Asia Pacific Law Review

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rplr20

Non-monetary relief for breach of contract: a European perspective on Chinese contract law

Sébastien De Rey & Lei Chen

To cite this article: Sébastien De Rey & Lei Chen (2021) Non-monetary relief for breach of contract: a European perspective on Chinese contract law, Asia Pacific Law Review, 29:2, 325-345, DOI: 10.1080/10192557.2022.2033086

To link to this article: https://doi.org/10.1080/10192557.2022.2033086

ASIA PACIFIC LAW REVIEW
2021, VOL. 29, NO. 2, 325–345
https://doi.org/10.1080/10192557.2022.2033086

Routledge
Taylor & Francis Group

SPECIAL SECTION: THE CHINESE CIVIL CODE

Non-monetary relief for breach of contract: a European perspective on Chinese contract law

Sébastien De Rey[a,b,c] and Lei Chen [d,e*]

[a]Centre for Private Law, UCLouvain, Ottignies-Louvain-la-Neuve, Belgium; [b]Institute for the Law of Obligations, KU Leuven, Leuven, Belgium; [c]Centre for Chinese and Comparative Law, City University of Hong Kong, Kowloon, Hong Kong; [d]Durham Law School, Durham University, Durham, UK; [e]Zhongnan University of Economics and Law, Wuhan, People's Republic of China

ABSTRACT

To compensate for the loss caused by the non-performance, monetary damages are considered almost automatically. This article provides a broader perspective. Indeed, albeit monetary damages are and will always remain the most frequently awarded form of compensation, this comparative analysis reveals that non-monetary relief has a full role to play within a modern law of contract. Non-monetary relief is not to be confused with specific performance. Unlike specific performance, an order for non-monetary relief does not provide actual or full performance. Non-monetary relief provides rather, by way of compensation for the loss caused by the non-performance, an act different as agreed upon, aimed at placing the aggrieved party in as good a position as if the contract would have been fully performed. Under Chinese contract law, this alternative form of compensation is available yet remains underexplored. This article provides the legal framework and highlights the under-utilization of this remedy, identifying examples for which non-monetary relief is an appropriate alternative to monetary damages for breach of contract. It argues that in the twenty-first century, when sustainability is increasingly pursued as a matter of a guiding principle, the law of contract needs to be re-gigged up to reflect this trend. The availability of non-monetary relief can meet not only private interests, but can comply with public interests as well.

KEYWORDS

Property; tort; personality rights; civil code

I. Introduction

The essence of a contract lies in the 'performance interest'.[1] If a party does not perform its obligations under the contract, or does not perform them properly, two types of remedies are readily conceivable to enforce this performance interest: either the party in breach to render actual performance as promised according to the terms of

CONTACT Lei Chen lei.chen@durham.ac.uk

*Lei Chen, the corresponding author, acknowledges the financial support of the Wenlan Visiting Professor Scheme at Zhongnan University of Economics and Law.

[1]Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628.

contract, or the party in breach to compensate for the loss caused by the non-performance. The former is termed 'specific performance' (the 'SP'), while the latter is referred to as 'damages'.

If the aggrieved party chooses to claim for damages, it is almost instinctively considered as an amount of money. In order to meet the performance interest of the aggrieved party, the payment of this sum of money aims to place this aggrieved party, who suffered the consequences of the contractual breach, in as good a position as if the contract had been fully performed. However, the same objective could equally be met by awarding compensation in a form other than the payment of a sum of money. For instance, imagine a couple booking an apartment with a tour operator, the latter informing the couple a few days before departure that the apartment appears to be overbooked due to its mistake. As a result, SP turns out to be impossible. Consequently, the tour operator is forced to cancel the couple's stay. One could think of awarding monetary damages in lieu of performance. As a result, the couple can use the sum of money to obtain substitute performance by booking another apartment. However, rather than monetary damages, compensation could alternatively include that the tour operator is required to provide, at its own expense, alternative accommodation for the couple, such as an equivalent apartment, a holiday home or a hotel. In essence, the couple is then awarded a non-monetary equivalent providing the closest possible approximation of what actual performance would have provided. Such an alternative redress is not a form of monetary damages. Nor can it be regarded as SP. This non-monetary form of remedy is termed 'non-monetary relief' (the 'NMR'), also known as 'reparation in kind'.[2] Unlike SP, an order for NMR does not provide actual or full performance according to the terms of contract. NMR provides instead, by way of compensation for the loss caused by the non-performance, an act different as agreed upon, aimed at placing the aggrieved party, as far as possible, in as good a position as if the contract would have been fully performed.

The concept and the potential scope of application of NMR remains in many legal systems substantially underexplored. To be specific, the Civil Code of the PRC ('Chinese CC'), effective since 1 January 2021, appears to be ambiguous without paying attention to the availability of this kind of remedy. Nonetheless, all civil codes of Western European legal systems allow that compensation for non-performance is not only made by paying monetary damages, but in a form other than the payment of a sum of money as well. This article argues that Chinese law needs to broaden the applicability of NMR, especially in the era of a circular economy where the value of products and materials is maintained for as long and sustainable as possible. To this end, the article investigates whether the Western European approach may provide a source of inspiration for Chinese contract law in view of the continuity of civil law tradition in China.[3] Such a comparison is particularly timely at the present juncture, since in China – as in some Western European legal systems – a wind of reform is blowing through the law of obligations. Based on a comparative analysis of these European legal systems, we first identify where there is a need for compensation in a form other than the payment of a sum of money.

[2]Jürgen Basedow, Klaus J Hopt, Reinhard Zimmermann and Andreas Stier (eds), *Max Planck Encyclopedia of European Private Law* (OUP, 2012), *v°* Reparation in kind, 1453. This term is in line with French (*réparation en nature*), German (*Naturalherstellung*) and Dutch (*herstel in natura*) terminology.

[3]Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78.1–2 Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review 159.

Subsequently, we determine whether non-monetary compensation is available, and if so, under which legal test it could fit into a legal system. Finally, some recommendations are made to broaden the applicability of NMR in Chinese law.

II. Why NMR? Some theoretical underpinnings

There is some relevant illuminating economic analysis of contractual remedies that indicate whether and how compensation for breach of contract should be awarded either in money or in a non-monetary way.[4] It is, however, not sure whether such economic analyses would provide a definite answer.[5] Indeed, economic analysis on the relationship between non-monetary and monetary remedies in both common law and civil law jurisdictions, in particular on the question whether SP (non-monetary remedy) or damages (monetary remedy) should be considered as the most appropriate remedy,[6] are not unequivocal. At any rate, *normative* arguments need to be advanced in favour of monetary damages and NMR respectively. These normative arguments relate to private (A) and public (B) interests.

A. Private interests

From a normative perspective, the popularity of monetary damages is easily justified. Since monetary damages can be claimed in many cases where other remedies are unavailable, unsuitable or inadequate, they are characterized by a general nature of the application.

Monetary damages provide a number of advantages. When a contract is breached, monetary damages appear to be the simplest way to put an end to a legal dispute by avoiding new or subsequent litigation. Costs on proper performance of remedial measures are usually easy to enforce. From the court's perspective, enforcing non-monetary measures, such as SP or NMR, would require a more effective judicial supervision mechanism than an award for monetary damages. Therefore, it is said that the courts, before awarding non-monetary measures, should weigh the aggrieved party's interests and the general public interest against the difficulties of enforcement.[7] If the enforcement process would be difficult and unduly lengthy, the additional supervision required would be a waste of resources, and therefore undesirable. In turn, from the aggrieved party's perspective, it is not inconceivable that this party might want to avoid the risk of expensive

[4]Henrik Lando and Caspar Rose, 'On the Enforcement of SP in Civil Law Countries' (2004) 24 Intl Rev L Econ 473; Steven Shavell, 'SP versus Damages for Breach of Contract: An Economic Analysis' (2005) 84 Texas L Rev 831; Lei Chen, 'Secific Performance as a Contractual Remedy in Chinese Courts: An Empirical Study' (2019) 7 Chinese Journal of Comparative Law 95. On the presence or absence of SP clauses in several types of contracts, see Theodore Eisenberg and Geoffrey P Miller, 'Damages versus SP: Lessons from Commercial Contracts' (2015) 12 J Empirical Legal Stud 29.

[5]Vanessa Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart, 2009) 67.

