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

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INTRODUCTION

A standard claim made by comparative-law experts is that even legal systems with markedly different concepts and doctrines often reach quite similar practical outcomes. Specifically, in the sphere of remedies for breach of contract, it has been repeatedly argued that, despite the contrasting positions of common-law and civil-law systems—the former denying specific performance in all but exceptional cases, and the latter awarding enforcement remedies subject to certain exceptions—the actual decisions made by litigants and courts need not be too different. Whether this is actually the case is, however, a matter of ongoing debate, as some scholars insist that the doctrinal and cultural differences produce considerable differences in judicial practice.

On the theoretical level, few ideas, if any, within economic analysis of law and beyond, have captured the imagination of legal scholars as much as the notion of efficient breach and the related distinction between property rules and liability rules. Almost fifty years after the introduction of this idea and the related distinction, the debate over the pros and cons of specific performance—as opposed to monetary damages—shows no

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signs of abating. In a nutshell, the claim is that contracts should be performed if, and only if, the promisee’s expected utility from performance exceeds the expected cost of performance to the promisor. When this is not the case, both the parties and society at large would be better off if the contract is not performed. Presumably, entitling the promisee to expectation damages creates adequate incentives for the promisor, because the duty to compensate the promisee forces the promisor to internalize the former’s disutility in the event of a breach, thereby aligning the promisor’s incentives with the social good. Dozens of articles have added much nuance to the basic argument.

Only a few studies have gone beyond the doctrinal, theoretical, or comparative analyses, and examined the issue empirically. These studies used qualitative methods, vignette surveys, or incentivized lab experiments. None, however, have quantitatively analyzed actual court judgments. This Article revisits the comparative and theoretical debates, and describes the surprising findings of a quantitative analysis of judgments concerning remedies for breach of contract in Israel.

The Israeli experience is particularly interesting in this regard because Israeli law is a mixed legal system that experienced a “legislative shock” in 1970. Prior to the enactment of the Contracts (Remedies for Breach of Contract) Law 1970, Israeli law closely followed the common-law rule, whereby damages were the ordinary remedy for breach of contract, while specific performance was an equitable relief that was awarded only in exceptional cases—primarily in contracts for the sale of real property and unique goods. The Remedies Law revolutionized Israeli law by abandoning the common-law rule and adopting the civil-law rule instead, whereby the injured party is ordinarily entitled to enforced performance of the contract, subject to certain exceptions (e.g., when the

5 According to the Law Journal Library of HeinOnLine (containing more than 2400 law and law-related periodicals), the number of articles mentioning “efficient breach” has constantly risen in every five-year period between 1971–75 and 2011–15 (1, 28, 107, 205, 241, 276, 324, 401 and 471, respectively)—for a total of 2,162 articles.

6 See infra notes 57–68 and accompanying text.


obligation is to perform a personal service, or when enforcement would require unreasonably costly supervision by the court). There is virtually a consensus among Israeli judges and scholars that this reform radically transformed Israeli law.11 Thus, one should expect that following the enactment of the Remedies Law, parties’ inclination to seek enforcement remedies and courts willingness to award them have dramatically increased.

This consensus notwithstanding, there are several reasons to doubt that such revolution has actually occurred in practice. Since Western common-law and civil-law countries resemble each other in their basic economic and social conditions, and do not fundamentally differ with regard to their basic normative convictions; and since the huge theoretical literature highlights complex considerations for and against the availability of enforced performance—it would be surprising if legal systems actually diverged markedly in this regard. In fact, as noted above, while some comparativists insist that there are fundamental differences between common-law and civil-law systems in this regard, others argue that the differences are more apparent than real. If this is true when comparing different legal systems, it may be true when comparing pre- and post-1970 Israeli law, as well. In this context, one must pay heed to terminological differences between the pre- and post-1970 Israeli law—in particular, the difference between specific performance under the old law and enforced performance under the new—and to the existence of exceptions to the basic rules under each legal regime. These differences—which echo similar differences in the international arena—call for caution when comparing the two regimes. Finally, important pragmatic considerations affect parties’ preferences and courts’ rulings in ways that might create discrepancies between law on the books and the law in action.

With all this in mind, we present the findings of a quantitative analysis of the judgments of the Israeli Supreme Court on remedies for breach of contract over 69 years—from the establishment of the State of Israel in 1948 through the end of 2016—and a complementary analysis of district court judgments in recent years. To that end, we constructed two new datasets, comprising a total of 767 judgments (and since in 85 of the

judgments the court discussed claims for remedies by both parties, the total number of observations in the two datasets is 852). Our initial goal was to examine whether the legislative reform of 1970 has indeed transformed the use of enforcement remedies, as is commonly thought. Our hypothesis was that, notwithstanding the legislative reform and the prevailing judicial and scholarly rhetoric, the actual resort to these remedies by plaintiffs and courts has not dramatically changed in the wake of the 1970 legislation. We were surprised to discover that not only there was no increase in the use of enforcement remedies after 1970, but the tendency of plaintiffs to sue for these remedies has actually decreased markedly since then. As for the courts’ willingness to award enforcement remedies in cases in which they were claimed, not only it has not increased, inasmuch as there was any change, it was in the opposite direction.

Since it is highly unlikely that the elevation of the status of enforcement remedies caused a decline in using them, we looked for other explanation for this phenomenon. Thus, we examined—and rejected—the possibility that the decrease in the use of enforcement remedies resulted from the availability of supra-compensatory remedies for breach of contract. We also tested whether judges’ legal education (civil law or common law) was associated with their inclination to award enforcement remedies—and found that it was not. Finally, we examined whether the initial claim for enforcement remedies and their award were associated with the length of the legal proceedings between the initial filing of the lawsuit to the final judgment by the Supreme Court. We found a highly statistically significant association between the length of legal proceedings and the inclinations to sue for, and to award, enforcement remedies. This association persisted even when we controlled for other variables—such as the legal regime (pre- or post-1970), the year of the judgment, and the type of contract. This finding was corroborated by an analysis of the complementary dataset of district court judgments.

Like other observational studies, the present study has considerable limitations stemming from both the scope of the data (especially with regard to lower-courts judgments and judgments from earlier periods) and the inherent difficulty of deducing causation from statistical association. That said, the study also has considerable advantages, including the fact that it compares two legal regimes in the same society (rather than comparing between different countries).
Given these limitations, one must be cautious in drawing theoretical, normative, analytical, or comparative conclusions from the empirical findings. We nevertheless believe that our study—and the theoretical and comparative analyses that motivated it—carry several positive and normative implications. First, they support the claim that the actual differences between the opposing legal regimes might be rather small, if they exist at all. Second, while our findings do not purport to resolve the normative debate over contract remedies, they arguably point to the limited practical significance of the theoretical arguments raised in that debate, and the possibly greater significance of mundane considerations—such as the length of legal proceedings. Third, our findings imply that if one truly strives to expand the use of enforcement remedies, shortening the expected lapse of time between the filing of a lawsuit and execution of the final judgment may be as important as formulating the appropriate substantive rules. Fourth, the discrepancy between the Courts’ rhetoric and practice regarding enforcement remedies may shed light on the complex roles that the law and the courts play in society.

The remainder of this article is divided into seven Parts. For readers unfamiliar with the Israeli legal system, the next Part briefly describes Israeli contract law and remedies. Part II describes the broad consensus among Israeli legislatures, judges, and scholars regarding the transformation of the status of enforcement remedies brought about by the 1970 Law. Part III then analyzes various reasons why this consensus should be questioned, and suggests that there may be considerable difference in this regard between courts’ rhetoric and practice. These reasons give rise to the hypothesis that, contrary to appearances, the Remedies Law of 1970 has not resulted in a major change in the choice of remedies for breach of contracts. Part IV introduces previous empirical studies, the motivation for our study, its methodology, strengths, and limitations. Part V presents the surprising results of the declined resort to enforcement remedies, and Part VI probes for explanations for these results. The concluding Part offers a brief discussion of the broader implications of our findings.

I. BACKGROUND: CONTRACT LAW AND REMEDIES IN ISRAEL

Israel has a mixed legal system. When the State was established in 1948, its legal system was an amalgam of pre-1917 Ottoman legislation, British legislation and case law that
had been introduced during the British Mandate Period (1917–1948), and religious laws applying to each religious community in matters of marriage and divorce. With the exception of tort law, there was almost no British legislation in the field of private law, yet contract law was distinctively common-law oriented due to a process of Anglicization brought about by the courts. During the Mandate period, local judges—who were either British or British-oriented—tended to read, interpret, and fill (actual or purported) gaps in the local legislation using common-law principles, concepts, and rules.

After the establishment of the State of Israel, Israeli judges became less dependent on English sources, but the legal system in general, and contract law in particular, remained common-law oriented. A fundamental, gradual transformation was brought about through legislation, primarily from the 1960s to the early 1980s. Unlike most countries that became independent in the mid-twentieth century, Israel did not meet the challenge of modernizing its private law by adopting and adapting an established European code, or by sticking to English common law. Instead, it embarked on a project of creating its own modern private law. In the controversy between those who believed that it would be more prudent to maintain the linkage of Israeli law to the English common law, those who argued that modern Israeli law should be based on Jewish law, and those who advocated for an entirely new system of Israeli law (inspired by both civil-law and common-law systems, but with greater emphasis on the former)—the third attitude prevailed. The outdated Ottoman legislation and patchwork of common-law doctrines were replaced with a systematic, comprehensive, code-like legislation. Although these Laws were enacted one by one, and prepared by different expert committees over an extended period, they were all intended eventually to form parts of a European-style civil code. These Laws were not designed to amend or complement extant law, but rather to replace it altogether.

In the field of contract law, the two centerpieces were the Contracts

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(Remedies for Breach of Contract) Law 1970, and the Contracts (General Part) Law 1973. The new legislation in the field of contract law did not mimic any existing foreign law, but is generally civil-law oriented, with a key role played by the principle of good faith, no requirement of consideration for contract formation, and so forth.

The Remedies Law 1970 was inspired by the remedial provisions of the Uniform Law on International Sale of Goods of 1964 (ULIS)—the predecessor of the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG). The three primary remedies under the Law are enforced performance (enforcement—in Hebrew akhīfa), rescission (in Hebrew bitul) of contract, and damages (compensation—in Hebrew pitzuyim). According to Section 2 of the Law, when a contract is breached, “the injured party is entitled to claim its enforcement or to rescind the contract, and in addition to or in lieu of the said remedies he is entitled to compensation...” As further detailed in the next Part, the primary remedy under the law is enforced performance, to which the injured party is entitled as a matter of course.

II. THE CONSENSUS

Under Section 3 of the Israeli Remedies Law, the injured party is entitled to enforced performance unless one of four exceptions applies. Courts and scholars agree that the
transformation of the status of enforced performance is the greatest change brought about by the 1970 Law. Already at its Bill stage, where the entitlement to enforced performance was more limited than in the final Law,\(^{18}\) it was explained that the primary right of the injured party is for the enforced performance of the breached contract, and that—contrary to the existing law at the time—this remedy would no longer be an equitable remedy only.\(^{19}\) In contrast, the rules concerning damages have not significantly changed: Section 10 of the Remedies Law follows the common law’s famous Hadley \emph{v.} Baxendale rule.\(^{20}\)

Shortly after the Law’s enactment, the Supreme Court (Zussman J.) emphasized that in the wake of the new Law, “enforced performance, which is akin to specific performance, had been promoted from its inferior status under English law.” Enforced performance, the court noted, “is now on a par with damages, if not superior to it, whereas until now it was only used as a secondary relief, when the payment of damages does not compensate the injured party.”\(^{21}\) Ever since, the Supreme Court has repeatedly stressed that enforced performance is “the primary and principal relief to which the injured party is entitled”;\(^{22}\) the “first and foremost” relief;\(^{23}\) the relief with priority position under contract law;\(^{24}\) and “\emph{primus inter pares} and even superior to other reliefs”.\(^{25}\) Hence, “in any case—but for those mentioned in the concluding part of Section 3—\emph{any} contract will be enforced by the injured party’s claim as a matter of course”.\(^{26}\)

While under English law, specific performance is considered an equitable relief, subject to the court’s discretion, under the Remedies Law “enforcement is the injured

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\(^{18}\) As cited in \emph{supra} note 17 and further explained below, under the 1970 Law, enforced performance is denied if it is “unjust”—however, the fact that damages would provide a just (or even more just) remedy does not militate against enforcement. In contrast, according to the Bill, enforced performance was to be denied whenever it was established that damages were a more just remedy in the circumstances.

\(^{19}\) HH 5729, p. 392.

\(^{20}\) 9 Exch. 341 (1854).

\(^{21}\) Zori Pharmaceutical & Chemical Co. Ltd. \emph{v.} National Labor Court, 28(1) PD 372, 384 (1974).

\(^{22}\) See, e.g., Peretz \emph{v.} Bitton, 30(1) PD 367, 373 (1975); Rabinai \emph{v.} Man Shaked Co. Ltd., 33(2) PD 281, 291 (1979); Elhaded \emph{v.} Shamir, para. 34 (Nevo, March 29, 2011).

\(^{23}\) Pomerantz \emph{v.} K.D.S. Const. \& Invest., 38(2) PD 813, 817 (1984).

\(^{24}\) Azimov \emph{v.} Binyamini, paras. 14, 18, 20, 23, 24 (Nevo, March 7, 2013).

\(^{25}\) Yanai \emph{v.} Yichya, 47(4) PD 773, 778 (1993).

\(^{26}\) Onison Const. Co. \emph{v.} Deutch, 30(2) PD 398, 405 (1976).
party’s right, and the relief is not dependent on the court’s discretion.”

Specifically, while under the previous law, enforcement was denied whenever damages adequately protected the injured party’s interests, nowadays the fact that damages would provide an adequate protection does not negate the entitlement to enforced performance—which is denied only under the exceptions set out in Section 3. Moreover, since enforced performance is the rule, or “the high road” (*derekh hamelech*), and the limitations on its award are the exception—the burden of proof for the existence of an exception is borne by the breaching party. The court has ruled that Section 3’s exceptions must be strictly construed: “Only in exceptional and extraordinary cases will the court refrain from ordering the performance of the contract.” This approach applies to all four exceptions, including the fourth (enforcement being “unjust”).

More than twenty years ago, one of us expressed some reservations about this rhetoric. But for this exception, the courts’ decisive position regarding the transformation of Israeli law of contract remedies and the primary status of enforced performance is overwhelmingly shared by legal academia, including English-oriented scholars.

