

# The Protection of Contractual Interest – A Comparison between Singapore and Taiwan<sup>1</sup>

## **I. Introduction**

1. This paper will compare the contract laws of Singapore and Taiwan in the following areas:
  - a. the extent to which contractual performance interest is protected; and
  - b. how remedies of breach of contract are justified and awarded.

## **II. Sources of contract law in Singapore and Taiwan**

### **A. *Singapore as a former British colony***

2. The law of contract in Singapore is largely based on English law, and continues to be heavily influenced by developments in English law.<sup>2</sup> While there have been several departures in an attempt to develop its own autochthonous system,<sup>3</sup> where a legal issue has not been considered by the Singapore courts, the position taken is usually similar to that of English authorities.<sup>4</sup>

### **B. *Taiwan as a smorgasbord of external influences***

3. Taiwan underwent significant legal reform under Japanese colonial rule. In particular, the Japanese introduced Western style laws during that period.<sup>5</sup> Thereafter in 1945, Taiwan was ceded to the People's Republic of China and "modern Chinese law was thus introduced"<sup>6</sup> to Taiwan's legal system. The Chinese laws had their origins in Japanese, German, and Swiss laws.<sup>7</sup>

---

<sup>1</sup> Lim Yin Hui & Dylan Mah, 2<sup>nd</sup>-Year J.D. Students, Singapore Management University's School of Law. Edited by Shriram Jayakumar, 4<sup>th</sup>-Year LL.B. Student

<sup>2</sup> Andrew Phang Boon Leong & Goh Yihan, *The Law of Contract in Singapore* (Kluwer Law, 2012) at para 02.085.

<sup>3</sup> *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR(R) 202 at [87].

<sup>4</sup> Application of English Law Act (Cap 7A, 1994 Rev Ed) s 3.

<sup>5</sup> Luo Chang-fa, *The Legal Culture and System of Taiwan* (Kluwer Law International, 2006) at p 3.

<sup>6</sup> *Ibid.*

<sup>7</sup> Luo Chang-fa, *supra* n 5, at p 3.

4. Much of Taiwanese contract law can be found codified in the Taiwan Civil Code (“**Taiwan CC**”). The Taiwan CC consists of five books – General Principles (articles 1 to 152), Obligations (articles 153 to 756–759), Rights in Rem (articles 757 to 966), Family (articles 967 to 1137), and Succession (articles 1138–1225).<sup>8</sup> It is modelled after the older German Civil Code (“**German CC**”) and did not receive sizeable amendments even though the German CC was amended in 2002.<sup>9</sup> In fact, numerous provisions in the Books of General Principles and Obligations are *in pari materia* with their older German counterparts.<sup>10</sup> Taiwanese law has also received several legal doctrines from the Swiss Code of Obligations 1881, the Swiss Civil Code 1912 and the Japanese Civil Code 1898.<sup>11</sup> The Taiwan CC was amended in 2000 to incorporate precedents from the Taiwan Supreme Court and other legal doctrines such as *culpa in contrahendo* and positive non-performance.<sup>12</sup>

### **III. Judicial remedies for breach of contract**

#### **A. Monetary compensation**

5. In Singapore, the common law remedy of damages is commonly awarded by the courts as compensation for a party’s loss arising from a breach of contract.<sup>13</sup> Such damages are awarded on a compensatory basis.<sup>14</sup>
6. Under the Taiwan CC, a breach of contract is more commonly known as a failure to perform a contractual obligation.<sup>15</sup> Following the classification in the German CC, the law relating to non-performance can be divided into three types – impossibility of performance, delay in performance, and defective performance.<sup>16</sup>

---

<sup>8</sup> Jan Sheng-Lin, “Theory and Practice of Specific Performance in Taiwanese Contract Law”, in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong eds, 2016) at p 281.

<sup>9</sup> Chen Tsung-fu, “Remedies for Non-Performance of Contract in the Taiwan Civil Code— A Comparative Perspective” in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong eds, 2016) at p 301.

<sup>10</sup> Tay-Sheng Wang, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945* (University of Washington Press, 2015) at p 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> Jan Sheng-Lin, *supra* n 7, at p 282.

