

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.

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1. INTRODUCTION

The old legal cliché says that *pacta sunt servanda* (promises are to be respected). Like all other Latin brocards, this aphorism makes all the sense in the world; that is, until a more complicated Latin term comes around. And indeed, *pacta sunt servanda* was soon complemented with the *Clausula rebus sic stantibus* (if things remain the same). The cynic would immediately recognize the consequence of adding this disclaimer. Without it, the unbridled obligation to keep one's promises is a source for trouble, and not surprisingly, has been the source of many literary ironies. Jephthah the Gileadite famously takes the oath that if God delivers the Ammonites into his hands "Then it shall be, that whatsoever cometh forth of the doors of my house to meet me, when I return in peace from the children of Ammon, shall surely be the LORD's, and I will offer it up for a burnt offering".¹ Victorious Jephthah returns home and is preceded by none other than his only daughter, who comes to him celebrating "with timbrels and with dance".² The question now stands – do Jephthah has to stand by his word, or do "*Clausula rebus sic stantibus*" enough in light of the new circumstances to excuse him?

The promisor's duty to abide by her word is but one aspect of the problem; another is the stake the promisee has in the upholding of the promise. Shylock famously insists before the Venetian court that Antonio should abide by his word, that is, that Antonio has to give him a pound of his flesh after Antonio defaulted on a loan he took from Shylock.³ The Venetian court clumsily manage to find a way out of the deleterious effects of enforcing the contract, and does not award Shylock with the pound of flesh, but not without reluctantly admitting that the "law doth give it".⁴

The moral duty is one thing. The legal is, arguably, yet another. How does the law should treat a broken promise? Civil Law tradition allows a disappointed promisee to enforce the broken promise

¹ Judges 11:31

² Judges 11:34

³ WILLIAM SHAKESPEARE, *The Merchant of Venice*, Act four (D.c. Heath & Co., 1916. 1878).

⁴ *Id.* at line 300. If a sequel to this play was ever to come out, it is certain that the Shylock of this play, aware of the outcome of the case in the Venetian court, would have avoided giving a loan to Antonio, which would have prevented Bassanio from marrying his Portia. It is understandable then why a sequel never came out.

on the promisor, through a Specific performance decree. The contractual duties are seen as a moral obligation that one cannot escape at will. The disappointed promisee can also sue, in lieu of enforcement of the contract, for the damages that the breach incurred. In the exceptional cases in which an obstacle to the free award of Specific performance would arise, the court itself can substitute Specific performance with payment of damages. In contradiction, the Anglo-American law was never as concerned with the actual performance of contracts. The remedy in law was damages and it was only in courts of equity that one could claim for Specific Performance. From the Common Law's point of view, an obligation broken – while may be morally condemnable – only entails a duty to pay damages.⁵ Enforcement of the contractual obligation is traditionally seen as a subsidiary remedy, to be given only in exceptional cases in which damages would provide an inadequate remedy. The strong opposition between the two legal systems on this point is intriguing. Why did each of the legal systems chose such a different point of departure, and do these different rules really lead to different results? Which rule is “better”?

Israeli law stands at the intersection of these two traditions. While being heavily influenced by English and American Common Law, the statutory infrastructure of contract law is mostly derived from Civil Law. While the Israeli contract law follows attentively developments in American law, and is heavily inspired by the spirit and doctrines of American Law, it nevertheless adopted the Civil Law rule on Specific performance. This mixture of influences makes Israel an ideal site to inspect and assess the impact of the Specific performance rule. The fact that Israeli contract law is Common Law in its essence (i.e. most of rule-making is done by judges in court; adversary proceedings, the judges are former lawyers etc.), allows the Common Law lawyer to gain insight into American law with relative ease. On the other hand, this study is also useful for Civil Law jurist, who is interested in studying the effects of Specific performance awards in relative isolation from the other mechanisms of the legal system.

⁵ The Common Law rule dates back at least to 1616. In one case then Lord Coke was of the opinion that by awarding Specific performance to the promisee, the intentions of the parties at the time of contract would be subverted. *Bromage V. Genning*, 1 Rolle 368, (K.B.

The question of how the law should treat broken promises has been at the center of attention ever since contract law became a discipline of its own. Scores of articles and books have been written on it. At first, most of the attention came from lawyers, who would then sit and write great monographs on Specific performance. But in the last 40 years or so, the question has become the bread and butter of many economist and ethical philosophers. The end result is a vast body of literature that analyzes almost every conceivable aspect of the choice of remedies. This research has shed light on many aspects of the question. There is now an understanding (albeit partial and ever changing) of the relationship between promises and contracts; of the many ways in which enforcement of contracts would induce future parties to behave, on the efficiency of each of the remedies. Nevertheless, the fundamental questions still remain, namely, which remedy should be awarded more freely.

A great deal of the theories turns on considerations that are theoretical in nature. It is purely a matter of theory whether morality condemns breaking of promises or whether one can redeem herself by buying her way out. Nevertheless, an even greater deal of theories turn on questions that are ultimately empirical. The prediction that one remedy is more efficient than the other because it induces parties to behave in a certain way is always susceptible to the charge that in reality parties do not behave in this certain way. Theories can always dismiss empirical findings, but for a theory to be practical as well as insightful, it must be in accordance with the realities of everyday life.

And the knowledge of the nitty-gritty is where the massive collection of literature is lacking the most. So far, relatively very little was written on what actually happens “out there”. Do parties behave in ways that are the most efficient? Are the typical moral scenarios, where two individuals who consensually promise to each other, even pertain to the commercial realities of modern life? How do “real” courts (and by this I mean, lower instances courts) decide cases? All of these questions receive only scant attention. It is this void that the current study fills.

1.1 Research Questions

Three interwoven questions stand at the heart of this study. The first is the question of the practices of the courts in a jurisdiction that favors Specific performance. Do courts award more Specific performance under the Specific performance rule or it simply a formal rule? Is the way that courts apply the law consistent with the different factual assumptions and predictions made by the different theories? My analysis focuses on describing the actual rates of Specific performance awards. In addition, my analysis tries to prove the nature of the correlation between the decision to award Specific performance and the amount of litigating parties; the type of action that is the subject matter of the contract; and the identity of the parties.

The second question is the impact that court judgments have on the behavior of parties *after litigation*. Are these decrees really effective? If so, in what ways, and if not, why not? Most notably, I try to understand the frequency of the actual performance of the court decrees, and on what factors the performance hang. I try to analyze the reasons why some parties simply do not abide by the court orders while others do. I also examine how common are settlement agreements at the post-trial stage, and try to understand what affects any variances in frequencies.

The third question relates to the decision to sue Specific performance. Under this question I try to assess are the actual rates of Specific performance litigation and what factors explain their number and frequency. I also try to understand when do parties sue Specific performance and when do they sue it for its own sake and when do they make only strategic use of it.

The thread connects all these questions is an avowed interest in the impact the rule of Specific performance has in the Israeli jurisdiction. The underlying postulate is that only by gaining an understanding into the nuts and bolts of this rule can we make educated reforms and decisions. The trust that the literature has expressed in the idea that what works in theory should work in reality must be reexamined. The findings of this study purport to do just that.

1.2 Methodological Approach

This study combines two different methodological approaches. One approach is the systematic study of a random sample of court cases. This approach, commonly known as “content analysis”, build on the careful codification of a set of 102 cases that compose the sample population. These cases were analyzed for patterns according to some 20 criteria, and the most important findings were then grouped and analyzed. The advantage of this approach is that it provides a relatively objective understanding of the way the legal system works. While limited in some respects (such as the reliance on what the courts choose to report of the case), this method nevertheless provides probably the most objective description possible of how the courts really work. The two main aspects that set this method off from the regular doctrinal analysis is the fact that this analysis is composed of court cases from all instances, without regard to hierarchical position, and that there are no “wrongly decided cases”. All cases are treated alike, which enables an understanding of the functional approach of the courts, not just an argument on how courts should decide cases.

The second methodological approach is interviews of parties to Specific performance litigation. In all, 18 lawyers, parties, and public officials were interviewed for their experience with Specific performance litigation. While this approach is much less objective than the former, it allows for a deeper inspection of the realities of Specific performance litigation in a way that doctrinal and theoretical analysis could never achieve. This method was used as a platform to gain insight into the motivations of the relevant players and into their strategic choices. Furthermore, these interviews allowed inspection of the oft-neglected, but highly important question – do parties abide by the Specific performance decrees.

1.3 Structure of Argument

The study proceeds in the following manner. After this chapter, the second chapter is dedicated to the introduction of the legal framework that controls the material of Specific performance. In this chapter, I offer an overview of the Israeli law on remedies of contract, focusing on the rules of

Specific performance. The chapter is designed to give the outside reader all the background information needed to understand later sects. To this end, the chapter offers a compilation of an analysis of the formal rules, the way the courts approach these rules, and a brief look into the mechanisms that the Israeli system provides for the enforcement of judgments. The overview of Israeli law is complemented with a cursory overview of American law of contracts, which is needed both to contextualize the discussion in a wider perspective and to allow the reader a better understanding of the literature review to come, which is mainly based on American literature.

The third chapter is a review of the relevant literature, with special focus the law and economic literature. The aim of this chapter is triple: to provide an in-depth understanding of the normative aim of this rule, to illuminate the way the academia approaches and tackles this issue, and most important of all, to show what factual assumptions and empirical predictions are made within this literature. The assumption and prediction are then analyzed and tested in the following chapter. I also added a short overview of relevant empirical research. The current study is exploratory, and touches on many questions that have not received any attention at all so far. Nevertheless, there are some very important contributions that shed, indirectly, light on the inquiry at hand.

The fourth chapter is the content analysis of a random sample of 102 court cases. As mentioned, this chapter focuses on patters found in court cases, and offers an analysis of these patterns. This chapter deals specifically with the question of rates of Specific performance awards, and analyzes correlations between the decision to award Specific performance and other factors that theory predicts will be of importance. The main factors analyzed are the amount of litigating parties; the type of action that is the subject matter of the contract; and the identity of the parties.

The fifth chapter is an analysis of a set of interviews conducted with relevant parties to Specific performance litigation. This chapter is roughly divided into three parts. The first part is an analysis of the post-trial stage. In this part, I analyze the reasons how frequently do parties abide by the Specific performance decrees and what affects their decision to do or abstain from so doing. The second part is the pre-trial stage. Here I analyze what affect parties' choice to pursue Specific performance and

what affects what seems to be low rates of Specific performance litigation. Here I also ask the question when do parties sue Specific performance for its own sake and when do they make instrumental use of it. Finally, I go back to the post-trial stage and inquire into the reasons that party settle, or do not settle, at this stage.

The sixth and concluding chapter, provides the conclusion of the discussion. Here I suggest a few concluding remarks, and, most notably, I sketch the outlines of the thesis that contract law jurisprudence should depart from the traditional preference of remedies approach. My thesis is that the realities of Specific performance litigation are too complex for the courts to consider, at least in a cost-effective manner. A dogmatic approach towards the superiority of one remedy over the other cannot be justified in light of the indeterminate results of the theoretical literature. I therefore suggest that courts move to do what they do best when the parties do not specify what they want in a contract – a balance of hardships in a decision that is ultimately at the court’s discretion (and is not a right of the plaintiff). Each party could ask for and object to the award of either one of the remedies. The fruits of the breach, according to my approach, should be divided between the parties and not fully granted to either one exclusively.

2. CHAPTER 2 – THE LEGAL FRAMEWORK

2.1 Introduction

This study examines the empirical practices of courts and parties in the Israeli legal system. The choice of the Israeli law is not arbitrary. This system of law represents a mixture of elements from both Civil Law and Common Law jurisdictions. The Israeli law is a unique mélange of Ottoman law, Colonial English and modern English law, American Law, Hebrew law, and, obviously, local innovations and developments. This variety may cause dizziness at first sight, but interestingly enough, neither American nor English lawyers will encounter any problem orienting themselves in this legal system. Specifically, the infrastructure of private Israeli law is similar enough to American law as to make it comparable to the law of the 51th state. These similarities means that Israeli law lends itself to some cautiously made generalizations into American law.

This chapter provides the needed background to understand the rest of the work. A brief overview of the Israeli contract law is given, with a concentration on relevant remedial law. The analysis does not purport to, nor can it, provide an exhaustive overview of all things contract law. The interested reader is encouraged to consult other literature.⁶ However, the cursory review given here should suffice to the average reader, and no prior knowledge of Israeli law is assumed throughout the dissertation.

Another aim of this chapter is to provide the reader not only with the formal rules of the Israeli system, but also a scent of its culture and inner-beliefs, as much as those properties can be attributed to such a diverse system. Israeli courts have strong ideological beliefs, especially with

⁶ For an insightful overview of the entire Israeli private law at one glance, see AHARON BARAK, *Codification of Civil Law and the Law of Torts Israel Law - Forty Years: The Codification of Civil Law and the Law of Torts*, 24 Isr. L. Rev., (1990). For a brief overview of the Israeli law of contracts, see JONATHAN YOVEL, *An Overview of Israeli Contract Law*, in *The International Contract Manual*, (Sieg Eiselen Albert Kritzer, Jessica Vanto & Jarno Vanto ed., 2008-2009).

regard to the proper rule of contract remedy law. It is impossible to understand Israeli law without having some understanding of the credo of the system.

Like any other system of law, Israeli law cannot be reduced to the works of the courts. The enforcement institutions bear significant implications on the understanding of the system as a whole. This dissertation is especially interested in the ways judgments are carried out and therefore enforcement institutions serve as the focus of some of the analysis. To provide the needed background, this chapter sketches a brief overview of the three formal institutions to the enforcement of judgments: order of contempt, enforcement agency, and appointment as a receiver.

Finally, this work is based on literature that is mostly American. Surely, law and economic analysis, and much more so, moral and normative claims do not tend to limit themselves by jurisdiction. The moral and economic claims made are purported to be of universal nature. One would expect that claims found in these writings would be relevant for and applicable to other countries as well. Nevertheless, the American context is ever present in these works, and the knowledge of American law is pertinent to their understanding. Furthermore, some of the findings of this dissertation are hoped to serve as lessons for American lawyers. Consequently, a brief discussion of American law is indispensable.

2.2 Overview of Israeli Law

Israeli Contract law is an amalgam of statutory legislation and common law. The statutory law is mostly concentrated in a few sources of legislation, while the rest of the law is found in scattered provisions throughout the rest of the legislation.⁷ The major sources are Contracts (General Part) Law, Contracts (Remedies for Breach of Contract) Law, Sale Law, and Standard Contracts Law.⁸

Israeli law is more substance-centric and is less concerned with issues of form. The governing principle of Israeli contract law is good-faith, and this principle trumps many formal requirements.

⁷ See, for example, Section 132 to the Law to the Protection of Tenancy (declaring that if the tenant fails to pay her rent, the landlord has the right for enforcement of the lease agreement – to evict her from the premises).

⁸ For a discussion of the relationship between the Law of Remedies and other remedial provisions found in the legislation, see DANIEL FRIEDMAN, *Remedies for Breach of Contract*, in Daniel Book: Reflection in his Teachings (Hebrew) 23-40, (Ofar Groskoppf Nilli Cohen ed., 2008).

Courts are very lenient with formal requirements for contract formation, and there is no prerequisite of consideration. For a contract to be formed, all that is needed is a “meeting of the minds” and a rough specification of the deal at hand. Substance-centric rules of interpretation complement Israeli contract law. Interpretation of a contract never ends inside its four corners, and the courts consider the totality of circumstances that led to its formation when they interpret it.

If a contract is breached, the aggrieved party has the option of choosing his remedies. The choice of remedies includes Specific performance, expectancy damages, reliance damages, and restitution. Other remedies include disgorgement and the recovery of reliance damages in a losing contract, but these remedies are rarely invoked. Israeli Law awards prominence to the remedy of Specific performance, and the plaintiff has the choice of requesting it. The defendant can excuse herself only within the confines of certain statutory exceptions. The most notable exception is the so-called justice exception, according to which Specific performance will not be awarded if it is “unjust” to do so.

It should be noted that the right to Specific performance is alienable under Israeli law. A party that prevails in litigation can then sell his right to the defendant. There are no formal limitations on this sale, and parties can agree to waive their right to Specific performance at any stage of the process, including at the time of the contracts’ formation.⁹

2.2.1 Scope of Specific performance

There is a conceptual difference between the Israeli concept of Specific performance and its Common law analogue. The Israeli term for Specific performance is “enforcement” (אכיפה). This term means the same as specific performance do under Common Law, but also covers court orders to refrain from doing a specified action, pay the contractual consideration, and to rectify the results of a breach. The latter means that if, as a result of a breach of contract, the party in breach has constructed a building, the court can order her to demolish it under an enforcement order.¹⁰ Finally,

⁹ NILI COHEN, *Remedies for Breach of Contract: From The Remedy to the Breach, From Law to Civil Code*, in Daniel Book: Reflections in his Teachings (Hebrew) 72, (Nili Cohen & Ofer Groskopf ed., 2008). CA 156/82 Lipkin V. Dor Hazahav (Hebrew), 35(3) PD 85, 96-97

¹⁰ URI YADIN, *Contracts (Remdies for Breach of Contract) Law 31-32* § 2nd edition (Institute for Legislative Research and Comparative Law. 1979). DAVID KATZIR, *Remdies for Breach of Contract, Part A* (Hebrew) 285-286 (Tamar. 1991).

while Common Law's Specific performance originated as an equitable remedy, enforcement is, strictly speaking, a right in law.¹¹

Many find it confusing that Specific performance covers not only the contractual duties to perform but also the contractual duties to pay for goods or services (i.e. the contractual consideration). The source of the confusion is that many times expectation damages are indistinguishable from Specific performance. However, the two are not the same, and it is important to notice their differences before continuing.

The legal consequences of these distinctions are significant. The most important difference is that courts have discretion to re-adjust the level of performance when they award Specific performance. Consequently, the courts can and often do require the payment of lesser sums than those agreed upon in the contract. The court has no equivalent prerogative with expectation damages. However, a suit for expectation damages based on the contractual duty to pay is subject to all the rules and limitation of recovery of damages, such as the burden to prove one's losses and the limit of damages to only foreseeable contingencies.¹²

2.2.2 The Prominence of Specific performance

Soon after the enactment of the Israeli law of contract remedies, the idea that Specific performance has prominence over all other remedies had gained acceptance. This view is shared by the courts and academia.¹³ Differing views on the prominence of Specific performance have long been forgotten.¹⁴

The decision to give Specific performance such prominence in the hierarchy of remedies for breach signifies a considerable departure from the earlier legal tradition.¹⁵ Ottoman law, prevalent in Israel up until 1917, did not provide for any entitlement for Specific performance under any

¹¹ Yadin, Law of Contracts, pp. 53-54

¹² KATZIR, 335-351.

¹³ For some of the examples, see the list of some 20 cases all repeating the same statement in Id. at 294-297. Another such long list is found in GABRIELA SHALEV, Law of Contracts (Hebrew) 523 (2nd edition ed. 2005).

¹⁴ YADIN, 49.

¹⁵ Interestingly, the bill is rather casual about this change, and explains it mainly by the need to depart from the complexities of the English Law. Contracts (Remedies for Breach) Law (Bill with commentary) (Hebrew). (1969).

circumstance.¹⁶ The attitude towards Specific performance was partially changed with the introduction of Colonial English law in 1917. In particular, English law admitted Specific performance in exceptional cases, mostly for the sale of land.

The reasons given by courts and the Academia to justify the preference of Specific performance remedy are moral in essence. It is claimed that morality demands Specific performance of promises. Under expectation damages, people are seen as being allowed to break their promises for a price, which is taken to be morally wrong. This sentiment is traceable far back into civil law, and presumably has its roots in canon law.¹⁷ And indeed, to this day some civil law countries view breach of contract as a morally condemnable action.¹⁸ Surprisingly, this position is at odds with ancient Hebrew law, which is incorporated as a source of inspiration into the body of Israeli Law.¹⁹ According to Hebrew law, the virtue of keeping one's promise is equivalent to all other *mitzvahs*. The first question a man is asked in the heavens, is whether or not she has negotiated with others with good faith, with the implicit assumption that breaching of a contract is a moral wrong.^{20,21} Ostensibly in contradiction to the high moral stakes Hebrew law has in the upholding of promises, they are not enforceable at all. In time, some mechanisms were developed to nevertheless award damages for breach, but Specific performance of an obligation never was a relevant remedy. The explanation for this conundrum is nothing short of insightful. According to Lifshitz, enforcing promises will deprive individuals from their full free choice whether or not to perform. It is therefore taken to be contradictory to the dictates of morality to pressure individuals into performance.²²

¹⁶ Ottoman Civil Procedure Law Sections 104-106 (1879). KATZIR, 286 note 3. DANIEL FRIEDMAN, *Remedies for Breach of Contract - From Right to Remedy; From Law of Remedies to the Civil Code*, in Daniel Book: Reflection in his Teachings (Hebrew) 23, note 24, (Ofer Groskoppf Nilli Cohen ed., 2008).

¹⁷ AMALIA KESSLER, Equity (?) forthcoming.

¹⁸ BERRY NICHOLAS, *The French Law of Contracts* 212 (Clarendon Press. 1992).

¹⁹ Foundations of Law, 5740-1980 (1980).

²⁰ AVIAD HACOHEH, "*God is not a man, that he should lie, nor a son of man, that he should change his mind*" (Hebrew) Parashat Haashavua, 322.

²¹ Apparently, this is the view taken by the law of some Arab countries, in which "a contract is concluded in the expectation the obligor will fulfill his promise specifically and in good faith" (citing the law of Egypt, Syria, Jordan, Sudan, Iraq, Kuwait, Qatar and Algeria). ADNAN AMKHAN, *Specific Performance in Arab Contract Law*, 9 Arab L.Q., 326 note 6 (1994).

²² BERACHYAHU LIFSHITZ, "*I Myself Will Guarantee his Safety; you Can Hold me Personally Responsible for Him*" (Hebrew) 7 Parashat Haashavua, Department of Justice.

Another argument for the availability of Specific performance is that the interests of the parties are better served by Specific performance, because with Specific performance they get what they contracted for.²³ It is taken for granted that parties contracted for the good under contract, and any deviation from it in the form of damages would circumscribe the intentions of the parties at the time of contracting.

Regardless of the proper explanation of the source of the preference, it is important to understand that within the Israeli law Specific performance is much more than the default remedy for breach. Israeli law views this remedy as the superior remedy, and the hallmark of the Israeli law stress on deontological, not utilitarian, considerations. I will move now to inspect the statutory exceptions to the right for Specific performance.

2.2.3 Exceptions to the Right for Specific performance

The statute defines four exceptions to the right of Specific performance. According to the statute, Specific performance will not be awarded under the following circumstances: if it is impossible to perform the contract; if enforcement of the contract consists of compelling both performance and acceptance of performance of personal service; implementation will be too costly to supervise (the “excess supervision exception”); and if it will be “unjust” to enforce the contract (the “justice exception”). The four exceptions constitute an exhaustive list.²⁴ Nevertheless, it is clear that despite its avowed exhaustiveness, the “justice” exception is vague enough to include almost every other consideration. A body of scholarship has developed surrounding the proper interpretation of these exceptions. For current purposes, however, there is no need to delve into the depth of this jurisprudence. All that is required is a brief treatment of the excess supervision and justice clauses.

According to the excess supervision clause, Specific performance is not awarded if its implementation “requires an unreasonable level of supervision on behalf of a court or an execution

²³ SHALEV, 525.

²⁴ Id. at 523.

office”.²⁵ As an example, in one case the continuing obligation to invest money in a factory was deemed as an obligation that demanded an excessive amount of supervision by the courts.²⁶ The criteria to assess what will require excessive level of supervision is “the level of complexity of the contract, the time needed for its full execution, and the level of cooperation between the parties that is needed”.²⁷ At least in its rhetoric, the courts advocate a narrow approach with respect to the implementation of this exception.²⁸

The justice exception is more complex and lends itself less to generalization. As a general rule, the courts are conducting a balance of interests. However, not every hardship to the defendant will excuse her, and only a serious hardship will be considered by the courts to be a valid excuse.²⁹ The court’s assessment also considers the prominence of Specific performance under Israeli law, the probability that the plaintiff will fulfill his end of the bargain, and other considerations of good-faith of the parties.³⁰ Despite the objections of commentators, some courts took into their analysis the question of the existence of a market for cover contracts. This trend was criticized mainly because it was viewed as a back-door entry of the Common Law uniqueness test.³¹ However, this trend, if at all a trend, is still in its nascent stages.³²

2.2.4 Cy-pres and Adjustment of Performance

The Israeli court has the power to condition its Specific performance decree on the fulfillment of certain conditions by the plaintiff. Section 4 of the Contract law of remedies states that the court can condition the Specific performance decree upon “fulfillment of the injured party’s obligations or upon assurance of their fulfillment or upon other conditions that necessarily result from the contract under the circumstances of the case”. The Israeli courts have interpreted this provision to give them the power permitting the readjustment of the contractual obligations. The courts use this power

²⁵ Contracts (Remedies for Breach of Contract) Law, 5731-1970 section 3(3).

²⁶ All examples are taken from the case law described in SHALEV, 527.

²⁷ CA 3380/97 Tamgar v. Bilahh Goshen (Hebrew) (1998), 52(4) PD 673, 688

²⁸ SHALEV, 528.

²⁹ Id. at 532-533.

³⁰ Id. at 532-535.

³¹ For an description of this test, see *infra* p. 22

³² COHEN, *in* 87-90. YADIN, 50.

when full, unmodified enforcement seems unjust.³³ This doctrine of adjustment is, in effect, a reintroduction of the *Cy-Pres* doctrine to the Israeli law, despite its formal repeal.³⁴

There is some ambiguity about the legal contours of the adjustment doctrine. Nevertheless, courts make frequent use of it, and use it not only to adjust performance but also to modify obligations to pay money. It is important to note that this discretionary power does not exist under expectation damages but only under a suit for Specific performance, making Specific performance much less attractive.

2.2.5 Enforcing Specific performance

The effectiveness of the court orders of Specific performance is dependant in part on the effectiveness of enforcement mechanisms. A winning party may move to enforce its decree in one of three main ways: the procedure of contempt of court, filing with a specialized formal enforcement agency and a petition to appoint a receiver over the plaintiff's assets for the purpose of paying the debt. While other means exist, they are rarely exercised.³⁵ The hierarchy of these methods is not clear, and some choice is left to the creditor.³⁶

An order of contempt is a court order that obligates the defendant to perform her obligations that result from a judgment or a decree. The court has an almost unbridled discretion to fine the defendant or even imprison her.³⁷ However, this is not a penal procedure and it is only used to achieve performance and never to punish for non-performance.³⁸ Courts are wary of this specific power, and tend to limit its use.³⁹ A filing of contempt will not be allowed if viable alternatives stand to the plaintiff.⁴⁰

³³ See generally, SHALEV, 535-537.

³⁴ For a discussion of the *Cy-Pres* doctrine, see AHARON BARAK, *Purposive Interpretation in Law* 80-82 (Sary Bashi trans., Princeton University Press. 2005).

³⁵ E.g. Penal Law of Israel 626-1977 Section 287.

³⁶ STEPHEN GOLDSTEIN, *The Reciprocal Relationships among Methods of Enforcing Non-Monetary Court Orders: The Doctrine of the Least Harsh Alternative*, 16 *Mishpatim* 176, (1986).

³⁷ Contempt of Court Ordinance, Section 6(1) (1929).

³⁸ CrimA 6/50 Levitt v. Angel (1950)

³⁹ CC 6807/06 Kugler v. Kugler (Hebrew) (2007),

⁴⁰ CC 517/06 Manor v. KPMG INC (Hebrew) (2007),

The second means of obtaining performance is through the enforcement agency. This statutory administrative agency is designed to collect judgments and commercial instruments (most notably, checks). The agency is a very popular means of debt collection – every year approximately 350,000 cases are open.⁴¹ The agency has many powers vested in it, from the ability to foreclose and seize property of the debtor to its ability to issue warrant of arrests for debtors. To restrain some of this power, the head of each chamber is a magistrate judge or an acting court registrar (a semi-judicial function).

In all, there are 25 chambers spread out throughout Israel. The procedure of debt collection is quite complicated, as there are many safeguards employed throughout this process. What is notable is that this process is rather expensive. One percent of the judgment is charged at the filing of the case from the creditor (which is then added to the total debt of the debtor). Once a case is filed within the agency, the debt starts accruing high rates of interest. Furthermore, the debtor is automatically charged the legal expenses of the creditor, which include the costs of a lawyer and all other collection costs. These sums can easily rise, and in many cases, exceed the original sum of debt. A case opened with the enforcement agency is not subject to the Statute of Limitation.

The usual modes of debt collection are seizure and confiscation of property and ejection from the property. The enforcement agency can liquidate the debtor belongings, as long as it can be proven that they are the property of the plaintiff herself.