Moreover, the transformation of the status of enforced performance is generally perceived to have altered the very nature of contracts: “The contract is not only a source

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27 Rabinai, 33(2) PD at 291.
28 Parchodnik v. Ackerman, 10 PD 72, 74 (1956).
29 Rabinai, 33(2) PD at 292.
31 Novitz v. Leibovitz, 36(1) PD 537, 543 (1982); Kassem, 37(3) PD at 90.
33 Azimov, at paras. 16–18 (Hayut J.).
35 As further described in *infra* Section IV.A, Arbel’s recent study (*supra* note 7) lends support to Zamir’s reservations.
for the duty to pay damages for its non-performance, it is, first and foremost, a source for the performance of the obligations it lays down.”\(^\text{37}\) Put differently, “when a contract is made for the sale of a horse, the buyer acquires a right to receive a horse, not a right to damages for not receiving a horse”\(^\text{38}\). This principled approach has guided the courts in developing the rules of enforced performance, for example, with regard to the appointment of a Receiver to complete a construction project,\(^\text{39}\) and the indexation of prices by the court to facilitate the enforced performance of transactions in periods of hyperinflation.\(^\text{40}\) It has similarly guided the courts beyond the scope of the law of enforced performance—for example in recognizing a broad entitlement to disgorgement remedies, based on the law of unjust enrichment.\(^\text{41}\) Finally, some judges view the broad availability of the remedy of enforced performance under Israeli law as incompatible with the doctrine of efficient breach, hence as an argument against economic analysis of law:\(^\text{42}\)

The economic approach does not give sufficient weight to considerations that cannot be given an economic weight. Contract law is not only designed to enhance economic efficiency. It is also designed to facilitate proper social life. A contract should be performed—and not only pay damages for its breach—because by adopting this position we encourage people to keep their promises. Keeping promises is a cornerstone of our life as a society and as a nation.

According to the legislation, the case law, and the scholarly writing it should therefore be expected that following the Remedies Law, the inclination of courts to award enforcement remedies—and correspondingly, plaintiffs’ tendency to claim these remedies—have risen substantially.

**III. Reasons for Skepticism**

Notwithstanding the broad consensus among Israeli legislators, judges, and scholars, there are reasons to doubt that the Remedies Law 1970 has actually brought about the

\(^{37}\) Novitz, 36(1) PD 542 (Barak J.).
\(^{38}\) Adras Building Materials Ltd. V. Harlow & Jones GMBH, 42(1) PD 221, 277 (1988) (Barak J.).
\(^{39}\) Onison, 30(2) PD 398.
\(^{40}\) Rabinai, 33(2) PD 291–95.
\(^{41}\) Adras, 42(1) PD 275–79.
\(^{42}\) Adras, 42(1) PD 278 (Barak J.).
revolution that is commonly attributed to it. This Part discusses four types of reasons for this skepticism: the familiar insight of comparative law that even legal systems that diverge in their doctrinal points of departure often converge in their actual rulings; the weight and complexity of policy arguments for and against enforced performance—given which it is unlikely that legal systems that share the same core values would take opposite stances on such a fundamental issue in practice; conceptual and terminological differences between the pre- and post-1970 law and exceptions to the basic rule under each regime; and pragmatic considerations that might narrow the actual differences between the two legal regimes.

**A. Comparative Law**

One reason to question the prevailing consensus that the legal practice concerning contract remedies changed dramatically in the wake of the Remedies Law 1970 comes from comparative law. A basic theme in comparative law is “that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.” In the present context, the argument is that, despite the contrasting positions of common-law and civil-law systems—the former denying specific performance in all but exceptional cases, and the latter awarding enforcement remedies subject to certain exceptions—the actual decisions made by litigants and courts need not be too different.

Whether this is actually the case is a matter of ongoing debate, which we could not resolve, or even describe in any detail, here. Some scholars, such as Anthony Ogus, Lucinda Miller, Shael Herman, Jan Smits, Alan Farnsworth, and Solène Rowan claim that there are fundamental differences in this regard between the common-law and civil-law systems. As Rowan concludes, “the view amongst commentators that there are few differences between the English and French approaches to specific remedies is

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43 ZWEIGERT & KÖTZ, supra note 1, at 34.
44 See Ogus, supra note 2; Miller, supra note 2; ROWAN, supra note 2, at 17–69; Shael Herman, Specific Performance: a Comparative Analysis, 7 EDINBURGH L. REV. 5 (2003) (comparing U.S. and Spanish law); JAN M. SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION 11 (2014); E. Allan Farnsworth, Comparative Contract Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 932 (Mathias Reiman & Reinhard Zimmerman eds., 2006) (arguing that although the difference between the systems “may not be as great as at first appears,” the systems’ attitudes “remain fundamentally different”).
fundamentally misguided” since the description of those two systems “demonstrates beyond doubt that the regime of specific relief in English law gives inferior protection to the performance interest compared to the law in France.”

Other scholars, including René David, Frederick Lawson, Louis Romero, Guenther Treitel, Konard Zweigert and Hein Kötz, Henrik Lando and Caspar Rose, Stephen Smith, and Ronald Scalise, argue that there is considerable practical convergence between the systems. For example, Reinhard Zimmerman states that “it is widely recognised among modern comparative lawyers that in the actual practice of German law the claim to specific performance does not have anything like the significance attached to it in theory. At the same time, the traditional common law view seems to be losing some of its force in both the United States and in England.”

Whatever the differences that may have existed between these two systems at any point in time, it is clear that these have gradually diminished over the years, thanks to legislative and judicial developments. Thus, for example, Section 1211 of the French Civil code was amended in 2016 so that enforced performance is denied not only when performance-in-kind is impossible, but also when its cost to the promisor would be manifestly disproportionate to the benefit to the promise. This amendment might not close the gap between French law and English law, and it is still early to foresee how the courts will interpret and implement it, but it certainly narrows the gap between the systems.

On the other side of the English Channel/la Manche, courts’ willingness to

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45 ROWAN, supra note 2, at 52.
46 See DAVID, supra note 1, at 126–27; LAWSON, supra note 1, at 213; Romero, supra note 1; TREITEL, supra note 1, at 71; ZWEIGERT & KÖTZ, supra note 1, at 484; Lando & Rose, supra note 1; STEPHEN SMITH, ATIYAH’S INTRODUCTION TO THE LAW OF CONTRACT 386 (2006); Scalise, supra note 1, at 730–34.
reinstate wrongfully discharged employees has increased in the past decades, at least in principle.\textsuperscript{49}

It appears that terminological differences between the systems (as discussed below); the existence of significant exceptions to the basic rules (with substantial correspondence between the situations governed by the common-law rule and those governed by the civil-law exceptions—and vice versa); possible discrepancies between judicial rhetoric and practice; and the interrelationships between substantive rules and the rules of civil procedure—all result in a narrower gap between the various legal systems than first meets the eye (even if some gap still remains). To use but one example, under Section 887 of the German Code of Civil Procedure, when a court orders the breaching party to perform a certain act, and the breacher fails to do so—and the said act can be performed by someone else—the court is authorized to order the performance of the act by a third party, at the breacher’s expense. In such cases, although enforced performance was awarded, the final result is a substitutionary monetary relief.\textsuperscript{50} Inasmuch as legal systems that start from opposite doctrinal points of departure tend to converge in their practical solutions, this may also be true within Israeli law, in relation to its pre- and post-1970 legal regimes.

\textbf{B. Complex Policy Considerations}

This Section briefly reviews some of the arguments for and against the availability of enforced performance as a remedy for breach of contract. The main purpose of this review is to argue that the weight and complexity of the moral, social, economic, and institutional arguments—which make it one of the most controversial issues in contract law—cast doubt on the plausibility of any legal system \textit{actually} moving from one extreme to another in this regard. In the face of a wealth of conflicting arguments, one would expect that, regardless of the doctrinal point of departure, the actual


\textsuperscript{50} See also BASIL S. MARKESINIS, HANNES UNBERATH \& ANGUS JOHNSTON, \textit{THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE} 403–06 (2d ed. 2006); Lando \& Rose, \textit{supra} note 1 (describing German and Danish law).
implementation of the law would be moderate, balanced, and nuanced.

One reason for awarding enforced performance as a matter of course is the moral duty to keep one’s promises. According to a liberal theory, promises, including contracts, enable people to enjoy the efforts and resources of others, while respecting their autonomy.\footnote{See, e.g., \textsc{Charles Fried}, \textit{Contract as Promise: A Theory of Contractual Obligation} \textit{(1981)}.} By legally enforcing contracts, the law treats promisors as autonomous and rational beings. Charles Fried has argued that expectation damages fully realize the moral duty to keep promises, because they place the injured party in the same position she would have been in had the contract been performed.\footnote{\textit{Id.} at 17–19. \textit{Cf.} Daniel Markovits, \textit{Making and Keeping Contract}, \textit{92} \textit{Va. L. Rev.} 1325, 1361 \textit{(2006)}.} However, as Fried’s critics have compellingly argued, if the goal of contract law is to let the promisee get what she was promised, then the primary remedy should in fact be specific performance.\footnote{Seana Shiffrin, \textit{The Divergence of Contract and Promise}, \textit{120} \textit{Harv. L. Rev.} 708, 722–24 \textit{(2007)}; Liam Murphy, \textit{The Practice of Promise and Contract, in The Philosophical Foundations of Contract Law} 151, 154–58 \textit{(Gregory Klass, George Letsas & Prince Saprai eds., 2014)}.} In retrospect, Fried conceded that the connection that he made between the promise principle and expectation damages was “insufficiently nuanced.”\footnote{\textsc{Charles Fried}, \textit{The Ambitions of Contract as Promise, in The Philosophical Foundations of Contract Law}, \textit{supra} note 53, at 17, 25.}

One might doubt that there is a moral duty to perform a contract when its breach does not entail losses to the promisee (or even when it does—if the breach results in better outcomes overall). However, even if one concedes that there is a moral duty to perform contracts, a liberal argument against generally awarding enforced performance is that this remedy often significantly curtails the promisor’s freedom. Especially when the contractual obligation is to do, rather than to give; active, rather than an obligation to refrain from action; and personal in nature—the liberal consideration weighs against enforced performance, and in favor of substitutionary monetary remedies.\footnote{\textsc{Dori Kimel}, \textit{From Promise to Contract: Towards a Liberal Theory of Contract} 95–109 \textit{(2003)}.} Furthermore, fairness requires taking both parties’ interests into account. In situations where enforced performance is expected to inflict substantial hardship on the promisor, and damages would adequately protect the injured party’s interests, both freedom and fairness considerations militate against enforced performance.

Extending one’s perspective to society as a whole, the convention of promise- and
contract-keeping is essential to the flourishing of a cohesive society and a functioning market—hence the law should help sustaining this convention. Arguably, the best way to do so is by forcing the promisor to perform the obligation they have undertaken. Giving the promisor a de facto choice to perform or pay damages legitimizes the breach of contracts—thus adversely affects society as a whole.

This is not, however, the position taken by economic analysis of law. From an economic perspective, maximizing social utility does not require utmost deterrence against contract breaches, but rather optimal—i.e., efficient—deterrence. Accordingly, contractual obligations should be performed if, and only if, the net cost of performance to the promisor is less than its net benefit to the promisee. This argument, known as the efficient breach theory, has preoccupied the minds of contract theoreticians ever since its introduction in the early 1970s.

In its crude form, this argument supports expectation damages as a remedy for breach of contract: to efficiently choose between performance and non-performance, the promisor should internalize the costs that the breach would impose on the promisee. In the world of economic models, expectation damages is the remedy chosen by the contracting parties ex ante, to maximize the contract surplus, because enforced performance might hinder efficient breach.

One criticism of this argument is the considerable discrepancy between expectation damages in the world of models—where they make the promisee indifferent between performance and damages—and in the real world. In the real world, promisees are typically undercompensated because they face difficulties in proving their losses and quantifying them; establishing the causal connection between the breach and the losses; persuading the court that their losses were foreseeable from the promisor’s perspective at the time of contracting; fending off arguments about mitigation of damages; and overcoming courts’ reluctance to award damages for non-pecuniary harms in contractual disputes—not to mention litigation costs. These limitations on the availability of

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56 Adras, 42(1) PD 278.
damages undermine the efficiency of expectation damages and lend support to enforced performance. This argument is particularly applicable when the subjective value of performance to the promisee is higher than its market value—as is often the case with real property and unique goods. The limited ability of courts to determine subjective value of items weighs in favor of enforced performance, since the latter obviates such determination (and opens the door to negotiation between the parties).

However, as Daniel Markovits and Alan Schwartz have argued, damages may be superior to enforced performance even if the injured party is not indifferent between performance and damages. Whenever the promisor values the option to breach and pay damages more than the promisee values the entitlement to enforced performance, the parties would rationally exclude the promisee’s right to enforced performance ex ante, and the contract price would reflect this exclusion. If these are the typical preferences, then an efficient default rule should mimic them. Indeed, some deduce from this analysis that an efficient breach is perfectly compatible with the moral duty to keep promises, because in the absence of any explicit agreement to the contrary, every contract includes an option to perform or to pay damages.

However, survey experiments conducted by Daphna Lewinsohn-Zamir—including with experienced business professionals—have shown that the sums of money people demand for giving up performance and settling for monetary damages are extremely high; indeed, many people refuse to settle for damages for any price discount whatsoever. Thus, it is doubtful that Markovits and Schwartz’s argument holds true in the real world.

