influenced by the distinguishing features of the overall culture.\textsuperscript{210} The growth of contract law can also be influenced by traditional legal culture and history, apart from existing social and economic factors. Therefore, the legal history and culture are also central to an understanding of the principles of contract remedies in a society.

The growth of Chinese contract law has been influenced by Chinese traditional legal culture and legal history. The punitive principle in China's economic contract remedy system reflects, to a great degree, the continuing impact of Chinese feudal legal culture on Chinese existing legal system.

In ancient China law was generally understood as a system of punishments applied by officials to people who disturbed social orders, and no distinction ever developed between civil liability and criminal liability.\textsuperscript{211} And China traditionally emphasized the coercive nature of law and viewed


\textsuperscript{210} Ibid.

forced obedience as one of the essential elements of law. All legal transgressions were handled with criminal punishment.\textsuperscript{212} The cruelty and variety of punishment were the distinguishing characteristics of all ancient Chinese law.\textsuperscript{213} The traditional understanding of law is that law was not directed at the good; instead, its only purpose was to deter the potentially evil.\textsuperscript{214} In traditional China, the role of formal law was limited mainly to the maintenance of the public order.\textsuperscript{215} Law was primarily perceived as a tool of governing, not as a tool of protecting rights or individual interests.\textsuperscript{216} The widely accepted concept was that law (fa) was punishment (xing), and punishment (xing) was law (fa).\textsuperscript{217} As a result, commoners feared law and legal institutions. They only knew that when they violated law they would be punished; but they never thought of law as something that could protect their rights and interests. \textsuperscript{218} Law was

\textsuperscript{212} Ibid.


\textsuperscript{216} Ibid.

\textsuperscript{217} See Wang Jiafu & Xie Huaishi, Hetong Fa (Contract Law) supra, at 22.

\textsuperscript{218} See Yu Xingzhong," Legal Pragmatism in the P.R.C." supra, at 32.
understood, therefore, not as having the function of protecting rights.

Despite the fact that the stages of history and social conditions have already changed, this ancient Chinese view of law as punishment still remains and has influence today, especially in Chinese legal theoretical underpinnings. The deep social and culture foundations are hard to dislodge. Nowadays, many Chinese people (including the legislators) still view law as a restriction or prohibition, i.e. a kind of compulsive measure to govern social life. Under the traditional influences, it is not surprising that Chinese legal scholars, theorists and legislators tend to stress the punitive and coercive aspects of law. They still perceive contract law primarily in its social function. And the fact that punitive doctrine is still clearly discernable in Chinese contract remedy system is just one of the examples of the lasting influences of Chinese traditional understanding of law.

By comparison, in Anglo-American notion, contract law is the child of commerce, and it has grown with the growth of industry and commerce. Moreover, contract law has developed in accordance with the basic premise that law is considered to be the guarantor of rights and the measure of freedom.\(^\text{219}\)

As mentioned before, the Anglo-American position tends

to associate contracts and contract law with individualism, autonomy and private agreement which are perceived to be the characteristics of market economy, rather than with restrictions or prohibitions of people's behaviours. In other words, contract law has been primarily perceived as an instrument of facilitating private transactions, allocating economic sources and risks, and protecting and guaranteeing individual's rights and interests.

In Anglo-American law, particularly its economic law does have social governing function, i.e. to maintain social orders. However, such social governing and social order maintaining function of law is not practised in the way that law should force or coerce people to obey. In the Anglo-American traditional legal culture, it is individual freedom and rights that are the core standards of legal thinking.

5. Brief Summary

Through the above analysis and comparison, the punitive principle is one of the basic principles of the system of remedies in Chinese contract law. China emphasizes the importance of economic sanctions as inducements to performance. The system of contract remedies is ultimately intended to bring pressure to bear on the breaching party and to increase the cost breach of contract so as to prevent

\[^{220}\text{See Huan Xin, "The Basic Principles of the Remedies for Breach of Contract" supra, at 45.}\]
breaches.

The reason why Chinese contract law adheres to punitive principle rather than the equal value compensation principle is that what the Chinese economic contract law reflects, recognizes and protects is not the economic relations arising from a market economy in the typical sense of Western capitalism, but those arising from a socialist economy based on the system of public ownership of the means of production\textsuperscript{221}, where the state plans plays a dominant role. Economic contract law is not only the legal system which guides the economic activities and regulate the economic relations, but also, and more importantly, is the effective legal measure to carry out the state economic policies and to guarantee the realization of the state economic plan and social developing plan. As discussed before, breach of contract not only infringes the contractual right of the other party, but also disturbs and even undermines the state economic plan and social economic order. Therefore, in order to strengthen contract discipline, to effectively prevent breach and to ensure the realization of the state economic policies and plan, naturally compulsive and punitive measures would be taken.

