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Inefficiency of Specific Performance As a Contractual Remedy in Chinese Courts: An Empirical and Normative Analysis

Lei Chen

Larry A. DiMatteo

University of Florida Levin College of Law, dimatteo@ufl.edu

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Inefficiency of Specific Performance as a Contractual Remedy in Chinese Courts: An Empirical and Normative Analysis

*Lei Chen** & *Larry A. DiMatteo***

Abstract:

This article investigates the values and latent policies in the area of the availability of specific performance (SP) as a contractual remedy, which have shaped the development of Chinese law. The National People's Congress (Legislature) and Supreme People's Court in China have addressed the remedial structure of Chinese contract law, namely, the availability of the remedy of SP as opposed to the awarding of damages only. The law is clear that the remedies of SP and damages are ordinary remedies that a claimant is free to choose between. The question that this article confronts is whether in practice the equality of SP and damages as remedies are applied in a neutral, unbiased way by the Chinese courts. Simply put, how often do Chinese courts use SP as a remedy for contract breaches? If SP is seldom awarded, the question then becomes: what are the underlying reasons or rationales given for its underutilization? This article employs an empirical study based on data collected by surveys and follow-up interviews with hundreds of Mainland Chinese judges at various levels of the Chinese court system (related to civil and commercial disputes). Based on the statistical findings of the empirical study, a theoretical inquiry is offered to better understand the relative use or non-use of specific performance as a contractual remedy. The findings show that damages are often favored over SP; additionally, judges in the Mainland Chinese court system take a far more proactive role in the preliminary stages of trials and will actively persuade parties to claim damages over specific performance where expedient. The study also shows that, despite popular belief, the higher supervision costs associated with specific performance are not a determinative factor in the decision not to award SP.

* Associate Professor, School of Law, City University of Hong Kong. This study has been financially supported by a general research fund from the Research Grants Council of the Hong Kong Special Administrative Region (project no. City U 11600315). He will become Chair in Chinese Law, Law School, Durham University since July, 2020.

** Huber Hurst Professor of Contract Law, University of Florida, Warrington College of Business and Levin College of Law.

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I. INTRODUCTION

The fundamental contractual obligation is to deliver the promised performance. A specific performance (SP) remedy is a court order that compels a breaching-party to fulfill its contractual promise.¹ The alternative to the issuance of an SP order is the granting of compensatory damages.² Comparative studies have shown that while the common law world favors awarding damages over ordering SP, civil law systems endorse SP, at least in principle. In the civil law, SP is seen as a primary remedy equivalent to the remedy of damages.³ Doctrinally, Chinese law adopts the civil law approach in not prioritizing damages over specific performance.⁴

Alternatively stated, the common law sees equitable remedies, such as SP, injunction, rescission, and reformation, as extraordinary remedies to be given when the legal remedy of damages does not provide adequate redress.⁵

¹ Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 632 (1988) (“Under Anglo-American law, specific performance refers to a judicial order requiring the performance of a party’s contractual obligations.”).

² It should be noted that the non-breaching party might claim damages along with a SP order, for incidental damages mostly related to the delay in performance. The damages are not technically compensatory in nature since the non-breaching party’s harm is rectified by actual performance.

³ Ronald J. Scalise Jr., *Why No “Efficient Breach” in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 726-33 (2007); Henrik Lando & Caspar Rose, *On the enforcement of specific performance in Civil Law countries*, 24 INT’L REV. L. & ECON. 473 (2004); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) FULL EDITION, 825 (Christian von Bar & Eric Clive eds., 2010) 825; PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II (Ole Lando & Hugh Beale eds., 2000); Lucinda Miller, *Specific Performance in the Common and Civil Law: Some Lessons for Harmonisation*, in RE-EXAMINING CONTRACT AND UNJUST ENRICHMENT: ANGLO-CANADIAN PERSPECTIVES 288-89 (Paula Giliker ed., 2007).

⁴ Article 107 of the Chinese Contract Law reads: “If a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures, or to compensate for losses.” Contract Law of the People’s Republic of China (Adopted at the Second Session of the Ninth National People’s Congress on Mar. 15, 1999 and promulgated by Order No. 15 of the President of the People’s Republic of China on Mar. 15, 1999) [hereinafter *CCL*]. Some scholars argue that specific performance takes precedence in the hierarchy of remedies since specific performance was spelled out first in the provision. See WANG LI MING, *STUDY ON CONTRACT LAW* 557 (2011). Others maintain that there is no hierarchical difference between damages and specific performance given the fact that both appear in the same sentence. See THE LAW OF CONTRACT 316 (Jianyuan Cui ed., 3d ed. 2010); SHIYUAN HAN, *THE LAW OF CONTRACT* 547 (4th ed. 2018). While specific performance is not expressly stated to be a primary remedy in China, it is, as a matter of principle, generally available as an option for aggrieved parties.

⁵ See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 380 (4th ed. 2010) (“It is hornbook law that equity will not act if there is an adequate remedy at law.”); *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (“[A] suit for damages would have given adequate relief, and therefore the appellee should have been confined to its remedy

SP is only given where the subject matter of the contract is considered to be unique, such as in the sale of works of art, or more commonly, the sale of real estate. In sale-of-goods transactions, the subject matter is considered to be fungible; therefore, legal damages are easily calculable by using the price differentials between the contract price and the market price, or the contract price and the price of substituted goods.⁶ There is rather deep comparative law literature comparing the role of SP in the civil and common laws,⁷ but that literature is conceptual in nature, while this article pursues an empirical methodology. Part II briefly examines the debate over SP as an ordinary remedy in American legal scholarship, as well as the divergence between the civil and common laws on the subject. It discusses the proposition that the divergence, despite the counterpoise in black letter law, is not as great as it seems on the surface. It also focuses on the different viewpoints on the subject in common law scholarship, along with the trend towards a more expansive use of SP in the common law. The second section discusses the divergence between the formal civil law rules as written versus as applied by the courts, to show that SP is more frugally used than is commonly understood in legal scholarship. Part III briefly examines the evolution of Chinese contract law and its use of SP. Part IV examines the design and findings of an empirical study of Chinese judges on their feelings and use of SP. Part V offers a descriptive theory of remedies in order to better frame the use of SP in practice, while Part VI provides a normative theory of SP based upon the norms of efficiency and fairness.

at law”).

⁶ U.C.C. § 2-712(2) provides that, in cases where the buyer purchases substituted goods, it “may recover from the seller as damages the difference between the cost of cover and the contract price”; U.C.C. § 2-713(1) provides that, in cases of non-delivery or repudiation, “the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach”. See U.C.C. §§ 2-712, 2-713 (AM. LAW INST. & UNIF. LAW COMM’N 2010). Article 75 of the U.N. Convention on Contracts for the International Sale of Goods provides that “the party claiming damages may recover the difference between the contract price and the price in the substitute transaction . . .” U.N. Convention on Contracts for the International Sale of Goods art. 75, Mar. 2, 1987, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG]. CISG Article 76 provides that “the party claiming damages may, if he has not made a purchase . . . recover the difference between the price fixed by the contract and the current price at the time of avoidance.” *Id.* at art. 76.

⁷ See John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959) (tracing the development of the specific performance idea in Roman Law, classical, post-classical and medieval law); Shael Herman, *Specific Performance: A Comparative Analysis (I)*, 7 EDINBURGH L. REV. 6 (2003); Guenter Treitel, *Remedies for Breach of Contract*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 155 (Arthur von Mehren ed., 1976); Gerard De Vries, *Right to Specific Performance: Is There a Divergence between Civil- and Common-Law Systems and, If So, How Has It Been Bridged in the DCFR?*, 4 EUR. REV. PVT. L. 581 (2009).

II. DAMAGES-SPECIFIC PERFORMANCE DEBATE

Michel Cannarsa has attributed the divergence in civil and common law in the remedial area to the larger role that the morality of promise⁸ plays in the civil law system. He states that “[t]his divergence is attributed to the ‘moral dimension’ of the contractual commitment in civil law jurisdictions. The one who does not perform his contractual obligations is seen as breaching a moral commitment and is therefore forced, by the courts, to keep his commitment.”⁹ In contrast, the common law sees SP as an inefficient remedy when damages are determined to be sufficient to fully compensate the non-breaching party.¹⁰ Thus, SP is reserved as an extraordinary remedy for cases where the subject matter of the contract is deemed to be unique.

The divergence between the civil and common laws in the area of remedies (SP as an ordinary or extraordinary remedy) is, like most of the well-recognized divergences between the two legal systems, an oversimplification. Lando and Rose showed in an empirical study that although the civil and common law treat the availability of SP differently, in practice, they have reached similar results or outcomes as to when SP is to be granted.¹¹ This convergence theory states that, in practice, there is less difference between common and civil law systems than the doctrinal statement of law might suggest.¹²

⁸ The morality of promise has seen some revised interest in American scholarship. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14-16 (1981); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722 (2007); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).

⁹ Michel Cannarsa, *Chinese Contract Law on Remedies and Damages: A Civil Law Perspective*, in CHINESE CONTRACT LAW: CIVIL AND COMMON LAW PERSPECTIVES 410-11 (Larry A. DiMatteo & Lei Chen eds., 2018). The morality of specific performance is also found in American legal scholarship. See FRIED, *supra* note 8, at 16; Randy E. Barnett, *Contract Remedies and Inalienable Rights*, in SOCIAL PHILOSOPHY & POLICY 179-83 (Ellen Frankel Paul ed., 1986); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 13-14 (1989); Daniel Friedmann, *Economic Aspects of Damages and Specific Performance Compared*, in CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 65 (Djakhongir Saidov & Ralph Cunnington eds., 2008); Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 138 (1981).

¹⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) (“[S]pecific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”) (Comment *a.* states that: “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.”).

¹¹ Lando & Rose, *supra* note 3, at 473 (arguing that despite black letter law recognizing SP as an ordinary remedy, it is rarely used in many civil law countries). “[E]mpirical observation is that specific performance is not enforced in Denmark for production contracts . . . In Germany and France, while enforced (although with many exceptions), claims for specific performance are rare.” *Id.* at 480.

¹² *Id.* at 474 (“Alternatively, it may be argued that specific performance is not, in practice, the routine contract remedy in Civil Law countries. Some scholars note a trend toward

The common law has in-depth legal literature discussing the proper use of specific performance vis-à-vis the awarding of damages. Lord Hoffmann proclaimed that: “there is less difference between common law and civilian systems than these general statements might lead one to suppose.”¹³ He maintains that “judges [in civil and common law systems] take much the same matters into account in deciding whether [SP] would be inappropriate in a particular case.”¹⁴ Allan Farnsworth sees a trend in American law where SP has been used in areas traditionally covered by an award of damages.¹⁵

A. The Common Law Debate

The common law views the payment of compensatory damages as satisfying the breaching party’s contractual obligations. In the immortal words in his 1897 seminal article, *The Path of the Law*, Chief Justice Oliver Wendell Holmes Jr. stated that:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing more.¹⁶

More recently, other American scholars have argued that the awarding of compensatory damages for breach of contract is a more efficient remedy.¹⁷

convergence in contract remedies in Civil and Common Law countries.”). Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 869 (2006).

¹³ *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1 (HL) 11 (appeal taken from AC).

¹⁴ *Id.* at 11-12.

¹⁵ E. ALLAN FARNSWORTH, CONTRACTS 854 (2d ed. 1990). Farnsworth asserts that: “Nevertheless, the modern trend is clearly in favor of the extension of specific relief at the expense of the traditional primacy of damages.” *Id.*

¹⁶ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

¹⁷ *E.g.*, Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 369 (1978) (arguing for the efficiency of the common law distinction unique versus fungible goods and, therefore, specific performance is only warranted in cases involving unique items: “[P]romisors and promisees will typically favor a money damages rule if the subject matter of their contract is not unique.”); Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEG. STUD. 29, 68 (2015) (“Our data provide modest endorsement of specific performance being subordinate to the default damages rule because a majority of contracts accept the default rule . . .”); Jeffrey L. Harrison, *A Nihilistic View of the Efficient Breach*, 2013 MICH. ST. L. REV. 167, 209 (2013) (“Arguments that specific performance is more efficient apply a very myopic concept of efficiency.”); Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1424 (1982) (“[T]he case for expanding the availability of specific performance is seriously flawed.”); Richard A. Posner, *Let Us Never Blame A Contract Breaker*, 107 MICH. L. REV. 1349, 1361 (2009) (endorsing the traditional rule but recognizing

Others, most recently including law and economic scholars, have argued otherwise, viewing SP as the better or more efficient remedy.¹⁸

Alan Schwartz has argued that SP is more efficient than damages because it achieves the goal of compensation better and reduces transaction costs in the negotiation and performance of contracts.¹⁹ However, it seems that Chinese jurisprudence is inconclusive as to whether there should be an increased use of SP instead of deferring to a damage calculation.²⁰ The use of SP is clearly warranted in cases where damages are difficult to prove.²¹ An example is where the non-delivery of a component part results in lost sales (breach of downstream contracts), which will cause negative reputational effects into the future. If Party A elects to breach a contract to deliver component parts to Party B in a just-in-time contract (where substitute parts are not readily at hand), Party B will under-produce the amount of its product needed to fulfill existing downstream contracts. Party B will be able to collect lost profits for its failure to perform on existing contracts with its customers. However, it is conceptually clear that a loss of future sales will also be suffered by Party B. Some of Party B's existing buyers will go elsewhere to fill their needs and Party B may be branded as a non-reliable supplier. However, these damages will not be collectable because they are speculative in nature; there is no certain way to determine the actual damages. Under the common law, SP would be denied because the goods were relatively fungible in nature. A court may also argue that Party B should have taken precautions to prevent a gap in production. Civil law is more likely to see the uniqueness of component parts at the time of breach. A civilian court may also recognize the under-compensatory nature of contract damages in such a scenario and see that only SP has the ability to make Party B whole. This is assuming that the order of SP is available prior to the production stoppage. In sum, the argument for the expanded use of SP in the common

that the arguments for and against the rule are “not conclusive . . .”).

¹⁸ *E.g.*, Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L. J.* 271, 305 (1979) (“Because specific performance is a superior method for achieving the compensation goal, promisees should be able to obtain specific performance on request.”); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 *MICH. L. REV.* 341, 343 (1984) (“[S]pecific performance is more likely than any form of money damages to achieve efficiency in the exchange and breach of reciprocal promises”); *see also* Shavell, *supra* note 12, at 875-76 (describing that some evidence exists that specific performance is the preferred remedy). *Cf.* Timothy J. Muris, *The Costs of Freely Granting Specific Performance*, 1982 *DUKE L. J.* 1053 (1982).

¹⁹ Schwartz, *supra* note 19, at 271 .

²⁰ Lei Chen, *Availability of Specific Remedies in Chinese Contract Law*, in *STUDIES IN THE CONTRACT LAWS OF ASIA I: REMEDIES FOR BREACH IN OF CONTRACT 21* (Mindy Chen-Wishart, Alexander Loke & Burton Ong eds., 2016) [hereinafter *Availability of Specific Remedies*].

²¹ *RESTATEMENT (SECOND) OF CONTRACTS* § 360(a) (1981) (A factor in determining whether damages are inadequate, thereby justifying an order of SP, is “the difficulty of proving damages with reasonable certainty . . .”).

law has been rooted in the rationales of efficiency and morality.²²

B. Civil Law's Application of the Remedy of Specific Performance

Again, civil law recognizes SP as an ordinary remedy, meaning a non-breaching party has the right to elect between pure damages or SP even in cases of fungible goods.²³ The purpose of this article is to determine whether SP is more likely to be awarded under a civil law system than a common law system by undertaking an analysis of the Chinese court system as a case study. China is a civil law country, in which contract law views damages and SP as primary and equal remedies.²⁴

The empirical survey presented here, which includes the collection of questionnaires from over three hundred Chinese judges, seeks to ascertain whether or not and to what extent the above legal divergence is reflected in actual judicial practice in the Chinese court system. Chinese law presents a particularly important and understudied area for the study of the use of SP as a remedy of first choice. This is due to the changing legal and economic context in which contract law and the dynamics of business transactions have undergone in the last few decades.²⁵ As a result, a gap exists between contract law's underlying assumptions (law in books) and the modern reality of how

²² From a normative perspective, there are arguments for specific performance and arguments for damages. Shiffrin, *supra* note 8 at 722; Kronman, *supra* note 18, at 351; Hayk Kupelyants, *Specific Performance in the Draft Common Frame of Reference*, 1 U. COLL. LOND. J. L. & JURIS. 15, 45 (2012). See also RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981). Comment *a* states that: "There is, however, a [modern] tendency to liberalize the granting of equitable relief [SP] by enlarging the classes of cases in which damages are not regarded as an adequate remedy." This statement recognizes that efficiency rationales must be balanced against morality or justice rationales.

²³ SOLÈNE ROWAN, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE 19 (2012).

²⁴ The Chinese civil law tradition finds its historical roots in the late Qing Dynasty (1902–1911). Lei Chen, *The Historical Development of the Civil Law Tradition in China: a Private Law Perspective*, 78 THE LEGAL HIST. REV. 159, 179 (2010) [hereinafter *Historical Development*]; Lei Chen, *Contextualizing Legal Transplant: China and Hong Kong*, in METHODS OF COMPARATIVE LAW 202-03 (P.G. Monateri ed., 2012). The influence of the German Civil Code is also seen when the Qing Civil Code Draft followed the German approach when it separated the civil code from a special commercial code. See DOUGLAS R. REYNOLDS, CHINA, 1898–1912: THE XINZHENG REVOLUTION AND JAPAN 18-28 (1993). The common law's focus on individualism did not fit well with Chinese communitarianism; also, the scattered nature of common law legal sources was consuming to Chinese scholars. See Roscoe Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 277, 289 (1955).