[6]See Gregory DeAngelo and Steven G Medema, 'Those Crazy Transaction Costs: On the Irrelevance of the Equivalence Between Monetary Damages and Specific Performance' (2014) Eur J Law Econ 269; Paul G Mahoney, 'Contract Remedies: general' Gerrit De Geest (ed), *Contract Law and Economics* (Edward Elgar, 2011) 164; Lando and Rose (n 4) 473; Ariel Porat, 'Economics of Remedies' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics,* vol 2 (OUP, 2017) 313; Shavell (n 4) 831; Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale LJ 271; Peter Linzer, 'On the Amorality of Contract Remedies – Efficiency, Equity, and the Second Restatement' (1981) 81 Colum L Rev 111.

[7]Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in Larry A Dimatteo and Lei Chen (eds), *Chinese Contract Law. Civil and Common Law Perspectives* (CUP, 2018) 401.

and lengthy proceedings. In addition, in some legal systems, such as under Chinese law, the effectiveness of the enforcement of court orders has long been regarded as notoriously worrying and deficient.[8] As a result, an order for non-monetary remedies may turn out to be ineffective eventually.[9] Finally, the aggrieved party may not want the defaulting party to perform non-monetary measures after the breach. Indeed, the judicial enforcement of such non-monetary measures may affect the quality of the goods or the performance provided by the defaulting party.

Remarkably, a wide availability of SP may be a restriction on the scope of the mitigation taken by the aggrieved parties. When SP is ordered, the non-breaching party shoulders off the responsibility of finding suitable alternatives. SP shall not be awarded or enforced when the court expects the aggrieved party to take reasonable steps to mitigate. In order to avoid social waste resulting from a literal enforcement of the contract or imposing a burden on the defaulting party which is disproportionate to the advantage to be gained by the aggrieved party, an alternative remedy is warranted. Specifically, NMR may resolve this tension between the mitigation and SP by finding a substitute or alternative performance to protect the expectation interests.

In many European legal systems, NMR as a remedy for breach of contract has first been applied by the courts and has only subsequently been codified by legislators.[10] Apparently, under certain circumstances, there may be a need for compensation in a form other than the payment of a sum of money. For instance, this may be the case if no market substitute is available or such substitute asks for high transaction costs. Under such circumstances, monetary damages are deemed to be inadequate.[11] If then SP is impossible or unreasonably expensive, NMR may provide an attractive alternative, as it can turn out to be more cost-effective and provide the aggrieved party with more satisfaction in terms of performance interest. The same is true if the aggrieved party would like to use the monetary damages, assessed in accordance with the costs of cure, to take remedial measures. Indeed, rather than using the sum of money to take remedial measures, the aggrieved party could prefer the party in breach to be required to cure himself by performing remedial measures. As a result, the aggrieved party avoids the practical concerns of cure.[12] In addition, if the defaulting party is a professional (e.g. constructor or seller), providing non-monetary measures himself can turn out to be more cost-effective, as he shall bear only 'internal' (production) costs, whereas the amount of monetary damages is usually based on the market price under which substitute performance is available provided by a third party (i.e. 'external' market costs).[13] It follows that, depending on the circumstances, also for the defaulting party NMR may be more attractive than monetary damages.

[8]Donald Clarke, 'Power and Politics in the Chinese Court System: The Execution of Civil Judgments' (1996) 10 Colum J Asian L 1.
[9]Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Mindy Chen-Wishart, Alexander Loke and Burton Ong (eds), *Studies in the Contract Laws of Asia: Remedies for Breach of Contract* (OUP, 2016) 21, 37.
[10]See on the availability of non-monetary relief, no III.
[11]Ralph M Cunnington, 'The Inadequacy of Damages as a Remedy for Breach of Contract' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 155, 116–17.
[12]Hermann Lange and Gottfried Schiemann, *Schadensersatz* (Mohr Siebeck, 2003) 214 para 3.
[13]James P Nehf, 'Contract Damages as Substitute for Full Performance' (1999) 32 Indiana L Rev 795.

In certain circumstances, aggrieved parties are ready to attach more importance to NMR than monetary damages. A typical example is in consumer contracts. Indeed, when concluding a contract, consumers are mainly concerned about the private use and/or enjoyment of the goods or services, not in the economic or financial value that such goods or services represent.[14] This phenomenon is referred to as the concept of 'consumer surplus'. This concept refers to the extra, non-monetary value or utility that consumers may attach to their contract on top of the economic value of the good or service provided by the contract.[15] Rather than an award of monetary damages, an order for NMR could realize this consumer surplus more effectively.[16] In more general terms, by making an order for NMR, the court could avoid a common deficiency resulting from an award of monetary damages, namely that they can be under-compensatory.[17] In addition, factors linked to the defaulting party's financial status may render monetary damages inappropriate or undesirable (e.g. in the event of insolvency). An order for NMR may then offer an alternative (e.g. because certain forms do not depend on the defaulting party's solvency).[18]

Monetary damages will be inadequate as well where they are difficult to quantify and/or require a complex, if not impossible, assessment.[19] In some legal systems, the courts rely indeed on this argument to award NMR, rather than monetary damages.[20] For instance, non-pecuniary loss caused by breach of contract does not, in principle, affect the aggrieved party's property, but is however, by means of monetary damages, expressed in terms of financial means. This explains why monetary damages are not always the answer to the aggrieved party's complaint.[21] Indeed, for cases such as any reputation damage, violation of personal identity or one's dignity (e.g. caused by discriminatory dismissal), empirical studies reveal that the aggrieved party may attach more importance to compensation in a form other than the payment of a sum of money.[22] To restore reputation or compensate the harmful effects, rather than awarding monetary damages, NMR, such as the publication of the court's decision, a rectification, or even court-ordered apologies, has been found to increase victim's emotional wellbeing.[23] That is why NMR is sometimes addressed in the ever-increasing trend towards restorative and/or corrective justice.[24] Indeed, also within private law, a trend towards a more

[14]Donald Harris and others, 'Contract Remedies and the Consumer Surplus' (1979) 95 Law Quarterly Rev 581.
[15]This concept is traceable to Alfred Marshall, *Principle of Economics* (8th edn, Macmillan, 1920) 103.
[16]Mak (n 5) 61.
[17]Anthony T Kronman, 'Specific Performance' (1978) 45 U Chicago L Rev 351.
[18]Cunnington (n 11) 118.
[19]Ibid, 117.
[20]See e.g. the Federal Supreme Court of Switzerland: ATF 21 May 1981 107 II 134, no 4 ('sie hat namentlich den Vorteil, dass sie die häufig komplizierte Berechnung des Schadens in Geld überflüssig macht').
[21]For instance, see Robyn Carroll and Normann Witzleb, 'It's Not Just about the Money – Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37 Monash U L Rev 216.
[22]See e.g. Liesbeth Hulst and Arno Akkermans, 'Can Money Symbolize Acknowledgment? How Victims' Relatives Perceive Monetary Awards for Their Emotional Harm' (2011) 4 Psychol Inj L 245-262.
[23]See Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35 Syd L Rev 317; Brent T White, 'Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy' (2006) 91 Cornell L Rev 1261; Andrea Zwart-Hink, Arno Akkermans and Kees Van Wees, 'Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction' (2014) 38 UWAL Rev 100; Gijs Van Dijck, 'The Ordered Apology' (2017) 1 Oxford JLS 12; Sébastien De Rey, 'Court-Ordered Apologies under the Law of Torts? Non-Monetary Relief for Emotional Harm – A Comparative Outlook from a Western European Perspective' in Robyn Carroll, Nicola Brutti and Prue Vines (eds), *Apologies in the Legal Arena – a Comparative Perspective* (Bonomo Editore, 2021) 205ff.
[24]For example, see Heather Strang and Lawrence W Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) Utah L Rev 15.

restorative approach is emerging. This is particularly true in cases on liability for emotional harm, where a more diverse basket of remedies is sought in a vein of restorative rather than retributive justice (e.g. through apologies).[25] Also within a commercial context, this trend is becoming more important. For instance, businesses may have an interest in ensuring consumers' confidence in the products and services provided, even after a dispute occurred. A more restorative attitude may then contribute to re-establish consumer confidence and public image of the business concerned.[26] This idea is clearly reflected in the remedies available for class actions (and their settlement). Indeed, in the assessment of the collective redress in class actions towards consumers, in addition to monetary damages, non-monetary forms of collective redress have received significant attention[27] and have been codified in some legal systems.[28]

It follows from the examples above that, depending on the situation, NMR may provide a better protection of the performance interest than monetary damages. This brings us to the moral justification of NMR. At first glance, indeed, it may be surprising that a remedy can require a breaching party to perform the contract in a way he did not promise it. In the 1800s, this has also been the position of the French Court of Cassation: according to this former case law, NMR was not available under the French law of contract because it requires a contracting party to perform an act that is not provided by the contract.[29] However, this point of view has evolved and in the meantime has become outmoded under French law.[30] Indeed, in civil law jurisdictions, the protection of the performance interest – opposed to the compensation interest[31] – prevails.[32] It follows that, the breaching party is under no choice to either provide performance as promised under the contract or pay monetary damages that preserve the expectation of the aggrieved party. As a primary remedy, the non-breaching party is entitled to performance, which means that the breaching party cannot opt for payment of damages in lieu of performance, except in circumstances where SP would be impossible or unreasonable.[33] The moral justification for this entitlement to SP varies within the literature, but the general idea

[25]For instance, see Carroll and Normann (n 21).

