

# Comparative remedies for breach of contract

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NILI COHEN  
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EWAN MCKENDRICK



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## *Introduction*

NILI COHEN AND EWAN MCKENDRICK

The book is the product of a conference entitled 'Comparative Remedies for Breach of Contract' which took place at the Faculty of Law, Tel-Aviv University between 4 and 6 June 2002. Most, but not all of the papers in this book were presented at that conference.

The purpose of the conference and the book is to present a theoretical as well as a descriptive picture of contract remedies. This has been done by reference to various legal systems representing the common law (English, American, Canadian), some continental systems (French, German) and also a mixed system (Israeli). The sphere of inquiry has not, however, been confined strictly to claims which assume the form of a claim for breach of contract. Taking into account the blurred borderlines between contract and torts, we decided to include in the book a comparative work on economic loss, in which consideration is given both to the role of the law of contract and to the law of tort in the recovery of pure economic loss. A legal system which has a conservative law of tort may resort to the law of contract for the purpose of enabling a claimant to recover pure economic loss, and vice versa. Thus there is a need to examine the relationship between the law of contract and the law of torts.

When it is said that the law of contract can best be understood by reference to the remedies it offers, what is often meant is that the law is best examined and evaluated not by reference to its bare, black-letter rules, but rather by reference to their practical application. It is, perhaps, for this reason that the law and economics school has devoted a considerable amount of energy to the study of the law relating to remedies for breach of contract. It can also be important to appreciate that an understanding of the law of contract does not end in the courthouse. Litigation is not the only means of resolving contractual disputes (indeed, in many jurisdictions only a small percentage of contractual disputes end up in court). Today many contracting parties resort to other dispute resolution mechanisms, such as mediation, commercial arbitration and other *fori* which claim to offer efficiency, creativity and flexibility in the resolution of contractual disputes. Our work does not deal with these trends, nor with their impact on the understanding of contract remedies and contract theory. Rather, it examines the traditional solutions where contract disputes are dealt with

by the courts, and it scrutinises the interrelationship between substantive rights and the remedies that are intended to protect these rights.

The book deals with remedies for breach but as a collection which has its origins in a set of conference papers it neither deals with the whole range of remedies (such as price reduction, set-off, or liens and other possessory security rights), nor with every major question within each remedy (restitution is mentioned in some of the chapters but is not examined separately). Further, although the book purports to serve as a comparative study of remedies for breach of contract, its framework is confined to a limited number of systems. In these senses the book does not aim to be comprehensive. But we believe that the limited picture (both in terms of the remedies and the legal systems subject to analysis) may well mirror the basic trends of the modern law of remedies in both continental and common law systems. These trends include: the efficient protection of contract rights; an increased willingness on the part of legal systems to draw from the experiences of other legal systems; a proper balance between the interests of the injured party and the party in breach; increased protection of the performance interest and a recognition of the non-pecuniary interests that may be affected by a breach of contract; the need to ensure compatibility between the various remedies on offer within a legal system; and responsiveness to the basic values of the legal system.

The book is divided into three broad parts, although these parts do not purport to be water-tight. The first part consists of three chapters which, in their different ways, are devoted to an analysis of concepts and to the basic structure and aims of the law of remedies for breach of contract. The second part, which consists of six chapters, consists of a series of comparisons. In some cases the comparison is to be found within the chapters (as in the case of the chapters by Cohen and by Bussani and Palmer). In other cases the comparison can be seen not within the chapters but between the chapters. For example, the chapters by Gergen and Laithier illustrate the contrasting perceptions of the right to terminate a contract to be found in American and French law respectively. Finally, the two chapters on the recent reforms enacted in Germany (by Heldrich and Rehm and by Coester-Waltjen) illustrate a further aspect of comparative law in that here we see the influence which other legal systems and international conventions have had on the development of the domestic law of a nation state. The third part, which consists of four chapters, deals with a number of issues relating to the remedies of specific performance and damages. We shall now introduce the various chapters and outline some of the principal issues which they raise.

The book opens with 'Rights and Remedies' by Daniel Friedmann. The author deals with the basic question underlying any discussion of remedies, namely the interrelationship between rights and remedies.

Friedmann offers four basic models which can help us to answer questions such as: can there be a legal right that is unprotected by a remedy? should the nature of a legal right be reflected in the type of remedy offered for its protection or is it the case that the type of remedy available sheds light on the nature of the right involved? The analysis of the relationship between rights and remedies also has significant implications for the debate over discretionary remedies. In the case where a remedy lies in the discretion of the court, what does this tell us about the nature of the legal right involved and of the relationship between this right and the remedy which the court, in the exercise of its discretion, decides to grant?

The four models which Friedmann identifies are as follows. The first model is the primacy of the remedy model. According to this model, it is the potency of the remedy and its availability which determines the nature of the legal right and, indeed, the very existence of the right. The second model is the primacy of the right model. The basis of this model is the assumption that the legal right precedes the remedy both in time and in importance and that remedies are merely derivative and follow from the legal right. The third model is the 'unity of the right remedy model.' This model casts doubt upon the right-remedy dichotomy and assumes that the remedy constitutes an integral part of the legal right. On this basis the remedy available for protection of the right is simply one of the many attributes of the right itself. The last model is the 'acoustic separation model.' This model was developed in the context of the criminal law and is applied by Friedmann to the law of remedies for breach of contract. According to this model legal rules can be divided into 'conduct rules' (namely rules which are intended to guide private actors) and 'decision rules' (being rules which are binding on the officials who apply the law to the conduct of others).