²⁵ Take third party rights for example. Initially when the Contract Law of 1999 was enacted, the legislature affirmed the principle of contractual privity in the absence of explicit recognition of third-party rights. However, given the social and economic condition changes, the time is ripe to introduce a legislative reform granting a third party an independent right of action. See Lei Chen, *Relaxations of Contractual Privity and the Need for Third Party Rights in Chinese Contract Law*, in STUDIES IN THE CONTRACT LAWS OF ASIA II: FORMATION AND THIRD PARTY BENEFICIARIES 62-63 (Mindy Chen-Wishart, Alexander Loke & Burton Ong eds., 2018).

contract law is applied (law in action).²⁶ This study will show that the generalization that Chinese courts treat SP as a routine remedy is not only superficial, but belies actual practice.

The substantial body of literature justifying the use or nonuse of SP, discussed above, lacks empirical verification.²⁷ Despite the existence of a rich and deep theoretical literature on the relative merits and moral justifications of SP and damages as contract remedies,²⁸ there is a surprising dearth of empirical research. This presents an opportunity for scholars to explore and further understand this academic debate in the context of empirical studies, such as the current undertaking on the use of SP in the Chinese court system.²⁹ At the same time, empirical studies could help respond to the lack of reliable and empirical knowledge about the application of law by the Chinese court system. There is no comparable study on the use of contract remedies in China. This article attempts to provide information on two core issues: (1) how readily do Chinese courts award specific performance for breach of contract; and (2) what are the core factors or rationales that influence their choice of remedies? An ancillary question to be addressed is longitudinal in nature: are changes implemented by the 1999 unification of Chinese Contract Law and subsequent developments reflected in judicial

²⁶ The “law in books” versus “law in action” distinction is longstanding. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); see also Jean-Louis Halpérin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45 (2011) (analyzing the distinction as discussed by Roscoe Pound and the European legal theories that are influenced by the ideas of Hans Kelsen, H.L.A. Hart, and Alf Ross about law and facts).

²⁷ Interestingly, in reformulating a moral argument challenging the instrumentalist view of contract remedy in favor of expectation interest, Klass argues that the dual performance hypothesis, i.e. to perform or pay damages may not be empirically sound. Gregory Klass, *To Perform or Pay Damages*, 98 VA. L. REV. 143, 158 (2012).

²⁸ Wang Li Ming & Xu Chuanxi, *Fundamental Principles of China’s Contract Law*, 13 COLUM. J. ASIAN L. 1, 15 (1999); HAN, *supra* note 4, at 536-37; Shiyuan Han, *Culpa in Contrahendo in Chinese Contract Law*, 6 TSINGHUA CHINA L. REV. 157, 169 (2013); BING LING, *CONTRACT LAW IN CHINA* 418-26 (2002).

²⁹ To the best knowledge of this PI, there is only one empirical study dealing with Chinese contract remedies up to now. See Lei Chen, *Specific Performance as a Contractual Remedy in Chinese Courts: An Empirical Study*, 7 CHINESE J. COMP. L. 95 (2019). Another study, strictly speaking, is not an empirical study on contract law, but rather on contract behavior. See Yifan Hu & Larry D. Qiu, *An Empirical Analysis of Contracting by Chinese Firms*, 21 CHINA ECON. REV. 423, 426 (2010) (arguing that firms are more likely to use formal contracts as opposed to relational ones if they are located in a city different from the firm’s main business location). Different from contract law scholarship in China, there are quite a number of empirical studies on contract law in the US. See, e.g., David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business be an Economic Bonanza?*, 65 TEMP. L. REV. 159 (1992); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Fred S. McChesney, *Tortious Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence* 28 J. LEGAL STUD. 131 (1999); Oren Bar-Gill & Lucian Arye Bebchuk, *Consent and Exchange*, 39 J. LEGAL STUD. 375, 397 (2010).

practice on remedies for breach of contract?

III. HISTORY OF CONTRACT LAW AND SPECIFIC PERFORMANCE IN CHINA

This part will briefly analyze the modern history of contract law in China. The first section moves from the planned economy during the first part of the Communist Party rule to the initial entry of China into foreign investment and international trade. Under the communist planned economy, there was little use for monetary compensation in the private sphere since private property rights were not recognized.³⁰ Upon entering the global economy and transitioning to a partial market economy, Western-style contract laws were enacted, but in a fragmented way.³¹ The second section reviews the unification of Chinese contract law with the enactment of the Chinese Contract Law of 1999. The final section examines the role of SP in modern Chinese contract law.

A. Planned Economy and the Economic Contract Law of 1981

Under the socialistic legal system, SP was viewed as a common remedy and was often preferred over damages.³² In some areas, SP was considered to be the ordinary remedy and the award of damages as the extraordinary remedy.³³ Part of the explanation for this reversed prioritization is due to the difficulty of the non-breaching party (buyer) to obtain substituted goods in a planned economy.³⁴ In China's planned economy, supply often did not meet demand.³⁵ There were no advanced secondary markets for goods and scarcity of certain goods was not uncommon.³⁶ An arrangement to purchase goods from another supplier could prove difficult and time consuming. As a consequence, the goals set by the central economic planners for an enterprise could not be achieved because the enterprise received money instead of the goods it needs for production.³⁷ Therefore, monetary compensation was an inadequate remedy as there were a limited number of suppliers in the market, making SP arguably the more efficient remedy.

³⁰ Wang Li Ming, *Specific Performance in Chinese Contract Law: An East-West Comparison*, 1 ASIA PAC. L. REV. 18, 22 (1992); Chenggang Xu, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON. LIT. 1076, 1077-81 (2011).

³¹ Li Ming, *supra* note 30, at 20.

³² *Id.*

³³ *Id.* at 19.

³⁴ *Id.* at 22.

³⁵ *Id.*

³⁶ Jacques deLisle, *China's Foreign Economic Contract Law and Technology Import Regulations*, 27 HARV. INT'L L. J. 275, 276 (1986).

³⁷ Bernhard Grossfeld, *Money Sanctions for Breach of Contract in a Communist Economy*, 72 YALE L. J. 1326, 1338 (1963) (“[T]he enterprise is liable for the acts of all its members in the preparation, execution, and performance of contracts which result in a failure to conclude the contract within the time prescribed by the plan . . .”).

Against the background of a centralized planned economy, actual performance was of paramount importance for every unit of the economy, including the courts. Non-performance by one supplier or producer could cause a waterfall effect in the supply chain, leading to numerous breaches of contracts and missed quotas set by the central plan. The principle of SP was accepted as the norm, as it was necessary in order to place the non-breaching party in the position that it would have been had the contract been performed. The granting of pure compensatory damages was not a proper fit in an economy characterized by scarcity of supply, mandated quotas, and the affixation of government penalties in cases of not meeting the pre-determined quotas.³⁸

Thus, even when contracting parties had expressly agreed that the SP remedy would be waived in favour of monetary compensation, such a contract term was often ignored as improperly restricting the Chinese courts' remedial function.³⁹ According to Article 35 of the Economic Contract Law ("ECL"), the defaulting party still needed to continue the performance under the contract even after damages have been paid, if so demanded by the non-breaching party.⁴⁰ This indicates that the payment of damages did not necessarily mean that the non-breaching party had waived the remedy of SP.⁴¹ Monetary compensation was categorically stated to be a remedy of last resort in cases where SP is virtually impossible to render.⁴² Another feature of SP in the planned economy era was that where SP was possible, neither party may demand, offer, or accept termination instead.⁴³ Further, SP was

³⁸ The first Western-style or modern contract law detailed the role of the planned contract system. Article 11 states:

For economic dealings involving products and items included in the state mandatory plan, the economic contracts must be signed according to the quotas set by the State; if no agreement is reached at the time of the signing, the matter shall be dealt with by the planning organ superior to both parties. As for economic dealings involving products and items included in the state guidance plan, the economic contracts shall be signed according to the actual conditions of the units concerned in reference to the quotas set by the State.

The Economic Contract Law of the People's Republic of China (adopted at the fourth session of the fifth Nat'l People's Cong., Dec. 13, 1981) [hereinafter China Economic Contract Law].

³⁹ Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L. J. 407, 407 (2016). Professor Shiffrin more broadly makes the case against such contract terms: "*I contend that the traditional presumption against such clauses enforces important values central to the rule of law, including that private parties should not decide their own cases and that the public has a special interest in deciding what remedies are appropriate for breaches of legal duty.*" *Id.* at 407.

⁴⁰ Li Ming Wang, *supra* note 30, at 21. (Professor Li Ming Wang notes that the Chinese courts at the time gave priority to the specific performance remedy.) China Economic Contract Law, *supra* note 39, at Article 35 ("If the processing work does not [live] up to the required quality and quantity stipulated in the contract, it should undertake repairs free of charge, make up for the shortage in quantity or, ask for less remuneration depending on the circumstances.").

⁴¹ Li Ming, *supra* note 30, at 21.

⁴² *Id.*

⁴³ Treitel, *supra* note 7, at 155.

available irrespective of the fault of the defaulting party.⁴⁴

B. Chinese Contract Law of 1999

China's attempt to transition to a partial market economy in the 1980s led to the enactment of a series of fragmented contract laws including the Economic Contract Law, Foreign Economic Contract Law, and the Technology Contract Law.⁴⁵ In 1988, China acceded to the United Nations Convention on Contracts for the International Sales of Goods ("CISG").⁴⁶ The earlier contract laws were not conducive to uniformity of law and a free market system. The adoption of the CISG was a move in the right direction since it provided a Western-style model for a uniform sales law and would become a source document for the implementation of a uniform Chinese contract law.

When the Chinese Contract Law was drafted in the 1990s, economic and social conditions had changed dramatically as China accelerated its transformation from a planned economy into a partial-market economy. The increased efficiency of the market economy and the privatization of property rights allowed supply and demand for goods to be based on free market dynamics instead of the inefficient government allocation system under a command economy. The result was the growth of secondary markets based upon real world supply and demand, which increased the availability of purchasing substituted goods in cases of breach of contract. The Chinese Contract Law of 1999 was drafted in the context of this transition and the increase of market efficiency.

Thus, the traditional role of SP as a preferred contract remedy gave way to SP being considered as one of the standard contractual remedies. In sum, SP's place in contract law's remedial structure radically changed from the default or preferred remedy to just another contractual remedy.⁴⁷ The question remained whether the growth of a market economy and the adoption of a more modern contract law would lead to SP becoming a secondary remedy to the awarding of contract damages.

C. Specific Performance Under Modern Chinese Contract Law

The primary legislative sources of Chinese contract law are the General

⁴⁴ Weiguo Wang, *On Specific Performance*, 3 *STUD. L.* 17 (1984).

⁴⁵ See China Economic Contract Law, *supra* note 39; Law of the People's Republic of China on Foreign-Related Economic Contracts (effective July 1, 1985) [hereinafter *CFECL*]; Law of the People's Republic of China on Technology Contracts (effective Nov. 11, 1997) [hereinafter *CTCL*].

⁴⁶ CISG, *supra* note 7. The full text of the CISG is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html. The CISG is now the law of ninety-one countries. The status of signatories to the Convention is listed at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed July 16, 2019).

⁴⁷ *Availability of Specific Remedies*, *supra* note 20, at 23-25.

Principles of Civil Law of 1986 (GPCL) and the Chinese Contract Law (CCL) of 1999.⁴⁸ The GPCL, albeit vague, broadly covers property rights, contractual obligations, intellectual property rights, marital rights, unjust enrichment, tort liability, and legal remedies. The CCL is the most comprehensive and specific statute on contracts in China. In practice, since the statutes are abstract and incomplete, the GPCL and the CCL are supplemented by governmental regulations and judicial interpretations of the Supreme People's Court (SPC). The courts, especially the SPC, play an influential role in spelling out concrete rules concerning contractual disputes. There are two judicial interpretations on contract law issued by the SPC, namely, Interpretation Numbers I and II.⁴⁹ Judicial interpretations serve as the “most important and active interpretation authority in China . . .”⁵⁰ Judicial interpretations issued by the SPC, although not directly binding on the courts, are sometimes referred to as “quasi-legislation.”⁵¹

Under Chinese law, in cases of breach of contract or failure to cure defective performance within the requisite period of time, the aggrieved party is entitled to either: (1) a claim for specific performance, or (2) the cancellation of the contract. In either case, the non-breaching party is also entitled to make a claim for damages.⁵² Article 107 of the CCL states that “[w]here a party fails to perform his contractual obligations or where his performance of the contractual obligations is not in conformity with the agreement, he shall bear liability for breach of contract by continuing his performance, taking remedial measures, paying damages and so forth.” This provision indicates that after a breach or failure to perform, the breaching party still has the duty of “continuing his performance,” as well as paying damages.⁵³ Article 112 provides that where a party fails to perform its obligations under the contract or its performance fails to conform to the contract, and the other party suffers further damages after the performance of

⁴⁸ General Principles of the Civil Law of the People's Republic of China [Revised] (1986 General Provisions) (promulgated by the National People's Congress Apr. 12, 1986, effective Jan. 1, 1987, *as amended* by the Decision of the NPC Standing Committee on Amending Some Laws (promulgated Aug. 27, 2009)) [hereinafter GPCL]; China Economic Contract Law, *supra* note 41, at art. 58.

⁴⁹ Interpretation of the Supreme People's Court on Issues Concerning the Application of the Contract Law of the People's Republic of China (II) (promulgated by the Jud. Committee of the Supreme People's Ct., 9 Feb. 2009, effective May 13, 2009) (China), <http://www.cmac.org.cn/wp-content/uploads/2018/08/Interpretation-of-the-Supreme-Peoples-Court-on-Several-Issues-Concerning-Application-of-the-Contract-Law-of-the-Peoples-Republic-of-China-2.pdf> (China).

⁵⁰ JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 108 (1999).

⁵¹ LING, *supra* note 28, at 32. These are general model decisions that attempt to clarify the statutory law and are considered part and parcel of the legislation, much like the comments found in the United States' Uniform Commercial Code.

⁵² HAN, *supra* note 4, at 775.

⁵³ CCL, *supra* note 4, at art. 107.

the obligation or adoption of remedial measures, the breaching party shall compensate the other party for such damages.⁵⁴ It is notable that the key consideration in determining whether damages and SP can be concurrently awarded is whether SP would cause over-compensation to the non-breaching party.⁵⁵ Article 110 notes that the non-breaching party has the right to demand performance, but qualifies it in cases where “the subject matter of the obligation is unsuitable for enforced performance or the cost of performance would be excessively high.”⁵⁶

Some scholars argue that SP takes precedence in the hierarchy of remedies since it is listed first in Article 107.⁵⁷ Others maintain that there is no hierarchical preference between damages and specific performance given the fact that both appear in the same sentence.⁵⁸ While SP is not expressly stated to be a primary remedy in China, it is, as a matter of principle, generally available as an option for aggrieved parties.⁵⁹ Nonetheless, this does not necessarily mean that Chinese courts readily issue judicial orders for SP.⁶⁰

On the surface, the complaining party has the right to choose the remedy of SP over damages. However, courts retain a degree of discretion whether to issue an order of SP. In Chinese law, there are generally recognized limitations on the remedy of specific performance: excuse or exemption (impossibility or *force majeure*), contracts for personal services, untimely claim, and, most importantly, where the costs of performance outweigh the benefits received by the promisee.⁶¹ The latter ground of discretion is known as the disproportionality limitation and “is a manifestation of the principle of good faith.”⁶² The disproportionality principle provides courts the discretion to consider benefits and costs. Also, damages are awarded when SP is impossible, impractical, or excessive, when the creditor does not request SP within a reasonable period of time⁶³ or contravenes the good faith principle because of her failure to mitigate⁶⁴; in cases of the debtor’s hardship arising

⁵⁴ CCL, *supra* note 4, at art. 112.

⁵⁵ HAN, *supra* note 4, at 774.

⁵⁶ CCL, *supra* note 4, at art. 110 (2).

⁵⁷ WANG LI MING [王利明], HE TONG FA YAN JIU [STUDY ON CONTRACT LAW 合同法研究] 557 (2011).

⁵⁸ HAN, *supra* note 4, at 316.

⁵⁹ This approach has been adopted even before the 1999 Contract Law. The GPCL and the other two pieces of pre-1999 contract legislation had made such a choice. *See* GPCL, *supra* note 49, at art. 111 (China); CFECL, *supra* note 46, at art.18; CTCL, *supra* note 46, at art. 17(1).

⁶⁰ *Availability of Specific Remedies*, *supra* note 20, at 21.

⁶¹ CCL, *supra* note 4, at art. 110.

⁶² *Availability of Specific Remedies*, *supra* note 20, at 29.

⁶³ CCL, *supra* note 4, at art. 110(2).

⁶⁴ GPCL, *supra* note 49, at art. 114 and CCL, *supra* note 4, at art. 119 (1) enunciate the rule of mitigation. This rule stipulates that the aggrieved party shall take prompt and reasonable measures to prevent further losses. If the measures are not taken, the aggrieved

from a change of circumstances⁶⁵, or for administrative considerations. Thus, the restrictions to the rule of general availability are as significant as the rule itself.

In sum, Chinese formal law does provide a hierarchy between the remedies of damages and specific performance. So, theoretically, the non-breaching party has the option of seeking damages or SP, or both. However, a petition for a SP order is not automatically approved since the courts still retain discretion on whether to provide such a remedy. The question remains: “[h]ow readily do Chinese courts award SP for breach and what factors influence the choice of remedy in their awards?”⁶⁶ There are two dimensions to framing an answer to this question—the judicial perspective and the plaintiff’s perspective. The courts may accept the law that the remedies of damages and SP are on par, but this does not mean that the courts view SP as a preferred remedy or as the default remedy. From the perspective of the aggrieved party, damages have been the most common remedy sought due to the additional costs associated with enforcing an order of SP.⁶⁷

Another issue that plays a role in the use of SP is the Chinese law on the enforceability of penalty clauses. Liquidated damages or penalty provisions are ubiquitous in Chinese contract practice. The difference between Chinese and American practices is that penalties are unenforceable under American law,⁶⁸ while they are enforceable under Chinese law.⁶⁹ Since penalties are enforceable in China, the non-breaching party may receive supra-

party is not entitled to request compensation for any further loss.