[26]See Ameeta Patel en Lamar Reinsch, 'Companies Can Apologize: Corporate Apologies and Legal Liability' (2003) 66 Business and Professional Communicaction Quarterly 18.

[27]For example, see Scott R Peppet, 'In-Kind Class Action Settlements' (1996) 109 Harvard LR 810; Lisa M Mezzetti and Whitney R Case, 'The Coupon Can Be the Ticket: The Use of "Coupon" and Other Non-Monetary Redress in Class Action Settlements' (2005) 18 Geo J Legal Ethics 1431; GP Miller and LS Singer, 'Nonpecuniary Class Action Settlements' (1997) 60 Law and Contemporary Problems 97.

[28]See, for example, in France (Art L 423-3 Code de consommation), Belgium (Art XVII.54, § 1, 7° and XVII.59, § 2 Code of Economic Law) and the Netherlands (Art 3:305a, al 3 Civil Code).

[29]See Cass (Civ) 9 July 1888 [1889] Dalloz 156; Cass (Civ) 4 June 1924 [1927] Dalloz 316.

[30]See III.C.

[31]It seems that the term 'performance interest' was first introduced by Daniel Friedmann (see n 1), but the distinction between performance interest and compensation interest comes from more recent scholarship (see e.g. Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligations' (2006) 26(1) Oxford J Legal Stud 41, 45). For an overview, see Jennifer Nadler, 'Contract Damages, Moral Agency, and Henry James' *The Ambassadors*' (2019) 32 Canadian Journal of Law & Jurisprudence 443ff.

[32]See Hein Kötz, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP, 2019) 923. See also Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP, 2012) 59ff. On the evolution of this idea, see Janwillem Oosterhuis, *Specific Performance in German, French and Dutch Law in the Nineteenth Century. Remedies in an Age of Fundamental Rights and Industrialisation,* in *Legal History Library*, vol 4 (Martinus Nijhoff Publishers, 2011) 87ff.

[33]There is, in other words, a natural link between the promisee's subjective right to performance, his entitlement to enforce this right (*ius agendi*), and the procedural instrument generally used to achieve this (see Mak (n 5) 8–9).

is that it was a voluntary act willed by both parties.[34] However, where SP is made impossible or unreasonable by his conduct, the breaching party should not have the possibility to 'buy' himself out of the contract by paying damages. Reversing the reasoning would mean that the breaching party, through his own conduct (i.e. the breach), can nevertheless keep away from protecting the performance interest. If a failure in performance is regarded as a wrong – in other words, if a moral connotation is attached to it that makes us regard it as bad behaviour on party of the breaching party – this might imply that the breaching party should at least, in some way, be held accountable for breaching the trust that the other party has put in his performance.[35] Therefore, in place of damages measured by the plaintiff's financial loss, moral critics have advocated a remedy of SP or its closest possible approximation.[36] Well, NMR belongs to the latter category: a remedy providing the closest possible approximation of SP for cases in which SP turns out to be impossible or unreasonable. NMR provides indeed an act different as agreed upon, aimed at placing the aggrieved party, as far as possible, in as good a position as if the contract would have been fully performed. It fits within the legal traditions where protection of the performance interest prevails over the protection of the compensation interest. It follows that, in the end, it is the binding nature of contracts (*pacta sunt servanda*) and the legal protection of the performance interest based thereon, that justifies a remedy such as NMR. However, this does not mean that NMR can take any form. Given the fact it protects the performance interest by providing the closest possible approximation of actual or full performance, the measure provided by way of NMR should be quantitatively and qualitatively equivalent to the act as agreed upon in the contract. For instance, if the hotel appears to be overbooked due to his fault, the tour operator could be required by way of NMR to provide, at its own expense, alternative accommodation of equivalent quality as promised under the contract. To assess the equivalency of this alternative accommodation, for example, the fact that the alternative accommodation belongs to the same category of stars as promised under the contract, could be considered as an indication.

B. Public interests

The normative arguments in favour of NMR do not only relate to private, but also to public or societal interests. In a completely planned economy, where there are only a limited number of goods or services available on the market, substitute performance is not easy to obtain.[37] Consequently, as there are only a limited number of suppliers, monetary damages are deemed to be inadequate.[38] Therefore, if within such an economy, a party does not perform its obligations under the contract, SP is considered to be the essential

[34]Even within common law jurisdictions, it is often argued that we have a moral duty to keep our promises and that the law of contracts enforces that duty (see Charles Fried, *Contract as a Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 17). For an overview, see Mak (n 5) 45ff. See however, for another approach, e.g. Jody S Kraus, 'The Correspondence of Contract and Promise' (2009) 109 Columbia L Rev 1603.

[35]Mak (n 5) 71.

[36]See e.g. Webb (n 31) 41; Brian Coote, 'Contract Damages, *Ruxley,* and the Performance Interest' (1997) 56(3) Cambridge LJ 537 and 542; Stephan A Smith, 'Substitutionary Damages' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart, 2008) 93.

[37]Jacques de Lisle, 'China's Foreign Economic Contract Law and Technology Import Regulations' (1986) 27 Havr Intl LJ 276.

[38]E Allan Farnsworth, 'Legal Remedies for Breach of Contract' (1970) 70 Columbia L Rev 1151.

remedy.[39] Indeed, the goals set by the central economic planners cannot be achieved if the aggrieved enterprise obtains money instead of the goods or services needed for its production process. For instance, in the PRC, operating under a socialist, planned economy before the early 1990s, SP was very important to both the enterprises and the state, and was therefore considered as the essential and primary remedy for breach of contract.[40] Even when contracting parties had expressly agreed that SP would be waived in favour of monetary damages, such a term could be struck down by Chinese courts during the time that a state-planned economy was practised.[41] Against such economic background, when SP is not or no longer possible, an order for NMR (such as alternative goods or services) instead of monetary damages, may be considered as an important remedy.

In other economic models, the same is true in cases of scarcity of goods, crises or extreme inflation, such as during wartime. For instance, during or short after World War II, within some legal systems, courts were particularly willing to award NMR instead of monetary damages. After all, in periods of supply shortages or scarcity (of certain) goods, manifestly high prices, rapid and unpredictable price fluctuations and severe persistent inflation, money loses its value as a 'means of exchange'. That is why, during that period, French courts opted noticeably more often to require the party in breach to deliver alternative goods to compensate for the loss caused by the non-performance, rather than monetary damages.[42] For example, just after World War II, several French car mechanics – which are to be considered as depositaries of the vehicle during the maintenance of the vehicle – were required to deliver equivalent car tyres for those they had lost or were found to be stolen.[43] Indeed, NMR provided an attractive alternative to monetary damages since SP turned out to be impossible. If the whole vehicle was lost or stolen, some even had to replace this item – as a measure of NMR – by providing another, equivalent vehicle.[44]

Once this period of exceptional economic circumstances had elapsed, French courts opted again for mainly monetary damages instead of non-monetary measures, usually arguing that the latter are no longer part of 'modern' times and that only money can be considered as a modern means of exchange.[45] In the PRC, economic and social conditions changed, and since 1993, the nation had transformed its socialist planned economy into a socialist market economy. With the economic rise of the country, commercial goods and services were no longer in as short supply as before. Consequently, SP was no longer considered as the most essential remedy for breach of contract.[46] It follows that NMR would be considered less important in an open market economy.

