Performance-Oriented Remedies in European Sale of Goods Law

Vanessa Mak
Contents

Acknowledgments v
Table of Cases xi
Table of National Legislation xv
Table of European Law xix
Table of International Treaties and Conventions xxiv

1—Introduction 1

I. Scope of the Project 3
   1. Jurisdictions and Legal Rules under Consideration 3
   2. Limitations to the Substantive Scope of the Project 5

II. Background and Theoretical Framework 7
   1. The Civilian Tradition: German and Dutch Law 7
   2. The Common Law Tradition: English Law 11

III. Outline of the Project 15

2—Harmonisation of European Sale of Goods Laws 17

I. Introduction 17

II. Contracts, Sales Contracts and Harmonisation 18
   1. Sales Law and European Contract Law 19
      a) Harmonisation of Contract Law in Europe 21
      b) Should Sales Law Lead the Way? 26
   2. European Sales Law—The Road Ahead 28
      a) Harmonisation of Consumer Sales Law 28
      b) CISG and European Sales Law 30
      c) PECL or CISG as a Basis for Harmonisation of European Sales Law? 32
   3. Conclusion 34

III. The Boundaries of European Sales Law 34
   1. ‘One is More than Two’ 36
      a) Issues of Delimitation 36
      b) A Transaction Costs Approach 37
      c) Consumer Protection and Consumer Confidence 39
   2. Harmonisation—An Assessment of the Current Position 40
   3. Conclusion 43
Contents

3—The Nature and Scope of Performance-Oriented Remedies 45

I. Introduction 45

II. The Nature of Performance-oriented Remedies 47

1. The Binding Nature of Contractual Obligations 48
2. The Nature of Performance: Rights or Remedies? 50
   a) Basic Notion: 'Performance-oriented Remedies' 52
   b) 'Discretionary Remedialism' 55
   c) Sub-division into Rights and Remedies 56
3. The Performance Interest Protected through Performance-Oriented Remedies 59
   a) The Under-Compensation Argument 61
   b) The Intentions of the Parties 64

III. The Scope of Performance-Oriented Remedies 66

1. Utilitarianism v Rights-Based Theory 67
2. Limitations Based in Efficiency 69
3. Limitations Based in Moral Rights Reasoning 71

IV. Conclusion 74

4—The Buyer's Entitlement to Specific Performance 77

I. Introduction 77

II. The Basis for Specific Performance in English Sale of Goods Law 80

1. Unique Goods and Section 52 of the SGA 83
2. Commercial Uniqueness 84
   a) Value of the Goods to the Buyer 85
   b) Temporary Unavailability of Substitutes 86
   c) Quantification of Damages 88

III. A Wider Perspective—Specific Performance in German and Dutch Law 89

1. General Availability of Specific Performance 90
2. Limits to Specific Performance—The Other Side of the 'Appropriateness' Test 94

IV. Restrictions on Specific Performance—Common Law and Civil Law Compared 95

1. English Law Bars to Specific Performance 96
   a) Impossibility 97
   b) Severe Hardship 98
2. Civil Law Bars to Specific Performance 99
   a) Impossibility 100
   b) Good Faith as a Bar to Specific Performance 100
## Contents

3. Common Law and Civil Law Restrictions Compared 102  
   a) Weight Attached to Restrictions on Specific Performance 103  
   b) Good Faith as a General Restriction on Specific Performance 106  
4. Conclusion 108  

V. Specific Performance in European and Other Uniform Sales Laws 109  
   1. The Basic Principle—General Availability of Specific Performance 110  
   2. Bars to Specific Performance 110  

VI. Conclusion 113  

5—Repair and Replacement 115  

I. Introduction 115  
II. Repair and Replacement: Definitions 117  
   1. Repair 117  
   2. Replacement 118  
III. Repair, Replacement and Specific Performance 120  
IV. The Buyer’s Freedom of Choice 123  
   1. The Choice between Performance-Oriented Remedies, Damages and Termination 124  
   2. The Choice between Repair and Replacement 127  

V. Restrictions on the Freedom of Choice 130  
   1. The Proportionality of the Remedy 132  
      a) Proportionality and Damages 132  
      b) Proportionality and Termination or Price Reduction 134  
   2. Elements of the Proportionality Test 138  
      a) Value of the Goods 139  
      b) Significance of the Lack of Conformity 140  
      c) Inconvenience to the Buyer 141  
   3. Repair and Replacement in Commercial Sales 142  
      a) The Availability of Repair and Replacement in Commercial Sales 142  
      b) Restrictions on Repair and Replacement—The Proportionality Test in Commercial Sales 143  

VI. Conclusion 146  

6—The Seller’s Right to Cure 149  

I. Introduction 149  
II. Policy Issues 150  
III. Cure Before the Due Delivery Date 152
## Contents

1. Cure in the Light of the Relationship between the Right to Withhold Performance and the Right of Termination 153
2. Cure, Tender and Delivery 157
3. Cure between Rejection and Termination 160
4. Conclusion 163

IV. Cure after the Due Delivery Date 164
   1. Where Time is of the Essence 165
   2. Where Time is not of the Essence 169
      a) Basis of the Right to Cure 170
      b) The Time Period for Cure 172
      c) Notice or No Notice? 174
   3. Conclusion 176

V. Informal Attempts at Cure 176
   1. The Time Period for Cure 177
   2. Acceptance of Repaired Goods 180
   3. Rejection and Termination Revisited 183

VI. Conclusion 184

7—Cure: Enforcement, Limitations and the Hierarchy of Remedies 187
   I. Introduction 187
II. Enforcement of the Right to Cure 188
   1. The Buyer’s Obligation to Take Delivery 189
   2. Safeguards for the Buyer 192

III. Limitations to the Right to Cure 192
   1. Limitations—Cure Compared with Specific Performance 193
   2. Limitations to Cure Based on Moral Rights Reasoning 195
      a) ‘Unreasonable Expense’ 195
      b) ‘Unreasonable Inconvenience’ 197
   3. Conclusion 199

IV. Cure and the Hierarchy of Remedies 200

V. Conclusion 202

8—Conclusion 205
   I. The Buyer’s Entitlement to a Performance-Oriented Remedy 205
II. The Seller’s Right to Cure and the Hierarchy of Remedies 207
III. Commercial and Consumer Sales 208
IV. The Future of European Sales Law 208

Bibliography 211
Index 219