The last means is through the appointment of the creditor or someone on his behalf as an administrative receiver of the debtor's assets. This method of debt collection is derived from English law, and is a Common Law doctrine. The creditor can file a request with the court, and if this petition is awarded, the winning party is given the legal power to conduct all necessary dispositions in the

⁴¹ Statistical data is based on official data - CENTRAL ENFORCEMENT AGENCY, Official Statistics from 2007, available online at: www.eca.gov.il/loadedFiles/stats2007.ppt (2007).

assets of the losing party. This is a very harsh method of debt collection, and the court will not easily grant it. However, there have been few cases in resulting in this mechanism.⁴²

In sum, a party that prevails in litigation can employ three means to enforce the judgment. He can either elect to file a case with the enforcement agency, file a petition for contempt, or petition to appoint himself as the receiver of the debt. The choice among these means is dependent on the special features of the case. If the debtor has many assets, receivership and then contempt are the most effective means of collecting the debt. On the other hand, the enforcement agency may prove to be a more effective way to recover from individuals with less equity. From the point of view of the creditor, the main advantage of the use of the enforcement agency is the relative ease with which arrest warrants are granted.

2.3 Overview of American Law

Anglo-American law has a long-standing tradition of favoring the award of monetary damages over the specific performance of the contract.⁴³ The hallmark of this preference is the oft-cited, and arguably misunderstood,⁴⁴ quote of Justice Holmes:

“[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,--and nothing else.”⁴⁵

Despite a past heated dispute,⁴⁶ the preferred benchmark for damages is the expectation measure, which is defined analytically as “the value to [the aggrieved party] of the other party's performance

⁴² KATZIR, 356, 378-380.

⁴³ This preference dates back to Lord Coke, in 1616. Bromage V. Genning, (). See also PAUL G. MAHONEY, *Contract Remedies: General* 117 (B. Bouckaert and G. de Geest ed., Ghent: Edward Elgar, University of Ghent 1999); ROBERT A. HILLMAN, *Contract Modification and Self-Help Specific Performance: A Reaction to Professor Narasimhan*, 75 *Cornell L. Rev.*, 74 (1989)..

⁴⁴ JOSEPH M. PERILLO, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *Fordham Law Review*, 1087 n. 6 (2000). Perillo cites Holmes letter to Sir Frederick Pollock, saying that:

“the persistence of the impression that I say that a man promises either X or to pay damages. I don't think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable simpliciter.”

(OLIVER WENDELL HOLMES, et al., *Holmes-Pollock letters : the Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932* 233 (Mark DeWolfe Howe ed., Harvard University Press. 1941).

⁴⁵ O. W. HOLMES, *Path of the Law*, 10 *Harv. L. Rev.*, 457 (1896).

caused by its failure or deficiency⁴⁷ or “[c]ompensation awarded for the loss of what a person reasonably anticipated from a transaction that was not completed”.⁴⁸ An alternative definition is functional, according to which expectancy damages represent the sum of money that would “make [the promisee] indifferent between the award [of damages] and the performance”.

Traditionally, the Common Law position was to award Specific performance only in cases in which damages were inadequate. The concept of inadequacy of damages is divided into a few subcategories. Some of them are mundane (e.g. sale of land or other unique goods), while others border on the esoteric (e.g. contracts for the sale of *standing* timber).⁴⁹ The category of unique goods is sometimes taken as a metonymy for the entire class of cases in which damages are inadequate. The key concept, then, is the question of whether the subject matter of the contract is ‘unique’.

However, even when Specific performance is deemed to be appropriate, it would not be granted if its imposition will impose a disproportionate amount of hardship on the defendant, will require excess supervision by the courts, or will not serve the public interest. The defendant can further fend off Specific performance claims by proving that she committed a unilateral mistake by contracting or that she has insufficient assurances that the promisee will fulfill his part of the contract.⁵⁰

The rationale for maintaining the preference of damages over Specific performance is a matter of dispute and seems to be fading. However, there are different types of explanations that are illuminating. The first explanation is historical. The law of contract in the English law grew up from tort law and, specifically, the form of action of *assumpsit*. Tort law tends to award monetary damages more than any other remedy, and this tendency for monetary remedies carried over to the modern

⁴⁶ L. L. PERDUE FULLER, WILLIAM R. JR., *Reliance Interest in Contract Damages: 1*, 46 Yale L. J., (1936). (claiming the prominence of the so-called reliance interest in contract damages), DAVID W. BARNES, *The Net Expectation Interest in Contract Damages*. (claiming that despite Fuller and Perdue wide scholarly effect, expectancy damages have always been and should be the rule), RICHARD CRASWELL, *Against Fuller and Perdue*, 67 U. Chi. L. Rev., (2000). (arguing against the usefulness of the Fuller and Perdue taxonomy and against its preference of the reliance interest).

⁴⁷ Black's Law Dictionary (8th ed. 2004). MAHONEY, 117.

⁴⁸ Restatement (Second) of Contracts (1981). Section 347(a)

⁴⁹ For a comprehensive list, see ARTHUR L. CORBIN, *Corbin on Contracts* Sections 1143-1156 (West Pub. Co. 2008).

⁵⁰ Id. at §1136; Restatement (Second) of Contracts, § 362-366 (1981).

law of contract.⁵¹ Hillman suggests two different types of explanations for this preference. He argues the possibility that common law courts traditionally preferred damages because of what he terms ancient “turf” battles.⁵² According to this assertion, chancellors at the courts of equity traditionally deferred to the judgment of the courts of law (for reasons irrelevant to the subject at hand), and therefore Specific performance was not a common remedy. However, this portrayal of ancient Common law and equity may be regarded as too simplistic, as the relationship between the two courts were far more complex and varied over time.⁵³ An alternative explanation he advances is procedural. Since the constitutional guarantee of trial by jury is only secured for actions “at law” and not those “at equity”, it is presumed that in order to assure procedural guarantees of a fair trial, American law has developed a preference for damages awards.⁵⁴

Recent trends in American law led to liberalization in the availability of Specific performance.⁵⁵ The liberalization is found mainly in the Section 2-716(1) of the Uniform Commercial Code. The liberalization has led some commentators to conclude that Specific performance, and not expectancy damages, is now the superior remedy under American law.⁵⁶ Interestingly, this liberalization seems to have escaped the attention of many of the recent commentators, which may suggest that it is yet to sink in the consciousness of the legal community.⁵⁷ Alternatively, one can argue that the supposed liberalization has been nothing but a “modest expansion of specific [performance]”.⁵⁸ However, whatever empirical evidence there is, suggests to the contrary: courts are actually quite generous with

⁵¹ FRIEDMAN, *Remedies for Breach of Contract - From Right to Remedy; From Law of Remedies to the Civil Code*, in 66. MARCO JIMENEZ, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies* 117 (SSRN). (describes the preference for damages as a "historical accident" which is a result of the forms of action ruling us from their graves)

⁵² HILLMAN, 73.

⁵³ SHASWATA DUTTA, *Principles of Equity and Contracts* at <http://ssrn.com/paper=895862>.

⁵⁴ HILLMAN.74; US. Const. 7th Amendment.

⁵⁵ MELVIN ARON EISENBERG, *The Emergence of Dynamic Contract Law*, 2 *Theoretical Inquiries in Law* 1, 20-21 (2001). (views the liberalization of Specific performance as part of a general trend towards “dynamic contract law” – which means a tendency to subjective, complex, dynamic, individualized rules of contract).

⁵⁶ DOUGLAS LAYCOCK, *The Death of the Irreparable Injury Rule* (Oxford University Press. 1991).

⁵⁷ SEANA VALENTINE SHIFFRIN, *The Divergence of Contract and Promise*, 120 *Harv. L. Rev.* 708, 722-723 (2007). (“Contract law, however, diverges from morality in this respect. Contract law’s dominant remedy is not specific performance but expectation damages.”). BARBARA H. FRIED, *What’s Morality Got to Do With It?*, 120 *Harv. L. Rev. F.*, (2007). (criticizing Shiffirin for overlooking modern trends in the availability of Specific performance). ETHAN J. LEIB, *Contracts and Friendships*, SSRN, *Forthcoming Emory Law Journal*, Vol. 59, 2010, 32 (2009). TESS WILKINSON-RYAN, *Do Liquidated Damages Encourage Efficient Breach? A Psychological Experiment*, 7 (2009).

⁵⁸ PETER LINZER, *On the Amoralism of Contract Remedies--Efficiency, Equity, and the Second Restatement*, 81 *Colum. L. Rev.* 111, 121 (1981).

the award of Specific performance – *once it is requested*.⁵⁹ Inasmuch as this liberalization takes place, it should be noted that it carries the seed of peril for theories that depend on the *status quo* for their justification.⁶⁰

In any event, American law still has some asymmetry with respect to its treatment of Specific performance. On the one hand, parties are free to contract around a Specific performance decree,⁶¹ but they cannot contract for it specifically.⁶² A schizophrenic relation to Specific performance complements this asymmetry. Efficient breaches are accepted, even encouraged, but it nevertheless constitutes a tort to induce an efficient breach by “interfering” with a contractual relationship.⁶³ A stipulated provision for Specific performance will not be enforceable, unless the promisee would have been independently entitled to Specific performance.

2.4 Conclusion

While the general structure of Israeli law of contracts, and private law in general, carries strong resemblances to American law, the two systems diverge starkly on the question of the prominence of remedies. Despite some contentions that American law now takes a liberalized approach towards specific performance, it is still a common belief that the prominence in remedy law is given to expectancy damages. Israeli law, on the other hand, gives preference to Specific performance.

The historical rationales for the hierarchical structure of each of the systems are telling. Arguably, American law still carries with it souvenirs from the war between law and equity. It was suggested that Israeli law, on the other hand, derives its stance from socialistic ideology that considers the

⁵⁹ See LAYCOCK, (over viewing 1400 court cases, and suggesting that Specific performance is generally awarded); see also, LINZER, 126-127.

⁶⁰ EISENBERG;TIMOTHY J. MURIS, *Costs of Freely Granting Specific Performance, The Comment*, 1982 Duke L. J., (1982). SUBHA NARASIMHAN, *Modification: The Self-Help Specific Performance Remedy*, 97 The Yale Law Journal, (1987).

⁶¹ EDWARD YORIO, *In Defense of Money Damages for Breach of Contract*, 82 Colum. L. Rev., 1379 (1982).

⁶² Restatement (Second) of Contracts, § 359(1). U.C.C. Article 2-716(1) (2005). The U.C.C. do allow for Specific performance provisions in contracts that are not consumer-contracts. For a thorough discussion of this rule, see ALAN SCHWARTZ, *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 The Yale Law Journal, (1990).

⁶³ DEEPA VARADARAJAN, *Note: Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*, 111 Yale L.J. 735, (2001).

foundation of a productive society as primary goal of the state. Obviously, the historical rationale, while illuminating, only provides a partial explanation.

Award of Specific performance is not only a legal right but also a moral claim that the plaintiff has. Israeli law is built on a general right for Specific performance with four exceptions. The burden to prove them rests on the defendant's shoulders. Courts are not especially lenient with this burden of proof. Only if the court believe that Specific performance may cause disproportionate harm to the defendant, it need not deprive the plaintiff of his right. The court also has some discretion to adjust the level of performance, thus preserving the bulk of the right of Specific performance. Three mechanisms support the plaintiff enforcement of the judgment: order of contempt, the enforcement agency, and appointment of a receiver. None of these mechanisms can solve completely the problem of the evading defendant, but taken together these mechanisms provide a wide range of instruments to coerce performance.

After having reviewed both the Israeli and American law, the discussion can move forward to the analysis of the way theoreticians have approached the difficult question of choice of remedy. This age-old problem has sparked much attention, and the following chapter will provide much needed insight.

3. LITERATURE REVIEW

3.1 Introduction

Specific performance has been, and will continue to be in the foreseeable future, the focus of scholarly attention. There are ample reasons for this extensive interest. The debate of specific performance intersects with some of the most fundamental questions of contract law and, more generally, private law. Cardinal questions, such as the nature of entitlements, the goals of private law, and the structure of default rules, stand at the heart of the debate. Another source of appeal is the fact that these questions represent every discipline of civil law: law and economy; law and morality; law and society; behavioral studies of law; and empirical studies of the law, to name just a few.

The plethora of writing on specific performance is intellectually stimulating. On the downside, this multiplicity of views makes it difficult, if not impossible, to include in one work the scores of articles, books, and cases which pertain to the matter. Conscious of the limitation of space, time and attention of the reader, I have limited this chapter to a review of the literature that will relate to the empirical analysis of this research. The few deviations from to this approach were made to clarify complex arguments or to provide additional insight.

The function of this chapter is threefold. First, I provide an appropriate normative background to the empirical analysis. Since this dissertation is focused on an institution that is wholly normative, it is important to have a proper understanding of the specific topics involved. Second, this chapter aims at illuminating the empirical assumptions scattered throughout the literature. Almost every argument is based, to a certain extent, on a set of explicit and implicit factual assumptions and predictions. For example, some theories advocating specific performance rest on the assumption that only a few parties are involved in contractual litigation. The factual assumptions and predictions are not collected for their own sake, but rather to provide hypotheses that be tested through empirical study.

By asserting and refuting these assumptions, it is hoped that the general structure of the debate will be re-conceptualized. The third function of this chapter is to provide some understanding of the ways in which the existing research is limited. The current research, expansive as it is, still tends to accentuate certain aspects of specific performance awards while neglecting others. The empirical research is aimed at refocusing the attention of the research into these under-developed areas of the research. By furthering the understandings of the lacunae in current scholarly writing, this study creates a platform for future research in this area.

This chapter is divided in three parts. First, the focus of most of my attention is the economic analysis of choice remedies. This literature is rife with empirical assumptions and predictions, and, therefore, provides a perfect Petri dish for evaluating a variety of hypotheses. The second part is the so-called *deontological analysis*. Under this heading, I collected an assortment of theories on the *moral* and *ethical* force of contracts. Unlike the legal and economic analysis, this sub-chapter is developed only generally. The reason is simple. Deontological analysis is usually based on relatively few factual premises, and these premises are usually common to all theories. Third, I some relevant empirical evidence from similar studies. Since the current study is exploratory in many ways, there are obviously very few materials directly related to specific performance issues. Nevertheless, there is indirect evidence that could be incorporated into the current analysis. In the final part of this chapter, I have collected these findings.

One final note is that my focus in this chapter rests almost exclusively on two remedies – expectancy damages and Specific performance. While I recognize that these are not the only possible remedies for breach of contract, and that, in fact, there may be an infinite number of remedies,⁶⁴ the analyses of all of these remedies would have exceeded the scope and ambit of this thesis .

⁶⁴ The literature is fraught with alternative remedies, such as disgorgement, super-compensation and a zero damages award (see, respectively, RICHARD R.W. BROOKS, *The Efficient Performance Hypothesis*, 116 see id. at 568, (2006). YORIO, 1386 note 100. RICHARD CRASWELL, *Two Economic Theories of Enforcing Promises*, in *The Theory of Contract Law: New Essays*, 2001). It is obviously possible to award any amount of money as compensation, thus making the possibilities infinite.

3.2 Economic Analysis

The basic framework of this subchapter is derived from a highly insightful article, written by Richard Craswell in 2001. In this article, Craswell argues that the prism of the efficiency of performance of the contract is too narrow to serve as a basis for the choice of remedies. According to him, whether or not it is efficient to perform the contract is but one question among many that must be considered when making the decision to establish one remedy as the default.⁶⁵ This claim serves as the spine of this sub-chapter, which also seeks to map important intersections and implications of the decision to award either Specific performance or expectancy damages. To achieve that, I discuss eight of the most prominent aspects of the choice of remedies debate. These eight points represent 40 years of lively argument on the choice of remedies in contract law. However, the aim of this sub-chapter is much broader than merely describing the debate. Through the discussion of the effects of each remedy, it is possible to illuminate the different assumptions of each theory, as well as each theory's factual predictions.

The assumptions made in the literature and the predictions made by the different theories are sketched in this chapter, in order to be later tested against the findings of the empirical research. This study focuses on the dissonances and harmonies between the theories and the realities of the courts and the practices of parties. However, neither parities nor disparities provide conclusive evidence to the correctness of any one of the theories. One reason for this is that it may well be that judges have their own agenda in deciding cases, and that this agenda leads them to sometimes diverge from the postulates of the different theories of remedies.⁶⁶ Another reason is that almost all of the theories presented here are flexible enough to withstand contradictory evidence.⁶⁷ Consequently, I am taking an intermediate position. The consistencies and inconsistencies are only meant to be suggestive of the

⁶⁵ CRASWELL, *Two Economic Theories of Enforcing Promises*, in.

⁶⁶ There are many articles on what judges and court do. Most notable among them is Richard Posner who harbors a strong belief in the general efficiency of the Common Law process. For a review of some of the literature, see TODD J. ZYWICKI, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis* (SSRN. 2002). (especially notes 1 & 2).

⁶⁷ This is a meta-theoretical question that I will not pursue here, e.g. what type of evidence can refute evidence, and if there is even any important relationship between evidence and theory. See THOMAS S. KUHN, *The Structure of Scientific Revolutions* (University of Chicago Press 2nd ed. 1970).

deficiencies in the relevant theories and to indicate how future research should proceed. Given that many of theories proclaim themselves to be tentative pending empirical data,⁶⁸ this study can be viewed as a step in this 1000-mile road.

In any case, this sub-chapter includes the following parts. First, I explore the many ways in which expectancy damages and specific performance can be over- and under- compensatory. This discussion provides the support for the entire theoretical inquiry. Thereafter, I discuss the eight ways in which the choice of remedies affects efficiency. The eight ways are: the effects on subjective and objective value the parties attach to the goods under contract; the effects of a choice of a liability or a property rule; effect on the level of efficient reliance; the effect on the efficient breach; the effects of social norms, especially reputation, bear; the effect the market for covers has; the effect of the French distinction between a contract to do and contract to sell has; and finally, the effects the attitudes of the parties has on the choice of remedy.

These eight parts do not amount into one coherent analysis. Some complement, others contradict while others are simply are not related. These incoherencies reflect the state of the scholarship. Nevertheless, whenever possible, I tried to link and aggregate similar arguments.

3.2.1 Under- and Over-Compensation of Remedies

The discussion of the choice of remedies usually makes some assumption about the equivalency or inequality of damages and Specific performance. The question that this discussion raises is whether one remedy is systematically over- or under-compensatory as compared to the other. A remedy that is over- or under-compensatory will result in an excessive level of breaches or performances.⁶⁹ The answers to this question are diverse. In this section I will explain in which ways each remedy can be viewed as either over- or under-compensatory.

⁶⁸ See, for example, LINZER.

⁶⁹ LEWIS A. KORNHAUSER, *Introduction to the Economic Analysis of Contract Remedies, An*, 57 U. Colo. L. Rev., 715 (1985).

But first, it is important to note that the wording over and under expectation is misleading because it assumes a certain baseline (the appropriate damages).⁷⁰ However, the question of the appropriate baseline is exactly what is at stake when one asks about the prominence of remedies. The efficient breach theory, for example, builds on the assumption that the plaintiff is not entitled to the breach generated-surplus⁷¹ to begin with⁷² (for without this assumption, expectancy damages and Specific Performance are functionally equivalent).⁷³ In other words, the efficient breach postulate assumes that Specific performance represents over-compensation. When stated in this way, the postulate of efficient breach has much less intuitive force.

There are many important ways in which expectancy damages are under-compensatory.⁷⁴ First, a disappointed plaintiff can only recover damages that are reasonably foreseeable.⁷⁵ While this rule may have a sound basis in terms of evidence law or economic efficiency, it limits the profits (and also the losses) of the promisee. That is, the promisee would have enjoyed all the benefits, even the unforeseeable, had the contract been performed (and have had suffered all the losses). Second, the American courts, and to a lesser extent Israeli courts, do not fully compensate litigants for their litigation costs.⁷⁶ Such costs are deadweight. Third, the promisee is only entitled to the objective value of the goods and not for the subjective value the plaintiff may have attached to his, say,

⁷⁰ An example of such an implicit assumption can be found in RICHARD R.W. BROOKS, *The Efficient Performance Hypothesis*, 116 Yale L.J. 568, 596 (2006). (“The efficient breach hypothesis supposes that the promisor has the legal right—not merely the de facto power—to choose to perform or pay damages.”)

see also A. MITCHELL POLINSKY, *Risk Sharing through Breach of Contract Remedies*, 12 J. Legal Stud., 434 (1983).

⁷¹ I define the *breach surplus* as the difference in price between the outside bid and the contract price. This definition does not take questions of entitlement or compensation into account. This definition also admits the possibility of a *breach shortfall*.

⁷² Webb recognizes two distinct interests protected by the contract, performance and compensation. According to him, the promisee is entitled to the performance interest, which is taken to mean that he is entitled to the breach surplus. CHARLIE WEBB, *Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation*, Oxford J. Legal Stud. 41, (2006).

⁷³ For a discussion of the efficient breach theory, see *infra* page 24

⁷⁴ My discussion here is based on points that are common to both American law and Israeli law. For a thorough analysis of these points in a wide comparative view, that also includes Israel, see JOHN Y. GOTANDA, *Damages in Lieu of Performance Because of Breach of Contract*, in *Damages in Private International Law*, 2007).

⁷⁵ Hadley v. Baxendale 9Ex. 341, (

⁷⁶ For a comparison of the American rule on recovery of litigation and the English rule on recovery, see A. MITCHELL RUBINFELD POLINSKY, DANIEL L., *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. Legal Stud., (1998). It should be noted that the Israeli rule is similar to the English but with a twist: the prevailing party only recovers part of her litigation expenses, based on a discretionary finding of the judge.

heirloom.⁷⁷ Fourth, usually, the courts do not compensate the parties for the mental distress caused by the breach, and if they do, they do so tight-fistedly.⁷⁸ Fifth, the mitigation of damages doctrine limits the scope of recoverable damages.⁷⁹ Sixth, courts do not usually recover the pre-contractual costs spent on finding the specific deal. If the deal at hand is unique, the expenses are likely to be relation-specific and will not be useful for the promisee should he look for a cover contract.⁸⁰

There has been some suggestions to correct this under-compensatory nature of expectation damages: One way of doing so is by offering super-compensation;⁸¹ another way is by expanding the limitation on recovery of speculative and unforeseeable damages. Yorio suggests a third way – expectation damages should be quantified based on the cost of finding a cover as opposed to the diminution in the market price doctrine.⁸² However, none of these solutions has been adopted to date.

On the other hand, expectancy damages may sometimes be over-compensatory. If the promisee is hoping to dispose of the goods under contract by selling them, then the fact that he is being paid directly, instead of having to incur the expenses of selling the good can be interpreted as over-compensation. Indeed, this scenario is infrequent but is worthy of notice nevertheless.⁸³ Furthermore, punitive damages and disgorgement awards are two ways in which damages may actually be over-compensatory. When awarded with punitive damages, the promisee gains from the breach more than he contracted for. The same is arguably true with the remedy of disgorgement.

⁷⁷ See, p. 36. See also, CHARLES J. SCOTT GOETZ, ROBERT E., *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum. L. Rev., 557 (1977). (“The proof problems inherent in fully recovering idiosyncratic values within the context of operationally practical damage sanctions may preclude the non-breaching party from recovering his subjective expectations if recovery is limited to legally determined remedies.”). See also NINA C Z KHOURI, *Efficient Breach Theory in the Law of Contract: An Analysis*, 9 Auckland U. L. Rev., 750 (2000).

⁷⁸ LINZER, 118. Gotanda provides some (morbid) examples of such exceptions: a burial contract that was breached and a contract for the transportation of a deceased individual. GOTANDA, *in* 26.

⁷⁹ CHARLES J. SCOTT GOETZ, ROBERT E., *Mitigation Principle: Toward a General Theory of Contractual Obligation*, *The*, 69 Va. L. Rev., (1983).

⁸⁰ THOMAS S. ULEN, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 Mich. L. Rev., 372 (1984).

⁸¹ YORIO, 1386, note 100.

⁸² *Id.* at 1402-1404. These two possible ways of computing damages are expanded upon in the famous case of *Peevyhouse v. Garland Coal & Mining Co.*, 356 F. 2d 979, (10th Cir.).

⁸³ See the discussion of a similar case, in Chapter 5, page 117

Table 1 Sources of Under- and Over-Compensation

	Specific performance	Expectation Damages
Under-Compensatory	<ol style="list-style-type: none"> 1. Animosity between parties. 2. Monitoring expenses 3. Emotional Distress / Exposure to risk 4. Legal Delay 	<ol style="list-style-type: none"> 1. Limit of reasonably proved damages. 2. Foreseeable damages 3. Emotional distress 4. Pre-contractual expenses
Over-Compensatory	<ol style="list-style-type: none"> 1. “extortion” of breach surplus. 	<ol style="list-style-type: none"> 1. Discount of selling price. 2. Immediacy of payment (after judgment)

Specific performance itself can be under-compensatory, if compared to expectation damages or to the profits the plaintiff would have made had the contract been performed in a timely manner. Schwartz contends that the animosity between the parties after the breach and the fact that a Specific performance award coerces cooperation both lead to low levels of performance by the plaintiff.⁸⁴ Even The plaintiff is likely to have to spend money on monitoring plaintiff’s performance because he cannot ascertain in advance that she will perform in a satisfactory level. In passing note that the plaintiff can still sell a release to the defendant and possibly regain some of the losses incurred by her under-performance.⁸⁵ The fact that the decree is under-performed will likely have little, if any, effect on the release negotiations, as the promisee always has the alternative of expectation damages. Additional reason is the fact that it will not compensate for any emotional distress caused by the fact of the breach, the exposure to the risk of losing in litigation and will not cover a any or all of the legal expenses.⁸⁶

Specific performance is over compensatory in a very obvious way. When the plaintiff obtains a Specific performance award, he can bargain with the defendant for some of the breach surplus. Some

⁸⁴ See also ALAN SCHWARTZ, *Case for Specific Performance, The*, 89 Yale L.J., 277 (1979).

⁸⁵ For a similar point, see STEVEN SHAVELL, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*, 84 Tex L. Rev., 35 (2005).

⁸⁶ YORIO, 1386-7, note 100.

view this action as “extortion” exerted by the plaintiff on the defendant. According to this account, the additional leverage that Specific performance gives the plaintiff is over-compensation.⁸⁷

In passing, note that parties will not favor *ex-ante* a super-compensatory remedy.⁸⁸ To contract *ex-ante* for super-compensation is the functional equivalent for gambling against the house. The other party (the “house”) has control on her own performance and the premium she will charge for super-compensation is not likely to be paid for in full by actual breaches. Therefore, it will be both inefficient and undesirable to participate in this gamble. The only instance in which this gamble might make sense is when there is information asymmetry divided between the parties. However a full analysis of this proposition extends beyond the ambit of the current project.

In sum, this section demonstrated the reasons why the different remedies can be either over- or under-compensatory. It also shows that any choice of remedies has to take into account the fact that each remedy will result in a different distribution of wealth. This redistribution needs justification. The summary of this chapter is found in Table 1. The sections to come discuss the effects the choice of remedy has on social-efficiency and generally build on the observation made here.

3.2.2 Subjective vs. Objective Value

There is no need to delve deeply into economic models to explain the notions of subjective and objective value.⁸⁹ Subjective value is the value that an individual attaches to a certain good. There are many reasons why people value goods; one of them is the extent to which these goods satisfy their needs and wants. Objective value, however, is the market price of that good.⁹⁰ There are many reasons for a specific good to have a certain market price, and economic theory obviously has much to say about market pricing. For current purposes, it suffices to say that the existence of an objective

⁸⁷ For a thorough analysis that is based on the baseline assumption that the plaintiff is not entitled to the breach surplus, see IAN MADISON AYRES, KRISTIN, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. Pa. L. Rev., (1999).

⁸⁸ A. W. KATZ & R. CRASWELL B.E. HERMALIN, Contract Law 170 § 1 (A. M. Polinsky & S. Shavell ed., Elsevier North-Holland 2007). SCHWARTZ, *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*.

⁸⁹ An analysis of the difference between subjective value and objective-market value in contract law, see TIMOTHY J. MURIS, *Cost of Completion or Diminution in Market Value: The Relevance of Subject Value* 12 Journal of Legal Studies, 246-7 (1983).

⁹⁰ The rough definitions of subjective value and objective value made here are by no means precise; however, they do have the benefit of being economic in assumptions. There is no need to assume f commensurability, rationality or endogenous choice for current purposes.

value in itself does not mean that a good is valuable in any meaningful sense. That is, the objective value does not necessarily carry any information about the good itself.