[39]Bernhard Grossfiedt, 'Money Sanctions for Breach of Contract in a Communist Economy' (1963) 72 Yale LJ 1326.
[40]Lei Chen, 'Specific Performance as a Contractual Remedy in Chinese Courts: An Empirical Study' (2019) 7 Chinese Journal of Comparative Law 95, 99; Shiyuan Han, 'The Performance Interest in Chinese Contract Law: Monetary Awards' in Mindy Chen-Wishart, Alexander Loke and Burton Ong (eds), *Studies in the Contract Laws of Asia: Remedies for Breach of Contract* (OUF, 2016) 40, 41.
[41]See Wang Liming, 'Specific Performance in Chinese Contract Law: An East-West Comparison' (1992) 1 Asia Pac L Rev 18.
[42]André Tunc, 'Comment réparer, dans une économie de taxation et de rationnement le préjudice résultant de la perte d'un bien' (1946) D chron XV 57.
[43]CA Paris 21 June 1945 [1945] Gaz Pal 65; CA Lyon 30 July 1946 [1947] Dalloz 377; T Com Seine 23 June 1947 [1947] Dalloz 506.
[44]For example, see CA Caen 2 March 1943 [1944] JCP 2657.
[45]Brunehilde Barry, *La réparation en nature* (PU Toulouse Capitole 1, 2016) para 178.
[46]Chen, 'Specific Performance as a Contractual Remedy in Chinese Courts: An Emperical Study' (n 40) 95, 100.

The twenty-first century, however, faces challenges putting NMR back on the burner. Indeed, nowadays, climate change and environmental degradation are an existential threat to this planet. To overcome these challenges, there is, among others, a need for a new growth strategy and resource-efficient economy. For instance, within the Green Deal of the European Union,[47] there is a strong focus on the development of a more sustainable consumption model through the development of a circular economy.[48] A circular economy is a manifestation of economic models where the value of products and materials is maintained for as long as possible, where cycles rather than linear processes dominate.[49] The goal is to throw away as little as possible and to reduce the need for purchasing new commodities, by emphasizing reuse, repair, and high-quality recycling, rather than single use only. In this transition towards more sustainable consumption, the law of contract has a role to play as well. For instance, in terms of remedies for breach of contract, it would be more sustainable to provide a right of repair (e.g. for defective goods), rather than providing monetary damages allowing to aggrieved party to obtain substitute performance on the market (e.g. by buying new goods). Indeed, repair can be an important tool to reduce the amount of waste and to prolong the lifespan of goods, which is the aim of a more sustainable and circular economy.[50] The same is true for the replacement of defective goods, not by new goods, but by refurbished or remanufactured goods.[51] It follows that the objectives of a circular economy can better be met by some forms of NMR than by monetary damages. NMR as such is definitely not in any event the most sustainable remedy, however, it is clear that some forms of it (such as repair of defective goods or replacement by refurbished or remanufactured goods) are more sustainable than monetary damages. Within this recent tendency towards a more sustainability, NMR could provide a highly relevant solution in the search of more sustainable remedies for breach of contract.

The need for a certain degree of sustainability within the law of contract has to some extent been recognized by the Chinese CC. For example, Article 509 of the Chinese CC[52] draws the attention of the contracting parties to some essential values of contemporary Chinese society which they should take into account when performing the contract, including environmental protection and the principle of resource saving.[53] Article 558 of the Chinese CC provides a sustainability clause in the context of the parties' obligation

[47]The European Green Deal, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 11 December 2019, Brussels, COM(2019) 640 final.
[48]See 'A new Circular Economy Action Plan', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 11 March 2020, Brussels, COM(2020) 98 final.
[49]Comp Ellen MacArthur Foundation, *Towards the Circular Economy. Economic and Business Rationale for an Accelerated Transition* (Ellen MacArthur Foundation, 2013) 7.
[50]For example, Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 4 ERPL 851; Evelyne Terryn and Vanessa Mak, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) 43 Journal of Consumer Policy 227.
[51]See Vanessa Mak and Enna Lujinovic, 'Towards a Circular Economy in EU Consumer Markets – Legal Possibilities and Legal Challenges and the Dutch Example' (2019) 8 EuCML 4.
[52]Article 509 of the Chinese CC: 'Each party shall fully perform its respective obligations as agreed upon. The parties shall abide by the principle of good faith, and perform obligations of notification, assistance, and confidentiality, etc. in accordance with the nature and purpose of the contract and the trade practice. The parties shall avoid wasting resources, polluting the environment and destroying the ecology in performing the contract.'
[53]Yingyi Li, 'Le nouveau droit chinois des contrats' (2019) Rev Int Dr Comp 983, 991.

to recycle used articles.[54] These new provisions are very modern and undoubtedly fit into a Civil Code of the twenty-first century. However, the question remains whether and how these statutory provisions, worded in very general terms, will be enforced by the courts: will these provisions be used as a legal basis to impose a more sustainable conduct on the contracting parties during the performance of the contract (for example, by rejecting a claim for a remedy such as monetary damages where a more sustainable remedy such as repair is available and reasonable under the circumstances), or will these statutory provisions rather remain a paper tiger, codifying a hollow principle only. It is difficult to predict what path the courts will take, all the more so because these legal provisions remain very general in nature and provide little guidance on the contracting parties' concrete conduct. However, bearing the example of the principle of good faith in mind, it is clear that courts are ready to accept that very general provisions and principles can lead to very concrete obligations, based on the concrete circumstances, imposing a precise conduct on the parties in the performance of the contract.

III. Availability of non-monetary relief and its application

Arising from the above theoretical framework, the specific systems on the availability of NMR deserve being individually examined and discussed in China (A), the European Union (B) and national laws of EU Member States (C).

A. China

1. Legal framework

Under the Chinese CC, there are three provisions which one may argue, touches upon the availability of NMR. Article 577 provides

> 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.

This provision is important in the sense that it seems to allow the availability of NMR under the category of 'remedial measures'. Indeed, this category could refer to non-monetary measures other than SP, since the latter is listed in that provision as well. Furthermore, according to Article 582 of the Chinese CC,

> the aggrieved party may, by reasonable election in the light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of retuned goods, or reduction in price or remuneration, etc.

Consequently, it appears that the defaulting party may be required to provide, by way of compensation, a non-monetary remedy different as agreed upon under the contract. For instance, repair, redoing and replacement are considered as major forms of civil liability under Article 179 of the Chinese CC.

[54] Article 558 of the Chinese CC: 'After the termination of the rights and obligations, the parties shall perform the obligations of notification, assistance confidentiality, and recycling of used articles, etc. pursuant to the principle of good faith and in accordance with trade practices.'

However, it has been argued by some that all non-monetary measures in the aforementioned provisions, namely, repair, replacement and remaking, are deemed as special forms of SP.[55] The Chinese CC and other provisions do not make a distinction between replacement of fungible goods and unique goods. Indeed, whether these non-monetary measures provide for cure of defective performance, repair, replacement or redoing – all these measures are aimed at achieving actual and full performance according to the terms of contract, and are therefore considered as 'sub-forms' or 'concrete forms' of SP.[56] Consequently, NMR is not specifically addressed under these provisions. Generally, the contractual remedies under Chinese law have a somewhat hybrid character, borrowing from mainly civil law, but also from common law influences, additionally strongly inspired by international instruments such as United Nations Convention on Contracts for the International Sale of Goods (CISG). As a result, the use of these multiple sources created gaps and inconsistencies within the predecessor of the Chinese CC, namely the Chinese contract law of 1999 (henceforth 'CCL'),[57] which has been substantially followed in the Book on Contract Law of the Chinese CC. With regard to the availability of NMR, as articulated, such a gap exits. When the breaching party is required to compensate for the loss caused by the non-performance, the CCL only provides for the term 'damages', without specifying whether these are monetary or can be awarded in a form other than the payment of a sum of money. For instance, Article 113(1) CCL sets forth the general rule on compensation for breach of contract, but remains silent on whether NMR is available.[58] The same is true for Article 107 CCL, a key provision on liability for breach of contract, providing a non-exhaustive enumeration of the remedies available in the event of non-performance.[59] Yet, in the judicial interpretations issued by the Supreme People's Court of the PRC (henceforth 'SPC'), no answer to this question can be found.[60] Hence, one may argue that NMR has not attracted as much attention in Chinese law.