<sup>13</sup> Andrew Phang, *supra* n 2, at para 20.002.

<sup>14</sup> *Id.*, at para 20.042.

<sup>15</sup> Section 3, Taiwan CC.

<sup>16</sup> Tay-Sheng Wang, *supra* n 10, at p 4.

(1) *Impossibility of performance*

7. Situations concerning the impossibility of performance can further be separated into excusable<sup>17</sup> and non-excusable impossible<sup>18</sup> performance. A debtor may be excused from damages if the impossibility of performance is not due to his fault.<sup>19</sup> As for non-excusable impossible performance, it includes initial objective impossibility of performance and initial subjective impossibility of performance. Initial objective impossibility renders a contract void in accordance with Article 246 of the Taiwan CC<sup>20</sup> and is not treated as a breach *per se*. This may arise when the parties contract to do something illegal, meaning it goes against another statutory provision or is against public policy. Initial subjective impossibility refers to the situation where performance by that particular debtor is impossible but performance by another party is possible. For example, this could arise where a seller did not have legal ownership over the object sold to the buyer and thus was not legally able to transfer ownership to the buyer.<sup>21</sup>

(2) *Delay in performance*

8. Article 229 of the Taiwan CC provides that a promisor is in default when the period fixed for the performance of an obligation expires and there has not been any performance of that obligation.<sup>22</sup> An injured party is entitled to claim specific performance and damages in respect of the delay.<sup>23</sup> If the performance is not desired by the injured party any longer, he may seek damages.<sup>24</sup> Damages will only be awarded when fault on the defaulting party's part is proved.<sup>25</sup> In cases of delay, there is a statutory provision entitling the injured party to set a reasonable time for the defaulting party to perform before the right of termination arises.<sup>26</sup> In contrast, there is no such

---

<sup>17</sup> Article 225, Taiwan CC.

<sup>18</sup> Article 226, Taiwan CC.

<sup>19</sup> Article 225, Taiwan CC.

<sup>20</sup> Article 246, Taiwan CC.

<sup>21</sup> Taiwan Supreme Court decisions 71 Tai-shang No 368 Civil Judgment (1982), 87 Tai-shang No 1236 Civil Judgment (1998).

<sup>22</sup> Article 229, Taiwan CC.

<sup>23</sup> Article 231, Taiwan CC.

<sup>24</sup> Article 232, Taiwan CC.

<sup>25</sup> Article 230, Taiwan CC.

<sup>26</sup> Article 254, Taiwan CC.

rule in Singapore allowing the defaulting party to perform within a reasonable time, although parties may make such arrangements via contract. Such a provision primarily protects the performance interest, while other interests such as restitution interest and reliance interest are secondary.

(3) *Defective performance*

9. Article 227 of the Taiwan CC prescribes the consequences of a defective performance depending on the factual matrix.<sup>27</sup> If this defective performance is curable, the defaulting party has to be given a reasonable period to cure the defect.<sup>28</sup> Only after the defaulting party refuses to cure the defect can damages be claimed.<sup>29</sup> If the defective performance is incurable or if it is of immense difficulty to cure, the aggrieved party may claim damages.<sup>30</sup>
10. For an injured party, the primary remedy is to be restored to his original position, as espoused in Article 213.<sup>31</sup> This remedy is subject to the defaulting party being willing to perform his obligation within a reasonable period<sup>32</sup> and that the obligation is not too difficult or not impossible to perform<sup>33</sup>. Damages are generally compensatory in nature unless otherwise specified in the contract or in other laws.<sup>34</sup>

**B. *Liquidated damages and penalty clauses***

11. In Singapore, liquidated damages clauses may be enforced if they represent a genuine pre-estimate of loss and they aim to estimate in advance the loss likely to result from a breach of contract.<sup>35</sup> However, penalty clauses which serve to coerce the breaching party into performing the primary obligation are not legally enforceable and will be

---

<sup>27</sup> Article 227, Taiwan CC.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Article 213, Taiwan CC.

<sup>32</sup> Article 214, Taiwan CC.

<sup>33</sup> Article 215, Taiwan CC.

<sup>34</sup> Article 216, Taiwan CC.