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63 Lewinsohn-Zamir, supra note 8.
64 Other empirical studies have shown that—contrary to the predictions of standard economic analysis—people treat breaches that are done in a bid to increase the promisor’s profits more severely than breaches.
Moreover, even assuming that expectation damages do put the injured party in the position she would have been in had the contract been performed, the efficient breach theory does not imply that promisees should not be entitled to enforced performance, because such entitlement does not necessarily prevent efficient breach. Take the paradigmatic case of a sale of a unique good, where a third party approaches the seller and offers to pay more for it than its value to the first buyer. Even if the initial buyer is entitled to enforced performance, the efficient outcome may ensue, since the third party can purchase the good from the buyer, or, alternatively, the seller may approach the buyer and offer to buy out her contractual entitlement, thereby allowing the good to be sold to the third party without breach of contract.65

In response, it is argued that the negotiation between the seller and the buyer may fail due to the bilateral monopoly situation and possible information problems, and that a breach coupled with a payment of damages is cheaper than two separate transactions (between the seller and the buyer, and between the buyer and the third party).66 However, resolving disputes following a unilateral breach may well be costlier than renegotiation between parties who already know each other (or an additional transaction).67 In this respect, one might distinguish between a contract to convey an existing object, and a contract to produce a new object or to perform certain work. In the former case, failure of the renegotiation between the seller and buyer would not necessarily preclude the efficient outcome, since the third party can always buy the object from the buyer. In the case of a contract to produce a new object or to perform certain work, however, such failure may result in a waste of resources (and costly ex ante measures to avoid such waste).68

Behavioral and experimental-economic insights have also been brought to bear on this debate. Specifically, conflicting arguments have been made as to how the very

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65 Scalise, supra note 1, at 733–34.
66 Ulen, supra note 60, at 381–82.
67 Id. at 382–83; Daniel Friedmann, The Efficient Breach Fallacy, 18 J. LEGAL STUD. 1, 6–7 (1989).
entitlement to enforced performance affects the value that the buyer attributes to her contractual right, and how the choice between unilateral breach and renegotiation affects the prospects of an agreement on the promisee’s compensation.69

Other considerations pertain to institutional and pragmatic aspects.70 One institutional consideration concerns the volume of litigation. On the one hand, broader availability of enforced performance might deter breaches more effectively—and fewer breaches mean fewer lawsuits. On the other hand, a simpler way to ease the burden on the courts is to award less effective remedies, or no remedies at all: the more paltry the remedies a plaintiff can expect, the less she is likely to file a lawsuit in the first place. Of course, the weaker the social, economic, and legal incentives to perform contracts, the less contracts are likely to be performed—to the detriment of the market and other social institutions.

The cost of designing and executing judicial remedies must also be considered. Enforced performance saves the court the need to determine the scope of compensable losses, and to quantify the damages—tasks that may require hearing and analyzing large amounts of evidence. Such quantification is particularly challenging when contracts pertain to unique assets that have no ascertainable market value, or whose subjective value to the promisee may be much higher. Sometimes, however, enforced performance entails greater judicial and administrative costs to the legal enforcement system. This is the case when a contract involves a complex, extensive project whose successful completion requires close cooperation and monitoring of the promisor’s conduct.

These are but some of the relevant considerations. Given their importance and complexity, it would be surprising if legal systems operating under comparable social and economic conditions provided markedly different solutions in similar situations. For the same reason, it would be surprising if the actual impact of the legislative reform in Israel proved to be as dramatic as is commonly thought.

C. Taxonomy, Rules, and Exceptions

In light of the argument that the actual difference between common-law and civil-law systems is smaller than it appears to be and the complex policy considerations described above, we take a closer look at Israeli law before and after 1970, which is commonly believed to represent two opposite approaches. Several terminological and taxonomic differences between the two legal regimes cast doubt on the common wisdom.

To begin with, there are two important differences between the pre-1970 concept of *bitzu’a be’ayin* (specific performance) and the post-1970 concept of *akhiṣa* (enforced performance). Common-law courts routinely order debtors to repay their debts. The right to enforce contractual monetary obligations is not an equitable, discretionary remedy, but rather a remedy in law. It is not an exception to the denial of specific performance, because such an order is not thought of as an instance of specific performance—a term that refers exclusively to non-monetary obligations.\(^\text{71}\) In contrast, according to Section 1 of the Remedies Law 1970, enforced performance explicitly encompasses an order to pay a debt. Hence whenever an Israeli court awards enforced performance of monetary obligations under the 1970 Law, it would have most probably done so under the previous law as well.

The same is basically true of obligations to refrain from action—e.g., when an employee undertakes not to compete with her employer for the duration of her employment. Like an order to repay a debt, a restraining injunction is not considered an instance of specific performance,\(^\text{72}\) and is awarded quite liberally in common-law systems. Again, the current Israeli definition of *enforced performance* explicitly covers restraining injunctions. Thus, in this regard too, the willingness of courts to issue such orders need not significantly depart from previous law.

Then, the primary exception to the denial of specific performance under common law pertains to real property transactions. Since both under the British common law and the pre-1970 Israeli law, contracts for the sale of real property were specifically enforced on a regular basis, here too, one should not expect any change following the enactment of the 1970 Law. A few years ago, Menachem Mautner examined all judgments of the Israeli Supreme Court in the field of contract law, as published in the official Report

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\(^\text{71}\) *Burrows*, supra note 70, at 433.

\(^\text{72}\) *Id.* at 527–29.
during the first sixty years of the State of Israel (1948–2008).\textsuperscript{73} He found that the single most common transaction dealt with in those judgments was the sale of real property. Twenty-six percent of the judgments dealing with contract law issues pertained to sale of real property (and the total share of judgments dealing with transactions in real property, including tenancies and combination transactions,\textsuperscript{74} was 36.5\%). To the extent that the courts have specifically enforced these contracts after 1970, they most likely would have done so before 1970, as well.

Thus, whenever Israeli courts enforce contractual obligations to transfer title in real property (the primary exception to the common-law rule), or to pay a debt, or to refrain from a given action, they do not necessarily depart from the pre-1970 law.

Finally, there are the four exceptions to the availability of enforced performance under Section 3 of the Remedies Law 1970, cited above. Although it is often emphasized that in interpreting and applying these exceptions, the courts should not take their cue from English law, there is actually considerable overlap between them and between reasons for avoiding specific performance offered in English law. For example, the denial of enforced performance when performance is impossible (Section 3(1)), or against employees and other providers of personal services (Section 3(2)), echo similar English rules.

**D. Practicalities**

Even in cases where enforced performance is available in principle under current Israeli law, there may be practical reasons not to sue for this remedy (or not to award it, when sought). It stands to reason that in many contractual disputes that are resolved in court (which are a small proportion of all contractual disputes), plaintiffs do not sue for enforced performance in the first place, or subsequently forgo this relief, and settle for monetary remedies only. A key reason for this lies in the disparity between substantive contract law and the rules of civil procedure.


\textsuperscript{74} A combination transaction, which is quite common in Israel, is one where a landowner provides the land, a construction firm builds an apartment building on it, and the parties then divide the apartments between them.
Usually, to obtain an effective order of enforced performance—be it for the transfer of an asset, the performance of certain work, or refraining from a certain action—the plaintiff must get a preliminary injunction. Thus, to ensure the effectiveness of an order to transfer property in a sales contract, the buyer must get an interim injunction prohibiting the destruction or sale of the property to a third party. Likewise, to compel a contractor to complete a certain construction work, it is essential that the contractor proceed with the work during litigation, because suspension of the construction for several years until final judgment is issued would greatly harm the injured party. Similarly, enforcing a non-compete clause requires a preliminary injunction, because clients who move to the promisor are unlikely to return to the promisee after several years of litigation (indeed, the very obligation not to compete may expire by the time a judgment is handed down).

Alas, by their very nature, preliminary injunctions are awarded before the court has heard the evidence, assessed its reliability and weight, or decided on the legal issues. For this reason, courts are reluctant to issue preliminary injunctions—especially mandatory injunctions to perform a certain act (as opposed to preventing one); injunctions that change the status quo (as opposed to maintaining it); or ones that are virtually identical to the main relief that is being sought. As in other legal systems, the rule in Israel is that the award of preliminary injunctions is discretionary. One key consideration is whether refraining from issuing such an injunction would cause irreparable harm to the movant, if she prevails on the merits. Usually, a preliminary injunction is not issued if money can adequately compensate the plaintiff ex post for the harm caused in the absence of such an injunction.75 Thus, while courts and scholars insist that the adequacy of a monetary relief does not weigh against the award of enforced performance, when it comes to preliminary injunctions the opposite rule has remained in effect after the enactment of the Remedies Law 1970. Since a plaintiff who fails to attain a preliminary injunction usually relinquishes enforced performance as the main relief (as it is likely to be pointless), this procedural rule has an enormous impact on the extent to which enforced performance is awarded. And even if, for whatever reason, a plaintiff insists on a pointless remedy, the court may well refuse to award it.

75 URI GOREN, ISSUES IN CIVIL PROCEDURE LAW 907 (12th ed. 2015, in Hebrew).
Moreover, even if the court is willing to award a preliminary injunction, it would ordinarily condition it on the movant giving a security for compensating the defendant’s losses caused by the injunction, if the plaintiff’s claim is eventually dismissed. Since providing a security may be rather costly, a plaintiff may refrain from asking for a preliminary injunction, or relinquish it ex post—thus practically abandoning enforced performance as the ultimate relief. Even before filing a claim, insisting on enforced performance often means that the injured party would not take steps to mitigate her losses from the breach (e.g., by selling the sales object to another person or buying a substitute from another seller). However, this is a risky option. If for any reason the injured party eventually fails to obtain enforced performance and has to content herself with monetary damages, she would not be compensated for losses that she “could have prevented or reduced by reasonable measures” (Section 14(a) of the Remedies Law). Taking mitigation-of-damages measures—which often entails renouncing her claim for enforced performance—may thus be the safer option.

Another reason for injured parties not to be keen on securing enforced performance is the expected lapse of time between the filing of a lawsuit and execution of the final judgment. Very often, the execution of an order of enforced performance years after the agreed time would not even remotely place the injured party in the position she would have been had the contract been duly performed. Even if a buyer is granted a preliminary injunction prohibiting the disposal of the sales object, receiving a used car or a new laptop computer two or three years after the due date is hardly satisfactory. In such cases, plaintiffs usually prefer monetary remedies (that said, if the plaintiff is granted a preliminary injunction, she may use it as leverage to obtain a favorable settlement).

Plaintiffs might also avoid suing for enforced performance because their relationship with the defendant has irrevocably deteriorated, or they have lost confidence in the latter’s competence to perform the contract as promised. Finally, the choice of remedies is a reflection not only of the interests of the plaintiffs, but of their attorneys, as well. Often attorneys prefer a monetary relief, out of which it is easier to collect their fee.

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77 Cf. Herman, supra note 44, at 18–19.
78 Cf. Herman, supra note 44.
79 Arbel, supra note 7, at 388–89.
For all of these reasons, people often avoid litigation altogether, or are content with suing for monetary remedies only. A common example of contracts that are hardly ever specifically enforced are those for the supply of fungible goods: if the buyer can purchase a similar object on the market, she would almost invariably prefer this option, and at most claim damages for the losses caused by the breach. Even if plaintiffs initially sue for enforced performance, as time goes by they may well settle for substitutionary, monetary reliefs.

IV. THE EMPIRICAL STUDY: MOTIVATION AND METHODOLOGY

A. Previous Studies
While the reasons to doubt that the status of enforced performance has been transformed by the Remedies Law 1970 sound sensible, the question of whether such transformation has actually occurred is largely an empirical one. However, contrary to the burgeoning theoretical discussion, only few attempts have been made, in Israel or elsewhere, to examine the issue empirically; and they all have considerable limitations. Thus, Lewinsohn-Zamir conducted a survey experiment in which she studied people’s preferences with regard to in-kind versus monetary remedies.80 The study used both lay- and businesspeople as subjects, and examined both ex-post choices and ex-ante preferences (backed up by willingness to pay for their fulfillment). While this study is vulnerable to the usual criticism about the external validity of laboratory experiments, it did shed new light on the recurring claim that people, or at least experienced businesspeople, are indifferent between actual performance and monetary compensation. The findings clearly indicate that they are not. However, the study did not answer the question of how often plaintiffs sue for enforced performance—and how often courts award it—because plaintiffs’ and judges’ decisions in this regard involve many other considerations that cannot be tested in a stylized, vignette experiment.

These limitations also characterize two incentivized lab experiments, designed to examine individuals’ judgment and decision-making under different remedy regimes. Ben Depoorter & Stephan Tontrup found that, when specific performance was the default remedy, promisees exhibited strong resentment toward efficient breach and a desire to

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80 Lewinsohn-Zamir, supra note 8.
enforce the contract—whereas in the absence of specific performance, they were more willing to accept such a breach. In a stylized experiment, Christoph Engel and Lars Freund found that participants were considerably more willing to donate money to a charity of their choice when they could purchase “insurance” that the money would indeed go to that charity, than when they could only purchase an entitlement to have their expectation or reliance interests protected monetarily (no such difference between the “remedies” was apparent in a parallel experiment regarding the purchase of chocolate bars of a particular taste).

In a study more directly relevant to our inquiry, Henrik Lando and Caspar Rose surveyed the judgments published in the Danish Weekly Law Report between 1950 and 2000, and found that specific performance is rarely used. However, their study provides no details about the method used to collect and analyze the data. More importantly, Lando and Rose did not explore the full terrain of enforced performance, or even of specific performance in the common-law sense of the term, but rather limited their study to duties to act—as opposed to duties to give (including to pay money) and (implicitly) duties to refrain from acting. Since positive duties to perform an act are the least specifically enforced obligations in virtually all legal systems, the lessons to be learned from this study are limited. Finally, in order to draw a comparison between civil-law and common-law systems, one should ideally examine representatives of both families, which Lando and Rose did not.

Finally, Yonathan Arbel conducted a qualitative study in Israel, in which he interviewed eighteen people: five plaintiffs who won a claim for enforced performance; one defendant against whom an enforced performance was awarded, eleven lawyers; and the head of an execution office. Interestingly, Arbel found that many plaintiffs do not sue for enforced performance, and enforced performance is not frequently awarded. The reasons for this included attorneys’ preference for monetary relief; changes in the plaintiff’s preference due to the lapse of time between the filing of the suit and the

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81 Depoorter & Tontrup, supra note 9.
82 Engel & Freund, supra note 10.
83 Lando & Rose, supra note 1. The authors referred to German and French law as well, but with regard to those systems they relied solely on academic writings of comparative law experts, without drawing on empirical data.
84 Arbel, supra note 7.
judgment; and the difficulty in ensuring the quality of performance pursuant to a judicial order. At the same time, he found that in some cases suits for enforced performance are “motivated by a desire to signal to the court something about the merits of the case, to minimize procedural costs and delay, or to use as leverage in negotiations.”

While this study offers further reason to be skeptical toward the prevailing rhetoric in Israeli law, its limited number of interviews, lack of any quantitative analysis, and absence of comparison between current practice and practice before 1970—or in other legal systems—limit the lessons that may be drawn from it.