[55]'Acceptance of retuned goods' and 'reduction in price or remuneration', as provided in Chinese Contract Law (Art 111), are, however, not considered as SP. The first implies a refund of the price and is therefore a right arising form termination/dissolution/rescission of the contract, whereas the second is a monetary remedy related to damages. See Bing Ling, *Contract Law in China* (Sweet & Maxwell, 2002) para 8.082; Chen, 'Availability of Specific Remedies in Chinese Contract Law' (n 9) 35–36; Han Shiyuan, *The Law of Contract* (4th edn, Law Press, 2018) 766–67.

[56]For instance, see Ling (n 55) para 8.083 (these remedies 'serve to cure the defects in the performance and achieve the actual and proper performance of the contract'); Zhang Mo, *Chinese Contract Law: Theory and Practice* (Brill, 2005) 304 (these remediese 'are themselves sort of continuing performance because they are aimed at having the contract performed as agreed upon by the parties' and according to this author, 'continuing performance' is 'deemed as SP or actual performance because it involves compelling the party in breach to complete the contract performance. (…) Unlike the performance under the contract, which is conducted by the performing party on a voluntary basis, the continuing performance is the legal obligation that would be enforced through compulsion'); Chen, 'Availability of Specific Remedies in Chinese Contract Law' (n 9) 35 (these remedies 'provide the buyer with the performance for which he contracted. They will give the creditor full protection of his performance interest. (…) In Chinese law, repair and replacement are regarded as sub-forms of the general right of SP').

[57]Lei Chen and Larry A DiMatteo, 'Inefficiency of SP as a Contractual Remedy in Chinese Courts: An Empirical and Normative Analysis' (2019) 40 Nw J Int'l L & Bus 276; John H Matheson, 'Convergence, Culture and Contract Law in China' (2006) 15 Minn J Int'l L 329.

[58]This provision reads as follows: 'Where a party failed to perform or rendered non-conforming performance, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract.'

[59]This provision reads as follows: 'If a party fails to perform its obligations under a contract, or rendered non-conforming performance, it shall bear the liabilities for breach of contract by SP, cure of non-conforming performance or payment of damages, etc.'

[60]As far as the CCL is concerned, the SPC issued two judicial interpretations, namely Interpretation I on Several Issues Concerning the Application of the Contract Law, adopted 1 December 1999; and Interpretation II on Several Issues Concerning the Application of the Contract Law, adopted 9 February 2009. See also Interpretation III concerning the application of Law for the trial cases of disputes over sales contracts, adopted 31 March 2012.

The text of the predecessor of the Chinese CC, the CCL, suggests that only monetary damages are available. Indeed, in the event of breach of contract, Articles 107 and 113 CCL provide for the 'payment' of damages. Since in common parlance 'payment' is only made in money, this wording could suggest that, under the CCL, damages are deemed to be considered as the payment of a sum of money. In some textbooks on Chinese contract law, damages for breach of contract are indeed defined as 'an amount of money'.[61] Other scholars refer to an 'equivalent in money' of what actual performance of the contract would have provided,[62] or without reservation, mention only monetary damages in this regard.[63] Apparently, under the CCL, compensation for breach of contract could take other forms than the payment of a sum of money. Indeed, it has been maintained that 'damages are generally the monetary remedy to compensate the loss that the aggrieved party suffers from the breach', but that 'in certain cases, damages may take the form of 'in kind'. […] If the 'in kind' damages are awarded, they must be something different from the subject matter of the contract, or otherwise, the 'in kind' would not be the damages, but continuing performance'.[64] It follows that, at least according to a number of legal scholars, under the CCL, the defaulting party may be required to provide, by way of compensation for the loss caused by the non-performance, a non-monetary act different as agreed upon (i.e. no SP), aimed at placing the aggrieved party in as good a position as if the contract would have been fully performed. Therefore, at least to some legal scholars, NMR is deemed available under the Chinese law of contract.

In any event, it is clear that Chinese law is not averse to non-monetary remedies for breach of contract. Also, Chinese contract law does not recognize a rule preferring damages over SP.[65] Theoretically, there is no hierarchy of remedies. Consequently, all remedies are optional to the aggrieved party. This is to say, the aggrieved party is free to request SP or other remedies. Nevertheless, scholars speculate, recently confirmed by an empirical study,[66] that in China's judicial practice, compared to the widespread use of monetary damages, there is limited use of SP.[67] However, the availability of SP under Chinese contract law is broader than under the common law tradition (e.g. SP for delivery of fungible goods, such as under Chinese law, vis-à-vis unique goods only under English law).[68] This confirms, up to a certain extent, the somewhat hybrid character of the law of remedies under the Chinese contract law, receiving both civil and common law influences.

Some other Chinese law provisions may suggest that Chinese law provides more than just SP and monetary remedies. For instance, within the specific provisions on nominate contracts, Article 801 of the Chinese CC (formerly Article 281 CCL), provides that where the construction project fails to meet the prescribed quality requirements due to any reason attributable to the constructor, the developer is entitled to require the constructor 'to

[61]See, for example, Ling (n 55) para 8.094.
[62]See Chen, 'Damages and SP in Chinese Contract Law' (n 7) 382.
[63]For example, see Jacques H Herbots, *Contracts in the People's Republic of China* (die Keure, 2018) para 91ff; Shiyuan Han, 'The Performance Interest in Chinese Contract Law: Monetary Awards' in Mindy Chen-Wishart, Alexander Loke and Burton Ong (eds), *Studies in the Contract Laws of Asia: Remedies for Breach of Contract* (OUF, 2016) 40.
[64]Mo (n 56) 305.
[65]See e.g. Ling (n 55) para 8.080; Chen, 'Availability of Specific Remedies in Chinese Contract Law' (n 9) 24.
[66]See Chen, 'Specific Performance as a Contractual Remedy in Chinese Courts: An Empirical Study' (n 40) 95.
[67]See Ling (n 55) para 8.093.
[68]Chen, 'Availability of Specific Remedies in Chinese Contract Law' (n 9) 35–36.

repair, re-construct or make alteration free of charge within a reasonable time […]'. To satisfy the aggrieved party's performance interest, which is also the guiding principle under Chinese contract law, one could argue that non-monetary measures other than SP could be available under this provision.

The enactment of a Chinese CC is intended to codify existing law by way of rationalization of sources on the one hand, and to reform Chinese civil law on the other hand, in order to provide an answer to the actual needs of contemporary Chinese society.[69] As far as the provisions on contract law are concerned, it has been argued that the Chinese CC is a compilation rather than a reform, coordinating the CCL with its judicial interpretations issued by the SPC, without changing the essence of its provisions.[70] With regard to the provisions on compensation for breach of contract, the text of the CCL remains indeed largely unchanged. On closer analysis, Articles 577 and 584 of the Chinese CC reaffirm the text of Articles 107 and 113 of the CCL. Notwithstanding the absence of an explicit provision, as under the CCL, NMR may therefore be available under the Chinese CC. In this respect, the Chinese CC seems to be closely aligned with the availability of NMR as provided for by modern civil codes of Western European legal systems, or similar national reform projects (see below).