It is quite different in Anglo-American law. Compensation is the fundamental principle of the system of contract remedies in Anglo-American law. It emphasizes the

\textsuperscript{221} Ibid. at 49.
importance of economic compensation as legal redress for the injured party, and reject the notion that remedies for breach of contract have punishment as a goal. The system is aimed at protecting and guaranteeing the economic interests of contracting parties so as to realize social justice and fairness, and hereby to encourage people to rely on contracts. It is just in this way that the law maintains the social economic order in a free market economy and to facilitate the operations of market.
PART FOUR: CONCLUSION

A. Summary of Comparison and Analysis

Contract, being the legal form of economic exchange, exists in every economy. The social institution of contract is found in virtually every society. However, in different social and economic structures, the functions and principles of contract institutions can be different from each other. Contract law is a reflection of the social and economic climate of a society. As we can see in this study, the principles and doctrines of a system of contract remedies are decided and heavily influenced by the social factors and economic philosophy of a society within which the remedy system operates. In short, legal principles are but the expressions in legal forms of the conditions of economic life in a society.

The rules and principles of contract remedies differ substantially from a market economy to a planned economy. And the contrast reflects the different needs of the two societies and the different responses made at the level of law to those needs.

The Chinese contract remedy system comes out of traditional and socialist sources that operate on assumptions which are quite different from Anglo-American assumptions. In a planned economic model, the emphasis of contract remedy is
to generate compliance with the state economic plan, which is
developed with a great degree of government involvement. It
is believed that this emphasis will effectively maintain the
social economic order and guarantee the realization of the
state economic plan.

In the Chinese context of a planned scarcity economy,
remedial rules in particular serve to promote the purposes of
contracts in implementing state economic plans. Realization
and guarantee of the state economic plan is the touchstone of
the principles and rules of contract remedies. What is
emphasized most is the obligation and duty of economic units
to implement the state economic plan assigned to them. The
Chinese position on contract remedies centres on the role of
economic sanctions which is perceived to be an inducement to
performance of contracts. Failure to perform a contract is
regarded as failure to carry out the state economic plan,
therefore, the contract remedy is punitive and coercive in
nature. So, we may conclude that excessive emphasis on
specific performance and giving rich punitive element to
damages is a Chinese product with the characteristics of
planned economy and high degree of government interference
with individual economic and commercial activities. It
reflects the internal demands of planned economy. That is,
Chinese contract remedies arise out of the needs of China's
specific social and economic reality.

In addition, the fact that China over-stresses specific
performance and punitive principle in contract remedies reflects, on the other hand, the influence of the feudal legal thinking of centralization of power, which has ruled China for thousands of years. This thinking still remains very strong in today's Chinese legislations. The fact that these ideas have persisted reflects the reality that China is still a society remarkably untouched by the commercial values and institutions that are quite common in the West. That is, market economy is still underdeveloped in China.

Clearly, as the result of a planned economy and socialist ideology emphasizing supremacy of the state interests, contracts have been used as a tool in planning, organizing and implementing state economic plan. Consequently, the planning principle, the punitive doctrine and specific performance as the primary remedy are the main features of Chinese contract remedy system.

However, on the other hand, the factors that have made specific performance and punitive damages so attractive in a planned economy are plainly absent in a free market economy.

In the context of a free market economy, contract remedy emphasizes a great degree of flexibility and choices to the economic actors, with minimal government interference. Such flexibility and choices, it is believed, can maximize social welfare and promote the operation of the free market economy. In effect, contract is the instrument by which the separate and conflicting interests of the participants can be
reconciled and brought to a common goal.¹ Contract serves as a vehicle for private economic activities. In addition, Anglo-American law prefers to restrict rather than to enlarge the responsibility of the party in breach. Therefore, the aim of contract remedies is mainly to compensate for the losses sustained by the innocent party, emphasizing the compensatory principle of contract remedies. The preference for substitutional relief rather than specific relief reflects the assumption that markets make substitutes freely available. All in all, the Anglo-American contract remedy system is heavily influenced by the economic philosophy of free market economy. As the result of a free market economy and an ideology emphasizing individualism, freedom and economic efficiency, contracts are perceived as a means of facilitating private transactions and of allocating social resources and potential risks. Freedom of contract, compensation doctrine, and damages as the primary remedy become the main features of Anglo-American contract law.