Expectancy damages are primarily based on objective computation of value.⁹¹ Specific Performance, on the other hand, compensates fully for subjective value, because it does not run the risk of faulty computation of damages.⁹² This fact led Richard Posner, in 1972, to claim that Specific Performance is justified in the cases in which subjective value is likely to diverge from objective value.⁹³ Posner gives the example of real property as a case in which subjective and objective values typically diverge. While the concrete example is questionable⁹⁴ the idea is pretty straightforward. In passing note that this idea is overreaching. It seems the typical case, not the exception, that subjective value diverges from objective value of the deal.⁹⁵

However, it is doubtful that protection of subjective value is even relevant to the justification of Specific performance. According to Muris, even if the courts under-compensate for subjective value, the promisee can use the damages awarded to him to buy a cover contract and thus be fully

⁹¹ Theoretically, courts are capable of compensating the plaintiff for subjective value lost. However, courts rarely do so in practice. One prominent reason is that compensating for subjective loss will encourage plaintiffs to exaggerate their losses, and it will be very hard (and costly) to prove otherwise. See MURIS, *J. Leg. Stud.*, 382.

⁹² Ulen claims in a similar fashion, that subjective value is only protected by Specific performance of the contract. ULEN, 375. The underlying notion is that if the promisee gets what he contracted for, then there is no lost subjective value. Note that the same result can be achieved through the use of super-compensation.

⁹³ RICHARD A. POSNER, *Economic Analysis of Law* 61 (Little, Brown, 1972).

⁹⁴ Bishop suggests that real estate differs from other goods in the sense that their owners are more readily identifiable. This characteristic leads him to believe that in these cases, a outside bidder with a higher valuation can reach the buyer as easily as he can reach the seller, and that, therefore, Specific performance will not result in the outside bidder not getting the property eventually. WILLIAM BISHOP, *The Choice of Remedy for Breach of Contract*, 14 *Journal of Legal Studies* 299, 302 (1985). This idea seems empirically unsound. Many types of chattel are under constant supervision by their owners because they, unlike real property, can be stolen.

⁹⁵ Consider first the fact that in almost every transaction, by definition, subjective value diverges from objective value. Were it not so, the buyer would never be willing to pay the market price for something he values for less. Second, if real estate does represent a systematic divergence of subjective and objective value, then what will be said of the market for used cars, kitchenware, jewelry, used books, and so forth? In all of these cases, there is no fixed market price and divergence is highly likely. In addition consider the following problem: if the outside bidder offers more for the contract but actually values it less than the original buyer (who just got a lucky deal). Allowing for the breach of the contract would result in sub-optimal results. Surprisingly, there are formal limitations on the seller that limit its power to renegotiate the price with the original price.. If the seller has a better offer, and she convinces the buyer to add to the contractual price on the threat of her defaulting and selling to the outside bidder, the courts will probably not enforce the new agreement on the grounds of the lack of adequate consideration. See DANIEL FRIEDMAN, *Efficient Breach Fallacy, The*, 18 *J. Legal Stud.*, (1989). See also, KHOURI, 743.

⁹⁵ For the argument that Specific performance should be the regular remedy based on this perspective to succeed, one has to prove that systematically outside bidder has lower subjective value than promisees. I am skeptical that anyone can make a convincing argument this way or the other, and so I believe that the relevancy of economic considerations on this point is very limited.

compensated for any lost subjective value.⁹⁶ As Muris says succinctly, “in essence, the buyer obtains specific performance of his contract through the market”.⁹⁷ It is true that a market for covers does not always exist. However, in these cases, damages fail not because of divergence of the objective and subjective value, but because they fail to protect both values.

In sum, specific performance is a direct means of protecting subjective value, but is not the exclusive mean. The market can protect subjective value with almost equal effectiveness.

3.2.3 The Paradigm of Property and Liability Rules

One of the most fundamental distinctions in private law is that of property and liability rules. This distinction, suggested by Calabresi and Melamed,⁹⁸ distinguishes between entitlements which are protected against transgression by only allowing for its voluntary sale for subjective value (property rules) and entitlements protected against transgression by the imposition of the duty to pay a price set objectively by the court (liability rules).⁹⁹ As the authors themselves note, this distinction is meaningless in an ideal “Coasean” world,¹⁰⁰ because the parties would in any case bargain between themselves so the entitlement would pass to the party who values it the most. However, when transaction costs are introduced, the difference between the two entitlements is noticeable. In a nutshell, property rules are preferred when transaction costs are low, because if the court is wrong in the assignment of rights, the parties can renegotiate easily between themselves and correct the mistake. However, liability rules, which are more expensive because they require determination by the

⁹⁶ TIMOTHY J. MURIS, *Comment - The Costs of Freely Granting Specific Performance*, 1982 Duke Law Journal 1053, (1982). The following example may illustrate the point: Assume that the plaintiff had a great deal – he could buy a laptop that he valued at \$500\$ and that carries a market price of \$450 for \$400. The profit for the plaintiff is \$100. Let us assume that the court decides, for some reason, to give the plaintiff only the market price of the laptop (\$450). One might argue that the plaintiff has lost \$50 in subjective value. However, now the plaintiff can go and buy a laptop on the market for \$450. After buying the laptop, the plaintiff is in as good a position as he would have been had the contract was performed (with a gain of \$100 in subjective value).

⁹⁷ *Id.* at 1055-6.

⁹⁸ GUIDO MELAMED CALABRESI, A. DOUGLAS, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev., 1092 (1971). For a restatement in less functional and more normative terms, see BROOKS, 575.

⁹⁹ An often-neglected aspect of their article, and one that just recently received attention, is another possible kind of rule – rules of inalienability. LEE ANNE FENNELL, *Adjusting Alienability*, 122 Harv. L. Rev. 1403, (2009). Interestingly, this framework has already been applied in the current context by Ayres and Madison. According to them, it is possible to design an inalienable Specific performance award. Such an award would inhibit suing for Specific performance merely for the sake of obtaining the breach surplus. This innovative option exceeds the scope of the discussion here, but it should be noted that they themselves express some skepticism about whether this remedy would indeed promote efficiency. See AYRES, 57.

¹⁰⁰ R.H. COASE, *Problem of Social Cost, The*, 3 J.L. & Econ., (1960). CALABRESI, 1096.

court of the transaction price, are generally justified if the transaction costs are prohibitively high for the parties to renegotiate.

In a 1979 article, Aaron Kronman took this distinction and applied it to the framework of contractual remedies. His intention was to prove that the mixed common law regime of expectation damages (which he termed liability rules) and Specific Performance (which he termed property rules)¹⁰¹ is justified on the basis of Calabresi & Melamed's framework. This work had an important effect on the acceptance of the Second Restatement of Contracts, and it is, therefore, not only important for its own sake, but also for the light it sheds on the Second Restatement.¹⁰²

Kronman observed that under Common law the dividing line between cases of Specific Performance and of damages is cases in which the contract deals with "unique" goods. According to him, unique goods do not have a "thick" market. Parties would rather, ex-ante, contract for Specific Performance since outside bids are less likely (from the point of view of the seller) and it would be harder to find an alternative in case of breach (from the point of view of the buyer). Conversely, in "thick markets" outside bids are more likely (and the seller would prefer retaining the freedom to sell to the outside bidder) and the buyer would face less difficulties finding an alternative in case of breach.¹⁰³ In the latter case, the parties would rather contract for expectation damages then. Later refinements to this argument repeated the same conclusion.¹⁰⁴

I disagree with Kronman's argument regarding thick and thin markets. I believe Kronman fails to consider that not only the quantity of offers is important but also their quality, or more

¹⁰¹ Another aspect of the property-rule entitlement is the fact that it is a tort to interfere with contractual relationships. See VARADARAJAN, 736.

¹⁰² See P. Linzer, *Amorality of Contract Remedies*, p. 124, n. 82

¹⁰³ Kronman makes the additional claim here that promisors will know better than promisees whether they will perform or not. If a promisor knows that she will not breach, and the promisee is anxious about it, she could sell him insurance that she will perform for a mutually agreed-upon price (in the form of a Specific performance provision). While this notion is intuitively attractive, it is faulty. The promisor's knowledge of her intentions to perform, in the case made by Kronman, is predicated on the possibility of her receiving better outside offers. However, as the former analysis shows, if both sellers and buyers share the same information regarding the level of development of the market, they will both value the possibility of a breach at the same level of probability. In other words, the promisee does not need to peer into the soul of a promisor to know whether she will perform or not; rather, it suffices for the promisee to learn the level of development of the market. The information about the level of development of the market is not private and puts both parties on equal footing in terms assessing the possibility of breach. See SHAVELL, 33.

¹⁰⁴ Yorio offers a more nuanced account that considers the price other offers will carry, not only their frequency. For reasons I dispute below, Yorio believes that Kronman's conclusion remains the same. YORIO, 1379-1380.

specifically, their price. In an under-developed market, less offers are likely to come her way, buy each one has a better chance of being for a much higher price. In a thick market, offers are likely to bear relatively close prices.¹⁰⁵ If all offers carry similar prices, the benefit from taking a slightly better offer are likely to be offset by the transaction costs of canceling the first deal and renegotiating a second one.¹⁰⁶

Despite the criticisms, the main thrust of Kronman's argument remains valid. Specific performance is a property-rule entitlement.¹⁰⁷ Property rules have the benefit of entailing low administrative costs. If the courts err in assigning the entitlement, the parties will reallocate it by negotiation. This negotiation will bear certain transaction costs. These transaction costs, as future contributions revealed, are likely to be low. The parties are already acquainted and have some means of contacting each other and negotiating a deal.¹⁰⁸ On the other hand, liability rules come with higher administrative costs, primarily because it is expensive to compute damages correctly that do not entail post-judgment renegotiations. The court should spend money on computing damages only as long as the money spent on damages quantification does not exceed the transaction costs of the reallocation.

The underlying empirical assumptions and predictions can be thus summarized. As long as costs of negotiation are low (and they are likely to be low if there is a small number of bargaining parties), parties are expected to renegotiate their awards, and (as a consequence) courts are expected to award more Specific performance.¹⁰⁹

3.2.4 Efficient Reliance

It is a recognized fact that reliance on a contract can yield positive efficient results.¹¹⁰ An example will illustrate this. Suppose I am buying your car. I can start clearing out my garage so that I have parking once you deliver it, but it is costly to clear my garage, and it will not be worth my while

¹⁰⁵ SCHWARTZ, *Case for Specific Performance, The*, 281. See also VARADARAJAN, 739.

¹⁰⁶ Yorio takes the price of the outside bidder into consideration, but neglects to consider the transaction costs of the additional transaction. See YORIO, 1380.

¹⁰⁷ Another aspect of the property-rule entitlement is the fact that it is a tort to interfere with contractual relationships. See VARADARAJAN, 736.

¹⁰⁸ ULEN, 369.

¹⁰⁹ A specific analysis of these assumption is found in section 4.3

¹¹⁰ For a discussion of positive reliance, see CRASWELL, *Two Economic Theories of Enforcing Promises*, in 12-18.

to do so unless you sell me your car. I can either rely on the contract and clear the garage (say, at a cost \$30), or wait until you will deliver your car and only then clear out the garage. In the time it will take me to clear out the garage, I will need to spend a sum of money (say, 40\$) on parking. If I am unsure whether or not you will perform, I may choose not to clear my garage although it is the most efficient decision for me if you actually perform.

The optimal level of reliance will be achieved if the promisee reaps all the benefits of reliance and internalizes all the losses from under-reliance. Of the two remedies, Specific performance and expectancy damages, only the former achieves this end result. The fact that expectancy damages insure the promisee against non-performance means that they will be induced to over-rely on the contract.¹¹¹ There are other means to ensure the performance of the other party, thereby enabling reliance on the contract. For example, one can take collateral from the promisor, purchasing its firm or just start manufacturing himself. However, these means are usually more expensive than using the court system and, in many cases, their costs are prohibitively high.¹¹²

In an expectancy damages regime, the promisee is insured against non-performance. However, the fact that he will be more reluctant to rely on the performance (i.e. will not try to find buyers for his current house until the house he bought from the seller is actually delivered) will present deadweight loss.

The empirical point to be taken from this discussion, is that in a jurisdiction that favors Specific performance, one would expect to find evidence of high rates of reliance. It is not easy to gather evidence for this, and it necessitates examining data that lays beyond the scope of the current study. Nevertheless, in designing the legal rule, one should consider this aspect of Specific performance.

3.2.5 Effective Alternative Hunting

In the period before the contract, the prospective seller hunts for prospective buyers. She has to sort through different buyers and identify the optimal buyer for her goods. This search is costly and

¹¹¹ AYRES, 87. See also KORNHAUSER, 700-702.

¹¹² For analysis of this means, see FRIEDMAN, *Efficient Breach Fallacy, The*, 7. ULEN, 349-356.

can be done at different levels. A seller may invest heavily in finding high-valuing buyers through advertisement or may want to avoid these expenditures and sell to the first buyer that comes her way. The decision regarding how much to invest in searching for buyers bears directly on the efficiency of the transaction. If the seller sells to a low-value customer, the good will not be in the hands of the individual who values it the most, wasting social resources.¹¹³ On the other hand, if the seller invests too heavily in advertising only to find a buyer that values the good slightly more than alternative buyers do, then the expenditures on advertising are wasteful. The optimal level of searching for alternatives is “when the marginal social costs of searching are equal to its marginal social gains. The promisor will invest in searching for alternatives until his private marginal cost equals his private marginal gain from searching.”¹¹⁴

In the interim between the signing of the contract and its performance, there is also an optimal level of alternative-hunting. The marginal value of finding an alternative is obviously smaller, now that there is a buyer, but it may nevertheless be worthwhile to spend a small amount of money to find a higher value buyer. The question is what remedy will incentivize the parties to invest optimally in alternative hunting on both levels. Another way of looking at alternative hunting is by describing them as precautions a party takes against defaulting or against the different possible remedies.¹¹⁵ Restated, the question is what is the optimal level of investment in precautions.

According to Kraus, expectancy damages will incentivize the seller to invest optimally in alternative hunting. The seller reaps all the benefits of finding a higher-bidding buyer, while paying all the costs to find him. On the other hand, a Specific performance rule means that the seller will have to disgorge all of his benefits from finding the outside bidder with the buyer. In this case, the seller will have no incentive to find an outside bidder.¹¹⁶ Kraus contends that the Specific performance rule only means that instead of the seller investing optimally in alternative hunting, it will be the buyer

¹¹³ Obviously, after the transaction, the buyer can engage in buyer hunting himself. This is what intermediaries do. However, even if the buyer does so, the fact that there must be an additional transaction before the good is in the hands of the highest valuing individual represents a social loss.

¹¹⁴ BROOKS, 434.

¹¹⁵ B.E. HERMALIN, 176.

¹¹⁶ JODY S. KRAUS, *A Critique of the Efficient Performance Hypothesis*, 116 Yale L.J. Pocket Part 423, 434-5 (2007).

who will do it. However, this solution is less efficient since, according to Kraus, sellers as a whole are more specialized in buyer-hunting than buyers are. The seller has already invested in finding the initial buyer, and is, therefore, presumed to be better situated to find the next buyer. In passing, I disagree with Kraus because I believe he fails to take into account the effect his proposal has on the general level of breaches, which is likely to rise.¹¹⁷ Other commentators also debated Kraus' contention.¹¹⁸

Nevertheless, the point to be taken from this analysis is that in a jurisdiction that favors Specific performance we will expect to see buyers less engaged in alternative hunting after the contract has been signed. Conversely, in a jurisdiction that favors Specific performance, the primary reason for breach of contract is likely to be not a better offer but surge in production costs.¹¹⁹

3.2.6 Efficient Breach

The theory of efficient breach has traditionally been viewed as the heart of the controversy regarding remedies. This theory postulates that by setting the contractual remedy to be expectancy damages, promisors are incentivized to breach if, and only if, a better offer (both from their and the social points of view) comes their way. All parties would be better off by this breach: the promisor would be able to sweep the additional gain to his pocket; the outside bidder will get the good which

¹¹⁷ , Kraus neglects to consider the necessary trade-off between pre-contract buyer hunting and interim-contract alternative hunting. The more incentives the seller has to invest in interim-contract alternative hunting, the less she will invest in pre-contract buyer-hunting. If the seller has the option to continue looking for alternatives despite signing the contract, she will invest less heavily in the pre-contractual stage of finding buyers. On the other hand, if the seller is denied this option (by a rule of Specific performance), then she will be incentivized to invest more optimally at the pre-contractual stage. The effects of expectancy damages are that sellers will invest twice, once at the pre-contractual stage and once at the interim-stage. The effects of Specific performance are that the sellers will invest only once, at the pre-contractual stage. Under the two regimes, the seller will adjust her investment to an optimal level. The only difference is the fact that expectancy damages will increase the level of breaches, which is wasteful in itself. Indeed, there may be some benefit to spreading the expenditure on alternative hunting over time to both the pre-contractual stage and the interim stage (the latter option), but this marginal benefit is likely to be offset completely by the additional costs of the increased rate of breaches.

¹¹⁸ According to Mahoney's analysis, unique, rare items are usually being sold in an auction-like manner. An auction is a method that incentivizes the prospective buyers to disclose their best offer before the closing of the auction. Under expectancy damages, however, the auction is really over only once the good has actually passed hands (arbitrary timing that may not be known to all prospective buyers so they cannot make their best offers prior to that time). This undermines the efficiency of the auction mechanisms and, therefore, works to the detriment of the seller. In other words, by specifically performing contracts, the pre-contractual process is made more efficient. The highest offer at the pre-contractual stage under Specific performance is likely to be the best allocation of the resource, whereas the highest offer under expectancy damages is but a tentative allocation. PAUL G. MAHONEY, *Contract Remedies and Options Pricing*, 24 *Journal of Legal Studies*, 155 (1995).

¹¹⁹ I do not analyze separately this question in my findings, but would nevertheless like to mention that in none of my interviews I found evidence to a better offer that came by the promisor way as a reason for breach. In one case the general market price rose, but no concrete offer was made.

he values the most, and the promisee would be (assumedly fully) compensated by payment of expectation damages. According to this theory, Specific performance will inhibit the additional transaction with the outside bidder because the promisee could demand the performance of the contract notwithstanding the better offer. In this view, expectancy damages are the optimal remedy. In a transaction cost free world this theory is meaningless, because the parties would renegotiate regardless of the legal rule and would make sure the good will find its way to the hands of the highest valuing party;¹²⁰ however, once transaction costs are introduced, Specific performance award could effectively preclude the efficient allocation of resources.

There is a camp of commentators who argue vehemently against the efficiency of efficient breach. These objections usually rest on one of three prongs.¹²¹ The first prong is a positive-normative argument. According to this argument, American Law (and even more so Civil Law),¹²² does not allow the promisor a choice of whether to perform or to pay damages as the efficient breach theory assumes. One reason for this is the doctrine of punitive damages; another is the (highly contested) fact that Specific performance is generally available under American law.¹²³ The second prong is the contention that the efficient breach is not Pareto-efficient, since it leaves the promisee under-compensated.¹²⁴ Third, and most important, is the idea that efficient breach does not really promote efficiency. According to Daniel Friedman, the efficiency of the efficient breach theory is predicated on the faulty assumption that there are no transaction costs to the payment of expectancy damages. When the promisor breaches the contract in order to sell to an outside bidder, then this transaction has its own costs. Indeed, these costs may be offset by the transaction costs associated with the promisor performing followed by the promisee negotiating a deal with the outside bidder. As a result, there is no difference in costs between performance and non-performance. However,

¹²⁰ For the development of this argument under the heading “efficient breach fallacy,” see IAN R. MACNEIL, *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev., 950-3 (1982).

¹²¹ For a similar three-pronged framework, see KHOURI, 741.

¹²² RONALD J. JR. SCALISE, *Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 Am. J. Comp. L., (2007).

¹²³ LAYCOCK, 247-247. It should be noted that despite the abundance of cases Laycock claims to have reviewed (1400!), he does not offer any statistical analysis of them, so there is no way of telling how representative they are. See also KHOURI, 746-748.

¹²⁴ See LAYCOCK, 254.

Friedman reminds us that there is an additional *hidden* transaction in the case of non-performance – the parties have to decide on the amount of damages, either by negotiation or by litigation. This transaction has its costs which undermine the efficiency of the so-called efficient breach theory.¹²⁵

The counter-argument made by Bishop is that the two transaction costs are different in an important aspect. To successfully negotiate expectancy damages (or for the court to quantify them), the expected value of the deal for the promisee must be ascertained. On the other hand, to successfully negotiate a release from Specific performance, the parties have to determine both the expected value of performance to the promisee *and* the expected value of the breach to the promisor. Since the latter includes the former, it is cheaper to negotiate expectancy damages.¹²⁶ Despite Bishop's contentions, it could be maintained that the higher costs of negotiating under Specific performance ensure that only efficient breaches will occur.¹²⁷

What should be taken from the entire discussion is the fact that under Specific performance one would expect to see lower rates of contract breaches in general. Once these breaches do take place, one would expect to see settlement agreement between the parties, either pre-trial or post-judgment, about the division of the possible gains to be made from the breach.

3.2.7 Social Norms and Reputation

Social norms play a major role in the decision to breach. In the context of economic analysis, the most notable of these social norms is reputation. The reputations of promisors may relate to their propensity to breach their contracts or to the quality of their performance, whereas the reputations of the promisee may relate to financial standings and habit of paying in a timely manner. Reputation bears another aspect that the rest of the discussion has thus far omitted: reputation analysis takes the

¹²⁵ Friedman concedes that the promisor may breach even under a Specific performance regime. By deciding to bring action against the promisor, the promisee will incur costs that might be equal to those of the litigation costs over damages awards. However, overall, the general amount of breaches will decline, since the promisors will have less to gain from them. Lower numbers of breaches mean lower litigation costs, and, thus, a more efficient regime. FRIEDMAN, *Efficient Breach Fallacy, The*, 7.

¹²⁶ In addition, Bishop claims that negotiating expectancy damages offers much less “wobble room” than negotiation for the breach surplus, which means that negotiations for the breach surplus may be lengthier and more prone to breakdowns. BISHOP, 312. For a similar notion, see also AYRES, 95.

¹²⁷ ULEN, 379.

effect of a player's decision not only on the current allocation of resources in the deal at hand into account, but also on future transactions. The addition of the temporal element into the analysis adds additional important nuances and complexities.

At the outset, a curious aspect of reputation is worth noting. If expectation damages or specific performance awards were fully compensatory, one would not expect that a breach of contract would harm the reputation of a repeat player. After all, if the promisor has the option not to perform but to pay expectancy damages, why would her decision to exercise her right be viewed negatively by the prospective promisee? Indeed, we sometimes deem as morally and socially condemnable the breaking of one's promise. However, we don't tend to view negatively an unhappy buyer returning a product to wal-mart within the time of the warranty. The case of the unhappy Wal-Mart buyer is effectively the same as employing the right in the alternative of terminating the contract for some compensation. The fact that reputation is nevertheless harmed by breaches is suggestive of the fact that the current remedies regime is under-compensatory. Note that reputation is harmed regardless of the relevant remedy, but specific remedies may augment the harm more than others.

Kornhauser believes that under both the Specific performance and the expectancy damages rule, reputation will have no effect. Assuming that these two remedies are fully compensatory, promisees will be indifferent to the possibility of the occurrence of breach (the knowledge of which is termed 'reputation') in their decision to contract at a certain price. The fact that they are insured against non-performance makes them less concerned about the reputation of the other party. Kornhauser then concludes that reputation will have no effect on the contractual price.¹²⁸ It should be noted that Kornhauser's account is caught within a tautology for the reason I mentioned above. Under a fully compensatory remedial regime, the parties will be indifferent to performance or non-performance; therefore, the concept of reputation will be devoid of all meaning. It is not so much that reputation has no effect, but that there is no reputation under this regime.

¹²⁸ KORNHAUSER, 702-705.

According to Ulen, reputation is likely to play a minor role as a deterrent to inefficient breaches. According to him, a highly competitive market leaves “only a minimal regard for future profitability” for the promisor, so that “some additional, court-imposed measure is necessary.”¹²⁹ This notion seems highly problematic as a general statement, and it is not supported by existing data.¹³⁰ Be that as it may, Ulen describes a feature of reputation that should be alarming to economists and deontological writers: reputation is insensitive to existing limitations on Specific performance. That is, whereas courts will refrain from enforcing a personal servitude provision or might avoid doing so in goods that are not unique, reputation may not be as forgiving.¹³¹ Indeed, reputation may lead to over-performance in many cases, and it is much less subject to regulation than court rules. Any analysis that builds on reputation – and no analysis can dispense with it – must take the counter-productive aspects of this social norm into consideration.

The empirical claim made here is that reputation has little influence on the behavior of the parties. This point is critically examined in Chapter 5.

3.2.8 Access to Cover Contracts

If an identical cover contract exists in a zero transaction cost setting, then the entire discussion on the choice of remedies is left devoid of any practical significance. Expectancy damages will enable the promisee to buy the cover contract and receive exactly what he contracted for (absent temporal considerations). What happens when transaction costs are introduced?

According to Alan Schwartz, transaction costs has very little bearing on the question.¹³² If both buyer and seller have similar transaction costs of acquiring a cover, the range of negotiation on the breach surplus will be hedged by these transaction costs, as each party has the alternative of buying a cover instead of buying a release. If the transaction costs of acquiring a cover are lower for the seller, no negotiations over the breach surplus will take place to begin with, as the seller will dispose of the

¹²⁹ ULEN, 349.

¹³⁰ LISA BERNSTEIN, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud., (1992); STEWART MACAULAY, *Non-Contractual Relations in Business: A Preliminary Study*, 28 American Sociological Review, (1963).

¹³¹ ULEN, 349.

¹³² SCHWARTZ, *Case for Specific Performance, The*, 284-291.

buyer's claims by buying her a cover. If the cover costs are lower for the buyer, a scenario which Schwartz claims is rare,¹³³ all the buyer can "extort" is the difference between the seller's transaction costs and his, which is likely to be low.¹³⁴ In sum, according to Schwartz, the effects of Specific Performance are unlikely to be significant if cover contracts exist.¹³⁵

In another article, Schwartz expresses such high skepticism of the possibility of credibly threatening performance in a developed market that he predicts the two following empirical assertions. First, even in jurisdictions in which Specific performance is readily available, the requests for it will be uncommon. Second, since all the requests for Specific performance are those that occur in under-developed markets (unique goods), the courts will award Specific performance at high rates.¹³⁶ My findings assert both predictions.

Other than these two empirical predictions, additional two postulates can be garnered: in a jurisdiction that routinely awards Specific performance, a promisor would breach the contract only if her costs of finding a cover contract are lower than those of the promisee. One way of examining this postulate is by checking to see whether promisees routinely receive cover performance. Alternatively, since promisees can negotiate with sellers for each parties' relative costs of cover, one would expect to find some indication of such a practice.¹³⁷

3.2.9 Produce and Convey – To Do or To Give

¹³³ This argument is heavily contested. I see no point in going into the details of this controversy; however, what is of interest is the fact that despite its being a totally empirical question, none of the commentators tries to prove his claims with any supporting empirical data. See YORIO, 1384-1385. MURIS, *Comment - The Costs of Freely Granting Specific Performance*, 1068.

¹³⁴ For further discussion see ULEN, 388-389.

¹³⁵ Yorio criticizes Schwartz' account, on the basis that it does not take into account the risk avidness of the sellers which may induce them to cover even when it is inefficient for them to do so: "to guard against the risk the [the buyer] will use the threat of specific performance to capture a portion of his profit from breach" YORIO, 1384. I believe that Schwartz can fend this argument off easily. Schwartz says that in these instances, the best the buyer can hope to achieve by bargaining is the cover differential, and not, as Yorio contends, a portion of the breach surplus. If so, the stakes involved are relatively low, and the threat needed to negotiate for this differential will likely outweigh its gains. Now because the buyer cannot make a cost effective threat that will initiate negotiations over the breach surplus, the buyer will be the one who will cover, not the seller. As a consequence, the Specific performance rule does not result in inefficiency.

¹³⁶ SCHWARTZ, *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 389.

¹³⁷ The latter question is not dealt with directly in my analysis for lack of data, but the lack of data hints that maybe the assumption on negotiation over relative access to the market for covers is unfounded in reality.

The focus of the discussion so far has been highly generalized and has differentiated contracts based solely on their uniqueness or the existence of a developed market for their subject matter. There are some good reasons, however, to adopt a different basis of categorization than uniqueness of the good. In a 2005 article, Shavell claimed that expectancy damages should be the remedy of choice if the subject matter of the contract is the production of goods, whereas contracts for the conveyance of property should be awarded Specific performance.¹³⁸ According to Shavell, the justification for this division is derived from the *ex-ante* preferences of parties. Shavell draws this distinction from the French rule on Specific performance.¹³⁹

According to Shavell, production contracts run the risk of surge in production costs; this risk does not affect contracts for conveyance of goods which already exist at the time of contracting. The possibility of Specific Performance in the former case would be impose certain risks on the seller-producer and do not create any parallel benefit for the buyer. As a result, Specific Performance is only justified (and is justified) in the latter case.