Article 111 of the CCL provides an array of remedial measures, which facilitate the actual performance of contractual obligations, when defective performance is rendered. These include the following five remedial measures, namely, repair, replacement, redoing, return of goods and price/remuneration reduction. If the delivered goods fail to meet the specified quality under the contract, the buyer is entitled to either demand that the seller bears the cost of curing the defect, or replace the goods. The buyer may also return the goods for a full refund or ask for a reduction in price. Clearly, among these five, return of goods is a remedy arising from the rescission of the contract and price reduction is a separate remedy which deserves further discussion beyond the scope of this paper. The former three measures give aggrieved parties, or buyers in cases of sale of goods contracts, a right to demand proper performance, which has been provided in the GPCL.[71]

The remedy of 'repair' refers to situations where a seller is requested to fix defective/non-conforming goods, which have already been delivered to a buyer, in accordance with the contract's specifications. Replacement, in short, means that non-conforming goods are replaced in their entirety. In this situation, a delivery of defective goods is remedied by a subsequent delivery of replaced goods that conform to the terms of the contract. It is notable that both repair and replacement are general remedies and therefore apply to both consumer and commercial sales contracts. However, the remedies of repair and replacement are frequently offered by sellers on a voluntary basis in order to maintain consumer relations.[72]

Repair and replacement, as remedial measures, give the aggrieved party full protection of his performance interest. What then, is the relationship between these remedies and SP? In Chinese law, repair and replacement are regarded as sub-forms of the general right of SP. In some contract law textbooks, repair and replacement are put on par

[69]Jiayou Shi, 'La rédaction du Code civil chinois: entre la compilation et l'innovation' (2019) Rev Int Dr Comp 945.
[70]Yingyi Li, 'Le nouveau droit chinois des contrats' (2019) Rev Int Dr Comp 983.
[71]Art. 134 (1) GPCL.
[72]Ling (n 55) 427–28. For example, Consumer Protection Law of 1993, and Provisions on the Liability for Repair, Replacement and Returning of Goods for Certain Goods (State Technical Supervision Bureau) 1995.

with continued performance as supplementary performance methods, under the heading of 'concrete forms of specific performance'. Therefore, the scope of application of repair and replacement should be the same as that of SP, namely that of general availability, subject to exceptions. In other words, the aggrieved party is entitled to either of these remedies as of right, upon the defaulting party's breach of his obligation to deliver goods which are in accordance with the contractual terms. Furthermore, the buyer has a free choice between repair and replacement, and can select the remedy that best suits his interests. For example, if repair cannot make the delivered goods as good as new, replacement would be a more appropriate remedy.

In what circumstances is the offer to repair and replace by the defaulting party appropriate? There is no easy answer to this, and Chinese courts take many factors into consideration when deciding this issue, including *inter alia*, whether the selection of the remedy of repair is made within a reasonable time, whether the selected remedy causes unreasonable inconvenience for the defaulting party, and more importantly, whether the aggrieved party has also turned to other remedies inconsistent with repair and replacement, such as price reduction.

Essentially, the availability of NMR is subject to the same restrictions as the availability of SP. These restrictions are mainly based on general grounds, such as impossibility, disproportionality and good faith. Thus, likewise SP, NMR will not be available where (1) the non-monetary act requested by way of NMR would be legally or practically impossible; (2) the subject matter of that non-monetary act would be unsuitable for enforcement (e.g. because of the personal nature of the obligation or when it would be offensive and against the religious or moral values of the party in breach) or would be unreasonably expensive; or (3) the aggrieved party fails to request the non-monetary act within a reasonable time after he or she has become, or could reasonably be expected to have become, aware of the non-performance.[73] Nonetheless, while the legal principle of NMR is permissible under the Chinese CC, a detailed legal test governing NMR remains unclear in Chinese law. One needs to turn to cases law for more insights.

2. Judicial practice

It seems that while Chinese courts are open to NMR, they rarely award it. A possible reason is perhaps that in view of the time limit of the trial prescribed by the Chinese Civil Procedure Law, the courts may find it time-consuming and uncertain when the party requests the court to support NMR. Litigation in China follows the procedures of first instance and second instance. Therefore, the parties may be unwilling to go to court to seek an order of NMR, after the remedial measures have been taken. If the aggrieved party is not satisfied with the remedial measures taken by the defaulting party, and the remedial measures including NMR are used as a ground by the defaulting party for reduction or exoneration of liability in the defense. For example, in *Ren Juhua v Jiangsu Tongcheng Huihuang International Travel Agency*,[74] the claimant complained about the service standard provided by the defendant agreed in a travel contract. Among others, the claimant argued that at certain dates during the trip, the hotels were not provided

[73]Comp Art 110 CCL, reaffirmed by Art 580 Chinese CC.

[74]*Ren Juhua v Jiangsu Tongcheng Huihuang International Travel Agency*, Wuxi Intermediate People's Court, Jiangsu Province (2019) Su 02 Minzhong 2676.

as promised in the travel contract. However, both the first instance court and the appeal court have taken the view that NMR has been provided by the defendant in providing the alternative hotels at the specified dates. In addition, the defendant took the initiative to pay the price difference between the hotel as contractually promised and the hotel where they have actually stayed. As a consequence, the Court ruled in favour of the defendant that provided the NMR.

Another hurdle for the limited use of NMR awarded by Chinese courts, perhaps is due to the fact that the judges do not have a clear-cut guidance on the availability and criteria of NMR. Where the claimant only requests monetary compensation in the event of contract breach, whether the Chinese courts award NMR? If so, to what extent? And under what circumstances? Framed as it is, the Chinese CC does not provide an explicit answer. In the light of the above analysis, Chinese law does not preclude NMR but the language in the relevant provisions is vague and therefore subject to various interpretations. Under time pressure to conclude a case within a statutorily prescribed period of time, Chinese judges may not prefer such an indirect approach through exercising judicial discretion in order to award the NMR, particularly when the claimant does not request such a remedy. That explains the rare use of the NMR in Chinese judicial practice. Hence, certain judicial interpretations issued by SPC that provide detailed guidelines are warranted if there is a need to expand the use of NMR in China.

B. European Union

To the present day, there is no such thing as a EU law of contract. However, the internal market is the most powerful motivation and driving force for legal harmonization within the EU, particularly in contract law.[75] Consequently, some issues of contract law, relating to certain specific types of contracts – basically in the area of consumer law – are treated, up to a certain point, uniformly across all EU Member States.[76] For instance, under the EU Passenger Regulations, the defaulting carrier of passengers by air,[77] rail,[78] ship[79] and bus or coach,[80] is required to provide alternative transportation or arrange for rerouting in case of cancellation or sufficient delay of the transportation initially booked, and is required to compensate the inconvenience caused by the delay with non-monetary measures, including catering, refreshments, means of communication, and even hotel

[75]Reinhard Zimmermann, 'Comparative Law and the Europeanization of Private Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP, 2019) 589.

[76]In contrast to the way it is used here, the term 'European contract law' can also be used to refer to those rules which are in force in all Member States of the European Union, as a result of primary European legislation (in particular the Treaties on the European Union), or secondary legislation (such as European regulations and directives), or even general legal principles developed by the Court of Justice of the European Union.

[77]See Arts 8-9 Reg 261/2004/EC of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Reg 295/91/EEC [2004] OJ L46/1.

[78]See Arts 16 and 18 Reg 1371/2007/EC of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14.

[79]See Arts 17 and 18 Reg 1177/2010/EC of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Reg 2006/2004/EC [2010] OJ L334/1.

[80]See Arts 8, 19 and 21 Reg EU/181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Reg 2006/2004/EC [2011] OJ L55/1.

accommodation. It is clear that these measures cannot be considered as a form of SP, nor as monetary damages. These measures provide NMR.

Some EU Directives provide for NMR in specific situations. For instance, the Package Travel Directive provides where a significant proportion of the travel services cannot be provided as agreed upon in the package travel contract, according to Article 13(5), 'the organiser [of the package travel] shall offer, at no extra cost to the traveller, suitable alternative arrangements of, where possible, equivalent or higher quality than those specified in the contract […]'.[81] For example, if the hotel appears to be overbooked, it follows that the defaulting organizer of the package travel is required to provide, at its own expense, alternative accommodation of, where possible, equivalent or higher quality than the hotel originally booked, such as an equivalent hotel of the same or a superior category, or a bed and breakfast nearby. The same solution applies if, for example, a planned excursion (e.g. safari) or way of transport (e.g. boat trip) cannot take place: rather than paying monetary damages, the organizer in breach is primarily required to arrange a non-monetary equivalent for what actual performance would have provided. Another example is provided by the EU Consumer Sales Directive, in which replacement and repair are codified as primary remedies.[82] Whereas the replacement of fungible goods is to be considered as SP, the replacement of unique goods by alternative goods should be considered as NMR. For example, the replacement of unique goods (e.g. a pet or second-hand car) provides the aggrieved buyer, by way of compensation, something different as initially agreed upon.

The aforementioned EU Directives are binding as to the result to be achieved, upon each EU Member State, but these legal acts are not fully effective between private parties until they are implemented by the individual Member States and incorporated into their national law. Therefore, these EU directives do not lead to uniform rules across the EU Member States.