⁶⁵ See Gordon Y.M. Chan, *The Doctrine of Change of Circumstances in Chinese Contract Law* 3 (Sep. 28, 2011), (unpublished paper, Faculty of Law, The Chinese University of Hong Kong) (available at <https://ssrn.com/abstract=1934085>) (this interpretation formalized the “change of circumstance” to exempt parties from continued performance of contract, a term first mentioned in China in the case of *Wuhan Gas Co. v. Chongqing Detection Instrument Plant* in 1992.).

⁶⁶ Lei Chen, *Damages and Specific Performance in Chinese Contract Law*, in *CHINESE CONTRACT LAW: CIVIL AND COMMON LAW PERSPECTIVES* 378 (Larry DiMatteo & Lei Chen eds., 2018).

⁶⁷ *Id.* at 379. (“The reality is that even though specific performance is generally available (on a par with damages) to the claimants as a remedy, it is rarely sought due to practical concerns.”).

⁶⁸ Common law historian Theodore F.T. Plucknett traces the role of equity in the formation of the penalty rule to a 1309 case in which the court reasoned that “this is not properly a debt but a penalty; and with what equity can you demand this penalty?” THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 677 (5th ed. 1956). RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981), Comment *b* states:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

See, e.g., *In re A.J. Lane & Co., Inc.*, 113 B.R. 821, 828 (Bankr. D. Mass. 1990) (A penalty must be voided “even when the transaction is fully voluntary and the parties have equal bargaining power.”).

⁶⁹ Chen, *supra* note 67, at 394-96.

compensatory damages⁷⁰ that likely diminish the appeal of SP. An explanation of the causal relationship between penalties, compensatory damages, and SP is the nature of recoverable damages. If damages were truly compensatory, then the non-breaching party should be indifferent to whether it receives damages or SP. Given the other costs related to the enforcement of SP, the preferred remedy from the plaintiff's perspective should be damages. However, if compensatory damages do not cover the actual harm, which may include inconvenience, loss of productivity, non-recoverable legal costs, and emotional stress, then SP should be the preferred remedy.⁷¹ Finally, if penalties allow for the collection of full compensatory damages and possibly more, then the enforcement of the penalty clause would be preferred over SP. In a sense, penalties act as a SP substitute.⁷² Unfortunately, the empirical survey was unable to capture the nature of the interrelationships between damages, penalties, and SP.

IV. EMPIRICAL SURVEY OF CHINESE JUDGES

Unlike previous works, which focused primarily on doctrinal analyses of black letter law,⁷³ this project undertakes an empirical examination of the judicial practice of granting SP in China. It questions whether SP is a common remedy granted in most types of cases. Alternatively, if in practice SP is not given as an ordinary remedy, then in what types of cases will the courts make an order of SP available? What factors or criteria do the Chinese courts assess when deciding to grant SP?

This article tests the "convergence" theory⁷⁴ through an empirical survey administered to judges in China. To be specific, this project aims to explore the following research questions:

- (1) How often do Chinese courts use SP as a remedy for contract breaches?

⁷⁰ *Ibid.* Contract law damages are based upon compensating the non-breaching party for harm caused by the breach based on the expectancy interest (putting the party in the place in the future that they would have been but for the breach). Therefore, damages that are supra-compensatory would be punitive in nature, which is not allowed in the common law, but is enforceable in the civil law and, therefore, under the Chinese civil law system.

⁷¹ Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U.L.R. 145, 225 (1995) ("The available remedial means of ensuring full compensation, such as injunctions, specific performance and restitution, are issued at a price, not just to the defendant, but also to the community . . .").

⁷² See Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883, 890 (2006).

⁷³ LI MING, *supra* note 4; HAN, *supra* note 4.

⁷⁴ *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1 (HL) 11-12 (appeal taken from AC). Again, the convergence theory holds that the civil and common law remedies have been converging overtime. The analysis presented here shows that Chinese courts are not indifferent between the remedies of damages and to SP. In fact, they frugally use the remedy of SP, more so than in the common law, but not as robustly is allowed in civil law.

It is predicted that the empirical survey will show that SP is granted far less frequently than commonly assumed. In common law terminology, the survey should show that SP is not an ordinary remedy as represented in Chinese contract law, but in practice it is viewed and applied as an extraordinary remedy.

- (2) What are the factors that are most predictive of judges' likelihood of granting SP? Relatedly, do Chinese courts respect the parties' *ex ante* specification of their preferences for SP or damages?
- (3) If the study finds that SP is awarded infrequently, what are the underlying reasons or rationales given for its underutilization? Are there organizational, professional, or individual reasons that restrict the use of SP as an ordinary remedy?
- (4) Further, are defendants more amenable to paying damages, sometimes damages higher than normal or compensatory damages where it appears the claimant has an objectively high probability of obtaining an order of SP? Does the probability of obtaining SP anchor settlement negotiations?

These questions seek to compare the 'law in the books' (SP as primary remedy) to the 'law in action.'⁷⁵ The survey hopes to determine whether SP is used more frugally despite the legal right of the buyer to choose the remedy. The common law has had a modest degree of influence on Chinese contract law. If frugality is found, does the use of SP in China signal a civil law-common law hybrid or convergence of the views of civil and common law thinking on SP?

A questionnaire was constructed in order to obtain a dataset of Chinese judges' perspectives concerning remedies for contract breaches.⁷⁶ The findings are critical to understanding the status of the SP remedy in contract enforcement in Chinese courts, as they continue to transition from a customary law system to the application of Western-style laws. The analysis also offers an innovative perspective to observe contract remedies and to understand the institutional dynamics and constraints in shaping the performance interests of contracting parties.⁷⁷

The sections below describe the research objectives of the empirical study of judicial attitudes toward the granting of specific performance. It provides a list of questions and assumptions that were brought to the survey effort and explains the characteristics and size of the survey sample. Finally, it discusses the scope and limitations of the research and reports on its

⁷⁵ See Schwartz, *supra* note 19, at 272 ("Under current law, courts grant specific performance when they perceive that damages will be inadequate compensation. Specific performance is deemed an extraordinary remedy . . .").

⁷⁶ See *infra* Part III.C.

⁷⁷ See *infra* notes 98-104 and accompanying text.

findings.

A. Research Objectives

The function of contractual remedies is to place the non-breaching promisee in as good a position as if the promisor performed,⁷⁸ or to “make the victim of a breach whole.”⁷⁹ The “performance interest” forms the very basis for a contract between parties and underpins the structure of contractual remedies.⁸⁰ There are two primary types of remedies available. The first requires the defaulting party to pay monetary compensation, either to enable the aggrieved party to purchase a substitute performance, or to compensate it for lost profits and other incidental damages causally related to the breach.⁸¹ If the non-breaching party is fully compensated, then the party is theoretically placed in the position that it would otherwise have been but for the breach. The second major remedy requires the defaulting party to render the actual performance as was promised. The former is known as legal damages while the latter is referred to as SP. SP requires that when a party to a contract does not perform an agreed obligation, by not delivering goods or delivering defective goods, the other party can request the court to order the party in breach to perform according to the terms of the contract.⁸² The party in breach is required to undertake what it previously promised in the contract, albeit often at a later point in time than originally agreed upon.

Doctrinally, while the common law world favors awarding damages over ordering SP, civil law systems still endorse SP as a primary remedy.⁸³ This has been challenged by some empirical studies, which maintain that

⁷⁸ Schwartz, *supra* note 19, at 271.

⁷⁹ Shavell, *supra* note 12, at 831.

⁸⁰ See Daniel Friedmann, *Performance Interest in Contract Damages*, 111 L. QUARTERLY REV. 628 (1995).

⁸¹ There are three generic limitations to damage recovery: (1) the damages must have been foreseeable at the time of contracting; (2) the breaching party is not liable for damages that would have been avoided through a reasonable mitigation; and (3) the injured party must prove its damages with certainty. See FARNSWORTH, *supra* note 15, at 873-74.

⁸² Being aware of the difficulty in having a consensual definition among different legal systems, this author attempts to provide this Chinese version, which hopefully is as understandable as possible for foreign scholars.

⁸³ In the common law of remedies, damages were obtained in the royal or government courts, while non-damage remedies or equitable remedies, such as specific performance and injunction, were within the jurisdiction of the ecclesiastical or equity courts. When the court systems merged the common law marinated the distinction between legal remedy and equitable remedy. The legal remedy (damages) was considered the ordinary remedy, while equitable remedies were considered extraordinary, to be used when damages were deemed to be inadequate. Damages are considered to be inadequate when the subject matter of a contract is deemed to be unique, such as in the sale of real property. Kronman, *supra* note 17, at 351; Dawson, *supra* note 7, at 495; PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) FULL EDITION, *supra* note 3, at 825; PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II, *supra* note 3, at 397-98; Miller, *supra* note 3, at 288-89; Herman, *supra* note 7, at 6-7.

different legal systems have reached similar results in practice.⁸⁴ This argument of the convergence of legal traditions asserts that in practice, there is less difference between the common law and civilian systems than these general doctrinal statements might suggest.⁸⁵ Nonetheless, Douglas Laycock concludes that when a court denies equitable relief such as SP, its real reasons are derived from the interests of parties or the legal system, not from the adequacy of the plaintiff's legal remedy.⁸⁶ This assertion implies that the rates at which SP is awarded are not as low as common law doctrine would suggest. Steven Shavell argues that parties would tend to prefer the remedy of damages for breach of contracts to produce things due to high transaction costs, whereas they would often favor the remedy of SP for breach of contracts to convey property.⁸⁷ The supervision costs of SP for the transfer of existing property is minimal. In contrast, the supervision costs would be high if SP is for the production of custom goods.⁸⁸ Shavell submits that SP in the latter case would, in many cases, result in a joint loss for the contracting parties.⁸⁹

Under Shavell's analysis, if goods already exist then SP makes economic sense, but when goods are yet to be produced (especially in high-cost production) SP would be an inefficient remedy. However, if there were no readily available substitute goods, then SP for the production of goods may be preferred. In other words, parties dealing with different categories of contracts prefer different remedies, which makes commercial sense. Shavell correctly observes that the main purpose of SP, at least in the common law, is in cases where the remedy of damages proves to be inadequate.⁹⁰ This would be in cases where compensatory damages are difficult to calculate or the performance is difficult to value, cases where obtaining substitute goods

⁸⁴ Lando & Rose, *supra* note 3.

⁸⁵ Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 (HL) 11-12.

⁸⁶ Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 771 (1990).

⁸⁷ Shavell, *supra* note 12, at 859 (“[L]egal outcomes seem broadly consistent with the economic theory in the important sense that specific performance appears to be employed as a remedy primarily for breach of contracts to convey property rather than of contracts to produce things or to provide services.”).

⁸⁸ *Id.* at 846 (“[R]easons suggesting that parties to a contract to produce something would prefer expectation damages to specific performance as the remedy for breach, since use of specific performance would tend to lower joint value and impose risk on the seller relative to use of the expectation measure.”).

⁸⁹ Shavell, *supra* note 12, at 860. Shavell states that “problems in supervision would be associated with a loss in joint value for the parties (because they would bear some of the costs of supervision and because the performance itself might be poor).”

⁹⁰ *Id.* at 854 n.62 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 350 cmt. c, 360 cmt. c (1981)) (“[I]t is often possible for the injured party to secure goods or services similar to those in the contract by looking elsewhere in the market and that if these are available, the damage remedy is usually adequate; however, if the goods or services are unique, the injured party is more likely to be granted specific performance.”).

proves to be difficult, and cases where the breaching party is unable to pay compensatory damages (and the goods are attachable).⁹¹ This schematic of the efficient application of SP will later be applied to the findings of the empirical survey.⁹²

B. Questions and Assumptions

Previous scholarship on SP has provided a certain degree of coherence to the availability of SP under Chinese law.⁹³ The goal of the current undertaking is to empirically determine the use and availability of SP in judicial practice. The goal of the study is to analyze the legal or judicial prevalence and attitude towards SP. The empirical survey of judicial attitudes towards SP will show how the taxonomy of the underlying contract dispute influences the courts' remedial choices.⁹⁴ A taxonomy of contracts involves the categorization or grouping of contracts based on transaction types, such as sales of goods, sales of real property, licensing, leasing, construction, and so forth. The survey also hopes to uncover whether there is a pattern where judges actively attempt to persuade a claimant to change a claim for SP to a claim for damages. To this end, the following set of assumptions and corresponding research questions will be tested and explored.

1. How often do Chinese courts award SP in cases of contract breach?

The comparative contract law theory holds that civil law systems favor or are more likely to order SP (than the common law, which gives damage awards priority), but is this true for China?⁹⁵ Will the evidence show that civil law's non-hierarchical view of damages and SP (equally available to plaintiffs) is replicated in judicial practice? Or will the evidence show that SP is seldom awarded, thereby supporting the view that Chinese contract remedies are a hybrid system somewhere between the civil and common laws as represented by convergence theory? It is expected that the data sample will empirically show how frequently Chinese judges award SP in commercial and civil disputes. To measure the robustness of SP as a remedy, a series of questions asked Chinese quota judges⁹⁶ to list the percentage of claims for

⁹¹ *Id.* at 859.

⁹² *See infra* Part IV.F.

⁹³ *Availability of Specific Remedies*, *supra* note 20.

⁹⁴ Lei Chen, *Specific Performance as a Contractual Remedy in Chinese Courts: An Empirical Study*, 7 CHINESE J. COMP. L. 95, 112 (2019).

⁹⁵ Herman, *supra* note 7, at 6-7.

⁹⁶ In November 2017, Justice Zhou Qiang (周强), President of the SPC, announced the third-round judicial reform ("this reform") in the "Report of the SPC on the Comprehensive Deepening of Judicial Reform by the People's Court" (最高人民法院关于人民法院全面深化司法改革情况的报告) available at <http://www.court.gov.cn/zixun-xiangqing-66802.html>. As a concrete initiative on the professionalization of Chinese judges in this judicial reform, the SPC established the Quota Judge System. The Quota Judge System aims to divide court personnel into three categories: judges, trial assistants and judicial administrative personnel,

which SP was granted. Other questions in the questionnaire, listed below, were aimed at gaining a deeper understanding of the factors used by courts in deciding whether to grant SP, as well as factors that are predictive of a court not granting SP.

2. What are the controlling or predictive factors that influence judges' decision to award SP? Do courts respect the parties' ex ante specification in their contract as to preferred remedy?

Under Chinese law, as a general rule, a party may have a choice in requesting what it deems as an appropriate remedy, but this choice is subject to the court's discretion, taking into account the circumstances of each individual case.⁹⁷ Nonetheless, Chinese judicial practice encourage judges to adopt an activist stance in persuading claimants to change the choice of remedy before the court hearing if they find no compelling reason to award SP.⁹⁸ Thus, the evidence should indicate that Chinese judges take a far more proactive posture in the preliminary stages of a case than what is commonly believed.

To examine these questions, we shall inquire as to whether judges actively arrange and recognize taxonomy of contract types when considering an award of SP. We suspect that where a judge actively considers taxonomy of contracts, she is more likely to take a proactive stance in considering the various remedies available to the claimant at the preliminary stages of a claim. For example, where the commonly regarded taxonomy of contracts indicates a claimant is in a dispute involving a category of contract where SP is commonly awarded, such as in real estate sale contracts, then a judge will defer to the claimant in its choice of the remedy of SP.

In some circumstances—such as instances where the underlying dispute falls into certain categories of contracts that are seldom awarded SP, for example a partnership agreement—consulting taxonomy of contracts might convince a judge to deny the use of SP. The survey asks judges about such circumstances and whether they ever consider actively persuading a claimant to claim damages even though SP was requested in the preliminary summons (complaint). The interplay between the act of consulting taxonomy of contracts and deciding to persuade claimants to change their claim for SP to a claim of damages will be explored with particular interest.

3. If SP is seldom awarded, what are the underlying reasons or rationales for its frugal use? Under what circumstances is the remedy of SP likely

and to ascertain the number of judges. Consequently, only the judges in the assigned quota in each court are allowed to hear the case and they are called quota judges.

⁹⁷ *CCL*, supra note 4, at art. 107.

⁹⁸ The system of judicial engagement of the parties pre-hearing to settle on the appropriate remedy originated from the German civil procedure system of *Aufklärung*. See Some Measures Concerning Civil Proofs (promulgated by the Supreme People's Court, effective April 1, 2002), at art. 35.

to be granted and under what circumstances will its use be restricted?

Again, the starting point of Chinese Contract Law distinguishes between monetary obligations (paying a sum of money)⁹⁹ and non-monetary obligations.¹⁰⁰ With regard to monetary obligations, Article 109 stipulates that: “where a party fails to pay the price or remuneration, the other party may demand him to pay the price or remuneration.”¹⁰¹ For non-monetary obligations, a party is entitled to enforce specific performance of a non-monetary obligation if requested in a timely manner.¹⁰² The statutory limitations, as noted earlier,¹⁰³ on the availability of SP include impossibility, disproportionality, good faith, and untimely claims are described in detail in Article 110 of the CCL.¹⁰⁴

In addressing this research question, the survey aims to look beyond the statutory limitations above and taxonomy of contracts to investigate other factors that might influence a judge to opt against awarding SP. Our objective here is to query judges on their opinion regarding the supervision costs of enforcement and whether it features prominently in a judge’s ultimate decision to award SP. This line of inquiry seeks to test Shavell’s hypothesis that transaction costs play a pivotal role in determining the request and granting of SP.¹⁰⁵ We hypothesize that transaction costs are an important but not pivotal factor in the courts determination to preclude awarding SP. Nonetheless, supervision costs are expected to be a factor among non-transactional cost factors and is an appropriate consideration to determine the degree of its influence.