Beginning in 1980, a major effort has been under way to stimulate economic growth in China through a series of new economic policies. And in the last decade, with the implementation of economic reform, China's commodity economy has developed rapidly both in its domestic economy and in its foreign trade. With the practice of a planned commodity economy, the gradual decentralization of the central economic power, the expansion of the enterprises' decision-making autonomy, and the gradual and appropriate narrowing of the scope of mandatory planning and expansion of the scope

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2 The resolution concerning reform of the economic system which was passed in October, 1984, at the third plenum of the twelfth party central committee pointed out that the P.R.C. 's economy is a planned socialist commodity economy with socialist public ownership as its basis. However, the term "planned commodity economy" has never been systematically explained by Chinese leaders or authorities. My personal understanding is that by using commodity economy instead of using market economy, the Chinese leaders tried to distinguish socialist market economy from capitalist market economy. For by that time, they still thought that market economy was a exclusive relic of capitalism.

3 As the result of the expansion, every state-owned enterprise now is supposed to have the duty to work profitably within the framework established by the state economic plan and in accordance with the economic goals it set forth. State-owned enterprises have been equipped with separate assets and money, and they are supposed to be responsible for their economic gains and losses. Thus, state-owned enterprises have become comparable to independent privately-owned enterprises responsible for their own operation in the West.
of the guidance planning, there have been a lot of changes in China's social and economic conditions and environment.

More important, China has changed her attitude towards market economy. ¹ Not long ago, the plenary of the Fourteenth Central Committee of the Chinese Communist Party decided that China will totally implement market economy model. ² This decision marks the starting of a new economic model in China and is of great epoch-making significance. It will surely have far-reaching effect on China's economy.

Such great changes in China's economic model and policies and China's willingness and attempt to develop market economy in turn suggest that China should re-think or re-assess her existing economic contract law which was

¹ China used to regard market economy as the exclusive product of capitalism and also thought it was absolutely irreconcilable with socialism. It was a long time before China realized that market economy is not merely a relic of capitalism. As one article recently published in the People's Daily states: China should make use of capitalism. To make use of capitalism includes to properly develop the capitalist economy (market economy) in China. The article goes further: China should take in some useful Western economic ideas, economic models and measures from modern capitalist economic theory and practice. The economic policies and legislation which have been practised in capitalist society and which reflect the inner rules of the market economy are worth learning. See Fang Sheng, "To Open the Door to the Outside and to Make use of Capitalism", (Feb. 24, 1992) People's Daily.

² The last forty-year's experience has proven that planned economy could not save China. Now, Chinese leaders have been convinced that market economy is the road to prosperity for China. See Jiang Zemin, "Jiakuai Gaige Kaifang He Xiandaihuai Jianshe Bufa Duaoqu You Zhongguo Tese Shehui Zhuyi Shiye De Gengda Shengli"---The report at the Fourteenth National Congress of Chinese Communist Party, Oct. 12th, 1992, People's Daily.
promulgated more than ten years ago when planned economy still played a predominant role in China's economy. Although the situation in China is changing significantly, the rules of CECL have not been modified at all. The question raised here is whether rules and principles drafted in the early 80's represent efficient rules in the present situations in China, and whether they can still accord with the current expectations and conditions of market economy.

The contractual practice of the last few years in China shows that contracts are no longer exclusively used as a tool to realize the state economic plans. To a certain degree, economic contracts have been increasingly becoming the legal forms for exchange of commodities among various equal economic actors, which is closer to the notion of contract in a market economy in the Western sense. Individuals begin to emerge as contracting parties in commercial transactions. Economic actors are obtaining a certain degree of autonomy to engage in increasingly independent transactional activities free from external organizational control. In short, many signs have indicated that China is now in the process of moving from a planned economy to a market economy.

While market economy is in the process of being built in China, some of the principles and legal doctrines are beginning to seem out of date. Some of them may have fallen into obsolescence. Excessive emphasis on specific performance is one of them. If we admit that specific performance of
contract is an effective remedy in guaranteeing the realization of the state economic plan in a context of planned economy and scarce market, then what is the most effective remedy in protecting the expectations and interests of individuals or private enterprises in a market economy?