In summary, to date no empirical study has used a quantitative methodology to examine the actual resort of litigants and courts to enforced performance. To start filling this gap, we conducted the study described below.

**B. Methodology**

To examine the impact of the Remedies Law 1970 on enforcement remedies, we created a dataset of all accessible judgments of the Israeli Supreme Court relating to remedies for breach of contract, from the establishment of the State of Israel in 1948 until the end of 2016. The dataset included both judgments published in the official Supreme Court Report (*Piskei Din*, or *Padi*), and unpublished judgments included in the comprehensive electronic database of *Nevo*—the leading commercial publisher of legal materials in Israel. To create the dataset, we examined all judgments published in the official report until 1970, and all judgments classified as dealing with “remedies for breach of contract” in the official report’s index after 1970. However, not all Supreme Court judgments have been published in the official Report, and the proportion of judgments that have been included has varied over the years. In recent decades, all judgments have been included in the Nevo database. To find all judgments concerning remedies for breach of contract that may have not been published in the official Report, or were not indexed under “remedies for breach of contract,” we searched the Nevo Database for all judgments citing the *Contracts (Remedies for Breach of Contract) Law, 1970*, or including the phrase *remedies for breach of contract*. A considerable number of these were found in fact to deal with other issues and not with remedies for breach of contract, hence they

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85 *Id.* at 386.
were not included in our dataset. While we might have missed a few relevant judgments in the Nevo database, we are fairly confident that we encoded almost all of them.

Our main dataset thus comprised a total of 531 Supreme Court judgments (since in 42 cases the court discussed remedies sought by both parties, the dataset includes a total of 573 observations). Of the 531 cases (573 observations), 169 (175) were handed down during the period of almost 23 years, from April 1948 until March 26, 1971—one day before the Remedies Law 1970 went into force and 333 (369) were delivered during the period of almost 46 years, between March 27, 1971 and the end of 2016. For the sake of convenience, we dub these two periods pre-1970 and post-1970, respectively. In addition, 29 judgments (29 observations) were handed down after the Remedies Law 1970 had come into force, but pertained to contracts that had been concluded earlier, which were subject to the pre-1970 legal regime. In those cases, it is not always clear whether the court applied the pre-1970 doctrine (as required) or the post-1970 rules—and even when it did apply the previous law, the judges might have been consciously or unconsciously influenced by the new legal regime. For this reason, when comparing pre-1970 with post-1970 court rulings, we excluded these 29 cases from our analysis (we did not exclude them from other analyses).

Our main dataset did not include lower-courts’ judgments that had not been appealed and discussed in a Supreme Court judgment—because such judgments have rarely been officially reported, and lower-courts’ judgments given before the 2000s are not available in electronic databases either. We did, however, create and analyze a complementary dataset of a large sample of 236 district court judgments (279 observations) given in the 2000s and 2010s, concerning remedies for breach of contract, that were included in the Nevo electronic database. As further explained below, we used this complementary dataset primarily to get a sense of the degree to which the picture of district court judgments emerging from the main dataset resembles the entire population of district

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86 Under Israeli law, the Supreme Court can convene a further hearing on its own judgments, with an extended panel of judges. Regarding the seven cases in which the court held a further hearing on judgments concerning remedies for breach of contract, only the final decision in the further hearing was included in the dataset.

87 As it happens, the judgments handed down by the Supreme Court after 1970 with reference to pre-1970 cases were also those in which the district courts ruled after 1970 with regard to such cases. When comparing the remedies claimed by the litigants in each period, we omitted lawsuits filed after 1970 that pertained to contracts made before 1970. This category included 23 judgments (23 observations).
court judgments, during a comparable period (thereby overcoming part of the difficulty created by the selection of appealed cases).

For each judgment, we encoded a long list of variables, including case number; litigants’ names and occupations; year of filing of the initial lawsuit and date of the final judgment; names of the judges; type of contract(s); type of alleged breach(es); rulings by the lower court and by the Supreme Court as to whether or not the contract had been breached; the appeal outcome; remedies initially sought; remedies awarded by the district court; remedies awarded by the Supreme Court; the substance of the enforcement remedies; and the type of damages awarded. In the relatively rare cases of minority opinions at the Supreme Court, each judge’s opinion was encoded separately. Comparable variables (excluding those pertaining to the Supreme court ruling) were encoded in the complementary dataset of district court judgments. All the variables were initially encoded by Leon Anidjar. The key variables of the judgments included in the main dataset—the period in which the lawsuit was filed and the judgment was awarded (pre-1970, post-1970, or the interim period), type of contract, remedies sought, remedies awarded by the district courts and by the Supreme Court, and the type of enforcement remedy—were independently encoded again by Eyal Zamir, Ori Katz, and the research assistant Roi Yair (about 100 judgments were encoded by Roi, and the others by Eyal and Ori). In the great majority of cases there was agreement between the two encodings, and whenever there were differences, they were discussed and resolved.

Regarding the remedies sought or awarded by the district courts and the Supreme Court, we focused on enforcement remedies and encoded the type of enforcement order sought or awarded: to give, to refrain from giving, to do, to refrain from doing, or to pay a debt). As previously noted, due to the terminological differences between the pre- and post-1970 regimes, the term enforced performance, as used by the Remedies Law 1970

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88 In 29 cases, the Supreme Court discussed disputes that had first been adjudicated in a magistrate court, then on appeal at a district court, and finally, on second appeal, at the Supreme Court. To avoid undue complexity, and given the relatively small number of such cases, we did not encode the remedies awarded by the magistrate court (but the year of filing the lawsuit and the remedies sought were encoded according to the initial lawsuit).

89 Information regarding the remedies initially sought and those awarded by the district court in the main dataset was gleaned from the Supreme Court judgments. However, whenever it was possible to obtain the judgment of the district court directly from the electronic database, that judgment was examined too.
and in post-1970 judgments, is equivalent to the aggregate of specific performance, prohibitory injunctions, and orders to pay debt under the previous regime. We therefore coined a new term—enforcement remedies—to denote both enforced performance in the post-1970 period, and all forms of specific performance, prohibitory injunctions, and orders to pay debt in the pre-1970 period. In contrast, the encoding described below does not differentiate between other remedies sought or awarded: damages (including the sub-categories of regular damages, compensation without proof of damage, damages for non-pecuniary harms, and liquidated damages); declaration that a contract had been duly rescinded (the rescission itself does not require a court order under Israeli law), restitution, and disgorgement.

Importantly, whenever both an enforcement remedy and damages were sought or awarded, we encoded it as a claim or as an award of enforcement remedy only. Very rarely does an enforcement remedy fully compensate for all the losses incurred by the breach—if only because the performance pursuant to a court judgment occurs long after the contracted time. Regardless of whether or not the plaintiff sues for, or receives, damages, for our purpose the critical point in such cases is that she sought, or received, an enforcement remedy.

C. Strengths and Limitations

To the best of our knowledge, ours is the first quantitative study of courts’ awards of the remedy of enforced performance. Although a quantitative analysis misses much of the richness and nuance of doctrinal and qualitative-empirical analyses, it does have distinct advantages. An assessment of judicial practice that does not rely on a quantitative analysis is prone to various biases. People often determine the likelihood of events and the frequency of occurrences based on the ease with which they can recall similar events.

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90 According to Section 11(a) of the Remedies Law 1970, “where an obligation to supply or receive any property or service has been broken and the contract is rescinded by reason of the breach, the injured party shall, without proof of damage, be entitled to compensation in the amount of the difference between the consideration for the property or service under the contract and its value on the date of rescission of the contract.” Under Section 11(b), “where an obligation to pay a sum of money has been broken, the injured party shall, without proof of damage, be entitled to compensation in the amount of the interest on the sum in arrears from the date of the breach to the date of payment, at the full rate under the Adjudication of Interest Law 1961, unless the court prescribes a different rate.”
or occurrences—the so-called *availability heuristic*. Since judgments vary in terms of saliency and memorability, scholars might overestimate the likelihood of phenomena that are manifested in salient judgments (and vice versa). People also exhibit *motivated reasoning* and *confirmation bias*—namely, they tend to automatically acquire and process information in ways that confirm their prior views and expectations. In the present context, this means that people who believe that the Remedies Law did (or did not) transform Israeli law may ignore or underestimate evidence to the contrary. A quantitative analysis can overcome such pitfalls.

That said, a quantitative analysis of court judgments involves its own challenges. As noted in the previous Section, our study faces the difficulty that for a considerable part of the period it covers, we do not have access to all Supreme Court judgments—only to the published ones. We do not know precisely what proportion of the court’s judgments were included in the official Report at any given time. Only in the mid-1990s did the Nevo database begin to comprehensively include all Supreme Court decisions. Presumably, the choice of judgments to be published in the official Report in previous years was not random. While we concede this limitation, the proportion of published judgments does appear to have been always fairly high (particularly with regard to those that provided substantial reasoning), and in any event, there is no reason to believe that the choice of judgments for publication in the early years systematically biased our findings one way or the other.

As for coding methodology, our study has the disadvantages and advantages of being coded mostly by the principal researchers. The main disadvantage is that the coding was not blind, that is, the encoders were aware of the research question. The main advantage is that we did not rely much on students, whose legal expertise is more limited (the research assistant who took part in the encoding was a third-year student). The fact that

the key variables were coded twice by different encoders significantly enhances the reliability of the encoding.

A general limitation of observational studies is that they can identify correlations (or associations), but hardly prove causation. We concede this limitation, and would therefore welcome the use of other empirical methods to further study the present issue. However, in this respect our study has the advantage that it is not comparing the legal regimes of two different societies, but rather two legal regimes of a single society, exploiting the “legislative shock” of 1970. To be sure, in the 69 years covered by our dataset, myriad social, economic, legal, and political developments have occurred in Israel that might have affected plaintiffs’ inclination to sue for enforcement remedies, and the courts’ willingness to award them. In a bid to identify causal connections, we used a series of logistic regressions in which we controlled for various variables—including the legal regime (pre- or post-1970); the length of legal proceedings; the year of judgment; the filing year; the type of contract; and type of plaintiff. Still, we cannot rule out the impact of other, unobservable or unmeasurable variables on claims for enforcement remedies, or on awards thereof.

Our quantitative study focuses on judgments by the Supreme Court, because the great majority of judgments of lower courts—especially in the first decades of Israel’s existence—were never published and are not otherwise available. The Nevo database began systematically including district court judgments only in the early 2000s, so it is practically impossible to get a reliable picture of rulings by the lower courts during most of the period in question. If one wishes to explore law-in-action, focusing exclusively on appeal judgments is obviously problematic: studies have shown that most contractual controversies are resolved without the involvement of lawyers, or—even if lawyers are involved—without filing a lawsuit. Of all contractual disputes that reach the court system, a great many are settled before judgment. Of the lower courts’ judgments, only some are appealed, and many appeals are settled before a Supreme Court ruling. Disputes that are resolved at the Supreme Court are not only a tiny percentage of all

96 Unlike its U.S. counterpart, the Israeli Supreme Court does not have the discretion not to discuss appeals from the district court. Such discretion exists only with regard to cases that were initially heard by the magistrate court and then, on appeal, by the district court.
There is no reason to assume that they are a random, representative sample of all adjudicated disputes (let alone of all contractual disputes). Since litigants decide which disputes are adjudicated (including those that are adjudicated all the way to a Supreme Court ruling); and since these decisions are a function of the litigants’ expectations about the court’s ruling—the resulting selection effect can seriously curtail the possibility of inferring lower courts’ judgments and out-of-court settlements from Supreme Court rulings.\(^\text{97}\)

A partial response to this difficulty is that disputes involving contract remedies are usually multi-dimensional, so it is unclear what determines the selection of cases for adjudication (or appeal). Typically, the parties disagree not only (or even primarily) about the appropriate remedy, but also, and often primarily, on the validity of the contract, its interpretation, whether it has been breached and by whom, whether it has been duly rescinded, whether the injured party waived her rights, and so forth. Hence, even if the litigants could perfectly predict the court’s ruling about the remedy, the case may be adjudicated and even appealed for other reasons. Information asymmetry between the litigants, cognitive biases (e.g., the over-optimism bias), and other factors render the possible effects of selection indeterminate and unpredictable\(^\text{98}\)—if they exist at all.\(^\text{99}\)

Moreover, in the present context, any one of the contracting parties (e.g., the seller or the buyer), the disputants (the alleged breacher or her counterparty), and litigants (the plaintiff or the defendant) may appeal the district court judgment (thereby possibly triggering a counter-appeal). And while the party alleging breach is certainly more likely to file a lawsuit, in contractual disputes (unlike typical tort cases), either party might be the plaintiff or the counter-plaintiff, since often the parties blame each other and react to alleged breaches in ways that may prompt either of them to file a lawsuit. It is therefore

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particularly difficult to know how, if at all, the selection of cases to be resolved by the courts biases the picture emerging from these judgments.

To gain insight into the selection effect in the present context, we created a complementary dataset consisting a sample of all district court judgments (whether or not appealed to the Supreme Court) from the 2000s and 2010s—the first period in which the Nevo database covers virtually all of the district court judgments. The sample included all district court judgments concerning remedies for breach of contract that were delivered in the years 2005, 2008, 2011, and 2014—a total of 236 judgments (279 observations). To create the dataset, all the judgments of those years containing the phrase “remedies for breach of contract” were examined and those that actually dealt with remedies for breach of contract were included in the complementary dataset. We compared the remedies sought by plaintiffs and awarded by district courts in this complementary dataset to those sought and awarded by the district courts, as gleaned from the main dataset. To have a sufficiently large basis for comparison, we compared the complementary dataset to all district court judgments in the main dataset were mentioned in the main dataset, given from 2000 to 2016—a total of 83 observations. This comparison allowed us to gauge the extent to which the picture emerging from the main dataset is skewed due to the selection of cases for appeal to the Supreme Court (but not the selection of cases to be adjudicated in the first place). It should be noted that the concern about the selection effect characterizes all observational studies of appellate court judgments, in which respect we join a respectable list of studies.100

Analyzing Supreme Court rulings is worthwhile also because Israel follows the common-law tradition with regard to stare decisis: according to Section 20(b) of the Basic Law: The Judiciary, “a rule laid down by the Supreme Court shall bind any court other than the Supreme Court.” While it is unclear whether lower courts and attorneys are influenced more by the Supreme Court’s rhetoric or by its practice (inasmuch as these two differ), the Court’s judgments do indubitably have an impact well beyond the particular cases they pertain to. Put differently, the Supreme Court’s judgments are at once a manifestation of law in action and of law on the books. Hence, even if one is

mostly interested in the legal doctrine—rather than its actual impact—Supreme Court judgments are one of the two primary sources of law, along with legislation. And while the meaning of statutory law depends first and foremost on the statutory text, the meaning of case law depends both on the court’s rhetoric and its operative rulings. Inasmuch as the prevailing rhetoric about the transformation of the status of enforcement remedies departs from the court’s actual rulings, one should doubt the efficacy of the declared doctrine, and perhaps even the sincerity of the judges. In any event, from this perspective, the fact that our dataset does not include unpublished judgments from the early decades is of lesser concern, since such judgments did not effectively shape Israeli law.