4. Will defendants be more amenable to settling for damages where it appears that the claimant has a plausible likelihood of obtaining SP?

Court-annexed mediation is a popular practice in Chinese courts, since it is used as a key performance indicator of the effectiveness of judges.¹⁰⁶ Since judges encourage parties to settle their disputes, it would be interesting to examine how the active settlement system affects the award of SP in China. The objective here is to enquire as to the frequency in which

⁹⁹ CCL, *supra* note 4, at art. 109.

¹⁰⁰ *Id.* art. 110:

(1) Performance would be legally or objectively impossible; (2) the subject matter of the obligation is unsuitable for enforced performance or performance would be unreasonably expensive; or (3) the aggrieved party fails to enforce specific performance within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

¹⁰¹ CCL, *supra* note 4, at art. 109.

¹⁰² *Id.*

¹⁰³ *Id.* art. 53-56 and accompanying text.

¹⁰⁴ *Availability of Specific Remedies*, *supra* note 20.

¹⁰⁵ *See supra* notes 88 & 90 and accompanying text.

¹⁰⁶ Cai Yanmin, *Case Management in China’s Civil Justice System*, in 39 CIVIL LITIGATION IN CHINA AND EUROPE (van Rhee & Yulin eds., 2014).

defendants across every level of the Chinese court system (Trial, Intermediate, and the High Court) elect to settle for damages where it appears that the claimant has an objectively real chance of being awarded SP. The survey also seeks to examine trends in individual courts.

Vigorously exploring each of these questions is critical to understanding the relative status of SP and damages as remedies for breach of contract. The findings will be important to litigants, lawyers, and judges. And since remedies support the contractual obligation itself, understanding remedies is important for commerce more generally. From a normative perspective, the research findings will shed light on the debate over whether one remedy is superior to the other (allowing for the possibility that one remedy is better in certain cases, while the other is better in other cases). Finally, it is especially important to study these questions in contemporary China as the research findings can be used to construct recommendations for statutory reform.

C. Survey Sample

A questionnaire pertaining to SP containing 13 questions was administered to 400 quota judges within the Mainland Chinese court system.¹⁰⁷ The questionnaires included 12 multiple-choice questions and one question asking the judges to estimate the percentage of cases where a defendant elected to settle their case when an order of SP was likely. Overall, the questionnaires were drafted to ascertain a range of data regarding judges' general attitudes toward SP and to indicate whether judges preferred damages, as opposed to SP, when a claim could ostensibly merit either.

To ensure that the sample was representative of the judicial population, the questionnaires were randomly sent to judges across a variety and levels of courts in distinct geographical and cultural provinces of Mainland China. The questionnaires were sent to randomly selected High Court judges at the Provincial level with jurisdiction to hear civil and commercial disputes. The sample included courts in economically developed areas such as Guangdong, Shandong, and Beijing to the less economically developed areas such as Inner Mongolia, Huanan, and Guangxi.¹⁰⁸ Additionally, every attempt was made to obtain data from each level of the court system in these disparate regions. The methodology necessitated that the survey include only quota judges. The assumption was that the new quota judges possessed greater expertise and legal knowledge than judges appointed prior to reforms of the

¹⁰⁷ The Supreme People's Court, pursuant to their stated aims of improving the professionalism of court personnel, instituted reforms regarding the selection and appointment system of judges. There "are nine selection and appointment steps", the completion of which will see judges selected to become quota judges based on merits. Judicial Reform of Chinese Courts, *The Supreme People's Court of the People's Republic of China*, Mar. 3, 2016, www.english.court.gov.cn.

¹⁰⁸ The ten provinces/autonomous regions are Guangdong, Guangxi, Shandong, Beijing, Hunan, Inner Mongolia, Hainan, Shanxi, Anhui, and Guizhou.

judiciary.¹⁰⁹ The use of quota judges also ensured a more robust comparison across different geographical locations given the distinct population of judges sampled. The power of the statistical analysis was ensured with an ultimate data set of almost 400 returned questionnaires.

The high response rate was likely due to the simplicity of the questionnaire. The questionnaire was intentionally drafted to be brief while also being legally compelling. Thus, the final questionnaire could be completed quickly but also offered the judges an opportunity to engage intellectually in order to encourage a serious level of thought.

The questionnaire was drafted in Chinese and subsequently translated into English. The questions translated into English are as follows:

- (1) *What is the length of your tenure as a judge?*
- (2) *In what level of court do you currently preside?*
- (3) *How many cases of contractual breach have you handled within your capacity as a judge (presiding judge or member of a judicial panel)?*
- (4) *Would you ever consider awarding SP where the claimant did not request a SP order in its complaint?*
- (5) *Do you know of any instances where a SP order was made by one of your colleagues without a clear SP request by the claimant in its pleadings?*
- (6) *Taking into account all of the contractual breach cases you have presided over, in what percentage would you say SP was awarded?*
- (7) *Have you ever considered attempting to persuade the claiming party to change a claim for SP to a claim for damages?*
- (8) *In your experience, do you find a need to address the type of contract and its subject matter when deciding whether or not to grant a SP order?*
- (9) *Do the supervision costs of enforcement factor related to SP weigh heavily in making your decisions on the appropriate remedy?*
- (10) *If you were the judge presiding over the scenarios below, how likely would you be to award SP? Please indicate your reasoning:*
 - a. *D agreed to pay P to advertise his business on rubbish bins; P has a contract to supply the bins to the local government for the period of three years. Before the advertisement was applied to the bins, D tried to cancel the contract, but P refused and continued with the advertisement campaign in order to demand*

¹⁰⁹ The quota system came into existence in 2016, which raised the qualifications needed to become a judge.

payment on the contract.

b. *D agreed to sell his apartment to P. After concluding the property sale contract, D refused to complete the performance because D found another buyer who was willing to pay a higher price. P sued D for SP.*

(11) *In your experience, when the claimant requests a SP order, how often do you find that the defendant works to settle the case before the possible issuance of a decree of SP? Please indicate a percentage (0-100%).*

(12) *If the parties included a liquidated damages provision in their contract, would this affect your decision to award SP? Please explain your reasoning.*

Questionnaires that were largely incomplete or illegible were discarded in order to properly utilize a regression analysis. Due to the large amount of incomplete questionnaires, no attempt was made to compute a propensity score or perform a multiple imputation analysis. Nonetheless, the completed questionnaires provided a robust sample size of 373 data inputs. Also, the sample size for each of the three levels of the court system was significant. Figure 1 below provides the numerical breadth of the Survey Sample.

Figure 1
Survey Sample

Court	Judges Surveyed	Excluded Questionnaires	Semi-Complete Questionnaires	Complete Questionnaires
Trial	244	6	n121	n117
Intermediate	62	10	n 4	n48
High Court	94	9	n39	n46
Total	400	25	n164	n211

In sum, the survey sample provides a critical mass of data to ensure statistical power. The sample size using semi-completed questionnaires not excluded for being mostly incomplete or illegible totaled 373 spread across three levels of the court system as follows: 236 from Trial Courts, 52 from Intermediate Appeals Courts, and 85 from High Courts. The appellate cases combined (Intermediate and High Courts) totaled 137. This included in-person interviews of judges by the investigator, which are discussed below.

D. Methodology

This statistical data analysis and contextual examination sought to investigate the prevalence of SP (in lieu of damages) as a contractual remedy in civil and commercial disputes among the three levels of the Mainland Chinese court system. This section provides a concise explanation of the basic statistical methodology (quantitative analysis) and the context of interviews conducted as part of the research (qualitative analysis).

As for the contextual examination, Mainland Chinese judges were interviewed over the course of the years 2014-2017 at an annual training program offered at the City University of Hong Kong. The interviewees were judges who specifically deal with civil and commercial disputes. The judges came from all three levels of court, and were from ten geographically diverse provinces. Information obtained directly from judges provides important insights into the perceptions, experiences, and approaches of judges to the remedy of SP in any given case. In addition, the face-to-face interviews allowed the researchers to identify a variety of factors—organizational, professional, legal and personal, which affect judicial decision-making in this area. The interviewer, Lei Chen, previously participated in two Supreme People’s Court sponsored examination panels on the availability of SP in Beijing Mentougou Trial Court and the Civil Tribunal No 1 of the SPC. Thus, he posed an in-depth understanding of how Chinese courts view the availability of SP across different categories of commercial disputes. Excerpts from some of the interviews will be used to highlight certain findings since the non-verbal responses of the interviewees cannot captured by the regression analysis.

Many of the objectives of the research were addressed with hypothesis testing and parameter estimation; the parameter of interest is the Odds Ratio (“OR”).¹¹⁰ The hypothesis testing determined whether sufficient evidence existed to suggest a rejection of the null hypothesis of no association.¹¹¹ With regard to addressing the association between the response Q7 and the response to another question, say QX, the null hypothesis states that the likelihood of a ‘Yes’ response to Q7 does not vary with the response to QX or that the response to QX does not vary with the response to Q7.

¹¹⁰ The Odds Ratio (“OR”) is defined as “a measure of association between an exposure and an outcome. The OR represents the odds that an outcome will occur given a particular exposure, compared to the odds of that outcome occurring in the absence of that exposure.” Magdalena Szumilas, *Explaining Odds Ratios*, J. CAN. ACAD. CHILD ADOLESC. PSYCHIATRY 227-29 (2010).

¹¹¹ In general, the magnitude of association between two events E_A and E_B is measured with the OR defined as a ratio of odds of event E_A to the odds of E_B , where the odds of E_A , for example, is the ratio of the probability P_A that E_A will occur divided by the probability $1-P_A$ that E_A will not occur, $P_A/(1-P_A)$, and the OR is $P_A/(1-P_A)$ divided by $P_B/(1-P_B)$ and $OR=1$ if and only if $P_A=P_B$. The 95% confidence interval (CI) for the OR is an interval that contains the true OR with 95% probability. We show both the OR and its 95% CI. In theory the CI will contain 1 if and only if the p-value of the test statistic is > 0.05 .

Much of our statistical testing was carried out using the Fisher's Exact Test¹¹², logistic regression and analysis of variance, as appropriate, with p-values and supporting statistics for each method. The p-value is the likelihood of observing data inconsistent with the null hypothesis; a smaller p-value indicates increased evidence that the null is not true. A p-value less than 0.05 is considered 'statistically significant,' suggesting that the data was unlikely (with probability <0.05) to have occurred purely by chance if the null is in fact true. Therefore, the discussion will revolve largely around those responses that are statistically significant (with probability <0.05). However, other data that is notable will also be discussed regardless of its statistical significance.

It should be noted that the statistical significance of variation in the mean value of Q11 ("In your experience, when the claimant requests a SP order, how often do you find that the defendant works to settle the case before the possible issuance of a decree of SP?") was assessed with analysis of variance and a Tukey correction for pairwise court contrasts. Data is summarized with the mean, standard deviation, median, minimum and maximum by court and pairwise contrasts are summarized with the mean difference, its standard error and a 95% confidence interval for the mean difference.¹¹³ All statistical testing was two-sided with a nominal or experiment wide significance level of 5%.¹¹⁴

E. Scope and Limitations of Research

It is important to underscore the fact that a judicial survey of the Chinese courts has rarely been attempted. Not surprisingly, the research project faced some considerable limitations. At the outset, all the information had to be gathered to create an entirely new dataset without access to any existing databases. Perhaps more importantly, given that the emphasis was on contractual remedies, the surveys were only sent to judges dealing with civil and commercial legal matters. As a result, the pool of judges that satisfied the survey requirements was noticeably constrained. In an effort to ensure an adequate sample size, we elected to survey all three levels of the Chinese court system. However, even this proved to be a challenge. In the vast province of Guangdong, for example, the Guangdong High Court has about one hundred judges presiding over the entire region and only forty-seven of those judges preside over civil and commercial disputes.¹¹⁵ Fortunately, the survey response rate was a robust 47 % (22 of 47).¹¹⁶

¹¹² JOHN H. McDONALD, *Fisher's Exact Test of Independence*, in HANDBOOK OF BIOLOGICAL STATISTICS 78-80 (3d ed. 2014).

¹¹³ RAMON C. LITTELL, GEORGE A. MILLIKEN, WALTER W. STROUP, RUSSELL D. WOLFINGER & OLIVER SCHABENBERGER, *SAS FOR MIXED MODELS 22-25* (2d ed. 2006).

¹¹⁴ SAS Version 9.4 for Windows was used throughout.

¹¹⁵ See details at the official website of Guangdong High People's Court at <http://www.gdcourts.gov.cn/index.php?v=listing&cid=70> (last visited Jan. 31, 2020).

¹¹⁶ *Id.*

F. Statistical Findings

The following section details the statistical findings and provides a concise interpretation presented in the corresponding tables. As with the preceding section, these explanations will provide an encompassing commentary that carefully explains the data for the reader.

1. How Often do Chinese Courts Award SP for Contract Breaches?

To evaluate this question, we analyzed Question 6 (Q6) (“Taking into account all of the contractual breach cases you have presided over, in what percentage would you say SP was awarded?”) with the responses divided into ‘0 - 10%’ and ‘> 10%’, then viewed the data with respect to Question 2 (Q2) (“In what level of court do you currently preside?”). The responses to Q6 indicate the general frequency with which SP is awarded while concurrently illustrating any trends within the different levels of the court system. The findings are shown below in Figure 2.

Figure 2
Dichotomized Q6 Frequencies by Court Where Q6 is Not Missing
(N=339)

Dichotomized Q6	Court			Total
	Trial	Intermediate	High	
[0, 10]	136 (59.4)	30 (39.4)	17 (35.4)	183
[10, 100]	93 (40.6)	47 (61)	31 (64.6)	171
Total	229	77	48	354

Overall, a little over 52% (183 out of 354) of all judges surveyed awarded SP in less than 10% of claims. In examining Table 1, it becomes clear that Trial Court judges rarely award SP when presiding over a claim of contractual breach. At the Trial Court level, 59.4% of judges awarded SP in less than 10% of their decisions. In the Intermediate and High Courts, the number of judges who awarded SP in less than 10% of claims or less was 39.04% and 35.4%, respectively. After adjustment for Q1 (“*What is the length of your tenure as a judge?*”) in a logistic regression of Q6, the proportion of judges awarding SP in less than 10% of cases decreased in Intermediate and High Courts relative to Trial Courts [Intermediate vs. Trial OR=0.374 95% CI (0.1919, 0.7084) p=-0.0042. High vs Trial OR=0.431 95% CI (0.251, 0.7383) p=0.0021]. More telling is that overall across every level of the court system nearly 59% of judges had never awarded SP. We adjusted for Q1 to address the possibility of a skewed finding based upon the length of service (amount of judicial experience).

The data clearly indicates that the percentage of cases awarding SP varies with the level of the court. In Trial Courts, SP is frugally awarded, while there is a slight increase in SP awards at both the Intermediate and High Court levels.¹¹⁷ One possible explanation could be that the Trial Courts are under greater time pressure than the Intermediate and High Courts and, therefore, incentivized to expeditiously conclude civil suits, which is best achieved by awarding damages or other forms of monetary compensation instead of SP. SP will inevitably involve the greater use of the court's time in supervising the enforcement of the performance.

There is also pressure on the Intermediate and High Courts under the ordinary procedure, which requires judges to complete cases within six months from the time the cases are filed. However, the amounts in dispute for contract breach are much higher at the Intermediate and High Court levels.¹¹⁸ In other words, the stakes on average (harm alleged per case) are smaller at the lower Trial Court level.¹¹⁹ If the judges are under time pressure to deal with a larger number of *small* cases, more likely than not they will try to quickly settle the disputes either through monetary awards or court-annexed mediation. On the other hand, the appellate courts hear fewer cases involving large amounts of money and are more likely to take the time to consider SP as an alternative remedy.

Another explanation for the higher rate of issuance of SP in the appellate courts is the greater level of expertise associated with judges on the higher courts. It may be that the higher quality of appellate judges allows them to partake in a deeper analysis that leads to decisions in favor of SP in cases where the giving of damages is determined to be inadequate. The deeper analysis likely uncovers findings that the harm caused is greater than the damages that can be awarded. This would be an unlikely outcome under a more superficial analysis. With these findings, we move to our Taxonomy Persuasion Hypothesis¹²⁰ to investigate whether Chinese judges' preference for damages affects the preliminary stages of a claim and their predisposition

¹¹⁷ This pressure is partially due to the prevalence of summary proceedings. According to a national survey conducted by the Supreme People's Court, 80% of civil litigation before the Trial Courts apply the summary procedure, which means cases must be closed within 3 months from the date they were officially filed. See more details at the Several Opinions of the Supreme People's Court on Further Promoting the Simplification of Cases, Streamlining and Optimizing the Distribution of Judicial Resources issued by SPC in 2016 《最高人民法院关于进一步推进案件繁简分流优化司法资源配置的若干意见》, available at the official website of the Supreme People's Court: <http://www.court.gov.cn/zixun-xiangqing-26061.html>.

¹¹⁸ Notice of the Supreme People's Court on Adjusting the Standards for Jurisdiction of Civil and Commercial Cases of the First Instance by the High and Intermediate People's Court, Fa Fa No. 7 (2015), available at the official website of the Supreme People's Court: <http://www.court.gov.cn/shenpan-xiangqing-14366.html>.

¹¹⁹ *Id.*

¹²⁰ This hypothesis relates to contract types; simply put, breaches of certain types or categories of contracts are more or less likely to be the beneficiary of SP orders.