Here, Shavell makes the empirical prediction explicit. According to him, in a jurisdiction, that favors Specific performance, parties will not opt for, nor courts award them with, Specific performance in contracts to produce. On the other hand, parties will usually opt for, and courts will award them with, Specific performance in cases of contract to convey property.

3.2.10 Risk Aversion

Another way of determining which remedy is more efficient is by analyzing the effects these remedies have on risk allocation between the parties *ex-ante*. The risk-allocation turns on the attitudes of the parties of towards risk. However, the research conducted both by Polinsky¹⁴⁰ and Mahoney¹⁴¹ reveal that none of the remedies is systematically superior over the other once attitudes towards risk are introduced. The empirical ramification of this aspect of the economic literature are rather limited

¹³⁸ SHAVELL.

¹³⁹ BISHOP, 300-301. For an earlier formulation of Shavell's article, see STEVEN SHAVELL, *The Design of Contracts and Remedies for Breach*, 99 99 Quart. J. Econ. 121, (1984).

¹⁴⁰ POLINSKY, *Risk Sharing through Breach of Contract Remedies*.

¹⁴¹ MAHONEY, *Contract Remedies and Options Pricing*, 153.

in the current context, as this study does not engage the question of studying the propensity towards risk of parties. As a result I do not expand on this aspect any further.¹⁴²

3.3 Deontological Arguments

In terms of the current study, which is mainly involved with empirical research, the deontological arguments made in the literature are only of little relevancy. Nevertheless, one feature is runs as a thread through this literature, and this is the implicit assumption that contract remedies involve (mostly) individuals and not corporations. As a matter of fact, the ordinary commercial contract receives very little attention by this literature. In the following paragraphs I describe some of this literature. My aim here is not to provide an exhaustive account of this literature, but rather to give a cursory taste of it and to exhibit its dependence on individuals as the linchpin of contractual activity.

3.3.1 Contract as a Promise

Most, if not all, of the literature on the moral aspects of contract law, is unified in the view of contract as a promise. The most famous proponent of this thesis is Charles Fried, who expanded on this thesis in his book *Contract as a Promise*. According to Fried, the obligation to keep the contractual promise stems from the fact that the promisor “intentionally invoked a convention whose function it is to give – moral grounds – for another to expect the promised performance. To renege is to abuse

¹⁴² Worthy of note is Shavell’s argument. According to Shavell, under a regime of expectancy damages, the promisor knows that if a better offer comes her way, she can obtain a release without (almost any) negotiations by simply paying expectancy damages. On the other hand, under a regime of Specific performance, the promisor runs the risk of having to go through costly negotiations to obtain her release from the contract. This risk is another cost of Specific performance. The counter-argument is that if expectancy damages are systematically under-compensatory, as most critics argue, then an expectancy damages rule exposes the promisee to the risk of under-compensation, which also has its own costs. SHAVELL, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*, 35.

[] confidence”¹⁴³

What Fried advances then is a view that is based on the promisee, and to be more precise, on the promisee’s mental perception. Because the promisee was induced to trust the promisor, breaking the promise would be a moral wrong.

3.3.2 Enhancement of Autonomy

Peter Linzer advocates the view that promises are means towards the enhancement of autonomy of the promisors. According to him, promises should be upheld by the courts because “personal liberty requires that people be able to bind themselves in a manner that will be enforced by the courts”.¹⁴⁴ This statement is a reversal of the moral argument made by Fried. Promises should be enforced not out of respect for the sentiments of the disappointed promisee, but rather to care for the promisor. The concern here is the autonomy and liberty of the promisor.

3.3.1 Commercial and Non-Commercial Settings

The arguments so-far rested on an implicit premise that when dealing with contracts we are concerned with individuals. Linzer makes a more complex argument. According to him, it is only in non-commercial settings that Specific Performance be awarded. In commercial settings all the parties involved are only involved in the transaction for the sake of profit, and therefore are likely to be just as better off with expectancy damages as with Specific Performance.

This argument is worth noting because it sets the foundation for the distinction which I deem as crucial, and this is the distinction between corporations and individuals. One more point that is worth noting is that Linzer’s argument rests not only on moral premises but also on more mundane observations such as that private people do not always reduce their claims into their monetary value, and, as a consequence, may not be as better off with damages as they would with Specific Performance.

¹⁴³ CHARLES FRIED, *Contract as Promise : a Theory of Contractual Obligation* 16 (Harvard University Press. 1981).

¹⁴⁴ LINZER, 112.

3.3.2 Irrelevancy of the Philosophy-of-Promising Arguments

The question of the morality of contract remedies is highly contested and may even seem to be hopelessly entangled. This is why Craswell's possible tie-breaker argument is so interesting and innovative. Craswell takes the stance that no promise is made in a legal vacuum. All promises are subject to a set of legal background rules – some dispositive, others mandatory – which give them substance. Examples of such background rules are the rules governing excuses for non-performance, rules of remedies, rules of interpretation of the words of the promise and its specific details. The notion that promises should be “honored” and even enforced, says nothing about which background rules should govern these promises. Therefore, a background remedial rule of expectation damage is in accordance with the dictates of morality just as the background rule of Specific performance, restitution and maybe even the right to freely excuse oneself from the contract all do.¹⁴⁵ The conclusion is that the entire literature on the morality of promising is indeterminate with respect to the choice of remedies.

A similar notion was expressed by Barbara Fried. Commenting on Shiffrin's article, Fried expresses the view that most of the discussion of morality eventually “boils down to a matter of interpretation.”¹⁴⁶

3.3.3 Distributive Justice

One last notion that is worth mentioning is a recent paper written by Nilli Cohen.¹⁴⁷ As the last sub-section illustrates, most of the arguments in favor of the morality of promise making resulted in some sort of *aporia* because they failed to prove not only why promises are important from a moral perspective but also why the legal remedy should be Specific Performance. Cohen tries to tackle this difficulty. According to her, the decision which remedy to award depends heavily on distributive

¹⁴⁵ RICHARD CRASWELL, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev., (1989).

¹⁴⁶ FRIED, *What's Morality Got to Do With It?*

¹⁴⁷ NILI COHEN, *Distributive Justice in the Enforcement of Contract* (SSRN. 2008).

concerns. This concerns should be resolved by resort to moral principles, to which first and foremost is the obligation to keep promises.

To sum, this sub-chapter illustrated the many ways in which the deontological literature on contract making depends on assumptions about the moral agency of the actors who partake in the decision to perform or breach and the way the legal system should therefore react to it.

4. CHAPTER 4 - CONTENT ANALYSIS – FINDINGS

4.1 Introduction and Methodology

This chapter investigates how a court system in a jurisdiction favoring Specific performance decides cases in which this particular remedy is sought. The focus of this analysis is to determine the patterns found in the judicial decisions themselves and to apply these patterns some of the empirical assumptions found in the literature and elaborated upon in chapter 3. I want to reiterate that I do not necessarily assert that judges are working to maximize social efficiency or promote the deontological ends set by the moral theories, nor that they should.¹⁴⁸ I am interested here in the consistencies and inconsistencies of the theory and the practice, and seek to understand whether there is a pattern to the behavior evident in the courts.

The method used to accomplish this objective is a content analysis of a random sample of 102 cases. This sample size is taken from an estimated population size of 279 cases,¹⁴⁹ and, considering the differences within the data, the sample describes fairly accurately the entire population. The timeframe is January 1988 through January 2009. This time frame was chosen to represent relatively modern law, to coincide with the cases chosen for the interviews,¹⁵⁰ and on the availability of reported cases.

¹⁴⁸ See also *infra*, Chapter 3, Introduction.

¹⁴⁹ The estimation is based on the division of the pool of cases that the search yielded by the over-inclusiveness factor (which is described below). Given that the search term (see appendix B for full details) resulted in 921 cases and that the over-inclusiveness factor was 3.3, the result of estimated population is 279. When the margin of error is taken into account, the population ranges (with 95% confidence) 257<>300 cases. To verify this notion, an independent survey of the entire population was done to reveal the number of cases in which Specific performance was given. In 146 cases, Specific performance was awarded. As revealed by the data Specific performance is given, in 60% of the cases. Calculating based on this number results in a population of 245 cases. This result affirms the above estimate, and the slight difference between this estimate and the lower range can be explained by the margin of error related to the 60% figure.

¹⁵⁰ The interviews were chosen from more recent cases, usually within a 10 years' time frame.

The cases were chosen through the use of a wide search term in an electronic legal database (“Nevo”).¹⁵¹ ¹⁵² The search was for cases containing a reference to the relevant section in the law of remedies for breach of contract and the word specific performance. This was the widest search term possible that did not result in an outright flood of irrelevant cases. Precautions were taken to minimize error and unwitting exclusion of relevant cases. The search term yielded 902 hits; an analysis of this hits was made in a random order, in order to compile a list of 102 relevant cases. To reach 102 relevant cases, 330 cases had to be reviewed and filtered. This result indicates that the search terms were ~3.3 times over-inclusive. The high rate of over-inclusiveness alleviates the concern that the chosen search term might have missed some of the relevant cases. Furthermore, the coding of the cases was reviewed twice to scan for errors.¹⁵³

The majority of the cases was filed between 1997 and 2003 and was resolved between 2002 and 2006. The cases were distributed between the different instances in a pyramid like fashion, which is similar to the general structure of courts in Israel and the majority was decided in the magistrate court.¹⁵⁴ Similarly, 78% of the cases were filed to the first relevant instance (magistrate or district court) and 22% to the appellate instance (district court or the Supreme Court).¹⁵⁵

¹⁵¹ The Nevo database is the most comprehensive legal database in Israel. It contains 448,420 cases from the Magistrate, District and Supreme courts (as of 3.13.09). For comparison, the second largest is the Takdin database, which contains 426,504 cases.

¹⁵² One of the biggest problems of every content analysis is what I term “the problem of reportedness”. Other than actual court records, almost every reporter or database is incomplete. This means that the database can be viewed as a sample only (although not necessarily, if one only cares about doctrine). The question is whether the sample is biased. Apparently, sometimes there are differences between reported and unreported cases, although this is not always the case. ROBERT W. MALMSHEIMER DENISE M. KEELE, DONALD W. FLOYD, LIANJUN ZHANG,, *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 *Journal of Empirical Legal Studies*, (2009). (analyzing ideological differences between reported and unreported cases and suggesting caution in drawing conclusions from reported cases alone). In the current research, there was no way to ascertain the method of collection of cases to the databases (the owners claimed that their method was a trade secret), but as much as I could gather from observation and secondary sources, the system of data collection of the database does not respond in any observable, meaningful sense to the factors analyzed in this study. For a similar conclusion see also LAYCOCK, 24. I nevertheless admit that my conclusions are possibly limited only to the reported cases.

¹⁵³ For sake of future research, the coding scheme included the following categories: year, docket, instance, procedure, parties name, verdict length, decision date, plaintiff and defendant type (private or corporation), plaintiff's and defendant's nationality, number of units to litigation, name and gender of judges, jurisdiction, the existence of a dissent opinion, the outcome of the case, the court fees, the value of the deal, the type of performance sought (action, omission or payment of damages), contract to produce or to sell property, nature of the deal, money paid under the contract, the contractual provision disputed, the statutory excusing clause, and the reason why the court said Specific performance was awarded.

¹⁵⁴ The Israeli legal system is roughly divided into three layers. At the first layer are the magistrate courts and on the second the district courts. The magistrate court is always trial court and the district court serves as a trial court only in cases which exceed a certain monetary value. In all other cases, the district court is serving as an appellate court for the

It should be noted that the family courts, religious courts, labor tribunals and administrative courts were intentionally excluded from the sample. There are two reasons for this choice: the fact that those tribunals are presided by laymen¹⁵⁶ and the fact that they usually apply a different body of law, which would have made the inquiry overly-complex and distorted the results.¹⁵⁷

This chapter is organized as follows: The five most important findings will be analyzed within the context of the relevant economic and deontological theories. Where the data is available, I will provide comparisons to the U.S. law. The comparison is based on raw data analysis I conducted on data taken from survey made by the United States Department of Justice in 2005. This survey encompasses a representative sample of bench and jury trials concluded in 156 counties around the United States.¹⁵⁸ Admittedly, the comparison to the United States is limited in scope because the survey does not specifically describe cases in which Specific performance was sought. Nevertheless, the comparison provides for a very important benchmark for evaluating the data taken from Israel.

4.2 Rates of Specific performance

Some of the literature postulated that the difference between the remedial approach of the civil law and of the common law is in effect small.¹⁵⁹ This study cannot fully test small-difference hypothesis. To do so would require a detailed analysis of all *disputes* (rather than court cases) from inception until their eventual resolution, if at all. However, my research can shed light on the way

decisions of the magistrate court. The Supreme Court of Israel is always an appellate instance. For decisions of the district court, the Supreme Court serves as the first (and last) appellate instance; for decisions of the magistrate court it serves as a second instance and its appellate power is discretionary.

¹⁵⁵ It may also be of interest that on average, 3.7 years passed between the year of filing and the year of the resolution, with a median of 2 years. The judgments were all between three to thirty three pages long, with one outlier of 77 pages. The average judgment was 13.5 pages long with a median of 10 pages. However, most of the cases (61%) varied between 5 to 13 pages. These variables—length of time between filing and resolution and judgement length-- do not correlate significantly with the outcome of the case.

¹⁵⁶ The labor tribunal, for example, is presided over by a representative of the employers section, and a representative of the employees' sector.

¹⁵⁷ For example, religious courts usually resort to religious law. Parts of the religious law have permeated to Israeli law, but the differences between the systems are nevertheless vast.

¹⁵⁸ The survey is found online on <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/23862.xml>

¹⁵⁹ Most notable in this regard HENRIK LANDO & CASPAR ROSE, *The Myth of Specific Performance in Civil Law Countries* (SSRN, 2003). ("The conclusion is clear. Even though specific performance is a remedy available in many of the CISG-cases we have studied, it is virtually never claimed and in our material literally never granted")

litigated disputes are resolved.¹⁶⁰ The way cases are actually resolved in courts (with all the shifts and deviations from the strictures of *black letter law*) is likely to be the single most determining factor on the so-called “shadow of the law.”¹⁶¹

Part of the argument made by those who believe that little difference exists between the common and civil law systems of remedies lays on the claim that the courts tend to reach similar results despite the opposite points of departure in each jurisdiction. These commentators base their claims on the structure of the remedy within civil law. In civil law, the strong language which defines the right for Specific performance is in tension with the open-textured manner in which the exceptions are put, most notably the justice exception. At stake is the assertion of an effectual difference between the two systems of law; one should point to the ratio of cases in which Specific performance was awarded.¹⁶² Table 1 summarizes the frequency of Specific performance awards. As can be seen from the table, regardless of the wide language of the exceptions, Specific performance is still the rule and it has not been devoured by its exceptions. In 60% of the cases in which Specific performance was sought, it was awarded. While there is no available data from common law countries for comparison, the fact that majority of the cases are awarded with Specific performance is significant by its self. It means that at the very least, these figures place the burden of proof on those who claim that Specific performance is not readily available under civil law.¹⁶³

There is one possible qualification to this conclusion. In 15% of cases only partial or adjusted Specific performance was awarded. Partial Specific performance can be the result of the court deciding that only parts of the counter-obligations have been met and that it would be unjust to fully enforce the contract. Partial Specific performance could also result from the employment of the cypres doctrine, with which the courts “adjust” the level of performance it sees fit and just to demand

¹⁶⁰ I stress the term litigated court cases as opposed to court cases in general. The cases that result in a judgment are but a tip of the iceberg of all the cases filed. However, it is likely that there is strong correlation between the outcome of the litigation and the legal rule. CHARLOTTE LANVERS THEODORE EISENBERG, *What is the Settlement Rate and Why Should We Care?*, 6 Journal of Empirical Legal Studies, (2009). (only 32.4% of contract cases were litigated)

¹⁶¹ The “shadow of the law” is ...

¹⁶² FRIEDMAN, *Remedies for Breach of Contract - From Right to Remedy; From Law of Remedies to the Civil Code*, in 87.

¹⁶³ I repeat here the notion I expressed in chapter 2, that in its remedial law, Israel belongs to the civil law tradition. It is entirely possible to distinguish Israel from the civil law tradition and by doing so, the evidence may not pertain to the civil law system.

from the parties.¹⁶⁴ Either way, this data limits some of the scope of Specific performance awards. Yet, even partial Specific performance, that is, specific performance that is adjusted by the court to encompass only part of the requested performance, is very different from the payment of damages. This qualitative difference may justify lumping partial Specific performance with Specific performance. In any case, and bearing this qualification in mind, it is still clear that full Specific performance is awarded regularly if the suit has merit (that is, if it is not dismissed): 65% of the meritorious cases were specifically performed.

Table 2 Breakdown of Remedies

Result	Amount	Percentage	Confidence Interval
Specific performance + Damages	10	10%	±5.8%
Specific performance	36	35%	±9.25%
Sub Total	45	45%	±9.6%
Partial Specific performance	15	15%	±6.9%
Sub Total	60	60%	±9.5%
Damages	9	9%	±5.5%
Rejection	31	30%	±8.9%
Back for Review	1	1%	±1.9%
Total	102	100%	95% Confidence Level

¹⁶⁴ For a discussion of the cy-pres doctrine, see p. 19

4.3 Bargaining Units

In this section I will suggest that *prima-facie*, the legal rule should favor Specific performance and that the design of the legal remedial rule should take into account the fact that courts do not take into consideration the number of the parties to the litigation, although they should under some theoretical framework.

The studies conducted by Calabresi and Melamed¹⁶⁵ and Kronman¹⁶⁶ stress the relevance of the number of parties participating in litigation to the choice of remedy. In the Calabresi-Melamed's framework, the number of participating parties has a direct bearing on the transaction costs involved. Building on this observation, Kronman claims that the greater the number of litigants, the more likely it is that the court should award damages (and not Specific performance). Conversely, the fewer the number of parties involved, the more the courts should award Specific performance. If the court erroneously awards Specific performance the parties can easily contract around it; however it is more expensive to bargain when there are many litigants. In the latter case, the court should take the trouble and expenses and decide the proper allocation of damages. The hypothesis here is twofold. First, if the number of bargaining units is high on average, then on efficiency grounds – *prima facie* – the general rule should be the payment of damages rather than Specific performance, because it will lead to a decrease in the transaction costs for the average case. Second, courts are expected to award damages when there are more bargaining units and Specific performance when there are only few. What is at stake then is to identify the average number of bargaining units and to ascertain how this number correlates to the decision in the case.

Tables 3 and 4 display data to address this question by assuming that the number of bargaining units is equal to the number of parties to the litigation. The assumption here is that however “bargaining units” are defined,¹⁶⁷ the number roughly corresponds to the number of parties

¹⁶⁵ DOUGLAS A. MELAMED GUIDO CALABRESI, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev., (1971).

¹⁶⁶ ANTHONY T. KRONMAN, *Specific Performance*, 45 U. Chi. L. Rev., (1977).

¹⁶⁷ If the term *bargaining unit* is not carefully defined, it can easily encompass every person in the world. However, here I offer a rough definition of the term to refer to all of the parties directly related to the dispute.

to the court case. If any of the parties opts to negotiate a settlement agreement, she will have to bargain with *all* of the parties to the litigation, hence the proximity between bargaining units and the number of parties to litigation; in that, both bargaining units and parties to litigation fill an identical function. Indeed, the actual number of parties who can count as a “bargaining unit” may be higher or lower than the actual number of parties to the litigation; however, it is likely that there will be strong correlation between the figures. If there are only a few parties to a particular litigation, this is likely to indicate that fewer people were actually bargaining, and inversely, a high number of litigants indicate numerous bargaining units.

Table 3 - Average and Median Number of Bargaining Units

	No. of Plaintiffs	No. of Defendants	Bargaining Units	Confidence Interval
Israel	n/a	n/a	Average = 3.75 Median = 3 Maximum = 12	±0.43
U.S. State Courts (General Contract Cases)	Average = 1.51 Median = 1	Average = 1.83 Median = 1	Average = 3.35 Median = 3 Maximum = 299	±0.27

Table 4 = Correlation between Bargaining Units and Remedy in Israeli Courts

	Correlation to increase in Bargaining Units ¹⁶⁸
Specific performance	0.020064
Partial Specific performance	-0.0164
Combined	0.008514

¹⁶⁸ P-values are 0.43, 0.39, 0.49, 0.35, 0.47, respectively.

Damages	-0.02776
Rejection	-0.03246

These tables tell a relatively unexpected tale on the two hypotheses. First, Table 2 illustrates that as a general rule there are only a small number of bargaining units.¹⁶⁹ A median of 3 parties (average of 3.75) – a finding which is strengthened by a similar finding in the U.S. courts – suggests that when designing the legal rule, one should expect that the low number of bargaining units will result in low transaction costs. Within the Kronman framework of analysis, the legal rule should favor, *Ceteris Paribus*, Specific performance. If the courts decide wrongly on the question of entitlement, the parties are presumed to contract around the court decision at a relatively low cost.¹⁷⁰

Second, Table 3 shows almost a total lack of correlation between the number of bargaining units and the choice of remedy. Yet, these results are statistically insignificant,¹⁷¹ and it is impossible to reject the null hypothesis that there is no correlation. However, the extremely low correlation and the lack of contradictory empirical data mean that it is possible to conclude tentatively that there is no relationship between the two variables. This also means that courts seldom factor in the number of bargaining units when deciding on the appropriate remedy for breach of contract. This finding may come as a surprise to those who believe that bargaining units should play a major role in remedies decisions, but is entirely consistent with prevailing doctrines and case law.

It is possible to claim that the practice of the courts is wrong, i.e., in not taking the number of bargaining units into account. This approach is possible, but it has to tackle the difficulty presented by the data presented here. The reason courts refrain from taking the number of bargaining units into consideration indeed may be a simple oversight, but is more likely to point to a deeper issue. As the

¹⁶⁹ Kronman speaks of x parties as a small number.

¹⁷⁰ For elaboration, see discussion on p. 38 onwards.

¹⁷¹ The P-values are 0.43, 0.39, 0.49, 0.35, 0.47, respectively.

interviews reveal, post-judgment renegotiations are not as frequent as the theory predicts.¹⁷² The infrequency of post-judgment renegotiations in general may mean that the number of bargaining units has only marginal influence on the occurrence of post-judgment renegotiations. As a result, courts are correct in not giving weight to this factor, because it will not affect the efficient reallocation of entitlements. An alternative claim may be that courts are aware of the inherent under-compensatory nature of damages and compensate for it by regularly awarding Specific performance.¹⁷³ Either way, t

In sum, the findings presented here suggest a legal rule favoring Specific performance. The findings also suggest that courts resist differentiating cases on the basis of bargaining units and that the legal rule should take this resistance into account.

4.4 Positive Performance, Negative Performance and Payment of Money

Roughly speaking, contracts involve obligation to perform one of these three categories: either a positive performance (i.e. construction of a house), negative performance (i.e. non-competition agreements) or a payment of a sum of money.¹⁷⁴ One might expect that courts would be more willing to award Specific performance when the obligation breached is negative performance rather than a positive one. For example, agreement to refrain from using heavy machinery after a certain hour of the day may present a more compelling case for Specific performance than an agreement to custom build a *bouzouki*. This difference in attitude is expected because being coerced to commit an action is usually perceived as being more intrusive into one's privacy than an order to refrain from doing something. An obligation to pay a sum of money is even more likely to be specifically performed because it is qualitatively similar to damages. Courts are accustomed to coercing the payment of damages and may see little, if any, difference in ordering Specific performance payment obligations.

¹⁷² See discussion on page 103

¹⁷³ It is worth noting that no statistically significant correlations were found between the number of bargaining units and other aspects of the case.

¹⁷⁴ Almost all contracts contain a mixture of the three types. For the purposes of analysis, the choice between the three was made based on the dominant nature of the obligation to perform that was breached.

Economic analysis may also support the notion that negative performance should be more prone to Specific performance. According to this view, a court order to perform an action is much more expensive to administer than a court order to refrain from doing a certain action, which is arguably cheaper to monitor.¹⁷⁵ For instance, it is likely to be cheaper to verify that the operator of the heavy machinery abstains from operating it after 8 p.m. than to verify that the bouzouki artisan builds it at a satisfactory level (i.e. uses quality glues). Forcing a kiosk owner to operate it may be more expensive in terms of police manpower than making sure the kiosk owner does not operate it. From a different economic perspective, Shavell's analysis¹⁷⁶ suggests that omissions and obligations to pay the contractual consideration are more prone to Specific performance orders because the possibility of a surge in production costs is less likely.

Table 4 reinforces some of these ideas. The data illustrate that obligations to positive performance are less prone to Specific performance than obligations to negative performance. On the other hand, the data also negate the idea that the payment of money will be more available than any other form of performance. Interestingly, the data suggest the opposite: only 37% percent of the payment of money cases resulted in Specific performance, whereas 48% of the positive performance cases and 80% of the negative performance cases were awarded Specific performance. However, when the possibility of *adjusted* performance (partial Specific performance) is taken into consideration and is considered as Specific performance, obligations to pay are slightly more likely to receive Specific performance than obligations to positive performance (62.8% and 55.6%, respectively).

I believe that an institutional-design factor explains the tendency of the courts to award less Specific performance in cases of positive action as opposed to cases of payment of money. Judges are much more comfortable when they need to decide on matters of money than when they have to decide on positive actions. While positive actions tend to have a more binary character – either performing or not – obligations to pay a sum of money lend themselves much more easily to

¹⁷⁵ It should be reminded that the court has an ongoing role in monitoring performance *after* the judgment was given, mainly through the procedure of contempt.

¹⁷⁶ SHAVELL, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*.

adjustments. For instance, how should the judge adjust the obligation of a contractor to build a second story? Furthermore, it is easier to assess the appropriate damages for the breach of an obligation to pay a sum of money than to assess the appropriate damages for the breach of a positive action. Judges, who usually lack credible evidence regarding how to adjust or compute damages, may be more willing to award Specific performance of a positive action to minimize the possibility of a mistake. This explanation is consistent with both the fact that more cases of the payment of money are adjusted than are cases of positive action (7.41% v. 25.6%) and the fact that more cases of the payment of damages are awarded damages rather than Specific performance (5.56% v. 13.95%).

Table 5 Specific performance Vs. Type of Performance

	Specific performance (46)	Partial Specific performance (15)	Sub Total (61)	Damages (9)	Other (1)	Rejection (31)	Total (102)
Action (54)	48.15%	7.41%	55.6%	5.56%	1.85%	37.04%	100.00%
Omission (5)	80.00%	0.00%	80.00%	0.00%	0.00%	20.00%	100.00%
Payment of Money (43)	37.21%	25.58%	62.79%	13.95%	0.00%	23.26%	100.00%
Statistics		$\chi^2=13.15$		P-Value= 0.107			

4.5 Contract to Produce Vs. Contract to Convey

As briefly mentioned above, Shavell distinguishes between contracts to produce and contracts to convey property. With regard to the former, Shavell claims that courts should award damages, whereas in the case of the latter, Specific performance is the adequate remedy. Shavell goes on to say:

to put the point differently, the law would be inconsistent with economic theory if specific enforcement were carried out mainly for breach of contracts to produce things and to provide services[74](Shavell 2005)[74](Shavell 2005)¹⁷⁷

Surprisingly, Shavell's point, made within the Common Law context, holds true within the Israeli system. Despite the different ideological bases of the two systems of law (Common Law and Israeli),

¹⁷⁷ SHAVELL, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*.23, note 85.

they converge on this point.¹⁷⁸ Table 5 shows that contracts to produce were specifically performed only 50% of the time, while contracts to convey were specifically performed 65% of the times. The picture becomes clearer when the cases that were dismissed on their merits are omitted: of the cases for conveyance of property, 90% of the cases were awarded Specific performance, while only 74% of the contracts to produce were awarded this remedy. Statistically speaking, the agreement between Specific performance and the sale of property is very significant.¹⁷⁹

Table 6 Production vs. Conveyance

	Production	Conveyance of property
Specific performance	21%	55%
Partial Specific performance	29%	10%
SubTotal	50%	65%
Damages	32%	29%
Rejection	4%	7%
Statistics	$\chi^2=13.79$	P-Value=0.008

On the other hand, Shavell's account predicts that only a few, if any, Specific performance awards will be granted in the context of contracts to produce. However, there are high rates of Specific performance awards in contracts to produce, and statistically speaking, there is no statistical significance to the agreement of either damages or Specific performance with contracts to produce. The fact that so many contracts to produce are granted Specific performance requires explanation.

¹⁷⁸ I assume here that Shavell correctly depicts the American system, although the evidence he provides to this end is anecdotal. It would be ironic if it were proven that Shavell's description fits the Israeli system better than the American.