V. The Empirical Study: Main Findings

This Part describes the findings of our empirical study. It first presents the types of contracts discussed in the Supreme Court judgments concerning contract remedies. It then describes the types of remedies initially sought by plaintiffs and the extent to which they were awarded by the district courts and the Supreme Court, before and after the Remedies Law 1970. We further examine the associations between the awarding of enforcement remedies and the judges’ legal education, and between those awards and the length of the legal proceedings. Finally, we compare the district court judgments that have been delivered since the year 2000 and included in our main dataset, with a sample of district court judgments from that period.

A. Types of Contracts

Both doctrinally and according to the pertinent policy considerations, the inclination to award enforced performance should vary from one type of contract to another. Table A1 (see Appendix) provides the absolute number and relative proportion of the various types of contracts among all judgments in our dataset, and Figure 1 depicts their relative share graphically, before and after the 1970 change in legislation.
As Table A1 and Figure 1 demonstrate, the relative proportion of the various contracts handled by the Supreme Court before the Remedies Law 1970 is roughly similar to those handled from then on. Comparing each of the categories before and after 1970 reveals a statistically significant difference only in the category of contracts for services.  

Most of the decline in the proportion of these contracts is due to the fact that before 1970, 15 out 169 judgments (9%) dealt with brokerage contracts, whereas after 1970, only 6 out 333 judgments (2%) did. In both periods, real-property transactions—including sales, long- and short-term leases, license, gifts of real property, and combination transactions—constituted more than half of the contracts. These findings are consistent with the finding that land transactions play a disproportionally large part in shaping Israeli contract law through Supreme Court precedents.

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101 Real property: $\chi^2(1)=2.69$, $p=0.1$; services: $\chi^2(1)=8.3$, $p=0.004$; personal property: $\chi^2(1)=0.783$, $p=0.38$; family contracts: $\chi^2(1)=0.05$, $p=0.82$; employment contracts: $\chi^2(1)=0.167$, $p=0.68$; other: $\chi^2(1)=2.323$, $p=0.13$.

102 Plausibly, a primary cause for this decline was the gradual expansion of the jurisdiction of the magistrate courts, in terms of the size of the lawsuits, between 1985 and 2001. Since claims for brokerage fees ordinarily refer to relatively small sums of money, and since the Supreme Court tends not to allow second appeals (that is, appeals on judgments in which the district courts have ruled on appeal from a magistrate court), the share of these contracts in the Supreme Court caseload has dramatically decreased.

103 Mautner, supra note 73, at 543–45, 553–55.
Of course, the relative share of the various contract types in Supreme Court judgments is by no means a reflection of their proportion in the economy, or even in the judicial system’s caseload (which comprises many small-scale disputes that are settled in the lower courts—including the small-claims court). Most small-scale transactions likely never reach the Supreme Court because the stakes are too low, and most large-scale transactions between commercial entities are settled out of court.104 Real-property transactions are often large enough to justify litigation all the way to the Supreme Court, and, being discrete—rather than relational—contracts, the incentives to resolve disputes amicably out of court are weak.

**B. Remedies Initially Sought**
As a rule, courts do not award reliefs that litigants do not ask for. Hence, to understand the actual role enforcement remedies play in contract law, it is important to establish the extent to which plaintiffs actually seek these remedies. Table A2 presents the number of times and relative share each type of remedy was sought, and Figure 2 presents the relative shares graphically, in each of the two periods. Both the table and the figure refer to the remedies sought when the lawsuit was initially filed, in cases that reached a Supreme Court judgment.

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As Table A2 indicates, before 1970 the Supreme Court ruled in 192 cases in which remedies for breach of contract were sought, and after 1970 it ruled in 358 such cases (excluding cases in which the contract was made prior to 1970). The most striking finding is that the percentage of claims for enforcement remedies sharply declined from 61% in the pre-1970 period to 44% in the post-1970 period ($\chi^2(1) = 15.491$, p<0.001).

To examine whether the 1970 legislative reform affected the inclination of plaintiffs to sue for enforcement remedies, we examined this inclination longitudinally. Figure A1 (see Appendix) presents the percentage of observations in which such remedies were claimed for each three-year period between 1950 and 2015. The use of three-year periods, rather than single years, is because the limited number of judgments—less than eight observations per year on average—would make a one-year graph very volatile. Even when we look at three-year periods, the 95% confidence interval is very wide, due to the small number of observations in each period (less than 24 on average), so this graphic illustration is not very informative.\textsuperscript{105} When comparing the percentage of enforcement remedies sought three, six, and nine years before and after the legislative reform (i.e., when comparing 1971–73 to 1968–70; 1971–76 to 1965–70; and 1971–79 to 1962–70), none of the differences are statistically significant ($\chi^2(1) = 1.05$, p=0.306; $\chi^2(1) = 0.004$, p=0.948; and $\chi^2(1) = 0.004$, p=0.95, respectively).

To sum up, the change in plaintiffs’ chosen remedies strikingly contradicts the prevailing belief among judges and scholars that the Remedies Law 1970 upgraded the status of enforced performance from a secondary relief to the primary and routine remedy for breach of contract. It does not even fall into line with the alternative, skeptical conjecture that the Remedies Law 1970 did not brought about any real change with regard to the use of enforcement remedies. As far as we can tell, the legislative reform did not affect the inclination to sue for enforcement remedies. This conclusion should be treated with caution, however, due to the small number of observations.

\textsuperscript{105} If Figure A1 shows anything, it is that there was a rise in the tendency to seek enforcement remedies just before 1970, and a relatively steady decline after that year. The apparent rise before 1970 can hardly be explained by an expectation of the legislative reform, because reforms in substantive law do not apply retroactively.
C. Remedies Awarded by District Courts

Of all the cases in our main dataset, prior to 1970 the district courts dismissed (i.e., did not award any remedy for breach of contract) 40% of the claims and accepted—in whole or in part—60%. After 1970, 25% of claims were dismissed, and 75% were fully or partially accepted. The following analysis refers only to cases where the court awarded some form of remedy for breach of contract. Table A3 presents the number of times and relative proportion of each type of remedy awarded (out of all remedies), and Figure 3 presents their relative shares graphically, with reference to the two periods (excluding judgments that were given after 1970 with reference to contracts made before 1970). In a comparison between the two periods, out of all observations, the award of enforcement remedies by district courts dropped dramatically from 53% to 45% ($\chi^2(1)=10.804, p=0.001$). Again, this is in striking contrast to common wisdom (and it does not even comport with the alternative, skeptical view that no change has occurred after 1970).

When one considers only the cases where one of the enforcement remedies was initially sought (and some remedy was awarded), the rate of awarding such remedies declined from 87% before 1970, to 81% after 1970, but this difference is not statistically significant ($\chi^2(1)=1.379, p=0.24$). Thus, even within the fewer cases in which enforcement remedies were sought, there was no increase in the district courts’ willingness to award them—if anything, there was a decline.
To examine whether the 1970 legislative reform affected the district courts’ inclination to award enforcement remedies, we examined this inclination longitudinally—as we had done for the inclination to seek such remedies. The results are shown in Figure A2. Due to the exclusion of judgments awarded after 1970 with regard to contracts made before 1970, there was only one observation in the 1971–73 period, hence we excluded this period from the comparisons. Again, due to the small number of observations, the 95% confidence interval is very wide, and none of the three-, six-, or nine-year before/after comparisons yield statistically significant results (1974–76 versus 1968–70: χ²(1)=0.113, p=0.737; 1974–79 versus 1965–70: χ²(1)=0.44, p=0.507; 1974–82 versus 1962–70: χ²(1)=0.015, p=0.904). Thus, it appears that the Remedies Law 1970 had no discernible effect on the inclination of district courts to award enforcement remedies. Yet, this conclusion should be treated cautiously because the number of observations is small.

**D. Remedies Awarded by Supreme Court**

Table A4 and Figure 4 show the types of remedies awarded by the Supreme Court in the pre- and post-1970 periods. Similarly to litigants’ choices and district courts’ decisions as described above, we found that out of all observations where remedies were awarded, the proportion of enforcement remedies in the post-1970 period is considerably lower than in the pre-1970 period: 37% versus 56% (χ²(1)=12.121, p=0.001). Once again, these findings contradict not only what one would expect based on the Remedies Law, case law, and scholarly common wisdom, but also the alternative, skeptical hypothesis, that the inclination to award enforcement remedies did not substantially change after 1970.

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106 Adding the single district court judgment in the 1971–73 period, that did not refer to a contract made before 1970, does not change the picture (1971–76 versus 1965–70: χ²(1)=1.463, p=0.226; 1971–79 versus 1962–70: χ²(1)=0.376, p=0.54).

107 Yoram Shahar and Miron Gross examined all judgments delivered by the Israeli Supreme Court from 1948 to 1994 and published in the official Report. They found that in the sphere of private (as opposed to public, or criminal) law, 40% of the appeals were accepted in whole or in part, and 60% were dismissed. See Yoram Shahar & Miron Gross, *Success and Failure of Appeals to the Supreme Court—Quantitative Analysis*, 13 BAR-ILAN L. STUD. 329, 332 (1996, in Hebrew). Our study takes a much closer look at the substance of the judgments, so we are not interested in the appeal acceptance rate as such. Shahar and Gross’s rates nonetheless appear to be a good approximation of the appeal acceptance rate in breach-of-contract disputes, as well.
When we examine only the cases where an enforcement remedy was initially sought (and the lawsuit was fully or partially accepted), the award of enforcement remedies declined from 89% of cases before 1970, to 84% after it—although this difference is not statistically significant ($\chi^2(1)=0.84$, $p=0.36$).

To examine whether the 1970 legislative reform affected the Supreme Court’s inclination to award enforcement remedies, we examined this inclination longitudinally, as we did for the claims for such remedies and their award by the district courts. The results are shown in Figure A3. Due to the exclusion of judgments awarded after 1970 with regard to contracts made before 1970, there are zero observations in the 1971–73 period, so we excluded this period. Once again, the 95% confidence interval is very wide, and none of the before/after comparisons yield statistically significant results (1974–76 versus 1968–70: $\chi^2(1)=1.269$, $p=0.26$; 1974–79 versus 1965–70: $\chi^2(1)=1.194$, $p=0.66$; 1974–82 versus 1962–70: $\chi^2(1)=2.67$, $p=0.605$).\(^\text{108}\) Hence, there is no evidence that the legislative reform affected the Supreme Court’s inclination to award enforcement remedies—but once again this lack of evidence should be treated with caution as the number of observation is small.

\(^{108}\) Including the 1971-1974 period does not change the picture: 1971–76 versus 1965–70: $\chi^2(1)=1.973$, $p=0.16$; 1971–79 versus 1962–70: $\chi^2(1)=0.054$, $p=0.817$.  

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**Figure 4: Remedies Awarded by the Supreme Court Excluding Dismissed Claims**

![Figure 4](image)
E. Complementary Dataset of District Court Judgments

While we had reliable data about the rulings of the Supreme Court (and about plaintiffs’ choices and district courts’ judgments in cases that ended with a Supreme Court judgment) for the entire 1948–2016 period, there is no available data on the rulings of lower (magistrate and district) courts for most of that period (including the entire pre-1970 period) in cases that did not culminate in a Supreme Court judgment. The Nevo database only began comprehensively covering lower court judgments in the early 2000s. In a bid to overcome this limitation (if only partly), we sought to examine the degree to which the picture of district court rulings and of plaintiffs’ choices, as reflected in the main dataset, mirrors the picture emerging from district court judgments in general, during the period on which we have data. To that end, we created a complementary dataset consisting of a sample of all district court judgments (irrespective of whether they were subsequently appealed to the Supreme Court) between 2000 and 2016. The sample included all district court judgments concerning remedies for breach of contract that were handed down in 2005, 2008, 2011, and 2014—a total of 236 judgments (279 observations). We did not examine earlier years, because the Nevo database’s coverage of district courts’ judgments delivered prior to 2000 was partial. Within the chosen sample, we examined all the judgments that included the expression “remedies for breach of contract,” and included in the complementary dataset only those that actually dealt with remedies for breach of contract. To have a sufficiently large basis for comparison, we compared the complementary dataset with all judgments in the main dataset in which the district court judgment was handed down between 2000 and 2016—totaling 72 judgments (83 observations).

First, we wanted to see to what extent the relative share of the various types of contracts in the complementary dataset resembles their proportion in the main dataset. As shown in Figure 5, the general picture is quite similar. There is a marginally statistically significant difference between the types of contracts discussed in the 72 judgments in the main dataset, and those discussed in the 236 judgments in the complementary dataset ($\chi^2(5)=9.803, p=0.081$). Similarly, there was little difference between the two datasets in terms of the composition of plaintiffs (and counter-plaintiffs)—individuals, corporations, or public body ($\chi^2(2)=0.415, p=0.813$).
We then compared plaintiffs’ inclination to sue for enforced performance and the
district courts’ willingness to award it. We found statistically significant difference in the
inclination to claim enforced performance between the 83 observations of the main
dataset (where they were sought in 38% of the times), and the 279 observations of the
complementary dataset (where they were sought in 26.5%) ($\chi^2(1)=4.471$, $p=0.034$). In
contrast, there was no statistically significant difference in terms of the inclination to
award enforced performance when some remedy was awarded ($\chi^2(1)=2.406$, $p=0.121$).
Of all the observations in which enforced performance was initially sought, the district
courts awarded it in 65% of the 23 pertinent observations in the main dataset and in 77%
of the 47 observations in the complementary dataset. Again, this difference is not
statistically significant ($\chi^2(1)=1.011$, $p=0.315$).