Friedmann evaluates the relative strengths and weaknesses of the four models and then draws his chapter to a conclusion by giving brief consideration to the role of certainty, predictability and discretion in the law of remedies. He concludes that the commitment of private law to certainty and to the non-retroactive nature of rights and obligations is not as strong as in the case of the criminal law. But it does not follow from this that certainty is not an important value in private law. On the contrary, he concludes that certainty is an important value in private law but that it is 'much less significant in the area of remedies.' The reason for this is that, while a person is entitled to know what are his primary contractual rights and obligations, she has no similar entitlement to know with certainty the consequences that will flow from a breach by her of one of her primary contractual obligations. This being the case, the rules regarding remedies have a degree of 'built-in flexibility' and 'contain many open-ended points that leave much to the court's discretion.' Friedmann maintains that this

uncertainty exists even in the case where the legal right is clearly defined. In his view the fact that the right is clearly defined *ex ante* does not have the consequence that the remedy is thereby fixed because the court, when called upon to determine the remedy after the breach, has the benefit of formulating the remedy *ex post* and it may take account of circumstances and policy considerations which were not, perhaps, apparent to the parties at the moment at which they agreed on the content of the primary right. Thus, while the primary right is generally 'fixed and pre-determined,' the remedy that is applicable in the event of a breach of that right is neither fixed nor pre-determined but rather is characterised by flexibility and (a degree of) uncertainty.

In the second chapter, 'Multiplicity in Contract Remedies,' Roy Kreitner argues that the attempt to solve all of the problems of contract remedies by the application of a single, unified principle is misguided and, ultimately, futile. He argues that an adequate understanding of remedies for breach of contract must take into account the multiplicity of interests that should be protected by remedial rules. Yet in recent years there has been a proliferation of theoretical models in the common law world that attempt to give a new foundation to the law of remedies through a single, unified principle. These attempts are reviewed critically in this chapter. The critical claim made by Kreitner is that these models are 'fundamentally flawed' and are 'doomed to failure.' In his view, unification theories

fail to explain the practice of the courts in granting diverse remedies for breach, and more importantly, they fail to account adequately for justificatory considerations that are and ought to be an inherent part of remedial rules.

Beyond the critique of unification theories, Kreitner suggests that contract scholars ought to look to contract types as a guide to the further theorisation of remedies. He offers an analysis based on contract types and employs contracts of carriage and merger agreements in order to illustrate his point.

He claims that the analysis of contract types offers two distinct advantages over unification theory. First, it provides 'a better tool for analysing and understanding the varying results of cases involving contract breaches and the remedies they entail.' Second, he asserts that contract types offer 'a research agenda that would never divorce itself from the underlying considerations that ought to govern the choice of rules governing contract breach', namely fairness between the parties, social utility and administrative concerns.

In the third chapter, 'Renegotiation, "Efficient Breach" and Adjustment: The Choice of Remedy for Breach of Contract as a Choice of a Contract-Modification Theory,' Barak Medina explores three distinct accounts of the purpose of remedies for breach of contract. The primary significance of the three accounts is said to lie in the distinct view which each gives of

the contract's 'completeness.' The first account is labelled the 'traditional' approach and it is based on the notion that the purpose of remedies is to 'preserve' the contractual right by deterring violations of the contractual right and correcting the unjust consequences that flow from a violation of the right. The second account is called the 'economic' approach and it is based on the premise that the rules relating to remedies define the terms on which the parties can exit from the contract which they have concluded. The first two accounts can be distinguished on the ground that they rest on different perceptions of the contract's 'completeness'. The traditional approach is based on the perception that contractual provisions are 'all-inclusive' so that they regulate the rights and duties of the parties in all situations. The 'economic' approach by contrast recognises that the contract is not all-inclusive and provides an escape route from the contract based on the prospect of 'efficient breach.' The third account shares the perception of the 'economic' approach that parties' contract is incomplete but differs in the remedial prescription which it provides. This account is based on remedies as a 'modification mechanism', according to which the parties prefer that their contract is completed by a compelled adjustment of the contract by a third party such as a court. On this view the choice of remedy is based on considerations such as what remedy best fits as an 'adjustment mechanism' and remedies can be perceived as a means of adjusting the contract's express provisions.

This chapter underscores the need to decide what is the purpose of remedy, as a precondition to the choice of the appropriate remedy. This decision is said to be 'a choice of a theory of contract interpretation and modification'. Medina maintains that the debate between the 'traditional' and the 'economic approach' is implicitly based on the formalistic, binary model and it reflects a notion of remedies as extra-contractual. His perception that contracts are not all-inclusive leads him to the conclusion that remedies may serve not only to 'preserve' a given contractual right, but also to fill a gap in the incomplete contract in case of a substantial change in surrounding circumstances. If this is so, then a choice must be made between the concept of remedies as exit rules and of remedies as a modification mechanism.

At this point we move from the general themes of Part One into a series of comparisons to be found in Part Two. This part opens with two chapters that can usefully be read together because of the contrasting perceptions which they present of the right to exit from a contract and of the value of 'protecting' a contract (or a contractual relationship) in the event of breach. In chapter four 'The Law's Response to Exit and Loyalty in Contract Disputes' Mark Gergen examines the rules in American private law that regulate exit and loyalty in contract disputes. 'Exit' refers to the situation which arises when one party to a contract suspends or withholds performance, refuses performance or obtains substitute performance as a result