

Fetter on Specific Relief by Duty of Mitigation

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Abstract

Specific performance is the core of the system of non-performance law both in Mainland China and Taiwan, and parties are entitled to choose this remedy on account of their own benefits and interests. But under some extreme cases, that parties insist on specific relief unreasonably may lead to speculation by non-defaulting party or enormous waste of resource, so we have to find some norms to limit the claim. Some other tools, however, such as impracticability, *rebus sic stantibus* cannot achieve this goal. For example, monetary obligation will not extinguish out of impracticability, so when the obligee (such as a lessor) of that obligation insist on enforcement of the debt, the other party cannot claim impracticability in order to get rid of it. General commercial risks which induce parties to end their contract will also exclude *rebus sic stantibus*. As a result, rule of mitigation has to play a role.

In terms of Mainland China's positive law, technically, duty of mitigation does not arise the moment the defaulting party sends a notice of repudiation or breach, but fetters the claim of specific performance only under extreme circumstances. To avoid the risk of accepting double deliveries from both the original and the substitute contract, there is no need to construct a duty to terminate the contract in time. Substantively, the test on deciding when a claim of specific relief should be turned down is whether the insistence would cause unacceptable wastefulness. There exists no general clause of mitigation in civil code of Taiwan

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which, however, does not mean similar problem does not exist neither. Article 217 (comparative negligence) of civil code Taiwan can realize the same effect of limitation. No matter how different the legal systems are, people in diverse communities are confronted with similar problems. Fetter on specific performance by duty of mitigation may echo with the need of a highly commercialized world.

Keywords: specific relief, duty of mitigation, speculation, repudiation, termination in time, legitimate interest, avoid wastefulness