Thus, the only statistically significant difference between the two datasets was found
in the inclination of plaintiffs to seek enforced performance, which was higher in the
main dataset. It is difficult to identify the cause of this difference, and in the absence of
data regarding other periods (especially the pre-1970 period) it is impossible to draw
clear conclusions from it. At any rate, the difference may indicate that plaintiffs’
disinclination to claim enforced performance in the past decades, as reflected in the main dataset, is more pronounced in the entire set of district court judgments (including those that have not ended in a Supreme Court judgment). Therefore, inasmuch as there is a selection effect in the choice of judgments to be appealed to the Supreme Court, this effect may well strengthen our main findings rather than weakening them.

**F. Summary and Additional Comments**

It may be useful at this point to recapitulate our key findings. *First*, we found that both before and after the enactment of the Remedies Law 1970, the most common remedy awarded by the Supreme Court and by the district courts (in disputes that culminated in a Supreme Court judgment) was not the one considered the primary remedy. Prior to 1970—when damages were deemed to be the primary remedy—enforcement remedies were awarded by the Supreme Court in 56% of the cases in which some remedy for breach of contract was awarded, while after 1970 they were awarded in only 37% of those cases—that is, a drop of 19 percentage point or 34%. In the district court judgments, the drop was from 53% to 45%, that is, a of 8 percentage point, or 15%.

*Second*, the main *direct* cause of this drop was the sharp decline in plaintiffs’ inclination to seek enforcement remedies, from 61% to 44%, that is, a drop of 17 percentage points or 28%. Even in the fewer cases in which enforcement remedies were initially sought (and some remedy was awarded) there was no increase in the courts’ willingness to award them; in fact, there was some decrease: from 89% to 84% (5 percentage points or 6%) in the Supreme Court judgments, and from 87% to 81% (6 percentage points or 7%) in the district courts judgments—although these differences are not statistically significant. Of course, the decline in plaintiffs’ claims for enforcement remedies may have been associated with their expectations about the court’s willingness to award them.

*Third*, plaintiffs’ disinclination to claim enforcement remedies after 1970 was even more pronounced in the complementary dataset of district court judgments in the 2000s and 2010s than in the district court judgments of the same period that were appealed and ended in a Supreme Court judgment. However, there was no statistically significant difference between these two categories in terms of the overall award of enforced
performance. This means that if there was a selection effect at the stage of appeal, it strengthens our findings rather than weakens them.

Fourth, based on longitudinal analysis and comparisons of three, six, and nine years before and after 1970, it appears that the Remedies Law had no statistically significant effect on plaintiffs’ inclination to seek enforcement remedies, nor on the courts’ willingness to award them. However, this result should be interpreted with caution, given the small number of observations in each year, before and after 1970.

The next Part examines possible explanations for the decline in plaintiffs’ claims and courts’ awards of enforcement remedies after 1970. Before we turn to this examination, it should be recalled that, according to our analysis of the terminological and doctrinal differences between the two regimes (supra Section III.C), no change was necessarily expected regarding the enforcement of obligations to repay debts, obligations to refrain from action, or obligations arising from real property transactions—as enforcement remedies were available in those cases prior to the Remedies Law, as well. When excluding cases pertaining to monetary debts, obligations to refrain from action, and real property transactions, the main dataset includes only eight judgments in which enforcement remedies have been awarded: none before 1970, one in the interim period, and seven in the post-1970 period. Though few and far between, it may seem that in these cases the Remedies Law has actually made a difference. However, even this very modest conclusion is dubious.

In the one judgment from the interim period that applied the pre-1970 rules (Magen v. Nakar,109 and in three of the seven cases from the post-1970 period (Chala’tz (Israeli Tire Marketing Co.) Ltd. v. Tzemeg – Tires and Services Ltd.;110 Tza’adi v. Ben-Tzvi;111 Erez Kochva Holdings (1999) Ltd. v. Key Vesting Ltd.),112 the court enforced an obligation to sell or issue unquoted shares in a company. Such obligations have been enforceable under the English common law at least since the nineteenth century.113 In another case (Costa v. Levi),114 the judicial enforcement order was part of a settlement

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109 29(1) PD 189 (1974).
110 30(3) PD 831 (1979).
111 Nevo, August 24, 2010.
112 Nevo, June 24, 2015.
113 JONES & GOODHART, supra note 49, at 161–64.
114 35(4) PD 274 (1981)
agreement approved by the court rather than the court’s own order. In the sixth case (Nachmani v. Nachmani), a 5:4 majority of the court dismissed a husband’s objection to the delivery of fertilized ovules by a hospital to his wife, who wished to complete the reproduction process through a surrogacy mother (the wife lost her womb and could not bear children). The majority judges opined that they were not forcing the husband to do (or refrain from doing) anything, hence it is unclear whether this is actually a case of enforced performance. The seventh judgment (Pundaki v. The Labor Court) involved the reinstatement of an employee who was unlawfully laid off. While this decision deviates from the pre-1970 practice and from the Supreme Court’s ruling in the interim period (Zori), it should be noted that in this regard there have been considerable developments not only in Israeli law, but in the English common law, as well. In both legal systems there has been a growing willingness to issue reinstatement orders against large—and especially public—employers. Interestingly, this development has occurred in Israel despite the clear language of Section 3(2) of the Remedies Law, which denies enforced performance when “the contract consists in compelling the doing or acceptance of personal work or a personal service.”

We are thus left with the Florian case, in which the Supreme Court dismissed an appeal on a district court decision to specifically enforce a commercial contract for the sale of carpets that had been breached by the seller. This is indeed a case in which enforced performance would not have been awarded under the pre-1970 legal regime, nor under English law. Ironically, the appeal was submitted by the buyer, who regretted his seeking enforced performance, preferring in retrospect monetary damages (the remedy he had claimed as an alternative). The Supreme Court held that a plaintiff who got what he asked for cannot appeal the court’s judgment.

Thus, even if one examines only the judgments in which enforced performance was awarded in cases that neither pertained to real transactions nor to debt repayment nor to

115 50(4) PD 661 (1996).
116 Nevo, November 19, 2013.
117 28(1) PD 372.
obligations to refrain from action, there is hardly sound evidence for the alleged revolution brought about by the Remedies Law. But this does not explain the declined use of enforcement remedies after 1970—an issue to which we turn next.

VI. POSSIBLE EXPLANATIONS FOR THE DECLINED RESORT TO ENFORCEMENT REMEDIES

Even if the Remedies Law had no impact on the status of enforcement remedies, this cannot explain the finding that the resort to those remedies after 1970 has sharply declined. Since it is extremely unlikely that upgrading enforced performance and making it the key remedy for breach of contract caused a decrease in its use, this Part examines other factors that might explain this decline. These include the availability of supra-compensatory remedies for breach of contract (which arguably make enforcement remedies less attractive), Judges’ legal education, the rise of individualism in Israeli society, and the length of legal proceedings.

A. Supra-Compensatory Remedies

Arguably, one explanation for the declined use of enforcement remedies could be the availability of supra-compensatory remedies for breach of contract under Israeli law: if plaintiffs can obtain remedies that make them better off than they would have been in had the contract been performed, they are less likely to settle for enforcement remedies, which at best puts them in that position. Two such monetary remedies are disgorgement of the breacher’s profits from the breach, and (monetary or in-kind) restitution following rescission of contract—both of which can, under Israeli law, exceed the injured party’s expectation interest.120

However, the availability of these remedies cannot explain our findings for several reasons. Restitution in excess of the injured party’s expectation interest was available both before and after 1970; and while disgorgement was broadly recognized only in

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120 SHALEV & ADAR, supra note 11, at 66–67.
1988,\textsuperscript{121} we found that—consistent with the findings of Zamir\textsuperscript{122}—in the entire dataset there was only one case in which such a remedy was initially sought, none in which it was awarded by the district courts, and only two in which it was awarded by the Supreme Court (and of these two, only in one case did the disgorgement remedy exceed the injured party’s expectation interest).\textsuperscript{123}

We are left with compensation without proof of damage, under Section 11 of the Remedies Law 1970, which (again, at least theoretically) may exceed ordinary expectation damages. Without delving into the doctrinal issues, there were only five cases in our entire dataset where such damages were awarded by the Supreme Court, and seven where it was awarded by the district courts. Even if these cases are excluded from the analyses, the findings presented in the previous Sections remain basically the same.

In fact, insofar as the availability of supra-compensatory reliefs had any effect on enforcement remedies, it appears to have made them more, rather than less, attractive after 1970. Between the mid-1970s to the mid-1980s, Israel experienced hyperinflation. It took some time for the market to adopt price indexing mechanisms—and when it did, these were often imperfect. As a result, many sellers breached their contracts, because the inadequately-indexed price quickly fell below the present market value of the asset, due to hyperinflation. In such cases, Israeli courts often compelled sellers to deliver the asset, on condition that the buyer paid the portion of the price that she had withheld in response to the breach. Usually, however, the courts only partially indexed that amount—thereby effectively awarding the buyer a supra-compensatory remedy, because in real terms, it meant that she paid less than the agreed price.\textsuperscript{124} During the hyperinflation period, enforcement remedies were therefore particularly attractive in these circumstances. And

\textsuperscript{121} Adras, 42(1) PD 221.
\textsuperscript{123} Reliance damages and monetary restoration of the contractual equivalence may also exceed the injured party’s expectation interest. However, it is unclear whether the former is available under Israeli law, and even if both reliance damages and monetary restoration are available (see Eyal Zamir, Remedies for Breach of Contract: Expectation Damages, Reliance Damages, Restitution of Unjust Enrichment, and Restoration of the Contractual Equivalence, 34 Mishpatim (Hebrew U.L. Rev.) 91 (2004, in Hebrew)), the number of cases in which they have been claimed or awarded is negligible.
yet, as we have seen, the incidence of claiming and awarding enforcement remedies declined after 1970.

The upshot of all this is that, even if in principle the injured party may, under Israeli law, obtain monetary and other supra-compensatory remedies, the actual use of such remedies has been so minor that it cannot explain the decline in the use of enforcement remedies after 1970.

**B. Judges’ Legal Education**

Another factor that might be associated with the award of enforcement remedies is the judges’ legal education. In the first decades following the establishment of the State of Israel, most public officials, including judges, were immigrants from other countries. Thus, it is possible that judges who received their legal education in a civil-law system—where the proclaimed rule is enforced performance—may have awarded this remedy more generously than judges from common-law countries, where specific performance is the exception. Beyond the attempt to explain the decline in resorting to enforcement remedies after 1970, testing this hypothesis is independently important. It relates to a much broader question, namely to what extent judicial decisions are dictated by the applicable legal rules and to what extent by judges’ personal background.

Information about the legal education of Supreme Court judges was obtained from the Israel courts’ official website, which details the legal education of all judges, past and present. We focused on the legal system where each judge obtained his or her basic legal training—that is, their first academic degree in law—on the premise that even if some of them subsequently pursued higher academic degrees in another system, it is the basic education that shaped their legal outlook. In addition to judges who obtained their legal education in a foreign civil-law or common-law system, the number of judges who completed their legal education in Israel has gradually increased over time. Thus, during the period of our study, 14 of the judges (representing a combined total of 135 years on the Supreme Court bench) had studied law in a civil-law country; 11 had been educated in a common-law country (for a combined total of 187 years of service at the Supreme Court); and 50 had been trained in Israel (442 years of Supreme Court service). In the pre-1970 period, none of the judges had obtained his or her basic legal education in Israel, so the comparison pertains only to the remaining two categories. Excluding judges
who received their legal education in Israel also removes any concerns arising from the fact that, overall, Israel is a mixed legal system.

We took into account the interdependence of judges’ rulings when sitting on the same panel. A previous study showed that in 94% of Israel Supreme Court’s judgments between 1948 and 1994, there were no differences of opinion between the judges. Given the lack of independence of rulings by different judges in the same case, we clustered the standard errors by judgments.

Table A5 presents the results of logistic regressions we used to examine whether judges’ choice of remedies for breach of contract (when such remedies were awarded) was associated with their legal education. The analysis refers to 552 decisions by judges who had received their legal education overseas. As the table demonstrates, the judges’ legal education bore no statistically significant association with their inclination to award enforcement remedies. This result did not change when we controlled for the legal regime (pre- or post-1970; Model 2), or for the year of judgment and length of legal proceedings (Model 3).

We then ran the same regressions while excluding cases where enforcement remedies had not been initially sought—that is to say, examining only those where the plaintiff had sought enforcement remedies. Table 1 presents the results. This

Table 1: Judges’ Legal Education and the Probability of Awarding Enforcement when Enforcement Initially Sought

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil law</td>
<td>-0.568</td>
<td>-0.563</td>
<td>-0.733*</td>
</tr>
<tr>
<td></td>
<td>(0.303)</td>
<td>(0.313)</td>
<td>(0.306)</td>
</tr>
<tr>
<td>Regime</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-1970</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-0.273</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.504)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


126 We controlled for the legal regime (pre- or post-1970) and year of judgment separately, to avoid any concerns about multicollinearity, given the high correlation between these two variables (0.816). As further explained in the next Section, length of proceedings was estimated by subtracting the year of filing the suit from the year of judgment. We used a logistic transformation of the length of legal proceedings (Log(length) in Table 1), because of the diminishing marginal effect of this variable; and added a constant of 1 before the transformation, because the length could be 0, and log(0) is not defined.
<table>
<thead>
<tr>
<th>Intervention</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate</td>
<td>-0.091</td>
<td>(0.87)</td>
</tr>
<tr>
<td>Year of judgment</td>
<td>-0.027</td>
<td>(0.017)</td>
</tr>
<tr>
<td>Log(length)</td>
<td>-1.455</td>
<td>(1.324)</td>
</tr>
</tbody>
</table>

(Constant) 2.049*** (0.278) 2.127*** (0.355) 56.04 (33.13)

Observations 319 319 306
Model Chi-square 3.51* 3.86 9.1
Pseudo R² 0.012 0.014 0.042

**NOTES:** Standard errors (clustered by judgments) in parentheses.


* p < .05, ** p<.01, *** p<.001.

Time, when controlling for the year of judgment and length of legal proceedings (Model 3)—but not when examining only judges’ education (Model 1) or controlling only for the legal regime (Model 2)—the judges’ legal education was statistically significantly associated with their inclination to award enforcement remedies. Unexpectedly, in the model where such association was found, judges with common-law education were more inclined to award enforcement remedies.