C. National law of EU member states

At the national level, several European jurisdictions institutionalize NMR. The availability of NMR has been accepted in legal systems in the Romanistic (e.g. France and Belgium) and Germanic (e.g. Germany and Austria) legal traditions, as well as in legal systems which are somewhere in between these two legal traditions (e.g. the Netherlands and Switzerland).[83] Within these legal systems, the rules of availability of NMR are framed in three different models.

[81]Dir EU/2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Reg (EC) No 2006/2004 and Dir 2011/83/EU of the European Parliament and of the Council and repealing Council Dir 90/314/EEC [2015] OJ L326/1 (Package Traval Directive).

[82]Art 3(3) Dir 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12, replaced by Dir EU/2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Reg EU/2017/2394 and Dir 2009/22/EC, and repealing Dir 1999/44/EC [2019] OJ L136/28 (however, remedies such as repair and replacement remain unchanged, see Art 13).

[83]The classification of legal traditions used here is based on Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP, 1998); René David and John EC Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens, 1985). The attempt to make a classification of legal families is sometimes dismissed as pointless or Eurocentric, reason why it should be replaced by the paradigm of 'legal traditions' (see H Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP, 2019) 423; H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP, 2014).

In the first model, NMR has been codified as an ordinary remedy. The Netherlands provide a good example. According to Article 6:103 of the Dutch Civil Code (*Burgerlijk Wetboek,* henceforth BW), 'loss is compensated in money. The court may, nevertheless, award another kind of compensation than a sum of money if the injured party has requested so […]'. This provision forms part of the general regime of obligations, and is therefore also applicable to the loss caused by breach of contract.[84] NMR is equally available under the German Civil Code (*Bürgerliches Gesetzbuch*, henceforth BGB).[85] Indeed, according to § 249, para 1 BGB, which applies for contractual relations as well,[86] 'a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred'. To the extent that this is not possible or is not sufficient to compensate for the loss, 'the person liable in damages must compensate the obligee in money' (see § 251, para 1 BGB). A very similar solution is laid down in the Civil Code of Austria (see § 1323 *Allgemeines bürgerliches Gesetzbuch*, henceforth ABGB).[87]

In the second model, the civil code does not provide in what form compensation shall be awarded. Switzerland provides an example. According to Article 43(1) of the Swiss Code of Obligations (*Code des obligations/Obligationenrecht*, henceforth CO/OR), 'the court determines the form and extent of the compensation provided for damage incurred, with due regard to the circumstances and the degree of culpability'. Apparently, compensation may take multiple forms. It is therefore accepted that Swiss courts may award monetary compensation or compensation in a form other than the payment of a sum of money.[88] Indeed, the Federal Supreme Court of Switzerland confirms that this provision does not preclude the award of NMR.[89]

The third model indicates the situation where the civil code prescribes only monetary damages, but case law has accepted that these purely monetary provisions do not preclude the award of NMR instead. Napoleon's Civil Code of 1804 (*Code civil,* henceforth C civ) provides an example. Although the provisions on compensation for breach of contract refer only to monetary damages (see Arts 1142 and 1146-1155 C civ), the French Supreme Court (*Cour de cassation*) has implicitly accepted in several decisions that under the Code Napoleon, NMR is available. The case *Courage* is well known.[90] In the performance of a construction contract, the owners identified some defects, which were not attributable to the constructor, but only to the architect. The Court of Appeal therefore required the architect to carry out remedial measures on the structure. However, in his appeal before the Supreme Court, the architect argued that his contractual obligations were limited to drawing up plans and supervision of the work and he was under no obligation to carry out any remedial measures or reparations to the structure. The Supreme Court rejected this argument. By way of SP, indeed, the architect could not be required to

[84]For example, see H Bart Krans, *Schadevergoeding bij wanprestatie* (Kluwer, 1999) 297; Arthur S Hartkamp and Carla H Sieburgh, *Verbintenissenrecht in het algemeen,* 6-II in *Asser serie* (Kluwer, 2017) para 21.
[85]For example, see Karl Larenz, *Lehrbuch des Schuldrechts. Allgemeiner Teil* (CH Beck, 1987) 421; Lange and Schiemann (n 12) 216–17.
[86]Hein Kötz, *Vertragsrecht* (Mohr Siebeck, 2012) para 1023.
[87]For example, see Helmut Koziol, *Grundfragen des Schadenersatzrechts* (Jan Sramek Verlag, 2010) 298–99 para 8/12.
[88]Ingeborg Schwenzer, *Schweizerisches Obligationenrecht. Allgemeiner Teil* (Stämpfli, 2016) para 15.01; Pierre Tercier and Pascal Pichonnaz, *Le droit des obligations* (Schulthess, 2012) para 1250.
[89]For example, see ATF 13 December 2016, n° 6B_1243/2016, www.swisslex.ch.
[90]Cass civ (3) 28 February 1969, Bull civ 1969.III.182, no 67-10.996.

perform any repairs or remedial measures on the structure. However, as a form of NMR, such an order was perfectly conceivable. In legal doctrine, this decision quickly developed into a landmark case.[91] Also under Belgian law a landmark case in favour of the availability of NMR was recently provided by the Belgian Supreme Court (*Cour de cassation*). The Belgian Supreme Court accepted that the current provisions of the Belgian Civil Code (*Burgerlijk Wetboek/Code civil,* henceforth BW/C civ), which are founded on the Code Napoleon and have remained virtually unchanged over the last two centuries, do not preclude an award of NMR for breach of contract.[92]

The recent reforms on the civil codes in Europe identify a trend towards the first model. After the enactment of the new Dutch Civil Code (1992) and the reform of the German Civil Code (2002), reform projects dealing with the law of obligations have been elaborated or suggested in several legal systems, including France, Belgium, Luxemburg and Switzerland. If it were up to these reform projects, NMR will be codified within these legal systems as an ordinary remedy. For instance, on 1 October 2016, a new law of contract has entered into force in France.[93] According to the new Article 1231 of the French Civil Code, in the event of breach of contract, the aggrieved party may 'claim reparation of the consequences of non-performance'. Although it is not clear from this text in what form 'reparation' may be awarded, the Explanatory Memorandum confirms that this provision 'should […] not be interpreted as calling into question the case law awarding, for example, NMR for breach of contract'.[94] A new project of 29 July 2020, issued by the French government aimed at reforming the rules on civil liability, including the obligation to compensate for the loss caused by non-performance, is even more explicit. Indeed, according to Article 1259 of this project, compensation for civil liability shall be awarded 'in money or by way of NMR'.[95]

IV. Legal tests

Despite the diverging legislative models in Europe and China, it turns out that a universal legal test of the NMR is almost impossible to define. Some doctrines can be gleaned from a survey of case law.

First, the measure providing NMR may include *material* acts (e.g. repair of defective goods or replacement of unique goods) or *legal* acts (e.g. compelled transfer of an intellectual property right, such as a domain name or trade mark, for example after its personal registration by an employee to the prejudice of his/her employer, known as

[91] See, for example, Barry (n 53) para 28–29; Geneviève Viney, Patrice Jourdain and Suzanne Carval, 'Les effets de la responsabilité civile' in Jacques Ghestin (ed), *Traité de droit civil* (LGDJ, 2017) para 66.

[92] Cass (1) 3 October 2019, no C.17.0621.N [2020] TBBR/RGDC 84 ann Sébastien De Rey and [2020-21] RW 136 ann Sébastien De Rey.

[93] See Ordonnance no 2016-131 of 10 February 2016, JORF no 0035 of 11 February 2016, no 26, confirmed by Act no 2018-287 of 20 April 2018, JORF no 0093, 21 April 2018, no 1.

[94] Free tanslation of the Report to the President of the French Republic of 11 February 2016 on the Ordonnance n° 2016-131, JORF no 0035, para 25 (« ne doit […] pas être interprété comme une remise en cause de la jurisprudence autorisant par exemple la réparation en nature du préjudice résultant d'une inexécution contractuelle »).

[95] See *Proposition de loi portant réforme de la responsabilité civile*, Sénat session extraord. 2019-20, n° 678, 29 July 2020, Art 1259 (« La réparation peut prendre la forme d'une réparation en nature ou de dommages et intérêts, ces deux types de mesures pouvant se cumuler afin d'assurer la réparation intégrale du préjudice »).