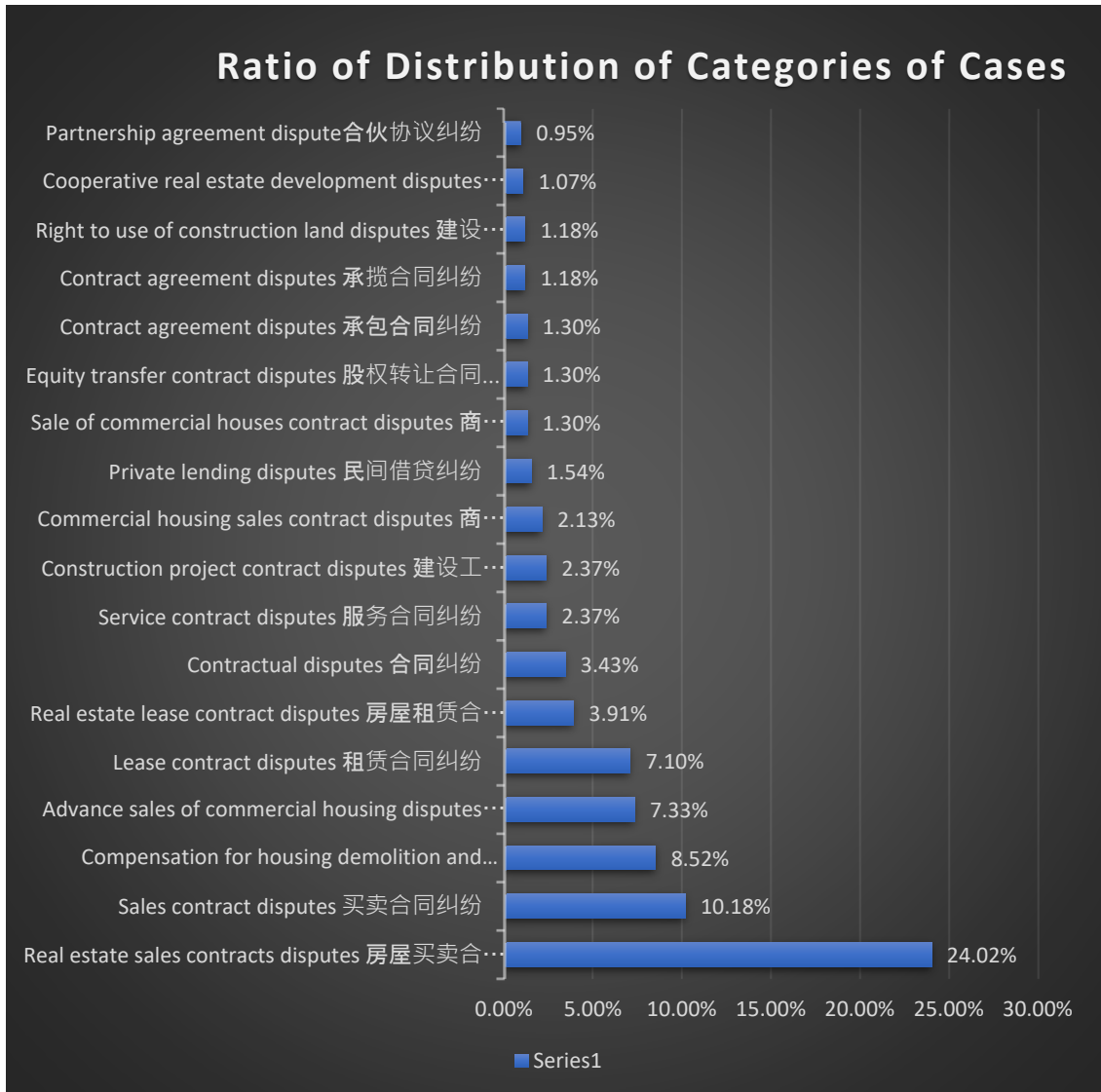
against granting SP. In sum, what factors or rationales explain the low rate of the issuance of orders of SP?

2. Predictive Factors and Party Preference

What are the controlling or predictive factors that influence judges' decisions to award SP? Do courts respect the parties' *ex ante* specification in their contract as to preferred remedy (such as a specific performance clause)? These questions are tested based upon responses to Q8 and Q7. First, does the type of contract involved in the dispute predict the likelihood of the issuance of an order of SP? Second, is there a substantial amount of cases where judges attempt to dissuade a claimant against a request for SP in favor of a damages award? If so, what variables predict the disposition of the court in favor of an award of damages? In analyzing these questions, the first objective was to examine Q8 ("*In your experience, do you find a need to address a taxonomy of contracts when you decide whether to consider a SP order?*"). Are courts more willing to give SP for certain types of contracts across each level of the court system? The more difficult question to verify is whether judges take an active role in steering claimants to a preferred remedy? The view of judges as passive or proactive players in determining the claimant's choice of remedy is posed by (Q7) ("*Have you ever considered persuading a party to change a claim for SP to a claim for damages?*"). The analysis attempts to find variables (addressed in other questions) that predict a judge's active intervention in the choice of remedy, such as years of practice, the number of cases the judge presided over relating to breach of contract, independent consideration of SP, the opinion of colleagues, the percentage of contractual breach cases in which SP was awarded, the taxonomy of contracts, the costs of supervision, and so forth. Regarding the influence of contract type on SP, an unpublished report released by the Beijing Mentougou trial court delineated the number of SP orders based on contract categories (see Figure 3).¹²¹

¹²¹ 'Report of Issues Concerning Continued Performance of Contracts' is an unpublished report under the auspice of Supreme People's Court Research Project in 2013.

Figure 3
Distribution of Cases Where There Was an Award of SP



The above figure shows that certain categories of contract disputes are far more likely to obtain an order of SP. The findings are interesting in a number of ways. First, the overall percentage of cases across categories of contracts that granted SP was much lower than expected in a legal system that does not prioritize remedies of SP and damages. It is no surprise that the category of contracts most likely to result in a SP order relates to the sale of

real estate. This would also be the case under common law where real estate is considered a unique subject matter that warrants the remedy of SP. The importance of compelling performance in cases involving real estate is amplified given that the great majority of contract categories relate to real property (construction, housing, leasing, lending). Nonetheless, the percentage of SP awards is very low.

Another surprising finding is that the second highest percentage of SP orders relate to the sale of goods (10.18%). This certainly would not be the case under the common law, where damages are the most commonly given remedy; only in the rarest cases of unique goods would a common law judge entertain SP.¹²² Although high from the perspective of the common law, this rate is low vis-à-vis damage awards, which is not what one would expect to see in a remedial scheme where both types of remedies are considered ordinary (choice of claimant). Logically, there are two factors behind the low percentage: non-breaching parties choose damages as their preferred remedy and judges disfavor SP as a remedy of choice. The first factor can be explained as a reasonable outcome in relatively efficient markets for fungible goods and the higher transaction costs related to compelling performance. Therefore, the claim for damages is the more efficient and rational decision. Another explanation is that due to the structure of Chinese society and the importance of non-legal norms based on Confucian and socialistic-communitarian values, reputational effects play a large role in the regulation of breach of contract.¹²³ To breach a contract dishonors the non-breaching party who then would no longer want to have further contact with the breaching party. Payment of damages, along with creation of negative reputational effects, would be viewed as just punishment from the perspective of the aggrieved party. The second factor, judicial intervention, will be discussed below.

The ancillary question to the percentage of SP orders in various types of contract disputes is whether the overall low level of use of SP as a remedy is statistically associated with a number of variables including the category of contract, the likelihood of SP being considered, and whether a judge, upon addressing a taxonomy of contracts at the preliminary stages, actively persuades a party to change its claim from SP to damages.

The rationale for including Q8 in the questionnaire was to determine

¹²² U.C.C. § 2-716(1) provides that: “[s]pecific performance may be decreed where the goods are unique . . .”; it also provides that even when the goods are not considered to be unique SP may still be possible in cases where “[t]he buyer has a right of replevin for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods.” See U.C.C. § 2-716(1) (AM. LAW INST. & UNIF. LAW COMM’N 2010).

¹²³ See Larry A. DiMatteo, ‘Rule of Law’ in China: *The Confrontation of Formal Law with Cultural Norms*, 51 CORNELL INT’L L. J. 392, 417 (2018) (“China has a long history of non-formal customary law that still plays a role in business practice as well as how contracts are viewed as a private ordering instrument. Confucian norms also deter resorting to the court system as a method of resolving contract disputes.”).

whether judges were more likely to consider the merits of awarding SP based on the general taxonomy of contracts.¹²⁴ If a judge willingly and actively addresses the taxonomy of contracts, then certain types of contracts (such as partnership agreements) would be considered incompatible with SP. This is notable as it suggests that judges may form an opinion about the available remedies appropriate for a claim before the beginning of the proceedings. This is especially important in civil law countries where SP is supposedly an ordinary remedy that should be applied irrespective of contract type.

Thus, in the context of transaction types, it is likely that a judge would consider persuading a claimant to change a claim for SP to a claim of damages for some types of contracts during the preliminary phases of the litigation (pre-trial) (Q7). Therefore, the survey explores statistical associations between responses and factors indicative of a proactive preliminary judicial posture, as well as ferreting out judges' general attitude toward SP. Figure 4 shows the percentage of positive responses to the question of whether a judge feels the need to address a taxonomy of contracts when deciding whether to consider a SP order.

Figure 4
Responses to Q8 by Levels of Court
(felt need to consider taxonomy of contracts)

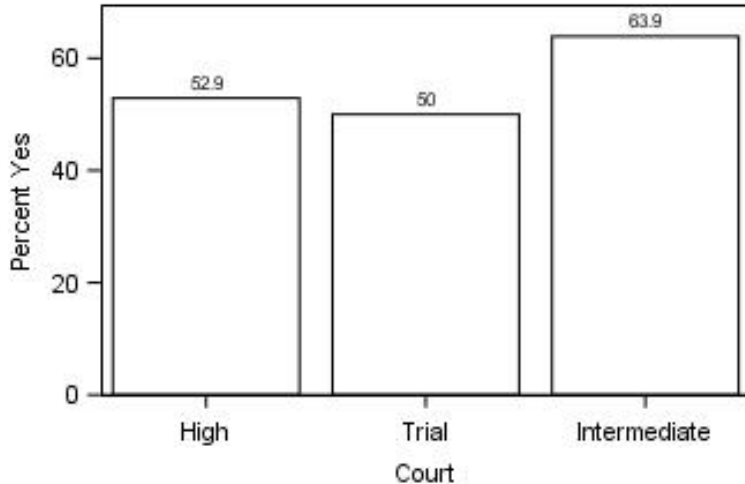


Figure 4 demonstrates the distribution of responses to Q8 across each

¹²⁴ See *supra* Figure 2.

level of courts. About half of the Trial and High Courts (50% and 52.9%) felt it necessary to consult an accepted taxonomy of contracts when evaluating a claim for SP. Notably, 64% of the Intermediate Courts' judges considered the type of contract as an important factor in deciding on SP. Again, the higher percentage of appellate court judges engaging taxonomy of contracts models is explainable by the quality of such judges, who are more sophisticated and experienced in understanding the variations between categories of contracts and the corresponding contractual disputes, as compared to the judges at the Trial Court level.¹²⁵

There are numerous institutional factors that partially account for the lower percentage of Trial Court judges relying on the taxonomy of contracts in issuances of SP. The major institutional factor is the procedural emphasis placed on negotiation and mediation at the Trial Court level.¹²⁶ It is in this area that judges may persuade the disputing parties to agree to a damage settlement. Verdict (*Pan Jue*) and ruling (*Cai Ding*) are two standard forms of judicial decisions in China. Verdict is the default way of making a decision, a consequence of adjudication. A ruling is based on the consent of the litigants, in which they agree to waive their rights to appeal.¹²⁷ A ruling is a consequence of judicial mediation and negotiation. If the litigants agree to a ruling, their litigation fees are cut in half.¹²⁸ In practice, many judges prefer offering rulings than rendering verdicts.¹²⁹ This is because by giving a ruling they avoid the risks of retrial, which increases their workload and possibly causes them to suffer lower performance ratings if their verdicts are found in error by higher courts.

An interview with Judge W, a quota judge from High Court H, was especially revealing.¹³⁰ Judge W has been presiding over contractual disputes for more than eight years. Regarding contract types and SP he stated: "...while High Court judges also hope to settle a case via mediation, I am mindful of the different judicial attitude[s] that different types of contracts tend to receive before I consider awarding SP in a given case." The practice

¹²⁵ With the introduction of the Quota Judge System by the SPC, only a person who is qualified as a judge is allowed to hear the case. The higher courts have a higher standard than lower courts in selecting quota judges. For example, the Guangdong High People's Court did not recruit any quota judges who were born after 1981 in 2017. But many Intermediate and Trial Courts in Guangdong province have recruited quota judges who were born after 1980 with less trial experience. Yulin Fu, *Court management in transformation China: A Perspective of Civil Justice*, 6 PEKING U. L. J. 82, 83-84 (2018).

¹²⁶ Kwai Hang Ng & Xin He, *Internal Contradictions of Judicial Mediation in China*, 39 L. & SOC. INQUIRY 285, 290 (2014).

¹²⁷ Chapter VIII of the PRC Civil Procedure Law.

¹²⁸ 诉讼费用交纳办法 [现行有效] [Measures on the Payment of Litigation Costs] (promulgated by St. Council of People's Republic of China, Dec. 19, 2006, effective Apr. 1, 2007) at art. 15.

¹²⁹ Chen, *supra* note 95, at 114.

¹³⁰ Interview with Judge W, Quota Judge, High Court H, at her Court office (Dec. 16, 2018).

of forcing judicial mediation is also found at the High Court level. Judge W noted that there “are institutional incentives that apply to High Court judges and encourage us to be proponents of judicial mediation. We also want to play safe. By that I mean, to close a case via judicial mediation will not only be taken into account during our performance assessment, but it also makes the litigants happy.” However, Judge W stressed that the importance of adjudication over mediation is stronger at the High Court level:

Generally, the cases that make their way to the High Courts have much at stake. They are extremely costly to both sides, and many of them are appeal cases; such a confluence of circumstances does not always lend itself to mediation. We will often try to mediate but we are concurrently well prepared to adjudicate by delivering a verdict.

Judge W’s commentary and Figure 4 illustrate that High Court judges are more sensitive to the taxonomy of contracts than judges at lower levels of courts in China. The practice of court-mandated mediation is especially strong in the lower courts.¹³¹ Thus, if judges prefer to use mediation often to settle a variety of contract disputes, then it is understandable that they are less likely to pay heed to the taxonomy of contracts when delivering remedies. By contrast, judges at the High Courts are more likely than not to adjudicate, which makes them more sensitive to contract type and more open to SP for certain types of contracts. It should also be noted that the need or judicial preference for mediation is less plausible at the appellate court levels, since it is likely that the parties have already been through multiple rounds of mediation at the lower court level and had failed to agree to a resolution.¹³² As noted above, since it is a costly and lengthy process to reach the High Court level, the disputants have high expectations of obtaining a judicial resolution (verdict). These factors explain why High Court judges appear to appreciate and use the taxonomy of contracts analysis more than judges in the lower courts.

¹³¹ Yedan Li, Joris Kocken & Benjamin van Rooij, *Understanding China’s Court Mediation Surge: Insights from a Local Court*, 43 L. & SOC. INQUIRY 58, 59-60 (2018).

¹³² PETER C.H. CHAN, *MEDIATION IN CONTEMPORARY CHINESE CIVIL JUSTICE: A PROCEDURALIST DIACHRONIC* 210-12 (2017).

Figure 5
Responses to Q7 by Levels of Court

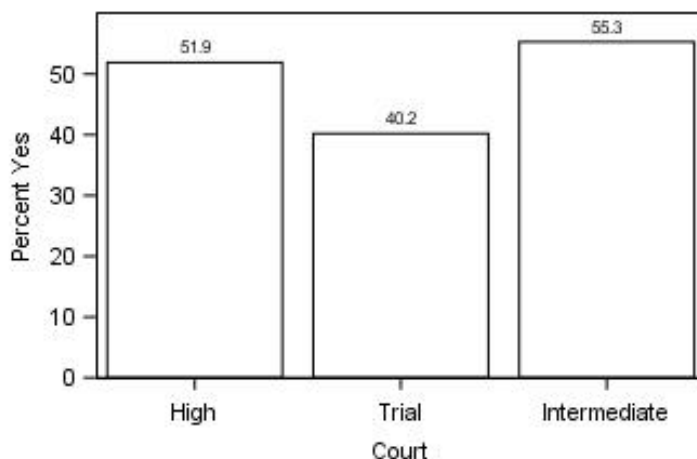


Figure 5 above illustrates the relative distribution between the responses in Q7 (“Have you ever considered attempting to persuade the claiming party to change a claim for SP to a claim for damages?”). Q7 most directly addresses the value of SP relative to a claim for damages. The percentage of judges responding ‘Yes’ to Q7 (Figure 4) did not vary significantly across the court system ($p=0.8720$). It is posed that if a judge is willing to *actively* persuade a claimant to change its claim for damages to one for SP, then the judge, taking into account various factors and benefitting from prior judicial experience, has come to recognize that SP is not suitable or feasible in some types of cases. Notably, over 55% of the surveyed judges in the Intermediate Courts and roughly 52% of judges in the High Courts consider persuading claimants to change their claim to damages. However, only about 40% of the judges in the Trial Courts would consider it appropriate to try and dissuade a claimant to pursue SP.