A lack of association between legal education and the inclination to award enforcement remedies would have comported with the view that, despite their conflicting points of departure, common-law and civil-law systems are not markedly different in their operative outcomes (Section III.B above)—and, of course, with the belief that judges faithfully implement the law, regardless of their legal background. However, we have no explanation for the finding that in two of the three models, civil-law education was associated with a lesser inclination to award enforcement remedies.

**C. Rise of Individualism in Israeli Society**

The two explanations considered thus far relate to the legal rules and to judges’ training. However, it is possible that the explanation for the declined resort to enforcement remedies (or part thereof) lies outside the confines of the legal system, narrowly
understood. Thus, it is widely accepted that in recent decades Israeli society has gradually become less collectivist, less communitarian, and more individualistic than it was in the 1950s and 1960s. One may argue that settling for monetary damages for breach is more consistent with an individualistic outlook, as it enhances autonomy by offering the promisor an option to perform or pay damages, while enforcement remedies are more in line with a notion of contracts being based on solidarity and community. This, perhaps, is why civil-law systems—which generally put greater emphasis on the moral and social duties of contracting parties (compared, for example, with U.S. law)—highlight the availability of enforced performance.

This link between individualism and the choice of remedies for breach of contract may be questioned. But even if accepted, it does not necessarily explain the declining use of enforcement remedies in Israel in recent decades. A competing account might be that during the early years of the state’s history, the Supreme Court promoted liberal values to counteract the then-dominant collectivist values, while in recent years it has done the opposite—championing values of solidarity and mutual consideration to counterbalance the growing trend toward individualism in Israeli society. This competing account is supported by the court’s rhetoric in contract law, including in the sphere of remedies for breach of contract (as described in Part II). Admittedly, our methodology does not shed much light on these competing hypotheses. Hence, we will leave it at that.

D. Length of Legal Proceedings

The final factor that may have caused the decline in claims and awards of enforced performance after 1970 is the length of legal proceedings. As noted in Section III.D, waiting several years for a certain work to be completed, or to receive a certain property, or for a defective product to be repaired, is often impractical. In such cases, monetary relief may be deemed to be more appropriate. Therefore, we hypothesized that the longer

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the lapse of time between the filing of a lawsuit and the final judgment by the Supreme Court, the less attractive enforced performance becomes both to litigants and to the courts—irrespective of the legal rule. The longer the expected length of legal proceedings, the greater the relative attractiveness of monetary awards. In this respect, an order to perform a monetary obligation—although analytically and doctrinally a form of enforced performance—is more akin to damages and monetary restitution, than to an order to perform (or refrain from performing) a certain act, or to transfer (or refrain from transferring) an asset. In fact, the boundaries between enforcement of a monetary obligation, damages for breach of a payment obligation, and monetary restitution in lieu of in-kind restitution, are sometimes blurred.¹³¹

Supreme Court judgments very often fail to state the precise date on which the initial lawsuit was filed, but since each claim is numbered, and the number includes the year of filing, our dataset does include the filing year.¹³² It also indicates the date of the Supreme Court ruling. We were therefore able to estimate the length of legal proceedings in each case in our dataset by subtracting the filing year from the judgment year. Figure 6 describes the running average of the length of legal proceedings in all the cases in our main dataset, by years. To avoid excessive volatility due to the small number of judgments in each year (about eight), the graph depicts the mean length of proceedings in a period of five consecutive years ending at that year, from 1952 onwards.

¹³¹ Imagine a contract for the sale of an asset for a price of 100—its market value—in which the seller delivered the asset, but the buyer did not pay the stipulated price. The seller may sue for and receive the sum of 100 as enforced payment of the agreed amount; as damages for not receiving it; or as restitution of the asset’s value following the contract’s rescission (Section 9 of the Remedies Law 1970 allows an injured party who has rescinded the contract to choose between restitution in kind and restitution of the value of the object transferred to the breacher).

¹³² We omitted from the analysis twelve cases (16 observations) in which the filing year was unknown.
As Figure 6 demonstrates, from the establishment of the State of Israel in 1948 until the early 1970s, the average length of legal proceedings in cases involving remedies for breach of contract that ended up in a Supreme Court judgment gradually declined, from four to two years. From the mid-1970s until the late 1990s, the length of proceedings steeply increased to around seven years, and has since remained around the six- or seven-years mark.

Insofar as the expected length of legal proceedings affects the inclination of plaintiffs to sue for non-monetary enforcement remedies—and of courts to award them—one would expect these inclinations to decline as the length of proceedings increases. Figure 7 describes the percentage of non-monetary enforcement remedies out of all remedies awarded in cases where the claim was not dismissed, as a function of the length of legal proceedings. As expected, the longer the legal proceedings, the lower, in general, the percentage of awards of non-monetary enforcement remedies.

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133 The distribution of cases as a function of the length of legal proceedings was as follows:

<table>
<thead>
<tr>
<th>Length</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
<th>13</th>
<th>14</th>
<th>15</th>
<th>16</th>
<th>17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>7</td>
<td>53</td>
<td>80</td>
<td>90</td>
<td>80</td>
<td>61</td>
<td>47</td>
<td>45</td>
<td>43</td>
<td>11</td>
<td>16</td>
<td>15</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>
To examine the relationship between the length of legal proceedings and the Supreme Court’s awards of non-monetary enforcement remedies, we used logistic regression analyses. Since the length of proceedings is likely to have a marginally diminishing effect on the award of enforcement remedies (e.g., the effect of the difference between one and two years is plausibly much greater than the effect of the difference between five and six years), we used the logistic transformation of the length of legal proceedings as the independent variable.\textsuperscript{134} We conducted the analyses with reference to judgments where the Supreme Court awarded some form of remedy for breach of contract. The results are depicted in Table 2, which comprises four models. Model 1 includes the length of proceedings as the predictor of whether enforcement would be awarded. Model 2 controls for the legal regime—pre-1970, post-1970, and cases pertaining to pre-1970 contracts that were decided after 1970 (dubbed intermediate). Model 3 controls for the year in which the judgment was handed down.\textsuperscript{135} Model 4 controls for legal regime, year of judgment, type of contract, and type of plaintiff (an individual, corporation, or public body).

\textsuperscript{134} Since the length can be 0 (and log(0) is not defined) we added to the variable a constant of 1 before the transformation.

\textsuperscript{135} We controlled for the legal regime and the year of judgment separately in Models 2 and 3, to avoid any concern about multicollinearity, given the high correlation between legal regime (pre- or post-1970) and year of judgment (0.802), and the relatively small number of observations (398).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log(length)</td>
<td>-1.623*** (0.5)</td>
<td>-1.597** (0.527)</td>
<td>-1.540** (0.543)</td>
<td>-1.51* (0.639)</td>
</tr>
<tr>
<td>Regime(^a)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-1970</td>
<td>0.14 (0.269)</td>
<td>0.134 (0.51)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intermediate(^b)</td>
<td>0.899 (0.529)</td>
<td>0.869 (0.643)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year of judgment</td>
<td>0.003- (0.007)</td>
<td>-0.009 (0.014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Type of contract(^c)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Real property</td>
<td>1.563* (0.638)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services</td>
<td></td>
<td>-1.684 (0.954)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal property</td>
<td></td>
<td>-0.196 (0.826)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family contracts</td>
<td></td>
<td>-0.72 (1.231)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td></td>
<td>1.511 (0.983)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plaintiff type(^d)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individual</td>
<td>-1.901 (1.368)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporation</td>
<td>-2.079 (1.402)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td>-0.978*** (0.115)</td>
<td>-0.22 (0.488)</td>
<td>-0.98*** (0.115)</td>
<td>0.677 (1.616)</td>
</tr>
<tr>
<td>Observations</td>
<td>398</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Model Chi-square</td>
<td>10.77***</td>
<td>13.62**</td>
<td>10.93**</td>
<td>83.012***</td>
</tr>
<tr>
<td>Nagelkerke R(^2)</td>
<td>0.038</td>
<td>0.048</td>
<td>0.039</td>
<td>0.271</td>
</tr>
</tbody>
</table>

**NOTES:** Standard errors in parentheses; \(^a\) Pre-1970 serves as a reference category. \(^b\) *Intermediate* denotes judgments handed down after 1970 that dealt with contracts made before that year. \(^c\) *Other* serves as a reference category; \(^d\) *Public body* serves as a reference category. * p < .05, ** p < .01, *** p < .001
Table 2 shows that the length of legal proceedings is highly significantly associated with the award of non-monetary enforcement remedies in all models. In these regressions, other variables do not show a statistically significant association, except for real property transactions.

Finally, as previously indicated, assuming that plaintiffs can (with the help of their attorneys) roughly predict the expected length of legal proceedings, the tendency to claim non-monetary enforcement remedies would be associated with the actual length of proceedings, which serves as a proxy for the plaintiffs’ expectation. Table 3 presents the results of logistic regressions similar to the ones presented in Table 2—but with four modifications. First, since we are searching for variables that might predict whether non-monetary enforcement remedies would be sought, the analyses cover both cases where such remedies were sought, and those where they were not. Second, lawsuits filed before the enactment of the Remedies Law 1970 are included in the pre-1970 category—even if the Supreme Court judgment was given after the Law’s enactment—because the present analyses do not pertain to the court’s ruling, which might have been influenced by the new Law (even though lawsuits filed before 1970 were expected to be governed by the pre-1970 legal regime). Third, the analyses cover both cases were some form of remedy was eventually awarded by the court and those where it was not—as this is unlikely to have affected the plaintiff’s initial choice of remedies. Fourth, instead of the year of judgment, we look at the year in which the lawsuit was filed—since that is when the plaintiff decided which remedies to seek.

Table 3: Length of Proceedings and Probability of Seeking Non-Monetary Enforcement

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log(length)</td>
<td>-1.191***</td>
<td>-1.158**</td>
<td>-1.202**</td>
<td>-1.228*</td>
</tr>
<tr>
<td></td>
<td>(0.389)</td>
<td>(0.416)</td>
<td>(0.428)</td>
<td>(0.487)</td>
</tr>
<tr>
<td>Regime</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>aPsot-1970</td>
<td>0.21</td>
<td>0.287</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.209)</td>
<td>(0.404)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intermediate</td>
<td>-1.32**</td>
<td>1.304*</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.428)</td>
<td>(0.506)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

When we ran the regressions only on the cases where enforcement remedies had initially been sought (N=144), the results were in the same direction, but no longer statistically significant.
<table>
<thead>
<tr>
<th></th>
<th>Coef.</th>
<th>Std. Error</th>
<th>Z</th>
<th>P-value</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Filing year</strong></td>
<td>0</td>
<td>-0.006</td>
<td>0.006</td>
<td>0.690</td>
</tr>
<tr>
<td><strong>Type of contract</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Real property</td>
<td>0.496</td>
<td>(0.342)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services</td>
<td>-1.893***</td>
<td>(0.954)</td>
<td></td>
<td>0.000</td>
</tr>
<tr>
<td>Personal property</td>
<td>-1.141*</td>
<td>(0.505)</td>
<td></td>
<td>0.044</td>
</tr>
<tr>
<td>Family contracts</td>
<td>-1.432</td>
<td>(0.840)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td>0.379</td>
<td>(0.678)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Plaintiff type</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individual</td>
<td>-1.519</td>
<td>(1.326)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cooperation</td>
<td>-1.867</td>
<td>(1.344)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td>-0.629***</td>
<td>(0.9)</td>
<td></td>
<td>0.000</td>
</tr>
<tr>
<td></td>
<td>-0.485</td>
<td>(0.398)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-0.629***</td>
<td>(0.09)</td>
<td></td>
<td>0.000</td>
</tr>
<tr>
<td></td>
<td>0.706</td>
<td>(1.385)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Observations</strong></td>
<td>557</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Model Chi-square</strong></td>
<td>9.557**</td>
<td>19.654***</td>
<td>9.56**</td>
<td>105.255***</td>
</tr>
<tr>
<td><strong>Nagelkerke R²</strong></td>
<td>0.023</td>
<td>0.048</td>
<td>0.023</td>
<td>0.237</td>
</tr>
</tbody>
</table>

**NOTES:** Standard errors in parentheses. a Pre-1970 serves as a reference category. b Other serves as a reference category. c Public body serves as a reference category.
* p < .05, ** p<.01, *** p<.001

As hypothesized, in all four models, the ex-post length of proceedings is significantly associated with the initial decision to sue for non-monetary enforcement remedies: the longer the proceedings, the less likely plaintiffs are to sue for those remedies. There is also significant association with two types of contracts: plaintiffs are less likely to sue for non-monetary enforcement remedies in contracts for services and in Personal property transactions.

Finally, we examined whether the length of proceedings was associated with the inclination to award non-monetary enforcement remedies in the complementary dataset of district court judgments (described in Sections IV.B and V.E). Since the complementary dataset was considerably smaller than the main one, we could only reliably test the association between the length of proceedings and the probability of
 awarding enforcement remedies with regard to all observations in which some remedy for breach of contract was awarded (N=192) (without excluding the cases in which enforced performance had not been initially sought—which would have left us with only 67 observations). Table 4 presents the results of the logistic regression analyses that we conducted, similar to the analyses we had conducted of the Supreme Court judgments (Table 2).

**Table 4: Length of Proceedings and Probability of Non-Monetary Enforcement Awards in Complementary Dataset**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log(length)</td>
<td>-1.783*</td>
<td>-1.646*</td>
<td>-2.166*</td>
</tr>
<tr>
<td></td>
<td>(0.727)</td>
<td>(0.777)</td>
<td>(0.871)</td>
</tr>
<tr>
<td>Year of judgment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-0.33</td>
<td>-0.110</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.734)</td>
<td>(0.758)</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.531</td>
<td>0.816</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.599)</td>
<td>(0.631)</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.851</td>
<td>0.921</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.531)</td>
<td>(0.554)</td>
<td></td>
</tr>
<tr>
<td>Type of contract</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Real property</td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td>Services</td>
<td></td>
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<td></td>
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<td></td>
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<tr>
<td>Personal property</td>
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<td></td>
</tr>
<tr>
<td>Family contracts</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Plaintiff type</td>
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<td></td>
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<tr>
<td>Individual</td>
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<td></td>
</tr>
<tr>
<td>Cooperation</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>192</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

137 The distribution of all cases as a function of the length of legal proceedings was as follows:

<table>
<thead>
<tr>
<th>Length</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
<th>13</th>
<th>14</th>
<th>15</th>
<th>16</th>
<th>17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>14</td>
<td>30</td>
<td>42</td>
<td>35</td>
<td>29</td>
<td>41</td>
<td>25</td>
<td>26</td>
<td>14</td>
<td>8</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
As Table 4 shows, the increase in the length of legal proceedings is statistically significantly associated with a decrease in the probability of non-monetary enforced performance awards in all models. It thus appears that the complementary dataset lends support to the main positive finding in the main dataset, namely that the longer the legal proceedings, the less enforcement remedies are awarded.