Prior to the economic reforms, economic transactions amongst socialist organizations were in large part governed by planned contracts, whose performance had a direct bearing on the fulfilment of the state economic plan. Such being the case, the principle of specific performance was deemed extremely important. As the result of the reform efforts, however, enterprises are now enjoying much greater freedom of contract and are constrained much less by the state plan. Economic transactions in the form of contracts are largely left to the enterprises themselves. In this new economic context, the function of contracts in fulfilling and realizing the state economic plan is no longer so predominant as it used to be. Any single-minded emphasis on specific performance, disallowing the use of monetary damages instead of specific performance, will only lead to constraints on the economic actors' flexibility and dynamics in the production and exchange of commodities. On the other hand, should breach of contract occur in a more advanced market economy, the innocent party always have the possibility of obtaining the necessary raw materials or products in the market. Therefore, substitution of performance in kind by performance in monetary
terms in certain contractual relations is not unlikely as the role of market mechanisms comes into fuller play. Thus, we might say that the principle of specific performance in China should gradually lose its ground under the present circumstances in China. If China still sticks rigidly to the enforcement of specific performance under normal conditions, it might largely limit the necessary flexibility and mobility in commercial transactions, and as a result, it might hinder the further development of a market economy in China. So, the law should allow the use of monetary damages instead of specific performance, for this would be more conducive to the development of a market economy.

It is also quite ironic that the punitive function of damages in the Chinese contract remedy system has not really served its intended purpose. It has had an undesired result: the penalty imposed on the breaching party is often disproportionate to the seriousness of the actual losses caused by a breach. Conversely, the greater the actual losses caused by a breach, the smaller the penalty; the smaller the actual losses are or even no losses at all, the greater the penalty. In addition, with the development of market economy, the underlying social and economic factors

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6 For a detailed discussion, please see Zhang Guilong, "Summery of The Opinions Concerning Modifications of the Economic Contract Law"(1990) No. 6, Zhongwai Faxue at 43-46. Also see He Yue, "A Different Opinion about the Nature of The Liquidated Damages in China's Economic Contract Law" (1987) No. 3, Hebei Faxue at 65.
which made the punitive principle so attractive in a planned economy may vanish. I personally think, if an economic legal principle does not minimize costs and maximize benefits, it is unlikely to attract many adherents and can not work well. Therefore, the punitive principle should be reconsidered and inquired. And, the compensation principle in Anglo-American law is worth being further studied and can be used for reference.

C. Suggestions.

Law, as a system of authority and regulation in society, must respond to social needs and changes. As Justice Cardozo said: the law becomes whatever the needs of life in a developing civilization require. Law must fit a growing social body and be adaptable and expendable to meet new problems and changing conditions. Society's needs, wants and values are always changing. Legal concepts and principles must be continually tuned and re-tuned to keep in harmony with society's needs. As mentioned above, the reform of economic structure in China has resulted--and will result in significant changes in Chinese society. The political,

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8 See C.E. Witherell, How to Avoid Product Liability lawsuits and Damages, (New Jersey: Noyes Publications, 1985) at 40.

9 Ibid. at 42.
economic and social climate has changed drastically in the last few years and is still being on its way to another drastic change—the transformation from a planned economy to a totally market economy. Such fundamental changes will inevitably be reflected at the level of law, and the economic contract institution in China should change in response to those changes in the social and economic environment. Continued economic reform would surely challenge concepts and principles in both Chinese traditional contract theory and practice which have been frozen for years and no longer accord with the way the society is developing, or which may even hinder the development of market economy in China. With the progressive transformation from planned economy to a market economy, China is facing and will be facing many new problems. There is really a practical challenge before China—how to cope with these issues through legal means. For example, how to regulate the contractual relations between private individuals in a market economy? How to adequately protect contract expectations and interests of private individual actors so as to promote the operation and vitality of market economy?

Market economy has the features and the inner rules of its own, which requires a corresponding legal mechanism. And as Anson said: Commercial developments depended—and still do depend—for their successful operation upon contract. 10 I

personally think that just like factory life required different approaches from agricultural life, market economy requires a different approach from planned economy. While trying to promote and develop market economy, China also needs to take active steps to improve her existing economic contract law, including its remedy system, and to establish a better corresponding legal mechanism so as to facilitate the effective operation of market economy in China.

I may conclude by suggesting that with the advent of market economy and the consequent need for more sophisticated rules to deal with market economy, the time is plainly ripe for a corresponding reforms in the existing Chinese economic contract law. To meet the needs of the ongoing market economy in China, there is a crucial need to create new institutions to expand, regulate and channel economic transactions. Perhaps, resolution of problems requires reforming China's economic contract law with an emphasis on applying market mechanism and values rather than on state planning.

On the other hand, Western countries are much more experienced in market economy and their economic contract laws are well-established. Their successful experiences both in their economic contract legal theory and practice are well worth learning.
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