As with the use of a taxonomy of contracts analysis, it seems the lower rate of judicial influence in the choice of remedy in the lower courts is in part due to their lack of experience, along with the time constraints related to heavy caseloads (leaving judges with little time or interest in persuading a party to change its chosen remedy). For those cases that appear unworthy of or inappropriate for awarding SP, experienced judges attempt to persuade claimants to change their remedial requests prior to the beginning of an official court hearing. It is in the best interests of all parties, including the court, to counsel the claimant to seek damages when the likelihood of being granted an order of SP is slight. This is especially true when a claimant seeks

the sole remedy of SP in its summons.¹³³

Figure 6 below shows that Trial Court judges' responses to Question 8 (Q8) (“*In your experience, do you find a need to address a taxonomy of contracts when you decide whether to consider a SP order?*”) were significantly correlated to positive responses to Q7. The percentage of Trial Court judges selecting ‘Yes’ in response to Q8 and Q7 was 64.9%.¹³⁴

Figure 6
Trial Courts Cross Tabulation by Response to Question 7 with
Reference to Question 8

		Trial Courts: Question 7			
Question	Text	No (N=140)	Yes (N=94)	Total	P=value
Q8	Need to address taxonomy? n (%)				<0.001
	No	84 (60)	33 (35.1)	117 (50)	
	Yes	56 (40)	61 (64.9)	117 (50)	
	Total	140	94	234	

These findings indicate that where a Trial Court judge felt it was important to pursue a taxonomy of contracts analysis in considering whether to decree an order of SP, she was also more likely to consider persuading a party to change a claim for SP to a claim for damages.

¹³³ In Chinese civil procedure law, a summons is similar to a statement of claim or complaint in the common law.

¹³⁴ 64.9 % of those judges who answered ‘yes’ to Q7 also responded ‘yes’ to Q8. 40 per cent of the judges who answered ‘no’ to Q7 responded ‘yes’ to Q8.

Figure 7
**Intermediate Court Cross Tabulation by Response to Question 7 with
Reference to Question 8**

		Intermediate Courts: Question 7			
Question	Text	No (N=25)	Yes (N=27)	Total	P=value
Q8	Need to address a taxonomy? n (%)				0.002
	No	17 (70.8)	7 (25.9)	24 (47.1)	
	Yes	7 (29.2)	20 (74.1)	27 (52.9)	
	Total	24	27	51	

Figure 7 above shows that in the Intermediate Courts, the responses to Q8 were significantly associated with the responses to Q7. The percentage of Intermediate Court judges selecting ‘Yes’ in response to Q8 and Q7 was 74.1%.

As with the Trial Courts, these findings indicate that where an Intermediate Court judge felt it was important to address the taxonomy of contracts in considering whether to decree an order of SP, the judge was more likely to consider persuading a party to change its claim for SP to a claim for damages.

Figure 8 below shows that the percentage of High Court judges selecting ‘Yes’ in response to Q8 did not vary significantly with the response to Q7. However, while 71.7% of High Court judges who answered ‘Yes’ to Q8 also answered ‘Yes’ to Q7, the findings failed to reach statistical significance ($p=0.11$).¹³⁵

¹³⁵ This is most likely due to our modest sample size and the rather even distribution of responses to Q8 by judges who answered ‘No’ to Q7.

Figure 8
High Court Cross Tabulation by response to Question 7 with
Reference to Question 8

		High Court: Question 7			
Question	Text	No (N=38)	Yes (N=47)	Total	P=value
8	Need to address a taxonomy? n (%)				0.11
	No	17 (45.9)	13 (28.3)	30 (36.1)	
	Yes	20 (54.1)	33 (71.7)	53 (63.9)	
	Total	37	46	83	

Despite the lack of statistical significance, it is important to note that the High Court judges were more likely than not to try to persuade a claimant to change its claim from SP to damages. Further, regardless of their response to Q7, the High Court judges were substantially more partial to consulting the taxonomy of contracts when considering an award of specific performance.

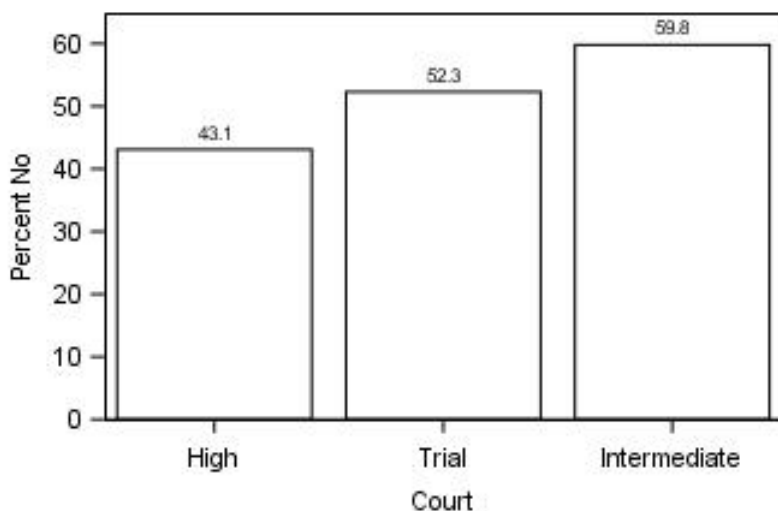
3. Availability of Specific Performance

If SP is seldom awarded, what are the underlying reasons or rationales for its frugal use? Under what circumstances is the remedy of SP likely to be granted and under what circumstances will its use be restricted? In exploring these questions, the concern over high transaction costs as a factor was explored by Question 9 (Q9) (“*Do the supervision costs of enforcement factor heavily in making your decision on remedies?*”). Secondly, the survey examined the association between Q2 (level of court) and Q9 in order to assess whether the concern for supervision costs varied between the levels of the court system. Next, the association between Q7 and Q9 was examined. Comparing the responses from Q7 to those in Q9 allows for a determination of whether supervision costs were a significant factor for judges who were strongly for or against awarding SP.

Figure 9 below reveals the distribution of responses regarding Q9 across the levels of the court system. The results did not support the hypothesis that supervision or enforcement costs are a prominent factor in judges’ decisions to award SP as we surmised. But it is still a relevant factor because overall, 51.7% of surveyed judges viewed supervision costs as prohibitive in forming their decision to award SP. Perhaps more surprisingly, almost 43.1% of High Court judges responded that they did not feel that supervision costs were a factor in their decisions on whether to award SP. At the Trial Court level,

only 52.3% of judges felt that supervision costs were an important factor, while 59.8% of judges in the Intermediate Courts viewed supervision costs as a major concern. However, it should be noted that the Intermediate Courts make up $n=85$ (22.8%) of the total sample size ($n=373$), and as a result, should be viewed with some reservation.

Figure 9
Responses to Q9 by Levels of Court



These results are surprising because of the view that the costs in time and money of supervising the implementation of a SP order was thought to be by far the strongest rationale for awarding damages instead of SP. This was not the case. If the enforcement process is difficult and unduly lengthy, there is a high probability that a court would decline to issue a SP order. Some insights can be gleaned from an interview conducted with Judge Z, a Trial Court judge.¹³⁶ Judge Z graduated from one of the most prestigious law schools in China and has been working in the Civil Tribunal of his court since 2012. Below are excerpts from the interview:

Q: Do you consider the supervision costs of enforcement as one of the reasons affecting your decision to award SP?

A: No... sometimes... but, no.

¹³⁶ Interview with Judge Z, Trial Court Judge, at his Court office (Dec. 12, 2018).

Q: You seem unsure of this. Are you certain the answer is “no”?

A: As a Trial Court judge, we are often overwhelmed by the volume of our caseload. As you have perhaps heard, the Chinese courts are often confronted with what we term ‘litigation explosion.’ In theory, we need to consider the supervision costs, but in practice, we simply cannot afford to consider it because we are under immense pressure to conclude the claim and move on to the next one. Under the Chinese Civil Procedure Law, we are required to complete the proceedings by delivering the judgment within six months of it being docketed. For cases applying summary procedures, which amount to the large bulk of cases at a trial court, we have to complete the entire claim within three months. I, personally, have been assigned 310 cases in the last year alone. As you might imagine, the simple math requires that I must issue judgments on an almost daily basis.

Q: So, would [you] say that the heavy caseload bars you from considering supervision costs as a factor?

A: Certainly. More than that, if you look at the variety, volume and nature of the tasks judges confront on a day-to-day basis, including administrative and routine activities, such as the mandatory half-day political study every week, you will appreciate that Chinese judges’ work environment and Chinese court’s social function are very different from other jurisdictions [countries].

Q: I understand. But what if your SP order requires particularly high supervision costs in order for it to be enforced? Put differently, will your performance appraisal be affected if your SP order has proven very difficult to enforce?

A: No.

Q: Why?

A: First, it comes down to the internal organizational structure of the court and compartmentalization. The trial units handle the hearings and deliver judgments. There is an entirely different unit that is responsible for the supervision and enforcement of judgments. Therefore, at the trial unit, we do not concern ourselves with the way in which a difficult judgment is enforced. The only exception to this is when a case involves an administrative petition (XINFANG).¹³⁷ Second, as a trial judge, my concerns stem from the possibility of one of my judicial decisions being reversed rather than any potential supervision or enforcement issues. Therefore, as you can likely appreciate, the supervision and enforcement is not officially part of

¹³⁷ Xinfang or Administrative Petitioning (also known as letters and visits) is the administrative system for hearing complaints and grievances from individuals in the PRC.

my duties or performance appraisal scheme.¹³⁸ So why should I let it factor into what I view is a prudent remedy?

To reinforce the discourse above, Judge Z's explanation of indifference to awarding damages or SP relates mostly to the structural division of work assignments in the Chinese courts¹³⁹ and current judicial reform policies.¹⁴⁰ Thus, concerns about additional transaction costs of SP are not captured as a factor in decision-making at the Trial Court level because the adjudicating divisions are separate from the judgment enforcement division. More tellingly, adjudicating judges are far more concerned about the potential of their decisions being overturned by the appellate courts than whether the decisions prove difficult to enforce. Nevertheless, the problem of judgments being issued by the lower Chinese courts proving difficult to enforce has begun to attract attention. There are now several campaigns underway aimed at minimizing the difficulties of enforcement. The SPC has established a special website on "resolving judgment enforcement problems."¹⁴¹

4. Probability of Obtaining Specific Performance as an Anchor in Settlement Negotiations

Will defendants be more amenable to agreeing to pay damages where it appears the claimant has a plausible likelihood of obtaining SP? The last analysis examines the willingness of defendants to settle for damages to avoid being compelled to perform part of a contract. Question 11 (*"In your experience, when a SP order is requested by the claimant, how often [do] you find that the defendant would like to settle the case before you decree a SP order? Please indicate a percentage from 0-100%"*) tests the propensity

¹³⁸ Chinese courts have developed a performance appraisal system to measure judges' performance. According to the *Chinese Judges Law*, the court will reward and punish judges based on the appraisal results. "The Guiding Opinion on Carrying out the Case Quality Evaluation Work" issued by SPC in 2008 and revised in 2011, stipulates how the SPC assesses the performance of courts at all levels nationwide. The appraisal system consists of 31 performance indicators, which are divided into three categories: trial fairness, trial efficiency, and trial effect. See Guodong Du & Meng Yu, *Performance Appraisal: A Decisive Factor in Chinese Judges' Behavior Patterns*, CHINA JUSTICE OBSERVER (Feb. 21, 2019), <https://www.chinajusticeobserver.com/insights/performance-appraisal-a-decisive-factor-in-chinese-judges-behavior-patterns.html>.

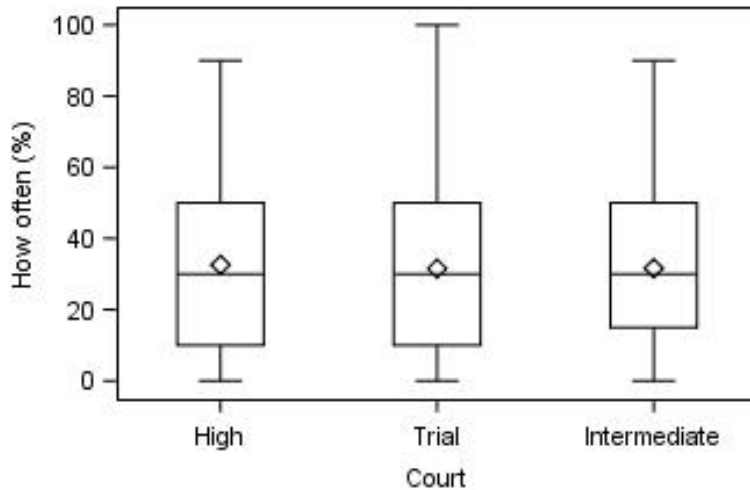
¹³⁹ Within the Chinese Courts at all levels, a judgment enforcement department (JED) is responsible for organizing and handling enforcement work. JED is not an independent governmental agency but an internal department in the Court. However, JED is a separate internal unit from the trial units within a court. JEDs of Chinese courts at the primary and intermediate levels undertake most enforcement work.

¹⁴⁰ The Third-round Judicial Reform during 2014-2017 initiated by SPC introduced a judicial accountability system, which means that "he who has tried the case shall decide the case, and he who makes the judgment shall be held accountable"; see also SPC REPORT, <http://www.court.gov.cn/zixun-xiangqing-66802.html> (last visited Mar. 24, 2020).

¹⁴¹ See SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, <http://jszx.court.gov.cn/main/ExecuteDynamic.jhtml> (last visited Jan. 26, 2020).

of defendants to pay damages in cases where the rationales for SP are strong. The responses answered as a percentage have been categorized into quartiles. The responses are also presented according to the level of the court system. The point of interest was whether defendants' willingness to settle in cases where there was a strong probability of the issuance of a SP order changed depending on the level of the court system. The results of the likelihood of settlement in cases where SP is requested are summarized in Figure 10.

Figure 10
Q11: SP and Settlement by Level of Court¹⁴²



The distribution shows that overall, the three levels of courts' mean values for Q11 (Intermediate 31.5%, Trial 32.6%, High 31.6%) were not significantly different ($p=0.96$) and none of the pairwise contrasts were significant. Essentially, what this illustrates is that there were no significant differences between the defendants' propensity to settle across the levels of the court system. One might have expected to see defendants more motivated to settle by paying damages at the Trial Court level. However, defendants were as unlikely to settle in the trial courts as they were in the intermediate or high courts.

The correlation between the claimants' request for SP and defendants' willingness to pay damages was not as strong as expected. The rate of the judges' belief that defendants were more open to settlement when a SP order was requested ranged from 31.5% to 32.6% as noted above. Once again, this

¹⁴² Boxes are determined by the first and third quartiles and whiskers extend to the maximum, minimum, and a horizontal line at the midpoint of each box indicates the median.

low percentage is likely due to the perception of whether the request for SP was perceived as having a high likelihood of success. For example, the correlation between a request for SP and settlement would likely be more statistically significant in cases involving real estate because of the higher rate of SP in those types of cases.

The empirical survey shows that although Chinese contract law replicates civil law's indifference between the remedies of damages and SP, in practice the law resembles a hybrid between the civil law's indifference and the common law's view that SP is the remedy of last resort. This is seen in the Chinese courts' creation of a number of rules of thumb or heuristics¹⁴³ restricting the availability of SP in certain cases. First, in cases where it is reasonable for the non-breaching party to obtain substituted goods, a claimant's request for SP is considered to be unreasonable.¹⁴⁴ Because of the higher transaction costs of SP, cover¹⁴⁵ or purchase of substituted goods may be considered within the non-breaching party's duty to mitigate damages. Furthermore, the failure to mitigate damages is viewed as an act of bad faith¹⁴⁶ or commercial unreasonableness that precludes the granting of SP.¹⁴⁷ Failure to mitigate or bad faith acts are especially likely to be recognized in cases where the breaching party's costs of performing are considerably higher than the non-breaching party's costs of purchasing substituted goods. Second, courts often weigh whether the enforcement of an order of SP would be "difficult and unduly lengthy."¹⁴⁸ Again, if it were more cost effective for the non-breaching party to purchase substituted goods and recover damages then the compelling of performance through SP would be considered unreasonable.

V. BUILDING A DESCRIPTIVE THEORY OF CONTRACTUAL REMEDIES

The empirical survey shows that in practice, there is limited use of SP as a remedy compared to the widespread use of damages. The purpose of the

¹⁴³ *Availability of Specific Remedies*, *supra* note 20, at 31-33.

¹⁴⁴ *Id.* at 32 ("[I]t has been generally acknowledged among the Chinese academic community and in the courts that [SP] cannot be claimed if a substitute transaction can be reasonably obtained."), cited in Sun Liangguo, *The Realization of Expectation Interest: A Study of Substitute Transaction*, 6 CONTEMP. L. REV. (2009)); see also HAN, *supra* note 4, at 612.

¹⁴⁵ The right to cover is a common legal term for the buyer buying substitute goods after breach of contract. See, e.g., U.C.C. § 2-712(1) (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("After a breach . . . the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.").

¹⁴⁶ The duty of good faith in Chinese contract law as applied by the Chinese courts plays an outsized role in judicial interpretation of contracts and application of contract rules. See DiMatteo, *supra* note 124, at 428-40.

¹⁴⁷ *Availability of Specific Remedies*, *supra* note 20, at 32.

¹⁴⁸ *Id.* at 37.

empirical survey was to determine if SP was indeed treated as an ordinary remedy and, if not, why. The empirical findings presented here support the claim that SP under Chinese law, despite the clarity of its formal law, is viewed as an unattractive and less commonly used remedy than is assumed. This part and the next offer two theories—one descriptive and the other normative—to account for the frugal use of SP in Chinese law.

