

ENFORCED PERFORMANCE IN COMMON-LAW VERSUS CIVIL-LAW SYSTEMS: AN EMPIRICAL STUDY OF A LEGAL TRANSFORMATION

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Legal economists and other theoreticians continuously debate the pros and cons of specific performance as a remedy for breach of contract; and comparative-law scholars debate the extent to which legal systems actually diverge on this issue. Very few studies have used qualitative methods, vignette surveys, or incentivized lab experiments to empirically study the pertinent issues, but none have quantitatively analyzed actual court judgments. This Article revisits the theoretical and comparative debates, and describes the surprising findings of a quantitative analysis of judgments concerning remedies for breach of contract in Israel during a 69-year period (1948-2016). While the judicial and scholarly consensus is that the Remedies Law of 1970 revolutionized Israeli law by turning enforced performance from a secondary, equitable relief to the primary remedy for breach of contract, we hypothesized that no such revolution has actually occurred. Our findings indicate that after 1970, the resort to enforced performance has actually decreased considerably. We examine several explanations for this result, and show that this unexpected phenomenon is associated with the increasing length of adjudication proceedings. The implications of these findings are discussed.