¹⁷⁹ A hypergeometric test, corrected for multiple hypothesis with FDR, yields statistical significance, where p-value = 0.001507

One simplistic explanation is that, from an economic perspective, courts are simply wrong in these cases. Judges miscalculate the economic calculus of incentives and social welfare and grant Specific performance when they should not. However, it seems that a more nuanced answer is required. It is highly likely that this conundrum in the way courts resolve cases is the result of two basic trends. First, economic impetus drives the courts to frequently award Specific performance when the contract deals with property.¹⁸⁰ This impetus is likely to be driving the judges subconsciously, since the judges never mention a preference for this type of contract.¹⁸¹ The second trend is the effect the legislation and social culture of the courts have on court decisions. As discussed, legislation in Israel accords Specific performance a prominent role. It is highly likely, then, that the legislation has had considerable impact on awards of Specific performance in general. The culture of the courts is a more elusive term, whose existence and impact are difficult to measure. By *culture of the courts* I mean primarily the rhetoric of the court. After reading all of the cases that constituted the sample, major precedents and other sources of law, I can assert unequivocally that there is uniformity in the way courts *speak* of Specific performance. Regardless of instance or year, the rhetoric is overwhelmingly unvarying. Israeli case law declared war on efficient breach¹⁸² and all the judges were enlisted.¹⁸³ While there is always the chicken and egg problem when trying to examine the impact of culture, the fact that the rhetoric is so strong and uniform leads me to believe that the Israeli court culture is most likely responsible for the high rates of Specific performance in general. Combined together, then, these two trends explain why both conveyance of property cases are more prone to Specific performance awards and why Specific performance is generally available.

One last point of interest is the fact that courts can adjust performance. Shavell does not consider this element in his analysis, but in cases of production, this option is used frequently by the courts

¹⁸⁰ I share here the belief that judges have *some* intuition in regard to the economic efficient solution to the case. For a discussion of the literature discussing this hypothesis, see *infra*, note 148. As Shavell explains, this intuition is likely to be the basis of the Common Law preference for awarding Specific performance in contracts to the sale of land.

¹⁸¹ The case may be different in the U.S. where the law shows a clear preference to award Specific performance in cases of real property.

¹⁸² The leading case is *Adres*, which declared the principle. Here are some citations from the case law just to give general impression.

¹⁸³ As a matter of fact, most of the Israeli academia treat efficient breach with suspicion and usually lack sympathy for it. See, for example, COHEN, *Distributive Justice in the Enforcement of Contract*.

(29% of the cases). In one case, for example, the court ordered that a different parking spot will be allotted to the plaintiff, a frustrated buyer of an apartment in a building in which the attached parking spot was blocked by another parking spot. Adjusting performance helps mitigate some of the detrimental effects Specific performance may have on the incentives of the parties and help realign them with the social welfare. The frequent use of adjusted performance in contract-to-produce cases at least partially explains the high number of Specific performance awards in general.

4.6 Identity of Parties

The deontological arguments which favor Specific performance usually envision a disappointed promisee whose – to caricaturize slightly – heart was broken by the breach. Whether this description is accurate or not, it seems certain that it does not hold true when it is applied to corporations.¹⁸⁴ Corporation by its own right does not have an autonomy that calls for promotion; nor does the corporation has human dignity that needs to be protected.¹⁸⁵

Furthermore, according to the “legalist” justification of Specific performance, the aim of contract law is to protect the interests of the parties, a goal best achieved by ensuring performance. The reference to interests is vague at best, circular at worse; however, it might suggest that some interests are irreducible to monetary terms. This irreducibility pertains primarily to individuals because corporations’ interests are presumed to be *mostly* if not *only* pecuniary. Therefore, it is interesting to learn the realities of Specific performance in terms of the identity of the parties seeking it as well as the identity of those actually receiving it.

Table 4 describes the identity of the parties to litigation where Specific performance was sought. It is clear from the data that corporations play a major role in suits for Specific performance. Indeed,

¹⁸⁴ One of my readers suggested that the deontological argument can be extended to corporations as well, since there are real people behind the corporations who might be frustrated or disappointed by the breach. I agree that the dichotomy individual-corporation may be too simplistic and that, in reality, there is a range of possibilities. Nevertheless, I am not sure that anyone at AT&T, for instance, will be even remotely disappointed with me if they are paid damages for my breaching their service agreement. In addition, it is true that there are real people behind every decision of the corporation. However, corporate decisions are made frequently by many people, and to none is the decision to contract or breach is fully attributable. For the problematic nature of equating corporations and real human beings see: FELIX S. COHEN, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, (1935).

¹⁸⁵

more private parties ask for Specific performance than corporations, but there is still widespread use of Specific performance suits among corporations. The high number of Specific performance suits by corporations poses a challenge for conventional justification for Specific performance; it seems inadequate to place the entire moral argument on the image of an individual who seeks redress of the wrong that was done to him and his autonomy.¹⁸⁶ After all, we are not as concerned with the development of the autonomy of the corporation and the corporation's disappointment as we are with those of the individual. This difference in concern means that something more has to be said before Specific performance could be justified as a general rule. The argument could be that Specific performance as a general rule means that no individual will be harmed by a mistaken decision to award him Specific performance; or the argument could be that corporations should receive Specific performance for the sake of educating the public with a uniform message. Either way, the argument has to be made and defended before Specific performance could be justified as a general rule.

More importantly, Table 5 suggests data that may seem troubling to those who hold deontological views on Specific performance. According to the data, Corporations have larger chance of receiving Specific performance than individuals (68.5% and 55.7%, respectively). Not only the fact that corporations are more likely to win in Specific performance litigation but they are actually less likely to lose when they defend against such a suit (52% chance of losing as opposed to 69.6% for an individual).¹⁸⁷

Table 7 Identity of Parties to Litigation

	Individual	Corporation
Israel – Plaintiff	65% (66)	35% (36)
Israel – Defendant	48% (49)	52% (53)

¹⁸⁶ It may be meaningful in this regard that the most frequent exception to litigation employed within the context of individual-defendants is the justice exception.

¹⁸⁷ Furthermore, more claims by plaintiff were dismissed than claims made by corporations (23 and 8 respectively). It is not surprising that corporations are better legal players; however, it still does not explain why they won more Specific performance and not damages awards.

Statistics	$\chi^2=5.76$	P-Value=0.016
U.S. – Plaintiff	60% (1185)	40% (785)
U.S. - Defendant	40% (1050)	60% (1547)
Statistics	$\chi^2=174.35$	P-Value=0

Table 8 Chances of Winning / Losing a Specific Remedy

	Specific performance	Partial Specific performance	Combined	Damages	Rejection
Plaintiff Type					
Individual	42.6% (26)	13.11% (8)	55.7% (34)	9.8% (6)	34% (21)
Corporation	51.4% (18)	17.1% (6)	68.5% (24)	11% (4)	20% (7)
Defendant Type					
Individual	54.3% (25)	15.2% (7)	69.6% (32)	2.2% (1)	28.3% (13)
Corporation	38% (19)	14% (7)	52% (26)	18% (9)	30% (15)
Statistics	$\chi^2=9.47$	P-Value=0.395			

5. CHAPTER 5 – INTERVIEWS ANALYSIS

5.1 Introduction and Methodology

Chapter 4 offers a semi-quantitative analysis of a random sample of court decisions to provide insight into the practices of the courts in general in regard to Specific performance litigation and to extract the factors associated with the decision to award Specific performance in litigation. Given the fact that the data in the previous chapter is based solely on what courts *say* and *do*, it is apparent that there is no account of the wider realities of Specific performance litigation, or more accurately, it does not describe fully the Specific performance law *in action*. This chapter fills this gap by providing data collected from interviews conducted with lawyers, private parties and public officials. There are two questions at hand – why do parties pursue Specific performance and how the court award affects their behavior. The two questions encompass a marked timeline division: the former question is focused on the pre-litigation stage and the latter at the post-litigation.

In the course of research, several obstacles limited the extent of cooperation received from litigants.¹⁸⁸ These obstacles frustrated attempts to interview a random sample of interviewees.^{189,190} While the result is a set of interviews that may not necessarily represent the population, this study offers a wide range of interviewees from mixed backgrounds and in-depth interviews. A total of 18 in-person, semi-structured interviews were conducted, each for approximately 30- to 40- minutes.¹⁹¹ Five interviewees were private parties involved in Specific performance litigation during the last fifteen years. Of them, four had won Specific performance awards and one had lost.

Ten additional interviewees were lawyers. They were chosen based on the specific cases in which Specific performance was awarded or due to their experience in the field of contract litigation. Four lawyers interviewed were partners in Israel's top law firms; another four were affiliated with

¹⁸⁸ For example, the contact information of the parties was frequently unavailable, and some parties were not confident that data given in the interviews would not be used in future litigation against them.

¹⁸⁹ While a random choice of cases was intended, the low return rates made any sample of cases inherently biased.

¹⁹⁰ The interviews were conducted under the ethical approval of the Institutional Review Board (IRB); IRB protocol no. 15682.

¹⁹¹ Three exceptions were made to the face-to-face interviews in an on-phone interview.

mid-sized law firms, while the two remaining lawyers were employed by a small law firm (one to four lawyers). Finally, after securing formal authorization,¹⁹² a magistrate judge was interviewed in his capacity as the head of the enforcement authority.

With five exceptions at the request of the interviewees, the interviews were all recorded on tape. Threelawyers requested anonymity.

The interviews revealed a complex picture on the practices of parties in regard to Specific performance. The interviewees held substantially opposing views on most questions, such as the prevalence of Specific performance, its desirability, its application and its results. Generally, it is not surprising that lawyers have differing views on questions of law and sometimes of fact; however, in the current context, considering the uniformity in the rhetoric of judges about Specific performance, the divergence in opinions and attitudes is worth noting.¹⁹³ It should be noted, that the divergence between the rhetoric of the judges and the views of lawyers are mostly related to the question of availability of Specific Performance. The strong rhetoric of the court suggests that Specific Performance is routinely awarded but lawyers are suspicious of this. It seems that Israeli lawyers (and perhaps lawyers everywhere) treat the official standpoint of the court with a grain of salt. The reasons for that far exceed current study, but it is nevertheless a very interesting observation.

The emerging picture from this chapter is that despite the general availability of Specific performance awards in Israeli law, parties abstain from suing it on a large scale. The reasons are myriad and are practical in nature. When parties do sue Specific performance they do not always do so for the sake of obtaining performance and sometimes do so inadvertently. despite the fact that the literature predicts that a Specific performance rule will increase Specific performance litigation, the actual effect of this rule are slight and parties engage in some form of self selection prior to suing Specific performance.

¹⁹²According to §39(c) to Code of Ethics for Judges, 5767-2007, Available online at <http://elyon1.court.gov.il/eng/ethic.doc>. A judge will not give interviews unless the President of the Supreme Court has given her permission in advance.

¹⁹³ For a development of this curiosity, see discussion below on 36

In the following sections, I will discuss several key findings using the factual history and legal background of the relevant cases to contextualize and deepen the discussion. I begin by discussing the post-trial stage, analyzing why some Specific performance awards are performed while others are not. This analysis suggests that social norms, reputation and solvency of the defendant play a near-conclusive role on the decision to perform. Once these conditions are satisfied, courts should be lenient in the decision to award Specific performance. I then inspect the role of settlement agreements on the post-trial stage through an analysis of three key impediments to settlements that are unique to context of Specific performance. I then analyze the trial and pre-trial stages of litigation. In these sections I provide analysis of the use parties make of Specific performance which is revealed to be instrumental rather than pursuing it for its own sake, and of the reasons why there is low amounts of Specific performance litigation under Israeli law.

5.2 Post Judgment Settlement Agreements and Obstacles to Settlement Agreements

A fully body of literature exists on the reasons parties litigate and why do they not reach a mutually beneficial settlement agreement when one is possible. In my study, I did not venture deeply into the broad question of the decision to litigate in general or the failures of settlement agreements in general. However, I did try gain insight into a few singularities that exists in the field of Specific performance.

The most prominent singularity is the fact that the alternative to negotiation is coerced cooperation. Usually, a settlement agreement seeks to mitigate the harmful effects of a previous failure to cooperate and to distribute the gains and losses that the failure to cooperate has yielded. The focus of attention, then, is both in the past and in the future. In the past lies the harm done: in the future, the division of the compensation. Specifically, the parties are conducting their negotiations in light of the past failure to cooperate and in the shadow of the law. Failure to reach a settlement agreement could lead to litigation, which could lead to a court mandated division of the harm

between the parties. In any case, if the parties fail to negotiate, the court will decide for them, and they can all go on to their separate ways. The case of Specific performance poses a singularity in this field. In this instance, unlike almost all other instances of settlement agreements, the parties face the risk that the failure to settle will result in (coerced) cooperation. This alternative makes the area of the settlement agreement under the shadow of Specific performance of special interest. The findings described here facilitate a glimpse into the special properties of this unique case. How does the implicit threat of future coerced cooperation impact the negotiations?

The analysis here shows that in the post trial stage, some negotiations take place, however, not all succeed, and even those who succeed do not necessarily secure the plaintiff a higher gain than he had under the Specific performance award. The fact of the matter is that Specific performance decrees are only partially alienable, which has strong theoretical implications.¹⁹⁴

5.2.1 Post-Judgment Renegotiation (PJR)

In some cases the parties renegotiate the judgment and reach an agreement that forfeits the plaintiff's right to use the judgment in exchange for some consideration from the defendant. The literature predicts that in these negotiations the plaintiff can negotiate some of the breach-surplus and therefore the PJR will result in better economic outcomes for the plaintiff than he would have had had the contract been performed. The PJR are sometimes treated with caution, as a possible impediment to the efficient breach. If the PJR will break down, the contract would be performed and the opportunity for the efficient breach will be lost. Surprisingly, the findings show that in several instances the PJR actually yielded lower monetary results for the plaintiff than those allocated to him in the judgment.

Consider the case of Mr. Negev.¹⁹⁵ In this case, Mr. Negev successfully evaded the collection attempts of his Moshav village for a few years. The Moshav presumably knew that for internal political considerations, it could not pursue with full force the collection of the debt from Mr. Negev.

¹⁹⁴ See FENNELL, AYRES; CALABRESI.

¹⁹⁵ See above on p. 92

Faced with the prospect of not being able to collect at all, the Moshav had to settle for a sum that was only 25% the original sum of the judgment.¹⁹⁶ In another case, the prevailing plaintiff found out that the defendant could not hand over the land the plaintiff was entitled to by judgment, because of a lien placed on the land by the tax authority. To remove the debt, the defendant had to pay more than he could. The plaintiff's lawyers told me that the plaintiff is contemplating paying for the removal of the lien out of his own pocket.¹⁹⁷

The reasons for the surprising low amount of sums in these instances of PJR are a result of an oversight of the literature. Breach of contract does not necessarily take place only when an offer is made to the defendant that is better than the one on the table. The defendant may breach also when she is insolvent, under-capitalized for the specific performance sought or because she thinks she can get away with it and the contract is no longer valuable to her. In all these instances the defendant is likely to breach the contract, and if the plaintiff will be able to negotiate a settlement with the defendant, it will probably be for a lower sum than the value for him of Specific performance. It turns out that the unilateral monopoly that the Specific performance award gives is much weaker than may be thought. In certain contexts, such as insolvency, the alternative to negotiations is not a negative result to the defendant but to the plaintiff – he would have to face a debt that he cannot collect.

The emerging picture of PJR on general is mixed. Two of the interviewees reported that they were engaged in successful PJR.¹⁹⁸ In another case, the PJR failed.¹⁹⁹ Finally, two interviewees commented that no PJR took place.²⁰⁰ The emerging picture is that PJR is not as prevalent as might be expected by the theory, but is nevertheless more common than previous studies have suggested.²⁰¹

¹⁹⁶ *Interview with Mr. Omri Negev* (12.24.08) (On file with author).

¹⁹⁷ *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author).

¹⁹⁸ *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). *Interview with Mr. Omri Negev* (12.24.08) (On file with author).

¹⁹⁹ *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author). (The lawyer said that the other party proved to be stubborn and did not always care for the exact truth. The case referred to was the Ben-Aharon case. CA 4018/03 Isodor Sharvit. v. Ben Aharon (2005) (Hebrew), ())

²⁰⁰ *Interview with Mr. Avi Shachar, Director of A.G.M.R. Engineering & Investment Co. LTD.*, (12.23.08) (On file with author). *Interview with Ms. Tzipi Katz* (12.24.08) (On file with author).

²⁰¹ WARD FARNSWORTH, *Do Parties to Nuisance Cases Bargain after Judgment--A Glimpse Inside the Cathedral*, 66 U. Chi. L. Rev., (1999).

The fact that the alternative to successful negotiations is coerced cooperation through the use of the Specific performance awards is likely to have made a difference, but this difference is only in the margin.

5.2.2 Obstacles to Settlement: Reducing the Remedy to Monetary terms

In the former section, it was shown that not always settlement agreements bear fruit or even take place. In this section I would like to suggest the main explanation to these two phenomena. Parties do not always reduce their remedies and rights into monetary terms, a tendency which impedes and inhibit successful negotiations. Parties and lawyers do not fully reduce the remedy to its monetary value. They still think of Specific performance as qualitatively different then damages. One lawyer said that he believes that private individuals see the actual performance of the contract as an end in itself – “a private person wants a specific apartment, a specific type of construction.” According to him, it is only in the commercial sphere that the actual performance is a means to profits.²⁰² This notion was reinforced by two cases of buyers of an apartment who did not receive one. They said they did not negotiate a settlement because they wanted *the specific* apartment, not just money to buy an apartment.²⁰³ The same is true in another case of the woman who purchased a custom-made door and got one that opened in the wrong direction.²⁰⁴ She believed that only by getting Specific performance would she be vindicating her right.²⁰⁵

Indeed, when confronted with the question of whether they would have sold their right for a very large amount of money, these plaintiffs all said that they would have; however, none of them actively tried to negotiate such a high sum, and all three seemed to think about the monetary aspect as being qualitatively different from their contractual entitlement.

The aversion from reducing the contract to monetary terms is important to the understanding the importance of Specific performance in general. In all of these cases private individuals showed

²⁰² Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm. (1.29.08) (on file with author).

²⁰³ Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm. (1.10.09) (on file with author). Interview with Ms. Tzipi Katz (12.24.08) (On file with author).

²⁰⁴ See discussion in

²⁰⁵ Interview with Ms. Nilli Madar (1.4.09) (On file with author). The costs of the door were relatively low (11,500 NIS, which is approximately 2700\$).

resistance to the idea that their contractual rights are commensurable with money. This resistance is explicative of the low rates of pre and post-trial settlement agreements. It also helps explaining why courts in Israel, alongside the writers from the deontological perspective, stress so much the importance of Specific performance – they simply do not see it as commensurable with damages awards. Damages awards, on the other hand, force the parties and the judges to reduce their claim to monetary terms and therefore facilitates settlements. One lawyer said that in Israel, unlike her experience from the United States, a breaching party do not negotiate before breaching, but simply breaches.²⁰⁶ I would like to suggest that this unwillingness to negotiate before breaching is at least partly related to the aversion from reduction. In a jurisdiction where damages is the prominent remedy, I believe that there would be much more pre-trial negotiations.

It follows then that when designing a rule favoring Specific performance, one should take into account that it encourages low rates of settlement agreement because of the problem of perceived non-commensurability.²⁰⁷ It is worth noting that there is no evidence collaborating the idea that corporations avert from reduction to monetary terms: au-contraires.²⁰⁸ Since I showed in Chapter 4 that corporations are mostly involved in Specific performance litigation and mostly win Specific performance awards, it may follow that the general rule should not take this aversion too seriously, or at least apply it differently in different contexts.

5.2.3 Obstacles to Settlement: Breakdown of Settlement Agreements

Another interesting reason why Specific performance negotiations are likely to fail, either post trial or pre trial is exemplified in the case of defective production. For instance, Ms. Madar purchased a custom-made entrance door to her house, with metal ornaments made to her specifications. The door cost approximately \$2,700. When the company installed the door, it was revealed that the hinges were on the wrong side, so that the door opens in a very inconvenient way. Ms. Madar approached

²⁰⁶ *Interview with an anonymous lawyer #3, partner in a leading law firm.* (1.5.09) (on file with author).

²⁰⁷ As I said, I do not deny that all of these actions are commensurable with *some* amount of time. The idea I am promoting here that although people would have accepted (passively) a better monetary offer, they would not pursue one on their own behalf.

²⁰⁸ *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm.* (1.29.08) (on file with author).

the company and after some ado they offered her a small amount of compensation in the form of a decorative doorknob. However, the company refused to take the door back and replace it with a different one. (Apparently, it was not possible to place the hinges on the other side of the door.) Mr. Madar despaired at the prospect of litigation but Ms. Madar stood firm in her conviction. She hired a lawyer and sued the company. She prevailed in the litigation, and the door was almost immediately replaced. Her court expenses were paid in full, and she even recovered some compensation for her disappointment. The company came out as a loser– they had to pay \$1,100 to replace the door in addition to their litigation costs.

It is a matter of speculation why the company initially refused to replace the door. It is puzzling at least at the stage when it was clear that litigation is imminent. When asked about it, Ms. Madar thought it was a simple mistake that was later infused with the company’s desire to back up the manager’s decision who had refused to replace the door. While this explanation is possible, there may be a competing explanation. Cases of faulty production, such as the case at hand, usually entail high replacement costs and relatively low damages. In this case, even if Ms. Madar could have proved her damages, which she did not,²⁰⁹ they were not likely to exceed a few hundreds of dollars – which is much less than the costs of replacing the defective product.²¹⁰ On the other hand, the costs of replacing the door were extensive. Given the fact that the door was custom-made, selling it to someone else would likely be very difficult, especially since the door was previously installed and, therefore, was not “new.”

In litigation the company at least had the opportunity to compensate only a small amount of money. While it does not seem plausible to assume (*ex-ante*) that the company had a good chance to win the case, they at least had a decent chance of changing the type of compensation. Ms. Madar shared the view that she has good chances of winning, but had a different view about the type of compensation likely to be awarded. The extreme difference between the two types of possible

²⁰⁹ CC (Haifa) 2117/07 Madar Nilli. *v.* Shiryonit Hasam - North (2007) (Hebrew), (paragraph 12).

²¹⁰ A similar common-law case comes to mind. In the case of *Jacob & Youngs v. Kent*, 230 N.Y. 239, (N.Y. Ct. of Appeals, 1921). In this case, the contractor installed the wrong type of pipes in the walls of the house. Justice Cardozo decided that compensation was to be computed not based on the costs of replacing the pipes but by the market value difference in the value of the two types of pipes, which was relatively low.

outcomes – Specific performance, on the one hand, and little to no compensation on the other – made negotiations very difficult. Indeed, Ms. Madar rejected a settlement agreement that offered her a small amount of compensation. I would like to suggest that defective products cases are more prone to settlement failure, and, hence, have a higher propensity for litigation due to the wide gap between the costs of Specific performance and market-value compensation.

In sum, Specific performance in the context of defective production raises the problem that negotiations are highly unlikely to bear fruit. The margin that each party moves in does not overlap with the other party. The gap between the two parties is simply too large. This is not to say that negotiations are always doomed, but only that it will be very hard to find a common ground.

5.2.4 Obstacles to Settlement: Entrenched Mistrust Between the Parties

There is little need to expand on this observation, but it nevertheless merits mentioning. The fact of the breach stirs up many emotions between the parties. Animosity plays a major role. A party feel commonly feel justifiable in deeply suspecting the other party, after she expressed what he may consider as a display of incredibility.

The entrenched mistrust between the parties may lead to breakdown of settlement agreement. One of the interview told that the other party came to her and offered her what would have been perceived as a great offer in other settings. He approached her and simply asked her how much money would she like in exchange to her claim to the house. She declined to make an offer. She feared that the other party was setting her up and will use this information in future litigation. Judging from the facts of the case, I believe that a settlement agreement could be very beneficial to both parties, and the fact that none was reached due to the entrenched mistrust is mistakable but maybe unavoidable.²¹¹

²¹¹ *Interview with Ms. Tzipi Katz* (12.24.08) (On file with author).

5.3 Pre-Trial Stage: The Tactical Use of Specific performance

When a party seeks Specific performance of a contract, it may simply indicate an interest in the actual performance of the contract. A cigar is sometimes just a cigar. That people do not always think of their rights in monetary terms²¹² is manifested in the choice of remedy. Parties may sue for Specific performance because they believe they are entitled to it. However, one of the most prominent findings that recurs in many of the interviews is that parties often make instrumental use of Specific performance actions. That parties may maintain a wider array of interests than the actual performance of the contract has not escaped the attention of the literature.²¹³ As discussed at length in Chapter 3, parties may sue – or threaten to sue – for Specific performance merely to gain a portion of the breach surplus. Surprisingly, only one²¹⁴ of the interviewees specifically mentioned this use of Specific performance action.²¹⁵ Despite the importance of these alternative uses, no mention of them was found in the relevant literature. The prominent reason for this oversight is probably the distance the literature has from the practical procedural considerations parties and lawyers have.

This section analyses the instrumental-tactical uses parties make of Specific performance claims. My analysis isolates four functions of Specific performance. When parties sue Specific performance they do so to signal to the court the sincerity of their intentions; to achieve an accelerated resolution of the case; to improve their bargaining position; and sometimes to enable them to collect insurance for non-performance. The underlying notion of this section is that through the understanding of the wider array of functions Specific performance fulfills, we can reassess the desirability of making it the default remedy available to the aggrieved party.

5.3.1 Improving Bargaining Positions

²¹² See discussion in p. 24

²¹³ It may be interesting to complement the deontological account of Specific performance with an account of the morality/ethics of suing Specific performance when one is actually indifferent between monetary compensation and actual performance.

²¹⁴ *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author).

²¹⁵ Specifically, one of the interviewees, a prominent lawyer in Israel's biggest law firm demonstrated reluctance to claim Specific performance even for tactical-instrumental reasons. I believe that this reluctance was based on his fear that a court order to perform may be easier to avoid than an obligation to pay money. *Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm.* (12.28.08) (on file with author).

If a contract is breached, the aggrieved party may choose to either pursue damages or a Specific performance award. However, Specific performance implies a certain unique risk. The defaulting party has already revealed that she has no continuing interest in the contract. Coercing her to perform nevertheless is likely to result in sub-optimal performance and may even lead her to intentionally performing badly. If this observation holds in a simple contract case, it holds *a-fortiori* in cases of a long-term, relational contract. The result is that Specific performance should not be the remedy of choice in cases of breach of a contract because it would be *ineffective*.

Even if this observation is true, it does not mean that Specific performance should not be pursued or awarded. The interviews reveal another important function that Specific performance awards fulfill: offering one of the parties a better position in post-judgment bargaining. More exactly, they give the winning party unilateral monopoly in bargaining. This function assumes that neither party is actually interested in the performance of the contract, but that they are both trying to negotiate some form of division of the breach surplus.

One of the lawyers told of a client of his who had suffered multiple breaches by the other party in a long-term, relational contract. The lawyer knew that Specific performance would not be effective, but pursued it nonetheless. “We knew that we will have a very hard time achieving actual performance ... however, we wanted to be in the other party’s territory.”²¹⁶

The winning party is in a better bargaining position now, because he holds a credible threat that if the negotiation is fruitless, he will pursue the actual performance of the contract which is (per assumption) against the best interests of the party in breach. Perhaps incidentally, this finding also asserts the notion prevalent in the economic literature that Specific performance will be pursued to negotiate some of the breach surplus.

Not all of the interviewees spoke of post-judgment bargaining. A relatively small number mentioned having had the experience of participating in such bargaining, even though they were all

²¹⁶ Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm. (1.29.08) (on file with author).

specifically asked about that in the interview.²¹⁷ Furthermore, sometimes plaintiffs who prevailed in litigation had to renegotiate after the judgment for a lesser amount.²¹⁸ However, inasmuch as this kind of bargaining is prevalent outside of this study, it may change the nature of some of the deontological arguments. No longer should the question be the moral value of keeping one's promise, rather it should be who should get the better bargaining position over the breach surplus. This study is inconclusive on the prevalence of such negotiations and as a result is inconclusive on this point.

5.3.2 Signaling Effect

For the plaintiff to be awarded a remedy for breaching a contract, he must first prove that the contract was breached by the defendant. This proof may not be easy, as the defendant can allege that the plaintiff breached the contract first. If the defendant proves her claim, the case is likely to be dismissed. One of the interviewees described such allegations as being common practice,²¹⁹ and the content analysis of the court cases partially supports this claim.²²⁰ The interviewee specifically spoke of a *counter-claim-syndrome*. Not only does that the defendant allege an antecedent breach by the plaintiff, but she actually files a counter-claim, asking for/requesting remedies for the alleged prior breach.