**E. Summary**

This Part examined possible explanations for the declined use of enforcement remedies in the post-1970 period. *First*, we argued that the availability, in principle, of supra-compensatory monetary remedies cannot explain the disinclination to seek or award enforcement remedies in that period. *Second*, the hypothesis that judges who had been educated in civil-law countries would be more inclined to award enforcement remedies than those educated in common-law countries was not borne out: in fact, common-law judges were found to be more inclined to award enforcement remedies. *Third*, we raised the possibility that the declining use of enforcement remedies had to do with the rise of individualism in Israeli society, but were unable to prove or disprove this conjecture.

We did, however, find clear support for a fourth explanation, that is, a highly statistically significant association between the length of legal proceedings and the Supreme Court’s inclination to award non-monetary enforcement remedies: the longer the proceedings, the lesser the tendency to award enforcement remedies. This association persisted when we controlled for a host of other variables. It was also evident in the complementary dataset of district court judgments. A similar association was found between the length of legal proceedings (which serves as a proxy for their predicted length) and the plaintiffs’ initial decision to seek non-monetary enforcement remedies.
DISCUSSION AND CONCLUSION

Legal scholars and policymakers around the world continue to wrestle with the question of whether an injured party should be entitled to insist on actual performance of contractual obligations, or whether she should only be entitled to damages in lieu of performance. The theoretical literature offers a host of sophisticated arguments for and against any conceivable rule. The comparative-law literature debates the question of the degree to which the two opposing doctrinal points of departure—namely, the broad availability of enforcement remedies (with some exceptions) in civil law systems versus the denial of specific performance (with some exceptions) in common law systems—translate into contradictory operative rulings. Our analysis and empirical findings contribute to both literatures. As far as the theoretical literature is concerned, our study suggests that mundane, unsophisticated considerations, such as the length of legal proceedings (and other factors, such as the rules pertaining to interim injunctions) likely have a greater impact on the choice of remedies by plaintiffs and courts than the substantive legal rules or the complex policy considerations underpinning them. As for the comparative literature, the findings show that under the civil-law rule, plaintiffs and courts may, in certain circumstances, resort to enforcement remedies less often than under the common-law rule.

According to our findings, one primary reason for the decrease in the use of enforcement remedies after 1970 was the decline in plaintiffs’ initial claims for such remedies, while the drop in courts’ tendency to award such remedies when sought was smaller and not statistically significant. However, it would be a mistake to infer from these results that the courts have not played a major role in this respect, for several reasons. First, absence of statistical significance in the case of courts’ rulings is a natural corollary of the fact that the number of observations was smaller. While in the case of initial claims we looked at the entire set of cases, the smaller and less statistically significant difference with regard to judicial decisions pertained only to cases where enforcement remedies had initially been sought—and among those, only to cases where the suit was ultimately successful, and a remedy of some sort was awarded. Second, it stands to reason that a plaintiff’s decision to sue for enforcement remedies is influenced by his or her assessment of the prospect of receiving them—so at least some of the
diminished inclination by plaintiffs to sue for enforcement remedies is likely due to the courts’ lesser inclination to award them. Finally, the goal of our inquiry was not to establish the effect of the Remedies Law on court rulings (in which case, low statistical significance would have been troubling), but rather to disprove that premise. Our findings do refute the belief that the use of enforcement remedies increased following the enactment of the Remedies Law. Not only the use of these remedies did it not increase—it fell considerably.

It should be emphasized, however, that our findings do not rule out the possibility that a broad recognition of an entitlement to enforced performance does increase the propensity to seek and to award this remedy: it may be that in the absence of such recognition by the Remedies Law 1970 and the case law, the incidence of plaintiffs resorting to enforcement remedies and courts’ awards thereof would have been even lower than it is today. However, if there was such an effect, it was not discernible in our longitudinal analyses, and it must have been overwhelmed by countervailing factors.

Our findings indicate that a key factor associated with the declining use of enforcement remedies has been the length of legal proceedings. Admittedly, association does not imply causation, and the relationships between the two phenomena may be more complex than first meets the eye. Possibly, in response to the proclaimed primacy of the remedy of enforced performance in the wake of the Remedies Law, defendants have come to use procedural tactics to deliberately delay the proceedings, in a bid to render this remedy less appropriate. It is also possible that judges who wish to refrain from awarding enforced performance deliberately delay the proceedings for the same reason.

While there is a grain of truth in these conjectures, we tend not to place too much weight on them. For one thing, our findings indicate that already at the filing stage—before any delay tactics are used by the defendant or the court—plaintiffs are increasingly disinclined to sue for enforcement remedies. For another, while publicly available statistics are scarce, there can be no doubt that the Israeli court system is suffering from a general, acute problem of unreasonably protracted proceedings, which is not unique to disputes over contract breaches.

Another limitation of our study is that it did not examine the behavior of contracting parties when no lawsuit is filed, or when it is settled before a court judgment. It might be argued that since the enactment of the Remedies Law in 1970 there have been fewer
breaches of contracts and that defendants are more likely to settle cases, because they know that if the contract is breached and a judgment is given, the promisee would be awarded an effective enforcement remedy. An alternative hypothesis is that, knowing that the Israeli court system is heavily congested and hence not very effective—especially when it comes to the enforced performance of non-monetary obligations—promisors and defendants are less likely to perform such obligations or to accept settlement offers that favor the plaintiff. The decline of claims for enforcement remedies in the post-1970 period (as described in Section V.B) is consistent with the latter hypothesis, which we believe is more plausible (or, at the very least, that the two effects counteract each other)—but based on our results, we cannot rule out the former possibility.

Be that as it may, the belief that, notwithstanding the declining incidence of enforced performance awards by the courts, the broad availability of that remedy under statutory and case law deters breaches and induces pro-plaintiff settlements, raises a general question: Are contracting parties, litigants, and their attorneys predominantly influenced by judicial rhetoric, or by judicial practice? Presumably, were contracting parties and litigants equipped with perfect information about the courts’ rhetoric and practice, they would be mostly influenced by the latter. However, attorneys—and even more so their clients—never possess such perfect information, so they are likely to be influenced by both judicial rhetoric and practice. Meir Dan-Cohen has pointed to the possible advantages of an acoustic separation between conduct rules—aimed at the general public and designed to guide its behavior—and decision rules, used by judges when making their decisions.138 Another relevant distinction is between the two roles played by the courts (especially Supreme Courts, in systems with stare decisis)—namely, resolving past disputes, and guiding future behavior. There is typically a correspondence between the court’s rhetoric and the conduct rules it wishes to lay down, and between the court’s practice (bottom-line rulings) and the decision rules that it applies. Thus, maintaining a discrepancy between judicial rhetoric and practice—as manifested in the Israeli law of contract remedies after 1970—arguably serves a useful social goal.139

139 On the merits of discrepancy between judicial rhetoric and practice, see Zamir, supra note 130, at 399–409
The final issue raised by our findings—whose ramifications, again, extend well beyond the issue of remedies for breach of contract—is the excessive length of court proceedings. However, discussion of this problem, which is not unique to Israel, is far beyond the scope of the present study.

Putting the broader issues to one side, our focus is on remedies for breach of contract—in particular, the choice between enforced performance and monetary substitutes. We concede the limitations of our empirical inquiry, and certainly agree that no analytical, normative, or policy conclusions directly or necessarily flow from empirical findings. We nevertheless believe that our results—which in the Israeli context, at least, run counter to common wisdom—can enrich the theoretical, comparative, and analytical debates about remedies for breach of contract.
APPENDIX

Figure A1: Percentage of enforcement remedies sought

NOTE: Error bars represent a 95% confidence interval.

Figure A2: Percentage of enforcement remedies awarded by District Courts

NOTE: Error bars represent a 95% confidence interval.
Table A1: Types of Contracts Handled in Supreme Court’s Judgments

<table>
<thead>
<tr>
<th>Type of Contract</th>
<th>Absolute number (and relative share) pre-1970 judgments</th>
<th>Absolute number (and relative share) post-1970 judgments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real property transactions (including sales, leases, licenses, gifts and combination transactions)</td>
<td>87 (51.48%)</td>
<td>197 (59.16%)</td>
</tr>
<tr>
<td>Services (including construction) contracts</td>
<td>42 (24.85%)</td>
<td>48 (14.41%)</td>
</tr>
<tr>
<td>Personal property transactions (including sales, leases, and securities transactions)</td>
<td>20 (11.83%)</td>
<td>31 (9.31%)</td>
</tr>
<tr>
<td>Family Contracts (dowry, marriage, divorce and alimony)</td>
<td>4 (2.37%)</td>
<td>9 (2.7%)</td>
</tr>
<tr>
<td>Employment contracts</td>
<td>4 (2.37%)</td>
<td>10 (3%)</td>
</tr>
<tr>
<td>Other (loans, banking, partnership, joint venture, etc.)</td>
<td>12 (7.1%)</td>
<td>38 (11.41%)</td>
</tr>
<tr>
<td>Total</td>
<td>169 (100%)</td>
<td>333 (100%)</td>
</tr>
</tbody>
</table>
### Table A2: Remedies Initially Sought

<table>
<thead>
<tr>
<th>Type of remedy</th>
<th>Absolute number (and relative share) in 1948–1970</th>
<th>Absolute number (and relative share) in 1970–2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>To give</td>
<td>60 (31.25%)</td>
<td>89 (24.86%)</td>
</tr>
<tr>
<td>To refrain from giving</td>
<td>0 (0%)</td>
<td>1 (0.28%)</td>
</tr>
<tr>
<td>To do</td>
<td>4 (2.08%)</td>
<td>24 (6.70%)</td>
</tr>
<tr>
<td>To refrain from doing</td>
<td>2 (21.04%)</td>
<td>6 (1.68%)</td>
</tr>
<tr>
<td>To pay a Debt</td>
<td>52 (27.08%)</td>
<td>37 (10.34%)</td>
</tr>
<tr>
<td>Other remedy</td>
<td>74 (38.54%)</td>
<td>201 (56.159%)</td>
</tr>
<tr>
<td>Total</td>
<td>192 (100%)</td>
<td>358 (100%)</td>
</tr>
</tbody>
</table>

### Table A3: Remedies Awarded by District Courts

<table>
<thead>
<tr>
<th>Type of remedy</th>
<th>Absolute number (and relative share) in 1948–1970</th>
<th>Absolute number (and relative share) in 1970–2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>To give</td>
<td>27 (25.71%)</td>
<td>53 (19.05%)</td>
</tr>
<tr>
<td>To refrain from giving</td>
<td>1 (0.95%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>To do</td>
<td>0 (0%)</td>
<td>9 (3.24%)</td>
</tr>
<tr>
<td>To refrain from doing</td>
<td>1 (0.95%)</td>
<td>6 (2.16%)</td>
</tr>
<tr>
<td>To pay a Debt</td>
<td>27 (25.71%)</td>
<td>29 (10.43%)</td>
</tr>
<tr>
<td>Other remedy</td>
<td>49 (46.67%)</td>
<td>181 (65.11%)</td>
</tr>
<tr>
<td>Total</td>
<td>105 (100%)</td>
<td>278 (100%)</td>
</tr>
</tbody>
</table>

### Table A4: Remedies Awarded by Supreme Court

<table>
<thead>
<tr>
<th>Type of remedy</th>
<th>Absolute number (and relative share) in 1948–1970</th>
<th>Absolute number (and relative share) in 1970–2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>To give</td>
<td>32 (28.83%)</td>
<td>61 (21.48%)</td>
</tr>
<tr>
<td>To refrain from giving</td>
<td>0 (0%)</td>
<td>1 (0.35%)</td>
</tr>
<tr>
<td>To do</td>
<td>0 (0%)</td>
<td>5 (31.76%)</td>
</tr>
<tr>
<td>To refrain from doing</td>
<td>1 (0.9%)</td>
<td>7 (2.46%)</td>
</tr>
<tr>
<td>To pay a Debt</td>
<td>29 (26.13%)</td>
<td>30 (10.56%)</td>
</tr>
<tr>
<td>Other remedy</td>
<td>49 (44.14%)</td>
<td>180 (63.38%)</td>
</tr>
<tr>
<td>Total</td>
<td>111 (100%)</td>
<td>284 (100%)</td>
</tr>
</tbody>
</table>
**Table A5: Judges’ Legal Education and the Probability of Awarding Enforcement**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education(^a)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil law</td>
<td>0.092</td>
<td>0.102</td>
<td>0.027</td>
</tr>
<tr>
<td></td>
<td>(0.168)</td>
<td>(0.167)</td>
<td>(0.175)</td>
</tr>
<tr>
<td>Regime(^b)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-1970</td>
<td>-0.609</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.285)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intermediate(^c)</td>
<td>-0.236</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.495)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year of judgment</td>
<td>-0.021*</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log(length)</td>
<td>-1.288</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.708)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Constant)</td>
<td>-0.065</td>
<td>0.135</td>
<td>43.01*</td>
</tr>
<tr>
<td></td>
<td>(0.15)</td>
<td>(0.201)</td>
<td>(20.966)</td>
</tr>
<tr>
<td>Observations</td>
<td>558</td>
<td>558</td>
<td>543</td>
</tr>
<tr>
<td>Model Chi-square</td>
<td>0.3</td>
<td>5.26</td>
<td>10.34</td>
</tr>
<tr>
<td>Pseudo R(^2)</td>
<td>0.0004</td>
<td>0.014</td>
<td>0.026</td>
</tr>
</tbody>
</table>

**Notes:** Standard errors (clustered by judgments) in parentheses.

- \(^a\) Common-law education serves as a reference category.
- \(^b\) Post-1970 serves as a reference category.
- \(^c\) Intermediate denotes judgments handed down after 1970 that dealt with contracts made before that year.

\* p < .05, \** p < .01, \*** p < .001.