Studying Specific Performance

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Tagged as : Remedies

Date : May 25, 2017

Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 **W. Va. L. Rev.** 100 (2015), available at SSRN.

Parties that have a right to the very thing promised in a contract may opt not to have it delivered by the breaching party through specific performance. Even when the promised item is unique, the plaintiff may choose not to enforce the remedy. Why? Is it too difficult to execute the remedy? Are motivations mixed? Do lawyers advise clients to pursue money damages over specific performance? Will the breaching party behave in good faith when complying with the order? Professor Yonathan Arbel, former managing editor of the New Private Law Blog, offers a fascinating qualitative study of this underexamined issue. He explores why a contractual party that has established a right to the remedy of specific performance might opt out of the preferred remedy. Despite having a proven right to this coveted remedy, he shows why plaintiffs may choose not to force the breaching party to perform as promised. This, he claims, is true notwithstanding the "notoriously" under-compensatory nature of expectancy damages in comparison to specific performance.

Remedies and substance are intertwined. Professor Ariel Porat, in a Remedies chapter in the forthcoming *Handbook of Law and Economics*, declares that "[a]nalyzing the substantive law without its remedial part is almost meaningless." Understanding remedial options and goals is essential. Professor Arbel's work thoughtfully analyzes contract law's pinnacle remedy of specific performance and the goals it serves. He then critically examines contract's law primary competing theories—economic and rights-based conceptions—in light of parties' actual behavior regarding specific performance. His treatment describes what parties actually do when confronted with the option of specific performance in the real world. His qualitative approach explores their practices "'from the inside,' tracking the internal view of litigants and their lawyers."

The heart of Professor Arbel's article centers on his findings from interviews with lawyers and their clients who were engaged in specific performance litigation. For the qualitative analysis, he uses a comparable legal system, but one where specific performance is the default remedy: Israel. The interesting findings are inconsistent with the two main contract theories: A utilitarian may view specific performance as a bargaining chip to extract more money from the breaching party, while a rights-based advocate may view the remedy as the ultimate vindication of the value of promise-keeping. In part, Professor Arbel opines that the growing empirical data to prove these theories relies upon faulty assumptions. For example, the theorists omit plaintiff's remedial choices, assume parities will negotiate execution of the order, and fail to appreciate real-world motivations and implementation challenges.

The interviews reveal the complexity that lies beneath. Though not all plaintiffs opt out of this powerful remedy, significant numbers do abstain at various stages: (i) prejudgment, (ii) post-judgment renegotiation, and (iii) ultimate execution. Pursuing a remedy via the court system takes time. Reaching the desired judicial remedy via litigation suspends the parties in an adversarial posture, which may linger post-trial when it is time to execute the special performance decree. Attaining the promised performance may entail further negotiations, and plaintiff's preference may alter over time. Such orders

require good faith in implementation, despite lack of standards or court supervisory means to ensure high quality compliance. In the face of bad faith or even simply delay, plaintiff must choose whether to spend energy and money to demand compliance. Most interviewees reported real challenges enforcing specific performance. Contempt may be ineffective if defendant lacks funds. Plaintiff may be left to leverage defendant's reputation or rely on social norms—both valuable tools but not full proof in operation.

Professor Arbel also seeks to bridge the binary nature of the two theoretical dialogues. He suggests the economics-minded align assumptions with actual practice—for example, a decree does not equate to receipt of actual performance as promised. For the rights-based theorists, he recommends they consider the strategic and utilitarian motivations plaintiffs demonstrate in the process. Per Arbel's findings, a plaintiff may choose specific performance prejudgment to signal the strength of the case, minimize costs and delays, and leverage renegotiation after judgment. Both would be well served to enhance their exploration with the possibilities that these real-world findings signify.

Importantly, Professor Arbel maintains that to best protect nonbreaching parties, both theoretical schools should give plaintiff the option between specific performance and expectation damages. Ethical rules must guide lawyers to avoid self-serving advice. But even assuming sage advice, Professor Arbel warns that judges shouldn't trust plaintiffs to choose wisely, which may necessitate judges exercising broad discretion to craft the remedial award. This harkens back to equitable cleanup jurisdiction in the United States in which the judge would render complete justice, including damages in lieu, should specific performance become unavailable or impossible. What about other possible remedies beyond compensation if specific performance is unattainable: for certain breaches of contract, should plaintiffs also be able to disgorge defendant's unjust gains? *See* here, here, and here. Both the United States and Israel permit a disgorgement gain-based remedy for breaches of contract when appropriate. That is a topic for another day, but more research along the lines Professor Arbel conducts would go far in servicing the very goals that the substantive law of contract aims to attain.

Overall, Professor Arbel seeks to contextualize contract theory, break the stalemate between instrumental and deontological stances, and stimulate the collection of more data with larger samples. His article successfully contextualizes the debate, but only time will tell on the other two aims. It is my hope that he and the scholarly community will succeed on all three goals. Fine-tuning data to context and linking theory to practice will sharpen the theoretical debate and aid plaintiffs in achieving optimal results in the face of breach.

May the third generation of specific performance discourse begin.

Cite as: Caprice Roberts, *Studying Specific Performance*, JOTWELL (May 25, 2017) (reviewing Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 **W. Va. L. Rev.** 100 (2015), available at SSRN), https://lex.jotwell.com/studying-specific-performance/.