As noted earlier, contract remedies are divided into two types: damages and non-monetary. The non-monetary remedies include SP, injunctions, termination of contracts (common law rescission), and adjustment of contracts (common law reformation).¹⁴⁹ A major divergence between civil and common law is their treatment of the SP remedy. The civil law does not formally prioritize damage and non-damage remedies, while the common law gives priority to the awarding of damages over the remedy of SP. A number of rationales have been offered to justify the equality of SP and damages in civil law remedies: (1) the availability of specific performance is justified from a moral point of view (people ought to keep their promises); (2) specific performance is a right, rather than a remedy, therefore parties to a contract are entitled to request specific performance; (3) damages are under-compensatory, for example, some losses that are not compensated for include emotional distress, loss of time, speculative damages, and in some cases the recovery of legal costs; and (4) the availability of specific performance enhances efficiency (honoring the non-breaching party the preference as to remedy).¹⁵⁰

Because of the history of the two-court system in common law jurisdictions, contractual remedies were bifurcated. The English or royal courts, and then later the law courts, were only able to issue awards of damages. The ecclesiastical or church courts, and later the courts of equity or chancery,¹⁵¹ were only able to award non-monetary remedies, such as SP. However, the two court systems eventually merged.¹⁵² Today, law courts can

¹⁴⁹ Injunctions are more prevalent in areas such as tort law, such in cases of trespass or nuisance, and in the infringement of intellectual property rights. Reformation and rescission are found in both the civil and common laws. The major difference in their use is the civil law's concern for contractual equilibrium. In German law, if the contract becomes out of balance (parties' valuations of costs and benefits at the time of contract formation) subsequent to the conclusion of the contract due to some unexpected event, which causes a hardship on one of the parties, then the parties are under a duty to renegotiate to place the contract back into equilibrium. The common law has no such principle. Thus, judicial termination or adjustment of the contract is more common in the civil law.

¹⁵⁰ Chen, *supra* note 96, at 100; Herman, *supra* note 7, at 212-13 ("If we look back over centuries of judicial decisions ordering specific performance, the claim of economic inefficiency of specific performance seems a modern gloss . . .").

¹⁵¹ "The most important historical limitation grew out of the circumstance that the chancellor [ecclesiastical courts and then court of equity] had originally granted equitable relief in order to supply the deficiencies of the common law. . . . When during the long jurisdictional struggle between the two systems of courts." Farnsworth *supra* note 15 at 163-64.

¹⁵² The Supreme Judicature Act of 1873 ended the competitive, separate law and equity

award any type of remedy. However, the old bifurcation of remedies was transplanted into the unitary court system with legal remedies (damages) being prioritized as the ordinary remedy and equitable remedies (SP) relegated to the non-preferred status of extraordinary remedies. The difference between viewing SP in the civil law as an available or primary remedy in all cases (claimant's choice) versus the common law's view that damages should always be awarded unless they prove to be inadequate (judicial choice) has been considered one of the major differences between the two legal systems.¹⁵³ Clearly this is the case when comparing formal law, but is it the case in practice? Do the two systems converge, that is, reach similar outcomes? The empirical survey presented in Part IV takes an initial step to answer these questions in the case of Chinese civil law. The findings conclude that in the Chinese court system there has been a convergence of the civil and common law approaches to SP as a remedy. This part offers a descriptive theory that explains this convergence.

A. Specific Performance is not an Ordinary Remedy After All

The percentage of court decisions in which a SP order was issued was relatively small. Judges at the trial court level were frugal in using SP as a remedy, with 59.4% of the judges answering that they used the remedy in less than 10% of their cases.¹⁵⁴ The rate was higher at the appellate levels with 61% of the Intermediate Court and 64.6% of High Court judges issuing SP orders above 10% of the time.¹⁵⁵ Unfortunately, the survey was simplified

courts in England. In 1873, Parliament passed the Judicature Act, which merged common law courts and courts of equity. Although one of the Divisions of the High Court is still called Chancery, all courts could now administer both equity and common law with equity to reign supreme in any dispute. S.C. of Judicature Act, 36 & 37 Vict. c. 66 (1873). The merging of the courts in the United States began with New York State's adoption of the "Field Code" in 1848. The Field Code provided a single law that today we simply recognize as civil procedure for all courts, essentially merging the law and equity courts into a single court system in which parties could request legal and equitable remedies. Rudiments of the old dual system still survey. In the United States, the states of Delaware, Mississippi, New Jersey, South Carolina, and Tennessee preserve the distinctions between law and equity and between courts of law and courts of equity. See Mildred Coe & Lewis Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L. REV. 238 (1942) (discussing the adoption of the Field Code in New York); see also Kellen Funk, *The Influence of the Field Code*, WORDPRESS (Sept. 1, 2014), <http://kellenfunk.org/field-code/the-influence-of-the-field-code-an-introduction> (showing the spread of the Field Code throughout the U.S.).

¹⁵³ *Claims to Performance and Their Enforcement*, in KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 479 (Tony Weir trans., 3d ed. 1998) ("In both German and French law . . . a contractor [party to contract] is in principle entitled to demand that his contract be performed in specie [SP]. The standpoint of the *Common Law* is quite different: if a contractor does not do as he promised, the innocent party's only right, in general, is to bring a claim for breach of contract . . . and which always leads to monetary compensation or damages.").

¹⁵⁴ See *supra* Figure 2.

¹⁵⁵ *Id.*

to increase the response rate. It did accomplish this goal, but at the cost of more granulated findings. Therefore, no mean percentage can be provided for all cases granting SP to the total number of cases. However, using the responses of the Trial Court judges, which had a larger sample size than the other two levels of courts (219 Trial judges to 72 Intermediate judges to 48 Higher Court judges) some conclusions may still be reached. The fact that 62% of the judges granted SP in less than 10% of the cases for breach of contract, including 9% of judges that had never issued a SP order, strongly indicates that it is not a preferred remedy and, in fact, is infrequently granted despite the formal law's treatment of SP as an equal or preferred remedy.¹⁵⁶ The low rate of the use of SP may be due to party or claimant preference for the remedy of damages or the lack of availability of SP (judicial choice). The limited use of SP is likely due to a combination of these factors. Either way, SP is not a popular remedy from the perspectives of claimants and judges.

B. Taxonomy of Contracts: Not All Contract Breaches are Ordinary

Supposedly, the courts should turn a blind eye to the type of contract or subject matter of the contract under the civil law. The type of transaction, whether for the sale of goods or sale of real estate, should have no bearing on the judicial decision to order SP. In the common law, this is not the case. The starting point is that, in most cases, SP is to be denied and provable damages awarded. SP is reserved for cases of contracts involving unique subject matters, such as a one-of-a-kind item, like real estate, paintings, or antiques.¹⁵⁷ This difference in civil and common law reasoning on the proper use of the remedy of SP is not clear in Chinese case law.

Although SP is most prominent in breaches relating to real estate contracts, the rate of SP orders issued was only 24.02% in those cases.¹⁵⁸ It would be expected that a seller's failure to transfer property would elicit many more SP orders. The second most common area where SP orders were issued involved sale of goods contracts at the rate of 10.18%.¹⁵⁹ On one hand, this rate seems to be low for a civil law system, but on the other hand it would be considered a high rate in the common law. The modest rate of SP orders in Chinese cases involving the sale of goods is likely due to the fungibility of goods. If there are readily available secondary markets for the goods being sold in the contract, then the buyer is likely to purchase the goods elsewhere and then sue for damages, assuming the cover price is above the contract price. This approach is simply the most efficient method of obtaining relief

¹⁵⁶ "Where a party fails to perform a non-monetary obligation or if his performance of the non-monetary obligation is not in conformity with the agreement, the other party may demand performance . . ." CCL, art. 107.

¹⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS § 360, cmt. *b* ("Some types of interests are by their very nature incapable of being valued in money. Typical examples include heirlooms, family treasures and works of art that induce a strong sentimental attachment.").

¹⁵⁸ See *supra* Figure 3.

¹⁵⁹ *Id.*

and to mitigate damages. SP is more likely to be used in contracts involving customized goods or when there is no efficient secondary market to purchase substituted goods. More importantly, the low percentage of SP orders in sale of goods contracts is likely also due to the courts using taxonomy of contracts approach. In cases where substitute goods are easily available, along with the high transaction costs of implementing or monitoring a SP order, a court is likely to suggest that the claimant withdraw its request for SP in favor of damages. If the claimant does not withdraw his demand for SP, the court will deny the claim for SP under the rationale that the claimant did not honor his duty to mitigate damages, or by reasoning that the demand for SP is unreasonable.

The importance of the influence of the type of transaction to the determination of the need or reasonableness of SP was also shown by the responses to the direct question of whether the judges overtly use the taxonomy of transaction approach. Across the three court levels, over 50% of all judges expressly stated that the type of transaction was a consideration in their deciding whether to grant of SP.¹⁶⁰ The use of a taxonomy of contracts by Chinese courts comes close to the common law approach that SP is only to be used for certain types of contracts.

The percentage of SP orders in other types of contracts are exceedingly low, ranging from 0.95% for partnership agreement disputes to 2.37% for service contract disputes to 7.10% for leasing contract disputes.¹⁶¹ Again, these very low rates of SP for these types of contract disputes are likely due to multiple factors—claimants' preference for money damages and courts viewing SP as an unreasonable or unfair remedy. In sum, taken as a whole, the rates of the use of the remedy of SP are lower than what would be expected in a system where the law does not prioritize remedies. It is also clear that a major predictor of successfully obtaining a SP order in China is the type of transaction that is at the center of the contract dispute.¹⁶²

Finally, a substantial percentage of judges responded that they would consider issuing a SP order in cases where there is only a claim for damages.¹⁶³ The point of inquiry here, is whether a judge would consider SP on her own accord, even though the non-breaching is making a claim for damages. Again, this fits the scenario represented by the influence of the taxonomy of contracts approach. In cases such as real estate sales, the transaction costs of enforcing the SP order are minimal. If the defendant does not voluntarily transfer the property, the court could simply order the local administrative office to effectuate the transfer. Additionally, damages would

¹⁶⁰ See *supra* Figure 4. The rates of judges using the taxonomy of contracts approach are as follows: 50% for Trial Courts, 52.9% for Intermediate Courts, and 63.9% for High Courts.

¹⁶¹ See *supra* Figure 3.

¹⁶² *Id.*

¹⁶³ See *supra* Figure 5. The rates of judges willing to consider issuing SP in cases in which the remedy was not requested were 40.2% for Trial Courts, 51.9% for Intermediate Courts, and 55.3% for High Courts.

be difficult to calculate given the uniqueness of the subject matter. The importance of the type of contract is also supported by the substantial correlation between responses to Q7 (judicial choice of SP) and Q8 (taxonomy of contracts).¹⁶⁴ This correlation suggests that judges attempt to align the type of contract with the most appropriate remedy. Again, in the sale of real estate, a judge may view SP as the most reasonable and efficient remedy despite the claimant's request for damages.

C. Inefficiency of Specific Performance Remedy

It is often assumed, especially in the common law world, that SP is an inefficient remedy. The awarding of damages is preferred since the court can simply make the award within the confines of the court, while the enforcement of SP may involve the court in additional monitoring or legal proceedings. In short, SP enforcement entails higher transactions costs to the courts, especially considering their busy workloads. This was borne out in the survey's findings of law rates of issuance of SP orders. This assumption was the basis for Q9: "*Do the supervision costs of enforcement factor heavily in making your decision on remedies?*" The findings falsified the hypothesis that higher transaction costs were an important factor in denying requests for SP. Surprisingly, only 47.3% of judges across the three levels of the court system felt that supervision (transaction) costs were a factor in deciding on whether to issue an order of SP. This percentage is lower than the rate expected, but the rate is substantial enough to support the thesis that the cost of enforcing SP orders is a factor. The findings may be skewed since judges may be less willing to admit that their decisions are more based upon procedural or cost saving grounds than on substantive grounds. Also, the findings support the thesis, explored in Part V, that efficiency is only one value that courts take in consideration and it may be outweighed by other values such as good faith, fairness, justice, and equity.

VI. NORMATIVE THEORY OF SPECIFIC PERFORMANCE: EFFICIENCY AND FAIRNESS

This part discusses the norms and rationales used to justify contract law and its applications. It begins with the premise that no single norm or theory can explain all of contract law. The above survey showed that efficiency (lower transaction costs) was a factor, but not the most important factor in the decision whether or not to order SP. This part attempts to provide a framework to show what other values are often influential in the application of contract law, including the use of remedies. The complexity of contract law is explainable only through a composite of norms or theories that often vary based upon the type of contract¹⁶⁵ and the legal system or tradition being

¹⁶⁴ See *supra* Figures 6, 7 & 8.

¹⁶⁵ See Larry A. DiMatteo, *The Norms of Contracts: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 445 (1995) ("Professor

studied.¹⁶⁶

The first section briefly frames a normative composite theory of contract law.¹⁶⁷ It poses that the normative composite is necessarily fluid in order to explain all of contract law. The various norms or values are weighed differently depending on the type of contract, context of the case (facts), and the legal system in which the norms are recognized. These influences impact the application of formal law. The normative composite impacts the creation of contract law (*ex ante*) and the application of that law to cases (*ex post*).

A. Contract Law's Normative Composite

Contract law cannot be explained by a unified theory because it services a basket of different norms often in conflict with one another.¹⁶⁸ Common norms associated with contract law include freedom of contract, certainty, predictability, efficiency, justice, fairness, and good faith. As a result of the complexity and variety of contract types, contract law rules must deal with a variety of factual contexts in which certain values will be more predominant than others. Different types of contracts are influenced by ancillary norms. For example, the rationale behind sales law is the norm of expediency;¹⁶⁹ in more formalized contracts, such as, negotiable instruments and letters of credit, the ancillary norms would be that of security and trust; in agency contracts the norm of loyalty plays a large role in the relationship between principal and agent; in long-term contracts, such as supply, distribution, and joint venture contracts, relational norms dominate over *ex ante* freedom of contract.¹⁷⁰

In both civil and common law, freedom of contract is considered the

Hillman asserts that 'contract law is a complex set of rules and principles.' As such, the theoretical underpinnings, by necessity, must reflect that complexity. One may argue that the complexity of contract law has grown over the years. The sophistication and complexity of modern commercial transactions have tested the rudiments of classical contract law." *Id.* at 445-46 (quoting Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 103 (1988)). The taxonomy of contracts thesis studied in the empirical survey showed that the type of contract was predictive of the likelihood of obtaining SP.

¹⁶⁶ As noted earlier, the civil and common law legal traditions view the remedy of SP and its use differently. See *supra* notes 3, 4, 22-25, 144 & accompanying text.

¹⁶⁷ DiMatteo, *supra* note 166, at 451-53.

¹⁶⁸ Robert Hillman states: "The problem of many theories of contract, however, is that attempts to reduce contract to a simple abstraction leave too much unexplained or distort too much to fit the theory." Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 122-23 (1988).

¹⁶⁹ For example, the requirement of prompt notice of non-conformity under CISG Article 39 or the right of the buyer to reject goods for minor defects under UCC Section 2-601. In the area of remedies, the CISG and the UCC provide simple damage calculations based upon the differentials between contract price, market price, and the price of substituted goods.

¹⁷⁰ Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical and Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 890 (1980) ("In a truly relational approach [to contracts] the reference point is the entire relation as it had developed to the time of the change in question.").

dominant norm of contract law. This is, of course, how it must be since contracts are private law, reflective of the idiosyncratic preferences and values of the contracting parties. The free market system rests upon private parties' freedom to pursue personal self-interests through contracts. However, because of the sometimes-high degree of disparity between the characteristics of the parties, the superior party will overreach and abuse its freedom of contract. The superior party can be defined as the party with superior bargaining power, with the advantage of asymmetrical information and greater sophistication. The outcome of the pseudo-bargain between the stronger and weaker parties will be judged through contract laws policing doctrines,¹⁷¹ as well as tailored laws to protect a class of weaker parties, such as consumers and minors.¹⁷² Thus, contract law has always, to various extents, served two functions—the primary function of the facilitation of private ordering and the secondary regulatory function of policing injustices within that private ordering.¹⁷³ SP can be seen as a means of providing justice to a weaker party.

Based upon the findings of the empirical survey presented in Part IV, a theory of SP will be offered based upon the norms of efficiency¹⁷⁴ and fairness.¹⁷⁵ The area of contractual remedies necessarily reflects this normative composite. More importantly, the application of remedies is influenced by the interrelationship between the basket of norms and the facts of the case. It is these two norms that represent the core rationales of contract law—in the creation of its rules and principles, and in their applications to different factual scenarios. They often sit in counterpoise to one another in which one must give way to the other in a given case. These core norms also are representative of other similar norms. Efficiency is related to the

¹⁷¹ Policing doctrines include good faith, unconscionability, duress, misrepresentation, and mistake.

¹⁷² Consumer-specific rules are found in consumer protection laws and in the American UCC's special rules in the battle of the forms scenario. *See* U.C.C. § 2-207(2) (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless . . .") and U.C.C. § 2-719(3) (AM. LAW INST. & UNIF. LAW COMM'N 2010) for collection of consequential damages ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."). Minors are offered special protection in the common law's infancy law doctrine, which allows persons under the age of eighteen to void their contracts.

¹⁷³ Contract law's regulatory function is found in its policing doctrines: coercion (threat), misrepresentation, undue influence, and mistake. *See* Alan Schwartz, *Contract Theory and Theories of Contract Régulation*, 92 *REVUE D'ÉCONOMIE INDUSTRIELLE* 101, 109 (2000) ("Courts can and should enforce the verifiable terms of contracts, police the contracting process to deter fraud and duress, and help to supply firms with a common vocabulary to use when making contracts.").

¹⁷⁴ The efficiency norm is the core theme in the economic analysis of law.