'cybersquatting'[96]). A striking example of a *material act* is provided by the Belgian Supreme Court.[97] In this case, the city of Namur ordered a sculpture to be placed in front of the casino. More than 30 years later, due to renovations, the sculpture was taken away by the city and never returned. A few years later, the artist found his sculpture in the garden of the father of the contractor who carried out the renovations at the time. However, the sculpture was badly damaged. Although the city was held liable for disregarding the moral rights of the artist, the artist was not seeking monetary damages. Instead, he obtained by way of NMR the (re)production of a new, equivalent sculpture based on the initial sculpture, intended for the same or a different, equivalent public place. A striking example of a *legal act* by way of NMR is provided by a Dutch court. In the winding up of an inheritance a notary wrongfully declared X to be the legitimate heir of a painting as the court attributed it to Y. However, in the meantime X had sold it to a *bona fide* art dealer. Rather than paying monetary damages, the notary was required to repurchase the painting at 85.000 EUR from the art dealer who bought it from X at the price of 25.000 EUR.[98] This provided the aggrieved party clearly with more satisfaction than monetary damages, as there was no substitute on the market for this unique good.

Second, NMR may include either a *positive* or a *negative* obligation. A positive obligation is an obligation to do something. For instance, imagine a depository required to provide by way of NMR equivalent goods instead of the original goods after infringing the obligation to return the original items in a deposit contract.[99] Another example of an obligation positive in nature: a landlord breached his obligation of maintenance and repair, which severely disrupted the tenant's peaceful enjoyment of the leased property. Therefore, by way of NMR, a judge ordered the landlord to provide another equivalent rental property during the maintenance and reparations.[100] From the tenant's perspective, this order avoids practical concerns when looking for a new rental property, and therefore avoids potential transaction costs. This form of NMR may be considered somewhat far-reaching, but in the context of defaulting real estate agencies, having multiple properties for rent, such an award is definitely conceivable.[101] NMR has also been accepted in insurance contracts. Where the insurer infringes his obligation to provide information on what is covered by the insurance contract, in particular that specific circumstances are not covered under the contract, courts have ordered the insurer, by way of NMR, to provide coverage even though the insurance contract did not provide for such coverage.[102] By way of NMR for the loss caused by a *culpa in contrahendo* (i.e. the liability for breaking off negotiations in a manner contrary to good faith), an

[96]For example, the Federal Supreme Court of Switzerland accepted that the transfer of a domain name after cybersquatting may be ordered by way of non-monetary compensation, see e.g. ATF 19 May 2003, no 4C.377/2002, [2003] sic! 822, [2003] Assistalex no 10151 and [2004] JdT 318.

[97]Cass 5 May 2011, no C.10.496.F, [2011] Arr Cass 1157, [2011] Pas 1272, [2012] A&M 437, [2011] ICIP 50, [2012] RCJB 363 ann L Van Bunnen, [2012] RGAR no 14.846 ann E Estienne, [2012] TBBR/RGDC 247 ann P Wéry.

[98]Trib Amsterdam 6 August 2010, ECLI:NL:RBAMS:2010:BN:3398.

[99]Accepted, for example, by the French Supreme Court: Cass civ (1) 20 January 1953, [1953] Dalloz 222 and [1953] JCP II.7677.

[100]See for Belgium: JJP Jumet 11 September 1995 [1995] RRD 458.

[101]For instance, this possibility is codified under Swiss law in Article 259c CO/OR as a right for the landlord. Also the German Federal Court of Justice confirms that this form of NMR may be available under general § 249, para 1 BGB (BGH 9 July 1986 [1987] NJW 50).

[102]For example, under Belgian law: Mons 10 June 2002 [2004] TBBR/RGDC 567 ann Flavie Vermander.

obligation to (re)negotiate or to enter into the contract has been accepted by case law in some legal systems.[103] In addition, case law provides concrete examples of NMR including a *negative* obligation.[104] For instance, imagine the breach of a non-compete clause. Rather than the payment of monetary damages compensating for the (potential) loss of revenue, it is possible to restrain the breach of contract by an injunction for the remaining non-compete period according to the clause (SP), and for the period of infringement, to extend the duration of the non-compete obligation with the period of infringement (NMR). In contrast to monetary damages, which mainly compensate for the loss of revenue, this extension provides the aggrieved party the possibility to (re)tie potentially customers to its business in a period of exclusive activity.

This overview of case law indicates that the distinction between SP and NMR, although clear from a theoretical angle, in practice, is not always straightforward. For instance, in construction or service contracts, this distinction gives rise to discussion: the contractor's obligation to repair, is that a form of SP or NMR? A decision of the French Supreme Court provides a striking example.[105] During the construction of a house, the bathroom was built in spite of the plans above the bedroom. The noise in the bathroom severely disturbed the sleep of the residents. SP would have resulted in the destruction of the bathroom and the appropriate rebuilding of it. However, probably because this would have been unreasonably expensive, the French Supreme Court accepted that the defaulting party was required to install soundproofing in the bath- and bedroom, even though this non-monetary measure was not provided by the contract. This measure could not be ordered by way of SP, however, it could be imposed as a form of NMR. It follows that the contractor's obligation to repair can be regarded as either SP or NMR. This assessment depends on the reparation works required to remedy the defects and which reparation works are provided by the contract. If the defects have to be remedied by reparation works other than that for which the contract was entered into, NMR is concerned.

The overview of case law within EU Member States on potential forms of NMR is not intended to be exhaustive – since this would be impossible – but rather provides a starting point, identifying examples for which NMR could be a suitable alternative to monetary damages for breach of contract. This may be a source of inspiration for Chinese law, provided that this remedy is available under the Chinese CC.

V. Concluding remarks

NMR is not to be confused with SP. Unlike SP, an order for NMR does not provide actual or full performance according to the terms of contract. NMR provides instead, by way of compensation for the loss caused by the non-performance, an act different as agreed upon, aimed at placing the aggrieved party in as good a position as if the contract would have been fully performed. Accordingly, if a party does not perform its obligations under the contract, or does not perform them properly, the distinction between SP and the payment of monetary damages is not as sharp. Between these two major types of remedies, transitional non-monetary measures may be available. In its very nature,

[103]For example, under Dutch law, see GiEA Curaçao 11 December 2017 [2018] NJF 68.
[104]Comp, for example, under French law: Cass com 25 June 1991 [1991] Bull civ IV 236, [1991] RJDA 6217 no 708, [1992] JCP E II.129 no 303 ann G Virassamy, [1992] Dalloz 249 ann A Batteur and [1992] RTD civ 391 ann J Mestre.
[105]Cass civ (3) 26 May 1994 [1994] Bull civ III 100 no 92-15911 and [1994] JCP G 3809.

NMR provides the closest possible approximation of SP for cases in which SP turns out to be impossible or unreasonable.

Albeit monetary damages are and will always remain the most frequently awarded form of compensation, this comparative analysis reveals that NMR has a full role to play within a modern legal system. Unlike monetary damages, NMR provides a lead for a more creative and less rigid way of compensation. Under certain circumstances, this alternative form of compensation may turn out to be more appropriate according to the nature of the loss caused by the non-performance and the protected interests of the aggrieved party. Indeed, under all civil codes of Western European legal systems, the concept of compensation for non-performance is understood more broadly than monetary damages only. Moreover, also recent reform projects and new enactments of the law of contract within these jurisdictions, make way for NMR. The same could be true under Chinese contract law. As explained, other forms of compensation than monetary damages are available under the CCL, which has remained substantially unchanged in the Contract Law Book of the Chinese CC.

We argue that in the twenty-first century, when sustainability is increasingly pursued as a matter of a guiding principle, the law of contract needs to be re-gigged up to reflect this trend. The availability of NMR can meet not only private interests, but also can comply with public interests. Up to now, however, NMR as an alternative form of compensation has remained, to a certain extent, a blind spot. This article does not attempt to provide a full overview of potential forms of NMR and its constituting test. It rather provides the legal framework and highlights the under-utilisation of this remedy, identifying examples for which NMR could be an appropriate alternative to monetary damages for breach of contract. Drawing upon the European recent experiences, a wider availability of NMR seems to be a sensible approach forward. This appears to be an undertaking done by the Chinese courts in implementing and interpreting the Chinese CC.

* * *

ORCID


Lei Chen http://orcid.org/0000-0003-4664-0700