<sup>35</sup> Tham Chee Ho, "Non-Compensatory Remedies", in *The Law of Contract in Singapore* (Andrew Phang ed, 2012) at para 23.011.

struck down by courts.<sup>36</sup> Singapore law follows the English law in this regard,<sup>37</sup> as held in the seminal case of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*.<sup>38</sup>

12. In contrast, both liquidated damages and penalty clauses are enforceable in Taiwan.<sup>39</sup> In fact, the Taiwan Supreme Court has held that an aggrieved party may seek specific performance and compensatory damages even after a penalty clause has been enforced.<sup>40</sup>
13. The enforceability of penalty clauses in Taiwan may arguably be a legislative recognition of the performance interest of contracting parties. However, Taiwanese courts have the discretion to reduce the penalty amount if the obligation has been partially performed.<sup>41</sup> They may also exercise their good faith limitation to lower the amount to a reasonable sum if the agreed penalty is disproportionately high.<sup>42</sup>

### C. *Specific performance*

14. In Singapore, specific performance is a discretionary remedy arising in equity.<sup>43</sup> As it is discretionary, it is unlike the remedy of damages, which is available as of right whenever a breach of contract occurs.<sup>44</sup> It will be awarded if the court deems it just and equitable to do so.<sup>45</sup> In ascertaining whether it will be just and equitable for the court to

---

<sup>36</sup> Tham Chee Ho, “Non-Compensatory Remedies”, in *The Law of Contract in Singapore* (Andrew Phang ed, 2012) at para 23.011.

<sup>37</sup> Even though the recent case of *Cavendish Square Holding BV v Talal El Makdeni* [2015] UKSC 67 (“*Cavendish*”) arguably alters the law in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (UK) (“*Dunlop*”) by taking into account a proportionality approach in ascertaining liquidated damages clauses from penalty clauses, it remains an open question whether the Singapore courts will follow this approach. The Singapore High Court in *iTronic Holdings Pte Ltd v Tan Swee Leon* [2016] SGHC 77 and *Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 acknowledged the new approach in *Cavendish* but applied the test in *Dunlop* in both cases, citing the Singapore Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 in holding that the test in *Dunlop* remains good law in Singapore.

<sup>38</sup> *Dunlop, id.*

<sup>39</sup> Article 250, Taiwan CC.

<sup>40</sup> Taiwan Supreme Court decision 100 Tai-shang No 532 Civil Judgment (2011).

<sup>41</sup> Article 251, Taiwan CC.

<sup>42</sup> Article 252, Taiwan CC.

<sup>43</sup> Tham Chee Ho, *supra* n 36, at para 23.071.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [52]–[53].

order specific performance, the court will have regard to whether another remedy, such as damages, is adequate.<sup>46</sup>

15. In cases where the nature of the goods is unique and has a special value which cannot be quantified, the court is likely to compel specific performance.<sup>47</sup> For example, in contracts involving the sale and conveyance of land, the court will usually compel performance as land is taken to have a “peculiar and special value”.<sup>48</sup> Even where goods are “specific”, the courts may not order specific performance unless the goods are also something atypical or out of the ordinary.<sup>49</sup>
16. However, in Taiwanese law, specific performance is a primary remedy and an aggrieved party may claim an *in personam* performance from a defaulting party. This is expressly stated in Article 199 of the Taiwan CC, which provides that “by virtue of an obligation, the creditor is entitled to claim a performance from the debtor”.<sup>50</sup> In 2013, the Taiwan Supreme Court held that an injured party is only entitled to demand performance in accordance with the stipulated contractual obligations and if the defaulter is responsible for causing part of the performance to be impossible, the injured party has the right to demand performance of the part which can be performed and if partial performance is still of interest to the injured party.<sup>51</sup> It was emphasised that the injured party would not be entitled to damages unless the performance was impossible, even in part, and the performance was of no longer of any interest or value to the injured party.<sup>52</sup>
17. In contrast with Singapore courts, Taiwanese courts treat specific performance as the core remedial right. Should an injured party request specific performance provided that performance is still possible, the court is likely to grant the order despite the consequences for the defaulting party. In summary, Taiwanese law protects the

---

<sup>46</sup> *Id.*, at [52]–[53].