¹⁷⁵ *See* James Gordley, *Equality in Exchange*, 69 *CAL. L. REV.* 1587, 1592-1603 (1981) (highlighting that procedural norms of fairness began to supplant substantive ones as early as the eighteenth century).

rationales of freedom of contract (private autonomy), as well as certainty and predictability of law. Fairness is representative of justice (procedural, corrective, and distributive), good faith, and equity. The rebalancing of contractual norms can be seen at work in the taxonomy of contracts studied in the survey. Different contract types have various normative bases that influence the court decisions whether or not to grant SP.

The power of the often-conflicting norms of efficiency and fairness vary across legal systems. English common law, at least in formal law, prizes the norms of efficiency, especially the importance of the certainty and predictability of law. It weighs in favor of the formal interpretation of contracts through plain language meanings. It rejects the duty of good faith believing that it would bring too much uncertainty to contracts and make law less predictable. Even though English courts may use the term unconscionable in their judicial decisions, the English common law rejects the policing doctrine or principle of unconscionability.¹⁷⁶ The United States also places heightened value on freedom of contract and the strict enforcement of contractual terms. It rightly or wrongly rejects standard terms regulations and freely accepts incorporation by reference of standard terms even in consumer contracts.¹⁷⁷ However, United States common law recognizes the duty of good faith, doctrine of unconscionability, contextual interpretation of contracts, and the civil law principle of hardship¹⁷⁸ (doctrine

¹⁷⁶ Lord Halsbury in the 1905 case of *Clydebank* set that threshold as a stipulated amount in a liquidated damage clause is determined to be “unconscionable and extravagant, and one which no Court ought to allow to be enforced.” *Clydebank Eng’g & Ship Bldg. Co. v. Yzquierdo y Castaneda* [1905] AC 6 (HL). More recently, the United Kingdom Supreme Court used the concept of “unconscionable and extravagant.” *Cavendish-ParkingEye* [2015] UKSC 67 [19]–[35].

¹⁷⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981) (stating that a party has duty to read the standard terms of a contract; whether the party reads them or understands them is immaterial. They are enforceable if the party enters into the contract. “[W]here a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.”). Comment c succinctly states that “standard terms imposed by one party are enforced.” Incorporation by reference is a common method of including terms or other materials found in other documents into a contract by simply referencing those terms or documents. *Id.* at §211(1) cmt. c. A standard definition of the principle of incorporation by references is “a doctrine in law: the terms of a contemporaneous or earlier writing, instrument, or document capable of being identified can be made an actual part of another writing, instrument, or document by referring to, identifying, and adopting the former as part of the latter”. MERRIAM-WEBSTER DICTIONARY, <https://www.merriamwebster.com/dictionary/incorporation%20by%20reference>.

¹⁷⁸ See, e.g., German Civil Code or Bürgerliches Gesetzbuch [BGB] § 313. Larry A. DiMatteo, *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, 27 PACE INT’L L. REV. 259, 262–63 (2015), citing Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657 (1992) (explaining the difference between force majeure or impossibility and hardship) (“The longstanding German law doctrine of *Störung der Geschäftsgrundlage* (interference with the foundation of the contract), codified in Section

of impracticability).¹⁷⁹

Although on the surface American contract law seems to be a more balanced reflection of efficiency and fairness than English common law, in fact, the divergence between the two is more a matter of degree. For example, the unconscionability doctrine as espoused in law¹⁸⁰ applies equally to both commercial and consumer transactions. In practice, it has mostly been used in consumer transactions¹⁸¹ and the evidentiary threshold to prove unconscionability is high.¹⁸² The doctrine of impracticability,¹⁸³ the American equivalent to German hardship,¹⁸⁴ is an empty vessel with very little content. American courts rarely grant an exemption of liability to a party from contracts that have become onerously burdensome due to an unexpected change of circumstances after the contract was formed.

In the area of remedies, common law places an outsized premium on freedom of contract and private autonomy norms and views damages as the preferred remedy. Examples of arguments that disfavor SP as a remedy include Oliver Wendell Holmes, Jr.'s adage that contracts do not require

313 of the BGB, allows relief to a party where there has been a 'fundamental' change in circumstances, which would render unfair the enforcement of the contract without the revision of the parties' obligations.”).

¹⁷⁹ In American law, the principle of hardship is found in the doctrine of impracticability. See U.C.C. § 2-615 (AM. LAW INST. & UNIF. LAW COMM'N 2010); RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

¹⁸⁰ U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

¹⁸¹ FARNSWORTH, *supra* note 15, at 330 (“most of the parties that have successfully invoked the doctrine of unconscionability have been consumers.”). Farnsworth notes that: “Courts have generally been chary about using the doctrine of unconscionability to protect merchants and similar professionals and have declined to apply the doctrine in favor of sophisticated corporations.” *Id.* at 331-32; *but see* Jane P. Mallor, *Unconscionability in Contracts between Merchants*, 40 SW. L. J. 1065, 1088 (1986) (“Although consumers have been the primary beneficiaries of the doctrine of unconscionability, the case law reveals an increasing tendency to recognize that commercial parties can be victimized by the same types of bargaining unfairness that stimulated the rebirth and expansion of unconscionability.”).

¹⁸² See Arthur Allen Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 531-33 (1967) (a highly influential article, generally adopted by the courts, requires that a party has to provide evidence of both procedural and substantive unconscionability). See also FARNSWORTH, *supra* note 16, at 582-85 (noting the general use of the procedural-substantive approach to unconscionability).

¹⁸³ U.C.C. § 2-615 (“Excuse by failure of presupposed conditions [is] . . . not a breach of . . . duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .”).

¹⁸⁴ The idea of hardship or an imbalance in the contract (although it is still possible to perform) is found in German Civil Code or Bürgerliches Gesetzbuch [BGB] § 313. “German law, however, has recently chosen the path of codification with a clear primacy of judicial adaptation of contract over discharge: § 313 BGB on ‘hardship’ was added to the German civil code (Bürgerliches Gesetzbuch – BGB) in the course of modernizing the German law of obligations.” Hannes Rösler, *Hardship in German Codified Private Law - In Comparative Perspective to English, French and International Contract Law*, 15 EUR. REV. PRIV. L. 483, 485 (2007).

performance but merely give each of the parties the right to sue for damages,¹⁸⁵ and Steven Shavell's assertion of the morality of breach under an economic analysis of contract law.¹⁸⁶

The civil law embraces freedom of contract but also focuses on the fairness of the exchange. In German law, the duty of good faith places an outsized role in the interpretation of contracts and the application of contract law.¹⁸⁷ Thus, one-sided, non-customary terms perfunctorily enforced in common law may be unenforceable in German law as a violation of the duty of good faith and its standard terms rules.¹⁸⁸ The importance of the fairness of the bargain, whether *ex ante* or *ex post*, is demonstrated in the German hardship doctrine.¹⁸⁹ *Ex ante* fairness is weighed in the interpretation of contracts through the prism of good faith. *Ex post* fairness is weighed in the courts' determination if a change of circumstances has placed an undue burden on a party to perform. The normal methodology is for German courts to affix an equilibrium based upon the agreement at the time of formation and then to determine if there has been a substantial change in that equilibrium due to a change of circumstances.¹⁹⁰ The courts can then bring the contractual equilibrium back into balance through the hardship principle. Under the hardship principle, when a contract becomes significantly imbalanced then the parties have an implied duty to re-negotiate the contract to bring it back into equilibrium.¹⁹¹ If a party fails to use reasonable efforts to negotiate an adjustment or reformation of the contract, the court may view that as an act of bad faith. In the end, this results in German contract law being more relational in nature, meaning the parties are likely to agree to an adjustment in cases of true hardship given the expectation of acting in good faith. This type of forced renegotiation and judicial intervention to re-balance a contract *ex post* is anathema to the common law, where the courts have a negative obligation to rescue parties to contracts that have become one-sided.

¹⁸⁵ See Holmes, *supra* note 16, at 462.

¹⁸⁶ See Shavell, *supra* note 12.

¹⁸⁷ Bürgerliches Gesetzbuch [BGB] [Civil Code], § 242.

¹⁸⁸ The German BGB, unlike the American U.C.C., has specific provisions restricting the enforceability of standard terms: Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 305 (places some requirement for incorporating standard terms), 305(c) (standard terms are "so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract"), 308 and 309 (listing a number of prohibited (unenforceable) terms).

¹⁸⁹ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE],) § 275, para. 2, sentence 1, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.) ("The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee.").

¹⁹⁰ *Id.* ("[P]erformance requires expense and . . . is grossly disproportionate to the interest in performance of the obligee.").

¹⁹¹ In referring to BGB § 313, one scholar states that "further instruments are needed to address changed circumstances that fundamentally alter the equilibrium of the contract." Rösler, *supra* note 185, at 485.

This idea of equilibrium of contract is found, in a much more modest way, in the common law's use of SP. Since SP evolved out of equity law, a prerequisite for obtaining a SP order is that the contract itself must be equitable.¹⁹² The common law courts do not hesitate in giving damages based on a severely one-sided contract, meaning that often the beneficiary of a one-sided contract is the non-breaching party who is able to collect damages based on the contract's one-sidedness. However, if that party seeks the remedy of SP, it will be denied because of the contract's one-sidedness.

The idea of types of contracts or taxonomy of contracts, or what Karl Llewellyn called transaction-types,¹⁹³ is based on the notion that over time contracts become differentiated from one another in categories or pathways of contracting. So, contracts will be readily recognized as a sale of goods, sale of real estate, franchise, or agency contracts, and so forth. And, each type of contract will possess its own normative structure including various customary practices, usages, and standard terms. The type of contract will also be a factor in determining the appropriate remedy in cases of breach. In sum, the empirical survey provided the importance of the categorizing (taxonomy) contracts in courts' decisions to provide the remedy of SP, especially in the Chinese court system. This proposition will be explored further in the next section.

B. Specific Performance in Chinese Contract Practice

The above discussion of the normative underpinnings of contract law can be used to better understand the use of SP in Chinese courts. The Chinese legal system is characterized as a type of civil law, but it is important to note that the common law has also influenced the creation of modern Chinese law.¹⁹⁴ The history of Chinese law shows that the Chinese courts are comfortable in following the decisions of other courts, which resembles the notion of the law of precedents (*stare decisis*) that is the core feature of common law.¹⁹⁵ There is strong evidence of a common-law style of legal system, based upon panwen (written legal documents, judgments or

¹⁹² RESTATEMENT (SECOND) OF CONTRACTS § 364(1)(c) (1981) (“Specific performance . . . will be refused if such relief would be unfair because . . . the exchange is grossly inadequate or the terms of the contract are otherwise unfair.”).

¹⁹³ Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 15 (Jody Kraus & Steven eds., 2000) (summarizing Llewellyn's analysis of transaction-types: “[A]n analyst will develop a model to show what contract term respecting damages would be efficient for a particular transaction type.”). *See also* Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L. J. 19, 22 (1993) (noting that the construction of legal categories is partially an adoption of roles and transactions defined by society).

¹⁹⁴ The common law concepts of anticipatory repudiation and adequate assurance are found in the Chinese Contract Law; also, the People's Supreme Court implemented a system of “Guiding Cases” to assist lower courts in the application of Chinese law.

¹⁹⁵ *See Availability of Specific Remedies*, *supra* note 20, at 168-69.

decisions), dating back to the pre-Qin dynasty (before 221 B.C.).¹⁹⁶ The empirical study has shown that Chinese courts' SP orders coalesce around a number of common rationales. This results in similar case outcomes as found in a case-based common law.¹⁹⁷ Additionally, today's Guiding Case system established by the SPC has historical precedence. Dong Zhongshu also created hypothetical or model panwen system (Chunqiu Jueyu practice) during the Han Dynasty (206 B.C.-208 A.D.), which can be seen as the precursor to the Chinese SPC's practice of issuing Guiding Opinions.¹⁹⁸ The model or guiding cases are applied to decide real cases in order to bring consistency and objectivity to the legal order.

The frugality of Chinese courts in issuing SP orders may indicate that the efficiency of SP is a concern. The supervision or transaction costs of SP, depending on the nature of the performance being compelled, often are viewed as substantially higher than the awarding of damages. The survey showed that the concern over higher costs of enforcement was an important but not controlling factor in court decisions on whether to issue SP. The competing factors include fairness, good faith, and reasonableness. Although these countervailing factors are not suggested in the formal law, especially in cases where the claimant asks for SP, the courts police the use of SP. The law states that it is the aggrieved party that selects the choice between damages and SP. In fact, the decision to order SP is a combination of party and judicial choice. For example, if the non-performing party elects not to cover by buying substituted goods and then demands SP, a court may see this as a violation of the party's duty to mitigate damages. Generally, requests for SP may be deemed to be unreasonable or an act of bad faith depending on the factual scenario and type of contract in dispute. The evidence shows that Chinese courts are familiar with other court rulings in this area and follow a widely accepted taxonomy of contract approach in deciding to issue SP.

VII. CONCLUSION

This article employs statistical data analysis and qualitative interviews of Chinese judges to investigate the theoretical foundation and practical application of SP in China as a contractual remedy in civil and commercial

¹⁹⁶ Norman P. Ho, *Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgments)*, 22 PAC. RIM L. & POL'Y J., 49, 55-56 (2013).

¹⁹⁷ The panwen system recognized the importance of the rule of law that similar decisions and punishments should be prescribed for similar fact situations. The panwen system, which came into full force during the Han dynasty (206 B.C. – 208 A.D.), was based on the application of principles to factual scenarios; analysis of context; and analogical reasoning from previously espoused panwen judgments. See DiMatteo, *supra* note 124 at 395 (citing Ho, *supra* note 197, at 78-79).

¹⁹⁸ See Jialue "Charles" Li, *China, A Sui Generis Case for the Western Rule-of-Law Model*, 41 GEO. J. INT'L L. 711, 737-38 (2010) (discussing precedent in the Han and subsequent dynasties and noting that Western scholars often ignore the role of precedent in ancient China).

disputes across the three levels of the Chinese court system. The findings indicate that: (1) the awards of SP as a remedy are less frequent than commonly assumed; (2) judges in the Chinese court system take a proactive role in the preliminary stages of a trial and actively persuade the aggrieved party to accept damages rather than seek an order of SP; (3) lower courts are more likely to order SP, but at the same time the breaching parties at that level of the court system are more likely to settle for damages; and (4) concern for supervision costs associated with SP is not a determining or predictive factor of the courts' reasoning on whether or not to grant SP.

First, the findings show that despite the view of SP has an ordinary remedy, Chinese courts seek efficiency by ensuring that the aggrieved party's interests are not overprotected. They have done this by imposing a number of restrictions on the availability of SP. The restrictions are broadly worded and can be used to offset a plaintiff's claim for SP. Damages are awarded when SP is impossible, impractical or excessive, or when the aggrieved party does not make a claim for SP within a reasonable period of time. This limiting language indicates that the courts see the giving of damages as the preferred remedy and SP as an extraordinary remedy. The abstract phraseology of impractical and excessive gives the courts a great deal of discretion in dealing with claims for SP. Furthermore, a claim that is well within the limitation period (statute of limitations) may be rejected as untimely within the "reasonable period of time" standard relating to SP.¹⁹⁹

There seems little practical difference between the applications of SP in the common law world as compared to the civil law system in China.²⁰⁰ Demands for SP orders are usually only granted in situations where a common law court would do the same.²⁰¹ This does not imply that there is no longer any divergence between Chinese law and common law on the prioritization of the remedies of damages and SP.

Second, judges will, before the court hearing, determine the probability of issuing a SP order in any given case by weighing the benefits to the aggrieved party and general public, against the difficulties of enforcement. Usually, the more experienced judges will exercise the power of persuasion to encourage an aggrieved party to change its claim from SP to damages.

Third, even if there is a good chance that the court would order SP, the aggrieved party might want to avoid the risk of expensive and lengthy proceedings. The cost of litigation may be high due to legal fees, and it may be time-consuming to convince the court to issue a SP order. Also, there is a great deal of uncertainty in the enforcement of SP orders. The effectiveness of the enforcement of court decisions has long been regarded as notoriously deficient in China.²⁰² There are also costs and risks on the side of the

¹⁹⁹ HAN, *supra* note 4, at 771.

²⁰⁰ ZWEIGERT & KÖTZ, *supra* note 156, at 484.

²⁰¹ Lando & Rose, *supra* note 3.

²⁰² Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement*

defendant. In some instances the plausible threat of SP may encourage the defendant to seek a settlement for the payment of damages.

Finally, from the court's perspective, if the process of enforcement is likely to be difficult and unduly lengthy, there is a high probability that a court would decline to issue a SP order. However, the greater preference for damages awards in the High Courts in China is not replicated in the lower courts. Trial Court judges are focused on not being overturned by appellate courts and less concerned about enforcement costs. This is due to personal considerations since being overturned affects the Trial judges' performance rating. Furthermore, enforcement of SP orders is the responsibility of the enforcement division of the court and not the court that issued the order.

The empirical study presented in this article on the use of SP in the Chinese court system provides support for the proposition that the divergence between the civil and common law views of SP as an ordinary or extraordinary remedy is not as wide as depicted in the formal law. It is also the case that Chinese law has been influenced by a common-law-like view of case law. The study makes clear that the labeling of SP as an ordinary or extraordinary remedy is not reflected in Chinese court practice. Chinese courts are influenced by a recognized taxonomy of contracts in determining which types of contracts are deserving of SP. In fact, Chinese courts' frugality in the issuance of SP orders bring them closer to the approach taken in the common law.

of Civil Judgments, 10 COLUM. J. ASIAN L. 1 (1996). (arguing the enforceability problem is sometimes due to the Communist party intervening into judicial decisions) *id.* 50. Another problem can be characterized as the lack of finality of judicial decisions: "Although the judgment of the trial in second instance is supposed to be the final judgment and thus enforceable ('legally effective'), defendants in fact have numerous opportunities to relitigate the merits of the case, or at least to pose further procedural obstacles in the way of execution." *Id.* at 38. See also Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 AM. J. COMP. L. 419 (2009).