It should be noted that allegations of antecedent breach are not necessarily spurious in nature. Contract interpretation is an “elastic art,” and a good lawyer is likely to find innovative interoperations of the mutual obligations in good-faith. The defendant lawyer may also cling to the plaintiff's trivial and minor deviations from the four corners of the contract. More importantly, in most instances, a breach is a matter of probability and degree, and the probability of prevailing in

²¹⁷ One notable example to post-judgment bargaining was given by Advocate Benichou, who said that he was personally involved in “some” post-judgment bargaining. *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm*. (1.10.09) (on file with author).

²¹⁸ *Interview with Mr. Omri Negev* (12.24.08) (On file with author); CA 148/77 Rot v. Yeshupa (Hebrew) (1979), 33(1) PD 617, 640 (

²¹⁹ *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author).

²²⁰ The reason for the dispute was recorded in 82 cases; in 10 of these cases, the dispute was about who breached first. The actual numbers are actually much higher, since these are cases in which the heart of the dispute was a cross-breaches and not only cases in which the defendant claimed a cross-breach.

litigation and effectively collect is but a probability. The plaintiff may not know for sure whether the defendant has breached the contract and if so, to what extent. Nor does the plaintiff know for certain that she will prevail in litigation and, if so, whether the defendant will have enough resources and capital to effectively compensate her. Faced with the probability of a breach, the plaintiff is likely to take precautionary measures. Indeed, he is required to do so.²²¹ The defendant, who has not actually or fully breached until this point, can claim that these precautionary measures constitute antecedent breach.

Faced with allegations of a prior breach, the plaintiff has to choose the remedy he seeks for the breach of the contract. The interviews reveal that the plaintiff may be wholly satisfied with damages, maybe even prefer it over Specific performance, yet she will still ask for Specific performance. The reason is tactical. By asking for Specific performance, the plaintiff signals to the court that he has an ongoing-concern in the contract. When the court will have to decide whether there was an antecedent breach by the plaintiff, the action for Specific performance will help convince it that there was no such breach. After all, if the plaintiff is sincerely interested in the contract, why would he breach? The action for Specific performance signals seriousness on behalf of the plaintiff. Conversely, the choice of damages gives the impression that the plaintiff seeks to rescind the contract and may strengthen the impression that the plaintiff had no interest in the contract which led him to breach it.

Ironically, one of the lawyers interviewed reported that in one case he was certain that the plaintiff was asking for Specific performance for tactical reasons. The contract led to losses, and the plaintiff was hoping that either the court would grant damages notwithstanding the action or that he could reach a favorable settlement agreement. The lawyer took advantage of this fact. In his defense

²²¹ §14 to *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm.* (1.10.09) (on file with author).

statement, he essentially agreed that this remedy would be granted.²²² The plaintiff, who had no ongoing-concern in the contract, retracted the claim.

The importance of this finding is the fact that it reveals a key aspect in that Specific performance makes all the involving parties worse off than they would have been under a rule of damages. The source of the problem is that, understandably, the courts make evidentiary inferences from the perceived failure to exercise the right to Specific performance. Under a common law regime of choice between damages and Specific performance, this inference is less likely and will carry much less weight. The conclusion is that in determining the policy that Specific performance is the prominent remedy, one has to take under consideration this adverse effect, which seems at least partly inescapable. Parties will sue more Specific performance than they would want. Whether the benefits from this remedy exceed this adverse effect is a matter of balance.

5.3.3 Faster Resolution

When parties had an action that combined both Specific performance awards and damages, they reported that they preferred dividing the action in two.²²³ Specific performance actions were thought to be much faster and less costly than actions for damages. Indeed, the quantification of damages can be a highly complex, lengthy and costly process. The consideration of the simplicity of litigation and faster litigation is also important from the social-welfare point of view, because it decreases the expenses for court time. Since monitoring performance can be costly from the plaintiff's point of view, the decision regarding which remedy to pursue could be thought of as a decision to allocate expenses between litigation and monitoring performance. If the costs of monitoring performance are low, such as in the case of easily verifiable performance, the plaintiff is more likely to prefer suing for Specific performance. Conversely, if the costs of litigation are lower than those of monitoring performance, the party is likely to prefer damages. This preference for

²²² *Interview with Y. Reiter, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). I asked another one of the interviewees who faced a similar situation why he did not use this tactic. He frowned upon the idea and thought it was unethical: *Interview with A. Kaban, Esq.*, (12.30.08) (On file with author).

²²³ *Interview with Mr. Avi Shachar, Director of A.G.M.R. Engineering & Investment Co. LTD.*, (12.23.08) (On file with author).

remedy is instrumental, or tactical, in the sense that it is not based on the inherent value of damages or of Specific performance.

5.3.4 Collection of Insurance Money

One party may be insured against failure of the other party to perform. This is manifestly the case in apartment-building construction contracts in Israel, which are all required by statute to have a mandatory insurance.²²⁴ When a party is insured against breach he may face a moral hazard, and be overly willing to take risks. One such risk is suing Specific performance in light of low chances of performance. Usually, when the defendant has a low chance of performing, the plaintiff would rather sue damages and be over with the transaction than to sue Specific performance and run the risk that the plaintiff will fail to perform. Indeed, the failure of the defendant to perform will allow the plaintiff to sue her for damages. However, if the risk has already materialized and the defendant actually failed to perform, it may be highly likely that the collection of the damages award will not be possible. The moral hazard in this case is rather obvious, but its implications are far from trivial. The findings reveal a surprising result of the impact of insurance. Apparently, the right to Specific performance in conjunction with insurance of the plaintiff will make the plaintiff sue Specific performance even if he is not interested in the very least in the actual performance of the contract. The following case illustrates this point.

An inexperienced contractor started a new construction project of several apartment buildings. In the early stages of the project, the contractor sold apartments in the future buildings. Perhaps due to his inexperience or simply due to an oversight, he sold apartments without concern to the fact that they are spread throughout all of his future buildings and are not part of one building. Unfortunately, the contractor managed to sell only enough apartments to allow him sufficient capital to build one apartment building but no more than that. Since the contractor obligated to sell apartments in several buildings, he could not meet his obligations. The contractor went bankrupt, and

²²⁴ §2 to the Sales Law (Apartments) (Guarantee of Investments of Apartment Acquirers) 5735–1974. According to this section, the contractor is not allowed to receive more than 15% of the contractual consideration for the sale of the apartment unless the consideration money is insured by a bank.

a receiver was appointed to his estate. Due to some unexplainable factors (probably related to fraud) some of the individuals who bought the apartment disappeared,²²⁵ and the banks who gave them mortgages came in their shoes.²²⁶

The receiver was unable to build all the buildings the contractor obligated to build due to lack of adequate capital. Therefore, the receiver thought it would be in all the creditors' best interest if he were to build one building, instead of several, and give the banks apartment in this building instead of the apartment they were entitled by the contract. The banks were offered reimbursement for any difference between the market value of the apartment offered to them and the value of the apartment in the contract. However, the banks refused and demanded that the receiver will perform his contractual obligations.

The receiver filed a petition with the bankruptcy court in an unusual proceeding. The receiver asked the court it will allow him to perform his duties *cy-pres* despite the fact he was not the aggrieved party. The receiver reiterated the settlement offer he previously offered the banks. Despite the procedural irregularity of the case, the bankruptcy court was willing to decide on the matter, and decided to allow the receiver to discharge his duties in an adjusted fashion.

The court did not explain why the banks were insisting on performance of the contract. This insistence demands explanation, as the banks will not be residing in the apartments and are not expected to have any idiosyncratic preference about the identity of the apartment other than its market value. Given that the banks were offered compensation for any deviation of the new apartment from the market price of the original apartment, the behavior of the bank may seem irrational. Nevertheless, the interview with the receiver solved this enigma.²²⁷

The price of the land apparently decreased and the value of the apartments in the project was not enough to pay back all of the banks expenditures on the project. On principal, the banks were in

²²⁵ It can be speculated that the people who purchased the apartments were nothing but straw men recruited by the contractor to fake a volume of sales, so as to allow the contractor to get more credit from the banks. One of the purchasers apparently fled the country. Do note that this is but a speculation.

²²⁶ BankruptcyCourt (Haifa) 1053/01 Receiver of Ramat Shlomi *v.* Shlali David (2004) (Hebrew), (

²²⁷ *Interview with A. Kaban, Esq.*, (12.30.08) (On file with author).

a position to rescind the contract and claim for restitution of their payments. However, given the insolvency of the contractor they could only hope to collect few cents on the dollar. Yet, the banks preferred performance of a losing contract. The plain reason is that the banks were insured and they estimated that by insisting on performance the receiver would fail to meet his obligations and with that, the bank could collect the insurance money. The bank preferred to collect the money of the insurance over waiting for the apartment to be built and then selling it for the following reasons: the price of the apartment was probably lower than the sum of the insurance, the sale of the apartment by a bank is almost always under market price²²⁸ and is costly, and finally and perhaps most importantly, the insurance money was not subject to the bankruptcy proceedings and in the case the apartment was actually built, they would have a secured claim for it.

In sum, this case illustrates an instance where the existence of insurance incentivizes the parties to insist on Specific performance for tactical reasons. Despite the fact that none of the banks wanted the performance of the contract, they insisted on it. The main reason is that insurance money is not subject to the bankruptcy proceedings, whereas damages are. The other reasons are the immediacy of the insurance money and the fact that it insures against decrease in market value. The conclusion is that it wrong to assume that Specific performance is in the interests of the plaintiff only if performance is likely, as seem to be the assumption of the literature. Specific performance may well benefit the plaintiff even if the defendant will fail. In deciding whether to accord Specific performance award to the plaintiff, the impossibility of performance should not always play a decisive role against Specific performance award. However, and more importantly, the courts should also be wary that the plaintiff is acting in a way that externalizes some of the risk of failure to perform from him. As such, courts should not be always willing to accept Specific performance claim by plaintiffs who are insured

²²⁸ *Interview with an anonymous lawyer # 1, specializing in debt collection.* (1.3.09) (on file with author).

5.3.5 Summary

To conclude, this section discussed four functions, or rather tactical uses, parties make of Specific performance. In some cases parties sue Specific performance just in order to signal to the court the sincerity of their intentions, and to signal that any allegation of antecedent breach on their behalf is wrong. The problem is that this use makes parties sue Specific performance even when performance of the contract is not in their best interest. This reservation show how the right for Specific performance can actually work for the detriment of the plaintiff. The second function is improving the parties bargaining positions. A party with a Specific performance award, or with a credible threat that he may win such an award in litigation, may improve his bargaining position so that he could negotiate some of the breach surplus. However, the findings of this study suggest that sometimes even Specific performance award is not enough to warrant a preferable position in negotiation. Nevertheless, at least in some of the cases Specific performance is used for improvement of bargaining position. This functions casts a cynical view on some of the deontological arguments, and forces the discussion of entitlements under the contract to address the question of not only who is entitled to the performance but also who should be entitled to the better bargaining position. The third function is derived from the fact that Specific performance litigation is faster and less costly than damages awards litigation. On the other hand, Specific performance is more costly in terms of monitoring performance than an action for the payment of damages. As a result, the tactical use parties make of Specific performance is a choice of allocation of costs, whether to allocate them to litigation or to monitoring of the performance. This tactical use entitles the plaintiff for a choice he would not have had under Common Law. This entitlement (or lack of entitlement under Common Law) requires justification. Finally, it was illustrated that insurance against failure of performance changes the balance of considerations parties make. The case of insurance raises the question of desirability of enforcement of low-probability-of-success obligations. Because the insurance externalizes some of the risk of non-performance borne by the plaintiff, courts should be more cautious in their decision to award Specific performance on such cases.

The tactical use of Specific performance raises interesting and important questions on the desirability of Specific performance as a prominent remedy. The literature is yet to tackle these questions.

5.4 Pre-Trial Stage: Why Do Parties Abstain from Suing for More Specific performance?

Some of the economic literature and most of the deontological studies find Specific performance to be a superior remedy for the plaintiff, at least *ex-post*.²²⁹ The content analysis suggests that in only a small proportion of all contractual cases (approximately 15%), is Specific performance sought.²³⁰ This gap between the expected rates of Specific performance litigation and the actual litigation rates demands an explanation – e.g. why is Specific performance *not* the remedy of choice for the plaintiff in all, or at least most, of the cases?

The interviews revealed several reasons lawyers and parties abstain from suing for more Specific performance. Parties may change their preferences over time; the lawyers have an agency problem due to their method of collection of their own fees; achieving cooperation by coercion may seem unattractive due to the high costs of monitoring; the parties may find on-going relationship with the party who breached the contract to be repugnant; and finally, for an unexplainable reason, some lawyers have a perception that actual Specific performance awards rates are low. Those advocating Specific performance may find the low rates of actual Specific performance litigation troubling. The successful identification of the reasons for the low rates may serve a reform that will increase rates of Specific performance litigation. Conversely, those who view Specific performance litigation negatively may seek to further the scope of these categories. In any event, it is important to properly identify these categories.

²²⁹ If Specific performance is super-compensatory, parties may not always be willing to pay the price for it *ex-ante*. However, if they do not have to pay it (or they have already paid for it) they will, in theory, prefer it. See SCHWARTZ, *The Myth That Promisees Prefer Supra-compensatory Remedies: An Analysis of Contracting for Damage Measures*.

²³⁰ As mentioned, the population of reported cases in which Specific performance was sought is estimated to be around 300 cases in the last 20 years: an average of 15 cases a year. A rough estimate of reported contract cases in general is at around 2,000 cases (estimate based on the classification of cases as contract cases made by the database): an average of 100 cases per year. This number is under-inclusive in the sense that it relies entirely on the commercial database taxonomy, which may not be complete or accurate as well as including cases that only dealt tangentially with contracts.

5.4.1 Preferences over Time

It is a truism that people have different tastes in different times. The issue of the plaintiff's preferences over time raises interesting questions. Even if the party is interested in the actual performance of the contract and favors it over payment of damages, it may not always be in his best interest to ask for Specific performance due to timing considerations and procedural aspects of the legal process. One of the lawyers told of a client who bought a brand new model of a fancy car.²³¹ The retailer committed an inventory mistake and could not supply the car on time. The client and the lawyer decided jointly against filing a claim for Specific performance. Considering the fact that litigation would take a few years to resolve,²³² the client would have no use for the car. The parties contemplated the possibility of *cy-pres* but rejected it as well, since the client was not sure whether he would still be interested in this brand of car in the future.

Theoretically, when the subjective value of the performance is greater than its objective value, the plaintiff will be better off with Specific performance than with damages award. In fact, it is presumptively the case in almost every deal, because the fact that the deal took place *ispo facto* means that the plaintiff found it worthwhile to pay the market price for the performance. However, the subjective value is not constant over time, and it may fluctuate. The gadget I so wanted yesterday may be of no use for me tomorrow.

When petitioning for Specific performance, the plaintiff is internalizing all risks (and benefits) resulting from fluctuations in his own *subjective* evaluation. If tomorrow, when the judgment will be rendered, the widget will no longer be of use for me, I will no longer be able to change my mind and ask for its market price. Similarly, when petitioning for damages, the plaintiff is internalizing part of the risks (and benefits) resulting from fluctuations in *objective* value. If the party is likely to change his preferences over time, Specific performance may not be the remedy of choice.

²³¹ Interview with Y. Reiter, Esq. from the Ron Gazit, Rotenberg & Co. (12.29.08) (on file with author).

²³² According to the content analysis, the average length of litigation is 2.8 years.

The length of litigation makes the risk of subjective evaluations fluctuations over time more imminent. Indeed, if the subjective evaluations will rise over time I will benefit from it (say, I just found a new use for this gadget), but a risk-averse plaintiff is unlikely to want to take this risk. Another point of importance is that damages litigation is even longer than Specific performance litigation. Nevertheless, it is less susceptible to fluctuations in subjective value. Because Specific performance is not an immediate remedy, parties who are risk averse are likely to be reluctant to ask for it. The prevalence of Specific performance in contract litigation depends on a large part on the speed of litigation.

5.4.2 Lawyers' Agency Problems

Another reason for the fact of low Specific performance litigation rates, and one of great importance, is the fact that the lawyer poses an agency problem. As a general rule, lawyers would prefer to petition for damages rather than Specific performance for two reasons – computation of their fee in a contingency agreement and its collection. If the lawyer works on a contingency fee agreement, computing the exact monetary value of Specific performance is likely to be complex²³³ and may, therefore, lead to undesired conflicts with the client and to a general “headache.”²³⁴ The second difficulty is with collection of fees.²³⁵ Under Israeli law, the lawyer has a laborer’s lien on the money received in the lawsuit.²³⁶ The lawyer and the client may also agree that the lawyer will take the fees directly from this sum of money.²³⁷ This lien provides important security for the lawyer, but it does not apply to cases in which Specific performance is awarded. It is understandable, then, why

²³³ Under common law Specific performance is awarded only in cases that involve unique items. Economic theory posits that uniqueness denotes prohibitive costs of evaluating the market price of the item (see KRONMAN, 362. (“In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of under-compensation on the injured promisee.”) Theoretically, in all such cases Specific performance is awarded under Israeli law as well (despite the absence of the uniqueness requirement). If so, it means that *by definition* in some of the cases – and it is likely that in a large part thereof – the lawyer will not be able to exactly compute her fair share at all.

²³⁴ *Interview with Y. Reiter, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). Another difficulty that parties and lawyers face in relation to Specific performance petitions is the problem of computing the court fees that are measured proportionally to the value of the deal.

²³⁵ *Interview with an anonymous lawyer # 1, specializing in debt collection.* (1.3.09) (on file with author).

²³⁶ §88 to the Israel Bar Association Law 5721-1961.

²³⁷ CrimApp 1075/98 State of Israel V. Oppenheim Pad 54(1) 303 (Hebrew)

some lawyers are reluctant to petition for Specific performance. This reluctance is likely to be more manifest when there are no entrenched trust relationships between the client and the lawyer.

5.4.3 Difficulties of Monitoring Coerced Performance

The fourth reason for low litigation rates is the difficulties associated with achieving coerced performance, primarily due to the weaknesses of the post-trial enforcement mechanisms. Lawyers reported that they abstain from filing for Specific performance because they know that it will be very hard and costly to actually obtain the performance of the other party – even with a judgment in their hands – and that it will even be harder and more expensive to monitor its quality.²³⁸ One lawyer mentioned a Specific performance award that his client got against his former employee. According to the award, the client was to refrain from participating any further in the field he used to work in (hi-tech). The client had reasons to suspect that the award was being breached and that his former employee was using knowledge that he acquired during the client’s employment. However he just could not assert this suspicion. Apropos, luckily for the employer, the ex-employee revealed the fact that he was actually continuing to work in his former occupation in an online social network (Facebook).²³⁹ It should be noted that this example illustrates a case in which monitoring negative performance is more expensive than monitoring positive performance.²⁴⁰

Therefore, if Specific performance is pursued, as suggested above, not for the sake of actual performance but for the sake of improving one’s bargaining position, why would not it be the remedy of choice in all cases? After all, if the party does not have to spend money on actual monitoring but only uses the award as a bargaining chip, he should not care about the expenses of monitoring. The following reason may complete this gap.

5.4.4 The Problem of an On-going Relationship

²³⁸ *Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm.* (12.28.08) (on file with author).

²³⁹ *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm.* (1.29.08) (on file with author).

²⁴⁰ See the content analysis chapter on the division between obligation to perform positively and negatively.

Animosity and charged emotions between the parties is the norm in contract litigation.²⁴¹ It is hard to find cases in which such tension does not exist. If a party finds the relationship with the other party repugnant, the damages remedy may seem as a blessing, just for the sake of not having to put up with the other party anymore. A remedy of damages puts an end to the relationship between the parties. On the other hand, Specific performance prolongs the relationship, and possibly, friction between the parties. When deciding which remedy to sue, a plaintiff is likely to take this under consideration.

The ruptured relational texture between the parties helps explain why plaintiffs may be unwilling to sue Specific performance more frequently. This reason does not only pertain to individual plaintiffs. Corporations as well may be dismayed by the prospects of dealing with a partner who, in their eyes, may not be trusted. In sum, the fact that Specific performance usually entails further dealings with the other party and that damages does not, may explain the preference for the remedy of damages in many cases.

5.4.5 Perception of Low Rates of Specific performance Awards

Despite the overwhelming uniform rhetoric of the courts on the importance and prominence of Specific performance and despite the findings of high rates of actual awards of Specific performance, not all lawyers perceive this remedy as prevalent.²⁴² The evidence here for a general statement on lawyers' perceptions is extremely limited, but it is still revealing that despite the vigorous preaching of the courts about the moral importance of Specific performance of contracts and its actual availability in judgments, there are lawyers who do not believe it is at all prevalent. This gap in consciousness is curious and demands an explanation of its own.

This study can only speculate on the reasons for this gap, if it indeed exists on a wider level and is not just a peculiarity. One possible reason is that lawyers think that there are low rates of Specific performance because they have an interest in having less Specific performance actions. Another

²⁴¹ See for example, *Interview with Mr. Omri Negev* (12.24.08) (On file with author); *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author).

²⁴² *Interview with an anonymous lawyer #2, senior partner in a leading law firm.* (1.5.09) (on file with author).

possible explanation is that lawyers assess the caselaw through the prism of their own experience, which may be biased. Yet another reason is that the lawyers interviewed do not view over 60% chance of receiving Specific performance as being high enough.

Whatever the reason for this gap is, it is clear that such a perception among lawyers may have heavy impact on the rates of Specific performance. If lawyers believe that a Specific performance action has low chances, they may prefer suing damages in the first place and not just in the alternative. The lawyers have strong influence on the decision-making process in the handling of the case, and therefore, such a perception may prove to be highly influential, even if erroneous. Perhaps this study will alter some of the perceptions lawyers have, although one should not be too optimistic.

In sum, this sub-chapter analyzed the reasons for the relative infrequency of Specific performance actions. The findings suggest that the length of the litigation process play a major role in the low rates of Specific performance litigation. Risk averse parties may fear that by the time the case is over they will have no, or little, use for the performance. Furthermore, lawyers have an economic preference for damages awards, since it enables them easily compute and collect their fees. This preference is likely to have effect, even if subconscious, in a large amount of cases. The fact that the parties find the companionship of each other burdensome and that Specific performance may make them continue their relationship, may explain the parties' aversion from Specific performance. Even if the parties can continue cooperation, they may still find the costs of monitoring the other party – who has already breached the contract – to be overly expensive. The last reason for the low rates of Specific performance is that for some reason, which is not fully explainable, some lawyers believe that there are low rates of award of Specific performance. This misguided perception has an adverse affect on the rate of Specific performance litigation.

5.5 Conclusion

This chapter provided a detailed look into the practices of Specific performance litigation. The use of interviews helped gain insight into many blind spots of current literature. The general

conclusion is that that the Specific performance litigation play a much lesser role than theory would have predicted and the role that it actually fulfills, is more different and complex than predicted by the literature.

This chapter revealed that despite the generosity of courts with Specific performance awards, these decrees are not commonly sought after and are frequently of little use to the plaintiff. Certain types of defendants can fend off enforcement attempts with relative ease. Furthermore, for many reasons post-judgment renegotiations are not effective and not as widespread as theory predicts. With the lower chance of renegotiation, plaintiffs are less likely to sue Specific performance unless they value it for its own sake.²⁴³ These two findings helps explain some the finding that rates of Specific performance litigation in Israel are relatively low. A few more reasons were given for this low rate phenomenon. Importantly, these reasons – such as the agency problem of lawyers and costs of monitoring the coerced performance – are inherent to the institution of Specific performance and are not jurisdiction-specific. It seems then, that the remedy of Specific performance is innately designed so as to make it unattractive for plaintiffs.

When plaintiffs do make use of Specific performance, they do so for many reasons, only some of them are predicted by the literature. In accordance with the prediction of economic theory, parties sue Specific performance to improve their bargaining position. More surprising, is the evidence that sometimes plaintiffs are inadvertently suing Specific performance, for the sole reason of signaling the court the sincerity of their intentions. Specific performance is sought often times due to its lower costs and duration of litigation. Anecdotal data suggested that Specific performance can serve, mainly in the context of construction contracts, to collect insurance money.

The resulting picture is that 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 Specific performance despite its general availability. As a result, even if Specific

²⁴³ For a theoretical discussion of the results of inalienability, see the *supra* note 194

performance has detrimental effects on efficiency – a highly disputed contention – these are likely to be low. In the following chapter I further develop this thesis.

5.6 Post-Trial Stage: Performance and Non-Performance of Specific performance Awards

One of the major blind spots of the research on Specific performance is the actual performance rates and quality of performance. To be sure, the anecdotal data collected in this study cannot entirely resolve this problem. However, the data presented do provide important insights into the practice of courts and parties in a jurisdiction that favors Specific performance and represent a first attempt at assessing the gap in the literature.

In this section I describe the findings of the interviews on actual performance rates. Based on the interviews I suggest that three factors are mostly related to actual performance – state of solvency of the defendant, her reputation, and the existence of social norms. Furthermore, the successful cases of performance allow for testing how a defendant’s claims in court about obstacles to performance were overcome in reality. The empirical evidence indicates that obstacles to performance are easily overstated in court and that neither complexity of the deal nor animosity between the parties plays a decisive role in the decision to refrain from awarding Specific performance. The data suggest that personal rivalries should not necessarily deter the court from awarding Specific performance, at least in big-business settings. Finally, this section analyzes the cases that were not specifically performed, despite the court order. The analysis reveals that five factors are mostly relevant to non-performance – passiveness of the plaintiff, a judgment-proof or insolvent defendant, the relative weakness of the enforcement mechanisms and absence of strong social norms that disfavor disobedience to court orders. Overall, these findings suggest that plaintiffs should consider the existence of reputation or social norms before asking in litigation for Specific performance (and maybe even before dealing with

the specific defendant), and that courts should be generous with Specific performance awards in cases where these conditions are satisfied.

5.6.1 Rates of Successful Performance of Specific performance Awards and Analysis of Reasons

The interviews yielded diverse answers on the likelihood of executing an order for Specific performance. Predictably, the lawyers working at the top law firms, which naturally tend to be involved in both representing and suing larger companies for larger sums of money, had a relatively positive view of the orders. In their experience, Specific performance orders were usually honored. On the other hand, a lawyer from a small law firm, savvy about small scale actions, said that from his experience, only a few Specific performance judgments were actually performed in a timely manner.²⁴⁴ The latter observation was reinforced in three more cases,²⁴⁵ but contradicted in three others.²⁴⁶ Indirect evidence from the Enforcement Agency reveals that 92% of all cases are against private individuals; these data reinforces the notion that private actors perform much less than large companies.²⁴⁷

Lawyers concur that an action for Specific performance is a serious threat (or, as one lawyer called it, “a whip”).²⁴⁸ While many cases of Specific performance do not lead to actual performance of the contract, in some contexts, the court order is more important and effective than others. Specifically, the judgment is more effective when the defendant is either historically law abiding or has reputation considerations to take into account. While it possible to deflect and evade some of the

²⁴⁴ *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm.* (1.10.09) (on file with author).

²⁴⁵ *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author). For the case, see CA 4018/03 Isodor Sharvit. *v.* Ben Aharon (2005) (Hebrew), *Interview with Mr. Omri Negev* (12.24.08) (On file with author). For the case, see CC (Ashdod) 1788/94 Beer-Tovia Ltd. *v.* Omri Negev (2001) (Hebrew), (petition approved for Specific performance of a sale of house in return to offset prior debts). See also LCA 7478/04 Beer-Tovia Ltd. *v.* Omri Negev (2005) (Hebrew), (discussing a settlement agreement between the parties). *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). The case was CC (Rishon-Lezion) 4616/02 Eshel Col. *v.* Hahevra Hamerkazit (2007) (Hebrew), (this case was not Specific performance per se, but dealt with collection of a bond).

²⁴⁶ *Interview with Ms. Tzipi Katz* (12.24.08) (On file with author). *Interview with Ms. Nilli Madar* (1.4.09) (On file with author). *Interview with Mr. Avi Shachar, Director of A.G.M.R. Engineering & Investment Co. LTD.*, (12.23.08) (On file with author).

²⁴⁷ In fact, 92% of the execution cases in 2007 are for collection of debts from private individuals. AGENCY.

²⁴⁸ *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm.* (1.29.08) (on file with author). A similar notion was expressed in *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm.* (1.10.09) (on file with author). And by *Interview with an anonymous lawyer # 1, specializing in debt collection.* (1.3.09) (on file with author).

attempts the plaintiff will have at enforcing his court order, such evasion may ultimately have adverse effects on the law-abiding citizen or on players who have repeat-play considerations.