<sup>47</sup> Tham Chee Ho, *supra* n 36, at para 23.083.

<sup>48</sup> *The Asia Star* [2010] 2 SLR 1154 at [52].

<sup>49</sup> *Fothergill v. Rowland* (1873) LR 17 Eq 132 at 139.

<sup>50</sup> Article 199, Taiwan CC.

<sup>51</sup> Taiwan Supreme Court decision 102 Tai-shang No 1242 Civil Judgment (2013).

<sup>52</sup> *Ibid.*

reasonable expectations of contracting parties more adequately in that it recognises that “the essence of contract is performance”.<sup>53</sup>

#### **D. Injunctions**

18. In Singapore, injunctions may be issued at the court’s discretion to prevent a defaulter from acting in a particular manner.<sup>54</sup> Like specific performance, they are equitable remedies and will be awarded subject to certain limitations. For instance, in deciding whether to award a prohibitory injunction, a court will have regard to whether this would result in hardship to the defendant.<sup>55</sup> The court will also consider if the inconvenience suffered by the defendant excessively outweighs the advantage accruing to the plaintiff before issuing a mandatory injunction.<sup>56</sup> There are not many reported cases where there has been an application for an injunction for a breach of contract, so it is difficult to assess the Singapore courts’ willingness to grant injunctions to restraint such breaches.<sup>57</sup>
19. In Taiwan, injunctions may be granted by the court upon application by the injured party. The procedures and rules regarding injunctions are stipulated in the Taiwan Code of Civil Procedure. They may be divided into provisional injunctions and injunctions maintaining a temporary status.

#### **E. Which protects performance interest more – Taiwanese law or Singapore law?**

20. While both Singapore and Taiwan claim to be committed to putting the creditor in the position he/she would be in had the contract been performed, there are certain conceptual differences in the way this aim is achieved. In Taiwan, the starting point is that performance should be the primary response to non-performance since it is intrinsic

---

<sup>53</sup> Daniel Friedmann, *The Performance Interest in Contract Damages* (1995) 111 LQR 628 at 629.

<sup>54</sup> Tham Chee Ho, *supra* n 36, at para 23.155.

<sup>55</sup> *Patel v Ali* [1984] C.h. 283.

<sup>56</sup> *Sharp v Harrison* [1922] 1 C.h. 502.

<sup>57</sup> Dora Neo, “Specific Remedies and the Performance Interest in Singapore Contract Law”, in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong ed 2016) at 207.

to the contractual obligation itself.<sup>58</sup> It is not entrenched in the idea of liability for a breach, and it is unfamiliar to regard performance as a remedy, because that connotes something external to the right of performance.<sup>59</sup> The principle of *pacta sunt servanda* (Latin for “agreements must be kept”) is upheld in the Taiwanese law through various provisions in the Taiwan CC, and is reinforced by the underlying moral idea in Taiwanese culture that promises should be kept.<sup>60</sup> As a Chinese saying goes, a word once spoken cannot be overtaken even by a very competent horse (一言既出，駟馬難追).

21. Singapore subscribes to a different school of thought. Damages are treated as the primary remedy, rather than as a right.<sup>61</sup> This can be attributed to various reasons – historical, social and economic in nature. Historically, the action for breach of contract originated from the tort of trespass, where only damages could be claimed.<sup>62</sup> Furthermore, the courts used to be divided into the courts of law and the courts of equity, which awarded damages as of right and specific remedies as of discretion respectively.<sup>63</sup> As a result of certain tensions, the court of law and its accompanying remedies came to be preferred over time.<sup>64</sup> In addition, the common law is opposed to imposing moral duties in law, as demonstrated by the usage of the economic efficiency theory as a justification and policy concern for many pronouncements. The common law approach is more pragmatic – rather than insisting on the specific performance contracted for, it is more concerned with placing the creditor in the same financial position he would have been in if the contract had been performed. The bars to specific performance, such as avoidance of constant supervision and not wanting to interfere with the personal liberty of the debtor by causing undue hardship, reflect this preference for damages as the primary remedy for a breach of contract.

---

<sup>58</sup> Jan Sheng-Lin, “Theory and Practice of Specific Performance in Taiwanese Contract Law”, in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong eds, 2016) at p 281.

