

THE SPECIFICS OF PERFORMANCE:

EMPIRICAL STUDY OF SPECIFIC PERFORMANCE LITIGATION IN ISRAEL

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ABSTRACT

This thesis empirically explores Specific Performance litigation in Israel. The question tackled here is the impact of the default rule of Specific Performance has on contract litigation, both from the perspective of the courts and of the litigating parties. This study reveals that despite the generosity of Israeli courts with Specific Performance awards, these remedies are not commonly sought and are frequently of little use for the plaintiff. When plaintiffs do make use of Specific Performance, they do so for many reasons, only some of which are predicted by the research literature.

The resulting picture is that whether or not Specific Performance is favored, the rates of Specific Performance litigation are likely to be low. Therefore, it is highly unlikely that a rule that favors Specific Performance would have significant bearing on the efficiency of the system as a whole. Parties employ self-selection and do not sue for Specific Performance despite its general availability. As a result, even if Specific Performance has detrimental effects on efficiency – a highly disputed contention – rates are likely to be low.

Based on the indeterminate state of the literature on the one hand, and the limited scope of Specific Performance litigation in practice on the other hand, my normative recommendation is to forego the discourse on the prominence of remedies and to exchange it with a system that does not show a-priori preference for any one of the remedies. My suggestion is more likely to fit squarely with (some) moral intuitions, and is more likely to advance efficiency in contract litigation.