Defendants are most responsive to Specific performance awards when they either have many assets and equity, have strong good reputation, or are in an environment that has strong social norms disavowing evasion of court orders.²⁴⁹ When a company has many assets or equity, the enforcement mechanisms are relatively effective. The plaintiff can either file for contempt, ask the court to be instated as a receiver of the company for the performance of the company debt to him or file a case with the enforcement authority. Of the three options, the interviewees only mentioned the use of the latter two.²⁵⁰ These two tools are effective because a company stands to lose much from their use—far more than having to perform. By becoming the receiver of a company, the plaintiff can effectively satisfy the company’s debt to him while also incurring heavy losses to the company.²⁵¹ By filing with the Enforcement Agency, a plaintiff can cause for the dissolution of the defendant.²⁵²

The second important element in performance of court orders is the reputation of the defendant. Some lawyers mentioned specifically that if the defendant has little reputation, collection endeavors are not likely to bear fruit.²⁵³ Indeed, the court order was usually performed when the defendant had strong reputation²⁵⁴ and was only partially performed when the defendant had little to no reputation.²⁵⁵ The importance of reputation cannot be overstated. This finding confirms similar findings in previous works that also asserted that businessmen and women are highly sensitive to

²⁴⁹ *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). *Interview with M. Shachor, Esq. from the Michael Shachor, Menes & Co.*, (12.30.08) (On file with author).

²⁵⁰ *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author); *Interview with an anonymous lawyer #2, senior partner in a leading law firm.* (1.5.09) (on file with author). (mentioned frequent use of the threat of the enforcement authority)

²⁵¹ One interviewee explained that if he were instated as a receiver, the defendant would have probably lost a very lucrative project, because he would have satisfied his own debt immediately which would have left the company under-capitalized for the other project. *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm.* (1.10.09) (on file with author).

²⁵² *Interview with an anonymous lawyer #2, senior partner in a leading law firm.* (1.5.09) (on file with author).

²⁵³ *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author).

²⁵⁴ *Interview with M. Shachor, Esq. from the Michael Shachor, Menes & Co.*, (12.30.08) (On file with author). (large company operating bus stations) CA 148/77 Rot v. Yeshupa (Hebrew) (1979), (a bank), *Interview with Ms. Nilli Madar* (1.4.09) (On file with author). (a well-reputed door company).

²⁵⁵ *Interview with Mr. Omri Negev* (12.24.08) (On file with author). (an individual), *Interview with M. Yord-Reed, Esq.*, (12.25.08) (On file with author). (individuals), *Phone Interview with Ms. Hayman.*, (1.06.09) (On file with author). (individuals).

considerations of reputation in their dealings.²⁵⁶ Interestingly, in the cases analyzed, reputation did not have sufficient force to deter the breach from taking place, but was nevertheless strong enough to ensure obedience to the court order. This fact suggests that reputation is a much more complex and nuanced concept than usually thought. Reputation works differently in different contexts, and as suggested by the data, it is more effective as the deviation from the duty is more apparent.²⁵⁷ However, a party's reputation has strong impact on performance rates and should be considered by both plaintiffs and judges when Specific performance is contemplated.

Finally, social norms play a major role, especially, albeit not exclusive, on the decision-making of individuals. Luckily, a defendant who lost in litigation and avoided performance for a long time agreed to cooperate with this study.²⁵⁸ His story reveals the cardinal importance of social norms to private individuals. Mr. Negev, A Moshav member (an agricultural cooperation community),²⁵⁹ owed the Moshav a considerable amount of money due to debts he incurred in failed agricultural business. The Moshav reached a settlement agreement with Mr. Negev that the latter would give the Moshav the house of his late parents in exchange for forgiveness of the debt. Mr. Negev did not perform, despite the fact that the Moshav prevailed in litigation. Mr. Negev continued evading the judgment until some five years later he managed to negotiate a superior deal with the Moshav. According to the new deal, Mr. Negev paid only half the sum he originally owed the Moshav.

Mr. Negev explained that his decision to evade performance drew strength from the fact that other Moshav members were involved in similar litigation with the Moshav. "The Moshav", he explained, "was divided between the good and the bad people". Mr. Negev added that "when I was alone I was ashamed, but when other members joined I drew force". Apparently this strength was

²⁵⁶ MACAULAY. BERNSTEIN; LISA BERNSTEIN, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev., (2000).

²⁵⁷ For a very good analysis of the literature on reputation and the role it plays for the study of contract law see BARAK D. RICHMAN, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering Essay*, 104 Colum. L. Rev., (2004).

²⁵⁸ *Interview with Mr. Omri Negev* (12.24.08) (On file with author). For the case see CC (Ashdod) 1788/94 Beer-Tovia Ltd. v. Omri Negev (2001) (Hebrew)

²⁵⁹ For further explanation on the Moshav settlements, which are a unique Israeli settlement type, see <http://en.wikipedia.org/wiki/Moshav>

much needed. The Moshav used heavy pressure.²⁶⁰ Agents of the Moshav came to Ms. Negev and told her to start packing because the Moshav was about to use its legal powers and evict them to an alternative housing in a poor town. While Ms. Negev was about to break from this threat, Mr. Negev held firm. According to Mr. Negev, one of the Moshav members committed suicide as a result of the heavy pressure employed by the Moshav. Other Moshav members shun Mr. Negev. The Supreme Court wrote a decision condemning the behavior of Mr. Negev which added additional pressure on Mr. Negev. While the settlement agreement can be viewed as a victory for Mr. Negev, it is a short-lived one. Due to the social implications of this affair the Negev family now contemplates leaving the Moshav.

Although Mr. Negev did not perform, the key observation from this affair is that the impact of the social norms can be devastating. It is doubtful that the Negev could sustain a longer period of social isolation, or that they would repeat their decision not to perform in hindsight. Similarly, had it not been for other members who participated in litigation, it is unlikely that Mr. Negev would have engaged in such a long-term evasion. Indeed, social norms are much more effective in close-knit societies, of which the Moshav is a prominent example.²⁶¹ However, the importance of social norms is not reserved to these narrow settings. These norms are prevalent in business communities as well.

The conclusion from the discussion so far is that whenever individuals are involved in litigation, they have basic propulsion to perform court orders even if those are not in their best interests. When considering whether to expect performance from the other party, one should consider these three main factors: the defendant's capital, the extent of the defendant's reputation, and the defendant's exposure to social norms. When these conditions are met, the defendant is likely to perform even if she stands to lose considerably from performance.

5.6.2 The Alleged Obstacles to Performance Tested in Reality

²⁶⁰ It should be noted that the Moshav did not fully use all of its legal powers. For the best of my knowledge, the Moshav did not use the Enforcement Agency.

²⁶¹ Professor Lawrence Friedman views law as an outgrowth of weaknesses in the social glue. See LAWRENCE FRIEDMAN, *The Role of Law in United States Society* (1982).

To avoid Specific performance, parties present a litany of deleterious consequences that will result from an award of Specific performance. While sometimes the lawyers assert such claims without proper substantiation, sometimes they represent a true assessment of the outcomes of a court order of Specific performance. In this section I analyze how these alleged obstacles emerge in reality after the court decided to award Specific performance despite their existence. The conclusion from the findings is that these obstacles can be easily overstated, and that, at least in commercial settings, they should be accorded lesser weight. The cases in this study reveal that parties often find creative ways to overcome the difficulties of performance.

In one case, the defendants argued that the entire religious equilibrium in Jerusalem was at serious risk if Specific performance was awarded. Opening a non-kosher McDonald's restaurant at the central bus station was described in litigation as being tantamount to "letting a pig stick his hooves into the old city wall."²⁶² In the context of Jerusalem, where the pig signifies an unholy abomination for the majority of the population, this statement carries a catastrophic undertone. Obviously, parties do not always claim catastrophic events of such magnitude. Sometimes the defendant merely claims that the relationship between the parties has been so seriously ruptured that it would be unrealistic to expect cooperation between the parties at a satisfactory level, even if performed. Other times it is claimed that monitoring the performance will require an unreasonable number of resources from the court or that enforcement will be plainly unjust.

Fortunately, the religious equilibrium in Jerusalem remains despite the opening of the McDonald's restaurant (admittedly, as it always has, in a fragile balance). Four interviewees, reported cases in which the relationship between the parties after Specific performance was indeed not harmed and sometimes even deepened and improved.²⁶³ Among the cases of successful performance despite strong resistance in the courts, the most revealing case, and one worth pursuing in detail, is the case of *Carmleton*.

²⁶² CC (Jerusalem) 12507/01 Alonial v. Amot Hashkaot LTD (2002) (Hebrew)

²⁶³ Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm. (12.28.08) (on file with author). Interview with M. Shachor, Esq. from the Michael Shachor, Menes & Co., (12.30.08) (On file with author). Interview with Ms. Tzipi Katz (12.24.08) (On file with author). See also CA 148/77 Rot v. Yeshupa (Hebrew) (1979)

Before addressing the case of *Carmelton* a brief introduction is in place. In Israel, the right to Specific performance is limited to cases when the supervision needed by the court or the enforcement office will be “unreasonable”. This limitation is commonly called “the excessive supervision clause”. The second restatement shares a similar exception.²⁶⁴ I discussed this remedy at greater length in Chapter two,²⁶⁵ but it is important to note that the notion that “unreasonable” may be construed as being prohibitively costly in terms of monitoring the quality of performance, which is most likely to occur when the deal is either complex, long-term or involves large sums of money. As a result, an extremely complex multi-million financing contract would be an ideal example of a case in which the court should refrain from awarding Specific performance due to the problems of supervision. The case of *Carmelton*, which features all of these characteristics, may be taken to suggest otherwise despite its special circumstances.²⁶⁶

Carmelton is a construction company that is the franchisee for digging a traffic tunnel through the Carmel Mountains. The estimated cost of the project is 1.22 billion NIS (\$300,000 million). As part of the contract, Carmelton negotiated a facility agreement with Discount Bank, one of Israel’s largest banks. According to the agreement, the bank was to extend 914 million NIS of credit for Carmelton to be used in the project.²⁶⁷ The span of the agreement was 30 years. However, unforeseen delays prolonged the time between the date of the agreement and the completion of the project. The bank suffered losses from having to extend credit for such a long period and sought to rescind the contract. To that end, the bank alleged that Carmelton had previously breached various specific obligations in the contract. Carmelton moved to enforce the specific performance of the facility agreement. Judge Modrick, after deciding that the contract was still valid, assessed whether the excess supervision exception had been met. The bank contended that the complexities of the project and the animosity between the parties made Specific performance unreasonable to supervise. It claimed that the court would not be able to effectively monitor the performance. In a bold decision,

²⁶⁴ Foundations of Law, 5740-1980.

²⁶⁵ See Chapter 2,

²⁶⁶ CC (Tel-Aviv) 2486/02 Carmelton Group Ltd. v. Discount Bank LTD.

²⁶⁷ Source: ROY BERGMAN, *Project Carmel Tunnels is Underway: Facility Agreement between Carmelton and Discount Bank Signed (Hebrew)* Globes.

Judge Modrick decided to set aside the bank contentions and to award Specific performance of the facility agreement:²⁶⁸

Take the fancy business suits and the prestigious titles from the partners to the facility agreement and you will discover that ... they are ordinary people with ordinary abilities (care for their dignity, ambitions, reasonableness or unreasonableness, social abilities and inabilities etc.). ... [The Bank's actions] cannot be effected, for long, by considerations of the ego of its managers. ... Indeed, BOT agreements are not simple ... however, **since we are dealing with rational parties** with intellectual and professional abilities **adequate to understand both the mechanisms needed to perform the contract and the consequences of disputing every petty argument, then there is no need to assume that an excessive amount of judicial supervision will be needed.** (emphasis added)

Despite the bank's contentions about animosity and the inability of the parties to effectively work together, a new agreement was signed after the judgment was rendered.²⁶⁹ In this agreement Carmelton made a concession and agreed to decrease the toll it would charge drivers in the tunnel; in return, the state agreed to compensate the bank for some of its losses.²⁷⁰ In other words, the judgment made the parties renegotiate and sign a new agreement. This agreement made the bank better off than it had been under the original agreement.

The interview with Carmelton's CEO revealed a surprising set of events. Not only was the facility agreement implemented, but the CEO was surprised when asked about the animosity with the bank. The CEO said that he "knows a different bank than the one described in the judgment" and that "*de-facto*, the relationships with the bank are excellent."²⁷¹ Despite having prevailed in litigation, the CEO was not excessively concerned with the gains his company had won in litigation, but seemed more concerned about how satisfied the bank was. He indicated that the bank was satisfied with the agreement, that its demands and concerns were all met and that Carmelton "keeps the bank

²⁶⁸ CC (Tel-Aviv) 2486/02 Carmelton Group Ltd. v. Discount Bank LTD., (

²⁶⁹ It may be worth noting that the judge decided to condition the remedy of Specific performance on the commitment of Carmelton to negotiate with the state a compensation agreement for the benefit of the bank. Carmelton was negotiating a compensation agreement for itself with the state, aimed at compensating Carmelton for the delays the state had caused in authorizing the project. According to a letter of intentions it was supposed to negotiate a compensation for the bank as well. The compensation was supposed to cover the costs the bank incurred due to the delays in construction. The compensation was specifically **not** supposed to compensate the bank for delays caused by its own attempt to revoke the agreement with Carmelton.

²⁷⁰ The state took an obligation to secure 90% of the bank loan.

²⁷¹ CA 148/77 Rot v. Yeshupa (Hebrew) (1979), (

fully informed so it has nothing to worry about.”²⁷² When pressed about the cooperation with the bank and whether he assumed that the bank would be willing to grant extensions, he said that he could not answer the question in general, but that they were making minor modifications on a day-to-day basis and that they had received full cooperation from the bank.

This case highlights the problematic nature of obstacles to performance arguments, especially in the context of the excessive supervision clause. It appears that the doctrinal approach that tests the complexity of the deal is lacking. The district judge noted correctly that the sophistication of the parties allowed them to both transcend personal rivalries and to cope with a complex deal despite implementation difficulties. If this case is indeed not one that highlights the difficulties of supervision despite all of its immense factual complexities, it seems that the realm of *excessive supervision* is extremely narrow.

The second lesson to be learned from this case is that despite having prevailed in litigation, the winning party had to sign a new agreement that included less favorable terms than the original agreement.²⁷³ This post-judgment settlement agreement is only partially explained by the conditions outlined in the judgment issued in the case. It seems that Carmelton was willing to make concessions in light of other considerations, probably the need to obtain the cooperation of the losing party. Carmelton’s move was made either to give proper assurances and incentives for the bank to cooperate in the future, to “save face” for the bank or a combination of the two. In any case, the fact that Carmelton was worried about the interests of the bank partially explains the successful cooperation between the parties. The other part is explained by the identity of the parties – professionals in a corporation involved in a multi-million NIS deal – that compelled them to consider issues of reputation more seriously and to transcend personal rivalries. The renegotiation also reveals that in some Specific performance cases, parties are incentivized to assist each other to overcome obstacles to achieve a mutually beneficial performance.

²⁷² Id. at (

²⁷³ The obligation of Carmelton to the state to decrease the toll its levies can be seen – and indeed is seen here – as a discount given to the losing party in a post-judgment settlement agreement.

Carmelton, alongside the case of McDonald's and another case of alleged impossibility,²⁷⁴ all reveal a similar picture. Difficulties implementing an order for Specific performance can be easily overstated. When the court orders Specific performance, parties are incentivized *ipso facto* to find innovative solution to their difficulties. In some instances, the defendant can even expect that the plaintiff will help her overcome them. Furthermore, claims of animosity can only go so far in commercial settings. Carmelton cooperates smoothly with Discount bank and McDonald's has other branches in other bus stations. Indeed, that data collected here is limited, but that the deals described were of such large magnitude and yet went underway notwithstanding all the difficulties is very suggestive. The conclusion is that courts should be less concerned with factual concerns of implementation of their awards than with normative questions of who should be entitled to receive it.

5.6.3 How and Why do Parties Not Perform?²⁷⁵

In the last section, attention was given to successful implementation of Specific performance awards. It was shown that parties can overcome significant difficulties when a judgment of the court hangs over their heads. However, not all court Specific performance awards are preformed. In this section I explore and analyze why some defendants did not perform. I isolate five important factors that affect the decision not to perform: passiveness of the plaintiff; insolvency or under-capitalization of the defendant for purposes of discharging the concrete obligation; weakness of enforcement mechanisms and the weakness of the social norms or lack of reputation of the defendant; and, finally, some of the defendants renegotiated after the judgment was rendered and settled for an alternative to the Specific performance award. These reasons should all be considered by the plaintiff in his choice

²⁷⁴ The latter case is the case of CC (Jerusalem) 2117/07 Hen David *v.* Lee Maon Ltd. (2004) (Hebrew), (. In this case the defendant claimed it was impossible for her to give the title to the apartment of the plaintiff due to an outstanding debt that placed a lien on the title.

²⁷⁵ In a very insightful research, Xin He analyzed patterns of illegality among immigrants in Beijing and found out that the legal system itself was inducing some this illegality. While this is not exactly the situation in Israel, the analysis at hand seeks as well to establish institutional reasons for non-compliance with court orders. See XIN HE, *Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepreneurs in Beijing*, 39 *Society Review* 527, (2005).

of remedies, and also by the courts when they consider the feasibility of Specific performance. Damage awards are less relevant most of these, and therefore damages are preferable in these cases.²⁷⁶

The first reason for non-performance is passivity on part of the plaintiff. interviews revealed that all successful collections were preceded by a plaintiff's approach to the defendant.²⁷⁷ Formally, the plaintiff has no obligation to take any action after a judgment is issued, and the defendant will not be excused from her obligation to perform just because the plaintiff did not take any action. Post-litigation action is also expensive and the plaintiff may not be willing to pay this additional cost. However, formal law is one thing, and law in action is another. If the plaintiff takes no action to collect the judgment, the prospects of performance are low. One example can be found in one case, in which the plaintiff, who was awarded with a parking spot under her apartment, became gravely ill. She took no action to collect her judgment, albeit she has no obligation to do so. The fact that in the last six years she took not action to collect her judgment, led to the fact that it was never performed.²⁷⁸ There could be other reasons as well to post-judgment passivity. Some can be viewed as rational: a plaintiff whose business are expanding (and therefore his time becomes more expensive) may not want to spend time on pursuing the disobedient defendant. The pursuing of the defendant is costly as well, and it may be that its costs – alongside all other sunk costs that the plaintiff has already invested in the case – exceed the gains of performance. Other reasons may seem less rational. A plaintiff may find assurances to the “villainy” of the other party in her continued non-compliance with the court order, thus strengthening the sense of victimhood of the plaintiff.

A second reason for non-performance is insolvency of the defendant. When a defendant is insolvent she becomes judgment proof. The prospects of coercing a judgment-proof debtor to perform are slim at best. One of the interviewees labeled these judgment-proof debtors outlaws, but

²⁷⁶ Note that this section does not repeat the argument about the role of reputation and social norms,²⁷⁶ and reserves the discussion of post-judgment renegotiation for a later stage See p. 26

²⁷⁷ For example, *Interview with Mr. Avi Shachar, Director of A.G.M.R. Engineering & Investment Co. LTD.*, (12.23.08) (On file with author).

²⁷⁸ *Phone Interview with Ms. Hayman.*, (1.06.09) (On file with author). The case was CC (Tel-Aviv) 63723/99 Lota Hayman. *v.* Shatrice David Moshe (2002) (Hebrew),

in the literal sense of the word – individuals living beyond law’s ambit.²⁷⁹ It should be noted, however, that Israel still imprisons individuals for non-payment of debts, and regrettably practices that option quite regularly.²⁸⁰ However, insolvency is an extreme condition. Some defendants may not be insolvent in general, but only in relation to the commission of the Specific performance award. Specifically, the defendant may have enough capital to pay damages but not to perform the contract. In this case the defendant may be viewed as being under-capitalized.

An illustration of the problem of a defendant’s under-capitalization is the *Sharvit* case. After signing a contract to purchase land, the Sharvit family discovered that due to an outstanding tax debt of the seller, the land was under lien for the benefit of the state. Due to insufficient funds that exceeded the amount the buyer was to pay for it, the seller could not discharge his tax debt; therefore, the title to the land could not be transferred. An attempt by the plaintiff’s lawyer to appoint himself as a receiver of the assets of the seller failed. As of this writing, three years after the decision of the Supreme Court, the title remains in the hands of the sellers. The plaintiff is contemplating paying the debts himself and suing the defendant for this sum; yet this action will fail due to the defendant’s insolvency, which will result in this claim being considered a lost debt.

The third reason for non-performance is the weakness of enforcement mechanisms. This weakness proved to be a crucial problem. The best evidence for the centrality of this problem is that plaintiffs rarely approach the enforcement authority with judgments ordering Specific performance.²⁸¹ Another illustration of this weakness is that the average collection rate is estimated to be only 7% (!) of the sum of the action. Lawyers usually complained about the length of time, the bureaucracy and

²⁷⁹ *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm.* (1.29.08) (on file with author).

²⁸⁰ 56,854 individuals were brought before a registrar for a hearing on their warrant for imprisonment. 650 of them were actually imprisoned, typically for a period of less than one week. Six were imprisoned for longer than 30 days. Luckily, the rates of actual imprisonment have decreased. AGENCY. Judge Flax explained the large imprisonment rates by the fact that it is very cheap to issue an arrest warrant. *Interview with Judge N. Flax.* , (1.08.09) (On file with author).

²⁸¹ *Interview with Judge N. Flax.* , (1.08.09) (On file with author). (The head of execution office stated that the amount of Specific performance judgments relative to all other execution cases is insignificant). The official statistics do not reflect the matter. The counter-argument might have been that there is no need for the Enforcement Agency to intervene because all Specific performance orders are performed, but as the findings show this is not the case. Also of notice that while there are some alternatives to governmental debt collection there is no known alternative to enforcement of Specific performance orders by the state.

the expenses involved in the proceedings in the enforcement authority.²⁸² This complaint was partially confirmed by the head of the execution chambers in Jerusalem, who said that the system was “clogged”.²⁸³ The Enforcement Agency suffers from another serious weakness: its inability to effectively monitor the debtor’s estate. The smuggling of assets is not exceedingly difficult, and the police rarely enforce this sort of criminal behavior.²⁸⁴ Nevertheless, both the head of the execution chambers and the lawyers agreed that when the execution agency actually functions, it is quite effective.²⁸⁵ Another feature of the weakness of the Enforcement Agency is that it rarely acts on its own initiative.²⁸⁶ The consensus was that it would be extremely difficult to enforce the Specific performance award.²⁸⁷ One anonymous interviewee suggested that use of private illegal collection agents was used by some of the parties, but this contention was not supported with any evidence beyond the claim.²⁸⁸

These three reasons for non performance – passiveness of the plaintiff; insolvency or under-capitalization of the defendant; and weakness of the Enforcement Agency – in conjunction with the two reasons previously discussed (weakness of social norms and lack of reputation) all have significant bearing on the decision not to perform the judgment. Lawyers reported that collecting damages was easier than achieving coerced performance and the institutional design of the Enforcement Agency supports this notion.²⁸⁹ The Enforcement Agency is primarily devoted to the collection of monetary debts and is better equipped to handle unwilling debtors than defendants unwilling to perform.

²⁸² *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm.* (1.29.08) (on file with author). *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm.* (1.10.09) (on file with author). *Interview with an anonymous lawyer #3, partner in a leading law firm.* (1.5.09) (on file with author).

²⁸³ *Interview with Judge N. Flax.* , (1.08.09) (On file with author).

²⁸⁴ *Id.* at *id.*

²⁸⁵ *Interview with Y. Reiter, Esq. from the Ron Gazit, Rotenberg & Co.* (12.29.08) (on file with author). The legal rates of debt collection are reconciled with the perceived effectiveness of the system when it functions by the fact that it is usually not set in action or that its action was not swift enough.

²⁸⁶ *Interview with Judge N. Flax.* , (1.08.09) (On file with author).

²⁸⁷ *Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm.* (12.28.08) (on file with author).

²⁸⁸ *Interview with an anonymous lawyer #2, senior partner in a leading law firm.* (1.5.09) (on file with author).

²⁸⁹ *Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm.* (12.28.08) (on file with author). *Interview with Judge N. Flax.* , (1.08.09) (On file with author).

6. SUMMARY AND CONCLUSION

This study inquired into the practices and realities of Specific performance litigation in a jurisdiction that has a Specific performance default rule. Three questions were the focus of attention:

How do courts resolve Specific performance litigation in a jurisdiction that favor Specific performance?; What impact do these decisions have on the behavior of parties after a judgment has been rendered?; and, finally, why and when do parties decide to sue Specific performance?;

The three questions discuss the influence Specific performance rule has, from different temporal perspectives. The method chosen to answer these questions was composed of two different methodological approaches. First, a set of interviews was conducted with parties to civil litigation in which Specific performance was sought and with lawyers savvy in these proceedings. Second, a systematic content analysis of 102 court cases was conducted. The cases were analyzed in a systematic fashion and were scanned for recurring patterns. Those patterns were then compared and analyzed according to the theoretical framework.

This study builds on a vast body of literature. The factual assumptions and empirical predictions made in the literature were collected to later serve as hypotheses and to be tested in light of the factual findings. The literature was divided along the lines of economic analysis of contracts and deontological approaches to promise-keeping. The review of the literature yielded many hypotheses that called for empirical testing. Among these hypotheses and assumptions were: the idea that contracts to the production of goods would receive less Specific performance than contracts to the conveyance of property; the implicit assumption, common to the deontological writing, that contract law is based on a transaction between two individuals; the notion that the amount of bargaining units would have inverse effect on Specific performance rates; and that reputation would fill a minor role in the decision whether or not to petition for Specific performance.

The review of the literature also helped gain better understanding of the state of the research on Specific performance. Despite a recent change of trend, most arguments are mostly involved with

theoretical arguments and lack significantly in way of empirical data. The literature itself is deep and intellectually stimulating, and yet, the lack of empirical data makes some of the arguments to be of very little relevance to actual law making. The current study fills part of this gap.

The content analysis offered an objective look into the praxis of the courts. The study revealed high rates of Specific performance awards. In 60% of the cases in which Specific performance was sought it was awarded, in full or in part. These findings are further reinforced when one discounts the cases that were dismissed, and then 65% of the cases were specifically performed in full. The study also revealed that the number of bargaining units in litigation is relatively low (average of 3.75 parties to case), and that this low amount of parties is consistent across jurisdictions. Interestingly, no statistically significant relationship was found between the number of the parties and the disposition of the case. This finding cast shadow on the relevancy of the property and liability rules literature to the context of Specific performance.

The content analysis suggests that the disposition of the case is dependant in part on the sort of action that court is asked to order. Negative performance was found to be more likely to result in a decree of Specific performance than positive performance. However, courts are the most generous with awards of Specific performance in cases which include the action sought after is a payment of a sum of money. The suggested explanation is the court ease of adjustment of these obligations, as opposed to the more complex questions that adjusted Specific performance requires tackling.

Shavell's argument, that contract to convey property would be more prone to Specific performance award than contracts to produce, was proved. On the other hand, it was also shown that Israeli courts are generally liberal with award of Specific performance awards in cases of production as well, which stands at odds with some of Shavell's predictions.

Finally, against much of the *animus* of the deontological arguments, the content analysis shows that Specific performance litigation is primarily a game for corporations. That is, corporations are more likely to win when they sue Specific performance or defend from such a claim.

The interview analysis provided a wide picture into the motivations of parties in Specific

performance litigation and enabled to gain a better overview of the working of the Specific performance rule. This chapter opened with the observation that in reality, Specific performance litigation constitutes a relatively small part of the contractual litigation. This was seen as a mystery, as the previous chapter proved that when parties sue Specific performance they usually receive it and the literature was relatively unified in the belief that it will be in the party's best interest to ask for Specific performance where possible. To answer this puzzle, the chapter started with an analysis of compliance with Specific performance decrees. The conclusion of this analysis is that commercial parties tend to perform much more, whereby private actors can evade performance quite effectively.

Out of the many reasons for non-performance, four were identified as the most important. First, if the plaintiff is not actively pursuing enforcement of the Specific performance award, his chances of obtaining performance are low. Second, expectedly, insolvent defendants pose a real risk of non-performance. Less visible are the under-capitalized defendants, whose risk of non-performance is as high but their financial state is not always observable. Third, certain weaknesses in the operation of the enforcement mechanisms contribute to the evasion of judgments. Fourth, in certain contexts reputation and social norms may not be strong enough to encourage performance. On the other hand, when reputation and social norms are present, rates of performance became much higher.

Parties can avoid performance of the Specific performance decree by buying a release from the prevailing party. The theory suggests that such transactions would take place quite regularly. The evidence shows, however, that post judgment renegotiations (PJR) are not frequent. This finding is consistent with other studies,²⁹⁰ but is surprising in the special context of Specific performance. In this context, parties run the risk that a failure to negotiate an agreement would result in coerced cooperation. This pressure may be expected to increase the amount of successful PJRs, but there is no evidence to this extent.