<sup>59</sup> *Ibid.*

<sup>60</sup> Mindy Chen-Wishart, “Comparative Asian Contract Law on the Remedies for Breach of Contract: Transplant, Convergence, and Divergence”, in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong ed 2016) at 407.

<sup>61</sup> Andrew Phang, *supra* n 2, at para 23.071.

<sup>62</sup> Mindy Chen-Wishart, “Comparative Asian Contract Law on the Remedies for Breach of Contract: Transplant, Convergence, and Divergence”, in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Chen-Wishart, Loke and Ong ed 2016) at 407.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*



22. These differences in legal traditions pertaining to contract law produce several effects. First, civil law reinforces the emphasis on performance by prioritising the continuation of the contract over its breakdown. For example, the Taiwan CC requires the creditor to give the debtor a second chance to perform, if performance is still possible, before allowing the contract to be terminated and damages to be claimed in lieu of performance.<sup>65</sup> In contrast, Singapore law does not provide for cure-oriented remedies such as repair and replacement. Once a contractual term is breached, the creditor is entitled to damages.<sup>66</sup> Even where a contract may be cured or repaired, the scope of this is only limited to specialist consumer legislation.
23. Second, the *prima facie* enforceability of penalty clauses in Taiwan stands in stark contrast with the rule at Singapore law. Penalty clauses are unenforceable at common law because they serve to compel performance and punish a defaulter's breach. However, that is the very purpose of a penalty clause in Taiwan. A penalty operates to compel the debtor to perform his principal duty and, if he does not perform, to punish him for breach.<sup>67</sup> Taiwanese law also protects the performance interest of creditors as it does not require proof of loss for penalty payments, and does not prejudice the creditor's separate but related claims to performance, termination, and damages.<sup>68</sup> This differs sharply from Singapore's position, where an agreed payment is only enforceable if it is in the form of liquidated damages and is a genuine pre-estimate of the loss flowing from the breach.<sup>69</sup>
24. In addition, the adequacy of damages is a clear bar to specific performance in Singapore, but not in Taiwan. However, it is submitted that the general duty of good faith in Taiwan (as is present in many civil law jurisdictions) will mitigate this gap. Where the cost of curing a defective performance is disproportionately high compared to the benefit the creditor will obtain from the cure, the creditor may be barred from obtaining specific performance.<sup>70</sup> In Taiwan, it is acknowledged that while the creditor will not be

---

<sup>65</sup> Articles 229–232, Taiwan CC.

<sup>66</sup> *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413.

<sup>67</sup> Chen Tsung-fu, *supra* n 9, at 311.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732, at [78]–[80], applying *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (UK).

<sup>70</sup> Andrew Phang, *supra* n 2, at para 23.132.

deprived of the right to performance simply because it could have made a reasonable substitute transaction, a creditor who unreasonably refuses to obtain performance from another source may be acting against good faith.<sup>71</sup>

#### IV. Conclusion

25. The greater emphasis that Taiwanese law places on the performance interest of contracting parties arises from both its civil law tradition, which stresses performance as the core remedial right, and the influence of its traditional morals on the law. Nonetheless, the principle of good faith ensures that judicial outcomes will be reasonable and just for the parties involved.
26. In contrast, Singapore, being a common law jurisdiction, prefers substitutionary remedies for historical, social, and economic reasons. However, cure-oriented remedies are available in Singapore consumer legislation, which is a statutory recognition of the performance interest in contracts. Performance interest of third parties is further protected by exceptions to the rule in privity,<sup>72</sup> and against third parties via the tort of inducement of breach of contract.<sup>73</sup> Taken as a whole, both Singapore and Taiwan protect the performance interest of contracting parties, but the extent through which this is emphasised varies according to the ease and availability of obtaining specific remedies.

---

<sup>71</sup> Mindy-Chen Wishart, *supra* n 8, at 409.

<sup>72</sup> Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).

<sup>73</sup> Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2<sup>nd</sup> Ed) at pp 653–664. The aggrieved party has to prove that there was (i) knowledge of a contract and an intention to breach the contract, (ii) procurement, (iii) breach, and (iv) damage to establish a *prima facie* case of inducing breach of contract.