Three reasons were identified as major sources for low rates of PJR. The first is the fact suggested by the interviewees, that people do not reduce their Specific performance awards to monetary terms

²⁹⁰ Most notably, see FARNSWORTH.

(much like people rarely think of their right to free speech as being a commodity). This reduction problem lead to the following bias: while people would react positively to some monetary offers in exchange for their decrees, they would not initiate such negotiations. Breakdown of negotiations is likely to take place in cases where the costs of Specific performance for the plaintiff far exceed the costs of payment of damages. Finally, entrenched mistrust between the parties, caused by the breach, is likely to impede the needed cooperation for successful negotiations between the parties.

When parties sue for Specific performance they do so for many reasons. Some of them are quite surprising. Indeed, it is not surprising that parties sue Specific performance in order improve their bargaining position. This has been discussed at length by the economic literature (but not as much in the deontological writings). However, other uses have so far escaped the attention of scholars. First to these uses is the use that parties make of the Specific performance claim in order to signal to the court the sincerity of their intentions. Interestingly, parties may be induced to choose this path even if they are not interested in Specific performance. Additionally, parties may pursue Specific performance litigation because it is much easier and faster to administer than an action for damages. This express route may tempt some plaintiffs who would have preferred expectancy damages, *ceteris paribus*. Finally, sometimes parties may be induced to sue Specific performance not for Specific performance's sake, but in order to collect insurance money. This scenario is expected to take place especially in the context of construction cases.

In addition to the problems of collection Specific performance, several other reasons for low rates of Specific performance litigation were explored. First, parties were concerned with the possibility that their preferences would fluctuate and change over time. If preferences are likely to change during the time of litigation, Specific performance might appear undesirable to the plaintiff. Second, lawyers' interests play a major role in the decision which remedy to sue. Because lawyers face problems with collection of their contingency fees from Specific performance awards, they are motivated to sue more remedies that are easily monetized, namely, damages. Third, it proved that parties foresee the possible problems with monitoring and ensuring cooperation in a satisfactory

level. These problems, that the legal system has hard time correcting for, deter parties from further pursuing Specific performance, even when it would be formally available. Fourth, parties are reluctant to keep on doing business with a party that already proved unreliable by breaching their former agreement. The breach may sometime cause for an eruption of negative feelings, and the prospect of continued cooperation is likely to seem repugnant. Fifth and finally, there are is a wrong perception that courts are not generous with Specific performance awards, despite the proven fact that they actually are. The source of this misperception is a matter of speculation, but its effect, as much as it is indeed widespread, is clear.

Where does all of these observations take us to? In the following paragraphs I would like to suggest a thesis that is built on a compilation of all of these observations. I will not be able to provide a full defense of it, but would like to nevertheless suggest it, both as a conclusion and an invitation for future development.

The literature review offered an overview of the current state of the debate on the ex-ante efficiency of Specific performance. Despite that extraordinarily deep and vast collection of insights that were gained throughout the years, the debate is at very much an indeterminate stage. At first, perhaps, the idea that Specific performance was undesirable because it prevents efficient breaches from taking place was good enough a reason to disfavor this remedy. However, Specific performance is no longer judged solely based on the effect it has on the occurrence of efficient breaches, and the fact that these breaches are even efficient is contested. In my literature review, the choice of remedies has been analyzed through its effect on eight (!) different factors. On almost each factor, the efficiency effects were inconclusive. It is very hard to imagine a remedy that will balance properly *a-priori* between all of these competing considerations. Even the breakdown to different categories, that each has a specific remedial rule, can only take the scholarship so far. The differentiation between contracts to produce and contracts to convey, while very convincing, is still too crude, as it is only one factor of many which are relevant efficiency-wise.

A great tie-breaker to the indeterminacy expressed in the law and economy literature could

have been made by the deontological argument. Unfortunately, the arguments made hitherto are arguably not enough to convince of the superiority of any of the remedies. Perhaps we can accept that morality demands the upholding of promises; perhaps acceptable – but to a much lesser extent – is the idea that some form of social reaction is in place for this moral violation. However, neither of these entails any specific remedy. The debate on the prominence of remedies is hopelessly entangled within itself.

Even if the moral argument stands to reason, it seems to suffer a great blow from the fact that most of the players in the Specific performance litigation scene are corporations. While it is arguably feasible to construct a moral theory that encompasses corporations in relation to Specific performance, no such argument has been made to present.

One might find the emerging picture disturbing and despairing. Luckily, however, the empirical analysis provides a bootstrap. Apparently, despite high rates of Specific performance awards, there are low rates of Specific performance litigation. The reasons for that were explored, and it was revealed that most of them are related to the nature of Specific performance. People abstain from pursuing it because it involves coercion of cooperation, it is hard to have these judgments enforced and lawyers tend to avoid pursuing it because it make their fee collection more complicated. Another reason for the low rates of Specific performance is the weakness in the system of enforcement. While this difficulty is theoretically amenable, it is not likely to change radically over time. Data collected from other jurisdictions in which Specific performance is regularly awarded, also suggest that Specific performance is infrequently sought.²⁹¹

This all boils down to the observation that even when there is a right for Specific performance, it is infrequently sought. Based on the indeterminate state of the literature on the one hand, and the limited scope of Specific performance litigation in practice, my normative recommendation is to forego the discourse on prominence of remedies and to change it with a system that does not show a-priori preference to any of the remedies. According to my suggestion

²⁹¹ LANDO & ROSE. LAYCOCK;SHAVELL, *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*.

the plaintiff would have the presumptive power to choose his remedies, but the defendant could defend against his choice (be it damages or Specific performance) with the claim that it would cause her disproportionate harm. The courts would then decide, ex-post and on a case-to-case basis, how to divide the harms and the gains, either on considerations of efficiency or morality. The binary entitlement approach, according to which one party is presumptively entitled to the breach surplus, is neither founded on morality nor efficiency. Unless the opportunity of breach is unique to one party, there is no sense of speaking of one party entitled to the entire breach surplus, and theory predicts that parties anyway would contract around such entitlements and would divide the breach surplus among themselves.

This system has the clear benefit of enabling the court to do what they know to do best, ex-post balancing of harms and gains. It allows the parties to efficiently allocate their costs between the so-called back-end (contract formation) and front-end (litigation) stages.²⁹² The more the parties will spend on stipulating remedies at the back-end, the less money they would have to spend on the front-end and conversely. If the parties foresee future uncertainty as to which remedy would be better, they can simply assign the task to the court by not stipulating one in the contract. Additionally, by forsaking the rhetoric of prominence of remedies, it is likely that courts would be more willing to accept stipulated remedies of either sort, and not only liquidated damages.

Even if this system would cause inefficiency, a speculation that is not supported by theory, it would be very limited in scope, as parties employ self-selection in their Specific performance suits. This self-selection results in low rates of Specific Performance litigation, even when it is an available remedy. Indeed, there is no perfect correlation between the standards that parties employ in their decision to sue Specific Performance and the efficient instances in which Specific Performance is the socially efficient remedy. However, nothing in the current system warrants that either.

As a side note, it should be taken into consideration that the low scope of Specific performance litigation should not only be counted in absolute terms (which are nevertheless low), but

²⁹² ROBERT E. TRIANTIS SCOTT, GEORGE G., *Embedded Options in the Case against Compensation in Contract Law*, 104 Colum. L. Rev., (2004).

should also be compared with the rates of Specific performance litigation in jurisdictions in which Specific performance is the exception.

From an ex-post perspective, the proposed system is likely to be more efficient. The courts can reallocate goods to the party who values them the most according to the evidence presented before them. The question is, how would parties react *ex-ante* to this rule? One implication is on the rate of settlements. The argument goes, that the proposed regime is offers less clear guidance than a bright line rule (of either Specific Performance or expectancy damages), and this vagueness would be detrimental in terms of settlement agreements rates. While the concern raised by this argument is fully justified in principal, it seems less convincing when one considers the fact that there is no bright-line rule in any known jurisdiction nor do anybody proposes such a rule. All jurisdictions make some exceptions. In Israel, there are broad exceptions to the Specific Performance rule (most notably for its vagueness is the “justice” exception); The common law provides for an exception to the damages rule in cases on “inadequacy of damages”. These exceptions are vague in themselves and therefore the proposed rule is not likely to have any detrimental effect on settlement rates. As a matter of fact, in some instances the question under my proposed rule is likely to be clearer than the question presented under current regime. Today, parties have to settle between themselves whether a good is unique or damages inadequate or if Specific Performance is unjust before they can settle. In some cases, these questions may be harder to answer than the question of balance of hardships. In any event, the proposed rule is much more attuned to the concrete needs of the parties than the questions currently asked (exempt is *perhaps* the justice exception).

It seems then that in terms of settlement rates, the proposed regime will not have detrimental effect on the behavior of parties. But how would it affect the ex-ante decisions of the parties? From many aspects, it seems that it would promote efficiency or at least will not stand in its way. Efficient breaches will only take place if the party in breach can ascertain that she has the better access to the outside bidder (for otherwise the court would order her to either disgorge her profits from the breach or the specific performance of the contract). In terms of effective reliance, parties are more likely to

be induced to relay than under expectation damages rule, but probably slightly less than under Specific Performance rule. Subjective value is likely to be better protected than under expectation damages rule (which only takes into account objective value) and, at worst, only slightly less than under Specific Performance rule (since the ability to find a cover contract – and thus protect subjective value – could be taken into account by the court in considering the balance of hardships). Risk aversion is likely to be better served under this regime than under any of the alternatives. The parties can trust, to a certain extent, that their personal hardships would be taken into account by the court – no matter on which side of the suit they are – and so that they are always secured against extreme damages.

The normative claim made here is limited in many ways. First, it is based on an empirical study, which is limited almost by definition. I have not surveyed all contract cases and have almost only focused on the cases that came to litigation. Indeed, the interviews allowed me to expand farther than just cases in litigation, but the focus of the study nevertheless remained on litigated cases. Therefore, there is only little I can say on cases decided outside the court and disputes settled or prevented before maturing into legal disputes. Second, there is obvious bias in relying on interviews. Parties and lawyers perceive and report from their own perspective, and this perspective may be biased by many factors, such as self-interest, inability to admit one's mistakes, etc. Third, my content analysis is based on reported cases, and these cases may be biased in unforeseen ways. Fourth, the normative claim is rested on empirical observations. The *is* does not derive an *ought*, and the premises I made in the transition may be flawed. Fifth, a different, competing normative claim can also be produced from the data presented here. According to this claim, perhaps it is the task of contract law not to forsake the default-remedies discourse but rather to further refine it based on the data here presented. This is the move made by Shavell for example, who advocated the almost free grant of Specific Performance in cases of conveyance of property. These are all limitations that qualify the extent of my proposed rule.

Furthermore, More research is needed in order to further prove and develop the thesis made

here. Especially of interest would be a general comparative survey of the rate of Specific performance litigation in relation to damages litigation across jurisdictions. Furthermore, a wide range survey of rates of performance and rates of settlement at the post-judgment stage would be extremely beneficial.

I hope this study would lead to the proposed revision, and that the debate regarding Specific performance would be, at least tentatively, put aside.

7. BIBLIOGRAPHY

1. Shakespeare, W., *The Merchant of Venice*. 1878: D.c. Heath & Co., 1916.
2. *Bromage V. Genning*, in *1 Rolle* 368. 1616, K.B. p. 368.
3. Barak, A., *Codification of Civil Law and the Law of Torts Israel Law - Forty Years: The Codification of Civil Law and the Law of Torts*. Isr. L. Rev., 1990. 24: p. 628.
4. Yovel, J., *An Overview of Israeli Contract Law*, in *The International Contract Manual*, S.E. Albert Kritzer, Jessica Vanto & Jarno Vanto, Editor. 2008-2009, Thomson-West.
5. Friedman, D., *Remedies for Breach of Contract*, in *Daniel Book: Reflection in his Teachings (Hebrew)*, O.G. Nilli Cohen, Editor. 2008, Nevo.
6. Cohen, N., *Remedies for Breach of Contract: From The Remedy to the Breach, From Law to Civil Code*, in *Daniel Book: Reflections in his Teachings (Hebrew)*, N.C.O. Groskopf, Editor. 2008, Nevo.
7. *CA 156/82 Lipkin V. Dor Hazahav (Hebrew)*, in *Padi*. 1985. p. 85.
8. Yadin, U., *Contracts (Remdies for Breach of Contract) Law*. Vol. 2nd edition. 1979, Jerusalem: Institute for Legislative Research and Comparative Law.
9. Katzir, D., *Remdies for Breach of Contract, Part A (Hebrew)*. 1991: Tamar.
10. Shalev, G., *Law of Contracts (Hebrew)*. 2nd edition ed. 2005, Jerusalem.
11. *Contracts (Remedies for Breach) Law (Bill with commentary) (Hebrew)*. 1969.
12. *Ottoman Civil Procedure Law*. 1879.
13. Friedman, D., *Remedies for Breach of Contract - From Right to Remedy; From Law of Remedies to the Civil Code*, in *Daniel Book: Reflection in his Teachings (Hebrew)*, O.G. Nilli Cohen, Editor. 2008, Nevo.
14. Kessler, A., *Equity (?) forthcoming*.
15. Nicholas, B., *The French Law of Contracts*. 1992: Clarendon Press.
16. *Foundations of Law, 5740-1980*. 1980.
17. HaCohen, A. (2008) "*God is not a man, that he should lie, nor a son of man, that he should change his mind*" (Hebrew). Parashat Haashavua, 322.
18. Amkhan, A., *Specific Performance in Arab Contract Law*. Arab L.Q., 1994. 9: p. 324.
19. Lifshitz, B. (2001) "*I Myself Will Guarantee his Safety; you Can Hold me Personally Responsible for Him*" (Hebrew). 7 Parashat Haashavua, Department of Justice 7.
20. *Contracts (Remedies for Breach of Contract) Law, 5731-1970*.
21. *CA 3380/97 Tamgar v. Bilahh Goshen (Hebrew) (1998)*, in *PD*. 1998. p. 673.
22. Barak, A., *Purposive Interpretation in Law*. 2005, Princeton: Princeton University Press.
23. *Penal Law of Israel 626-1977*.
24. Goldstein, S., *The Reciprocal Relationships among Methods of Enforcing Non-Monetary Court Orders: The Doctrine of the Least Harsh Alternative*. Mishpatim, 1986. 16(1).
25. *Contempt of Court Ordinance, Section 6(1)*. 1929.
26. *CrimA 6/50 Levitt v. Angel (1950)* in *Supreme Court Online English Database: http://elyon1.court.gov.il/files_eng/50/060/000/Z01/50000060.z01.pdf*. 1950.
27. *CC 6807/06 Kugler v. Kugler (Hebrew) (2007)*, in *Nevo*. 2007.
28. *CC 517/06 Manor v. KPMG INC (Hebrew) (2007)*, in *Nevo*. 2006.
29. Agency, C.E., *Official Statistics from 2007*, available online at: www.eca.gov.il/loadedFiles/stats2007.ppt. 2007.
30. Mahoney, P.G., *Contract Remedies: General*, in *Encyclopedia of Law and Economics*, B.B.a.G.d. Geest, Editor. 1999, Ghent: Edward Elgar, University of Ghent. p. 117-140.
31. Hillman, R.A., *Contract Modification and Self-Help Specific Performance: A Reaction to*

- Professor Narasimhan*. Cornell L. Rev., 1989. 75: p. 62.
32. Perillo, J.M., *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*. Fordham Law Review, 2000. 68: p. 1085.
 33. Holmes, O.W., F. Pollock, and M.D.W. Howe, *Holmes-Pollock letters : the Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, ed. M.D. Howe. 1941, Cambridge, Mass.: Harvard University Press.
 34. Holmes, O.W., *Path of the Law*. Harv. L. Rev., 1896. 10: p. 457.
 35. Fuller, L.L.P., William R. Jr., *Reliance Interest in Contract Damages: I*. Yale L. J., 1936. 46: p. 52.
 36. Barnes, D.W., *The Net Expectation Interest in Contract Damages*.
 37. Craswell, R., *Against Fuller and Perdue*. U. Chi. L. Rev., 2000. 67: p. 99.
 38. *Black's Law Dictionary*, in *Black's Law Dictionary*. 2004.
 39. *Restatement (Second) of Contracts* 1981.
 40. Corbin, A.L., *Corbin on Contracts*. 2008, St. Paul, Minn.: West Pub. Co.
 41. *Restatement (Second) of Contracts*, § 1981.
 42. Jimenez, M., *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*: SSRN.
 43. Dutta, S. (2006) *Principles of Equity and Contracts*.
 44. *US. Const.*
 45. Eisenberg, M.A., *The Emergence of Dynamic Contract Law*. Theoretical Inquiries in Law, 2001. 2(1): p. 1.
 46. Laycock, D., *The Death of the Irreparable Injury Rule*. 1991, New York: Oxford University Press. xviii, 356 p.
 47. Shiffrin, S.V., *The Divergence of Contract and Promise*. Harv. L. Rev., 2007. 120.
 48. Fried, B.H., *What's Morality Got to Do With It?* Harv. L. Rev. F., 2007. 120: p. 53.
 49. Leib, E.J., *Contracts and Friendships*. SSRN, Forthcoming Emory Law Journal, Vol. 59, 2010, 2009.
 50. Wilkinson-Ryan, T., *Do Liquidated Damages Encourage Efficient Breach? A Psychological Experiment*. 2009.
 51. Linzer, P., *On the Amorality of Contract Remedies--Efficiency, Equity, and the Second Restatement*. Colum. L. Rev., 1981. 81: p. 111.
 52. Muris, T.J., *Costs of Freely Granting Specific Performance, The Comment*. Duke L. J., 1982. 1982: p. 1053.
 53. Narasimhan, S., *Modification: The Self-Help Specific Performance Remedy*. The Yale Law Journal, 1987. 97(1): p. 61-95.
 54. Yorio, E., *In Defense of Money Damages for Breach of Contract*. Colum. L. Rev., 1982. 82: p. 1365.
 55. *U.C.C. Article*. 2005.
 56. Schwartz, A., *The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*. The Yale Law Journal, 1990. 100(2): p. 369-407.
 57. Varadarajan, D., *Note: Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*. Yale L.J., 2001. 111.
 58. Brooks, R.R.W., *The Efficient Performance Hypothesis*. Yale L.J., 2006. 116.
 59. Craswell, R., *Two Economic Theories of Enforcing Promises*, in *The Theory of Contract Law: New Essays*. 2001, NY: Cambridge University Press: New York. p. 19-44.
 60. Zywicki, T.J., *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*. 2002: SSRN.
 61. Kuhn, T.S., *The Structure of Scientific Revolutions*. 2nd ed. 1970, Chicago: University of Chicago Press. xii, 210 p.
 62. Kornhauser, L.A., *Introduction to the Economic Analysis of Contract Remedies*, An. U. Colo. L. Rev., 1985. 57: p. 683.

63. Polinsky, A.M., *Risk Sharing through Breach of Contract Remedies*. J. Legal Stud., 1983. 12: p. 427.
64. Webb, C., *Performance and Compensation: An Analysis of Contract damages and Contractual Obligation*. Oxford J. Legal Stud., 2006(26).
65. Gotanda, J.Y., *Damages in Lieu of Performance Because of Breach of Contract*, in *Damages in Private International Law*. 2007, Academy of International Law (forthcoming): Hague.
66. *Hadley v. Baxendale* 1854. p. 341.
67. Polinsky, A.M.R., Daniel L., *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs*. J. Legal Stud., 1998. 27: p. 141.
68. Goetz, C.J.S., Robert E., *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*. Colum. L. Rev., 1977. 77: p. 554.
69. Khouri, N.C.Z., *Efficient Breach Theory in the Law of Contract: An Analysis*. Auckland U. L. Rev., 2000. 9: p. 739.
70. Goetz, C.J.S., Robert E., *Mitigation Principle: Toward a General Theory of Contractual Obligation*, *The*. Va. L. Rev., 1983. 69: p. 967.
71. Ulen, T.S., *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*. Mich. L. Rev., 1984. 83: p. 341.
72. *Peevyhouse v. Garland Coal & Mining Co.*, in *F.2d*. 1962, 10th Cir. p. 979.
73. Schwartz, A., *Case for Specific Performance*, *The*. Yale L.J., 1979. 89: p. 271.
74. Shavell, S., *Specific Performance versus Damages for Breach of Contract: An Economic Analysis*. Tex L. Rev., 2005. 84: p. 831.
75. Ayres, I.M., Kristin, *Threatening Inefficient Performance of Injunctions and Contracts*. U. Pa. L. Rev., 1999. 148: p. 45.
76. B.E. Hermalin, A.W.K.R.C., ed. *Contract Law*. Handbook of Law and Economics, ed. A.M.P.S. Shavell. Vol. 1. 2007, Elsevier North-Holland: Amsterdam.
77. Muris, T.J., *Cost of Completion or Diminution in Market Value: The Relevance of Subject Value* Journal of Legal Studies, 1983. 12: p. 379.
78. Posner, R.A., *Economic Analysis of Law*. 1972, Boston,: Little, Brown. xi, 415 p.
79. Bishop, W., *The Choice of Remedy for Breach of Contract*. Journal of Legal Studies, 1985. 14.
80. Friedman, D., *Efficient Breach Fallacy*, *The*. J. Legal Stud., 1989. 18: p. 1.
81. Muris, T.J., *Comment - The Costs of Freely Granting Specific Performance*. Duke Law Journal, 1982. 1982.
82. Calabresi, G.M., A. Douglas, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*. Harv. L. Rev., 1971. 85: p. 1089.
83. Fennell, L.A., *Adjusting Alienability*. Harv. L. Rev. , 2009. 122.
84. Coase, R.H., *Problem of Social Cost*, *The*. J.L. & Econ., 1960. 3: p. 1.
85. Kraus, J.S., *A Critique of the Efficient Performance Hypothesis*. Yale L.J. Pocket Part, 2007. 116.
86. Mahoney, P.G., *Contract Remedies and Options Pricing*. Journal of Legal Studies, 1995. 24: p. 139.
87. Macneil, I.R., *Efficient Breach of Contract: Circles in the Sky*. Va. L. Rev., 1982. 68: p. 947.
88. Scalise, R.J.J., *Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*. Am. J. Comp. L., 2007. 55: p. 721.
89. Bernstein, L., *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*. J. Legal Stud., 1992. 21: p. 115.
90. Macaulay, S., *Non-Contractual Relations in Business: A Preliminary Study*. American Sociological Review, 1963. 28(1): p. 55-67.
91. Shavell, S., *The Design of Contracts and Remedies for Breach*. 99 Quart. J. Econ., 1984.

- 99.
92. Fried, C., *Contract as Promise : a Theory of Contractual Obligation*. 1981, Cambridge, Mass.: Harvard University Press. 162 p.
93. Craswell, R., *Contract Law, Default Rules, and the Philosophy of Promising*. Mich. L. Rev., 1989. 88: p. 489.
94. Cohen, N., *Distributive Justice in the Enforcement of Contract*. 2008: SSRN.
95. Denise M. Keele, R.W.M., Donald W. Floyd, Lianjun Zhang., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*. Journal of Empirical Legal Studies, 2009. 6(1): p. 213-239.
96. Lando, H. and C. Rose, *The Myth of Specific Performance in Civil Law Countries*. 2003: SSRN.
97. Theodore Eisenberg, C.L., *What is the Settlement Rate and Why Should We Care?* Journal of Empirical Legal Studies, 2009. 6(1): p. 111-146.
98. Guido Calabresi, D.A.M., *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*. Harv. L. Rev., 1971. 85: p. 1089.
99. Kronman, A.T., *Specific Performance*. U. Chi. L. Rev., 1977. 45: p. 351.
100. Cohen, F.S., *Transcendental Nonsense and the Functional Approach*. Colum. L. Rev., 1935. 35: p. 809.
101. *Code of Ethics for Judges, 5767-2007, Available online at <http://elyon1.court.gov.il/eng/ethic.doc>*.
102. *Interview with Mr. Omri Negev (12.24.08) (On file with author)*.
103. *Interview with M. Yord-Reed, Esq. , (12.25.08) (On file with author)*.
104. *Interview with R. Zan, Esq. from the Ron Gazit, Rotenberg & Co. (12.29.08) (on file with author)*.
105. *CA 4018/03 Isodor Sharvit. v. Ben Aharon (2005) (Hebrew), in Nevo. 2005.*
106. *Interview with Mr. Avi Shachar, Director of A.G.M.R. Engineering & Investment Co. LTD., (12.23.08) (On file with author)*.
107. *Interview with Ms. Tzipi Katz (12.24.08) (On file with author)*.
108. Farnsworth, W., *Do Parties to Nuisance Cases Bargain after Judgment--A Glimpse Inside the Cathedral*. U. Chi. L. Rev., 1999. 66: p. 373.
109. *Interview with D. Zailer, Esq. from the Herzog, Fox Neeman Law Firm. (1.29.08) (on file with author)*.
110. *Interview with G. Benichou, Esq. from the Burnstein-Benichou Law Firm. (1.10.09) (on file with author)*.
111. *Interview with Ms. Nilli Madar (1.4.09) (On file with author)*.
112. *Interview with an anonymous lawyer #3, partner in a leading law firm. (1.5.09) (on file with author)*.
113. *CC (Haifa) 2117/07 Madar Nilli. v. Shiryonit Hasam - North (2007) (Hebrew), in Nevo. 2007.*
114. *Jacob & Youngs v. Kent, in N.Y. 1921, N.Y. Ct. of Appeals. p. 239.*
115. *Phone Interview with Y. Sharvit, Esq. from the Herzog, Fox Neeman Law Firm. (12.28.08) (on file with author)*.
116. *CA 148/77 Rot v. Yeshupa (Hebrew) (1979), in PD. 1979. p. 617.*
117. *Interview with Y. Reiter, Esq. from the Ron Gazit, Rotenberg & Co. (12.29.08) (on file with author)*.
118. *Interview with A. Kahan, Esq., (12.30.08) (On file with author)*.
119. *Sales Law (Apartments) (Guarantee of Investments of Apartment Acquirers) 5735–1974.*
120. *Bankruptcy Court (Haifa) 1053/01 Receiver of Ramat Shlomi v. Shlali David (2004) (Hebrew), in Nevo. 2004.*
121. *Interview with an anonymous lawyer # 1, specializing in debt collection. (1.3.09) (on file with author)*.
122. *Israel Bar Association Law 5721-1961.*

123. *CrimApp 1075/98 State of Israel V. Oppenheim Pad 54(1) 303 (Hebrew)*, in *Nevo*. 2000.
124. *Interview with an anonymous lawyer #2, senior partner in a leading law firm. (1.5.09) (On file with author)*.
125. *CC (Ashdod) 1788/94 Beer-Tovia Ltd. v. Omri Negev (2001) (Hebrew)*, in *Nevo*. 2001.
126. *LCA 7478/04 Beer-Tovia Ltd. v. Omri Negev (2005) (Hebrew)*, in *Nevo*. 2005.
127. *CC (Rishon-Lezion) 4616/02 Eshel Col . v. Hahevra Hamerkazit (2007) (Hebrew)*, in *Nevo*. 2002.
128. *Interview with M. Shachor, Esq. from the Michael Shachor, Menes & Co., (12.30.08) (On file with author)*.
129. *Phone Interview with Ms. Hayman. , (1.06.09) (On file with author)*.
130. Bernstein, L., *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*. *Mich. L. Rev.*, 2000. 99: p. 1724.
131. Richman, B.D., *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering Essay*. *Colum. L. Rev.*, 2004. 104: p. i.
132. Friedman, L., *The Role of Law in United States Society*, in *Conference on the Role of Law in the United States and China (1982)*. 1982. p. 6.
133. *CC (Jerusalem) 12507/01 Alonial v. Amot Hashkaot LTD (2002) (Hebrew)*, in *Nevo*. 2002.
134. *CC (Tel-Aviv) 2486/02 Carmelton Group Ltd. v. Discount Bank LTD.*, in *Nevo*. 2004.
135. Bergman, R. (2006) *Project Carmel Tunnels is Underway: Facility Agreement between Carmelton and Discount Bank Signed (Hebrew)*. *Globes*.
136. *CC (Jerusalem) 2117/07 Hen David v. Lee Maon Ltd. (2004) (Hebrew)*, in *Nevo*. 2004.
137. He, X., *Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepreneurs in Beijing*. *Society Review*, 2005. 39(3).
138. *CC (Tel-Aviv) 63723/99 Lota Hayman. v. Shatrice David Moshe (2002) (Hebrew)*, in *Nevo*. 2002.
139. *Interview with Judge N. Flax. , (1.08.09) (On file with author)*.
140. Scott, R.E.T., George G., *Embedded Options in the Case against Compensation in Contract Law*. *Colum. L. Rev.*, 2004. 104: p. 1428.