

## Investigating the Efficiency of the Precedence of Enforcement to Specific Performance over the Termination of Contract within Iranian and American Law

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### Extended Abstract

One of the basic issues in the economic analysis of contract law is the position of remedy enforcement concerning the specific performance along with its connection to the termination of contract and payment of damages which are presented in this study. In fact, the common law and civil law systems have predicted a set of different regulations in this regard. In common law, damages are taken into account as a general remedy for the breach of contractual obligations where in some exceptional cases, an execution of the specific performance is possible. Nonetheless, in civil law systems, a public remedy for breaching contractual obligations is equal to the execution of the specific performance and the termination of contract as well as considering damages as exceptions.

A group of experts in economic analysis of contract law emphasize the efficiency of the precedence of executing the specific performance. To prove their theories, they have cited the neutrality principle and the reliance on the contract as well as the moral obligation of adherence to the obligation. To explain these reasons, it must be

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pointed out that (1) according to the neutrality principle, the legislator must foresee the remedies of breach of the contractual obligation in a manner that the promisee would remain absolutely neutral between the execution of the specific performance and its termination, in which the precedence of the former on the latter could place the promisee in such a situation; (2) Given the principle of reliance on the contract, both parties would trust the execution of obligation by one another and consequently, various costs would be at stake. Hence, with the precedence of executing the specific performance, such a reliance can be supported while wasting the costs of trusting a contract can be avoided as the execution of obligation is prioritized; (3) According to a common view, morality requires both parties to remain faithful to the obligation and a contract breach is frowned upon. As a result, the precedence of executing the specific performance can terminate motivations toward the breach of contract.

In return, the most important reasons put forth by the advocates of the efficiency in the precedence of termination of contract against the specific performance include the principle of promisee's self-reliance in the remedy of contractual obligations as well as the fact that such contractual remedies lead to motivation. Consequently, (1) according to the self-reliance principle in contractual remedies, both parties should foresee the probability of the breach of contract with regards to the contractual conditions and states, hence, the contractual remedies must provide self-reliance to both parties when faced with a breach of contract; (2) Based on the principle of providing motivation via contractual remedies, they must be predicted in a way that both parties' motivations would remain intact in case of perform or breach as well as the payment of damage; meanwhile, with the precedence of executing the specific performance, the promisor would not be motivated to perform or breach the obligation as it must be performed in any case, and the promisee also would not have any motivation to mitigate the damages inflicted upon himself in case of a contract breach.

Considering the methodology of the present study, the authors will employ a combination of methods including explanatory (stating the reasons put forth by both parties regarding the efficiency of the precedence of executing the specific performance or termination of contract), analytical (presenting the selected theory, given the examinations and expressed reasons), comparative (comparison between Iranian and American Law), and formal (difference between the characteristics of contracts concerning the priority of executing the specific performance or the termination of contract). Albeit, given the requirements of the main approach in this paper, first an economic analysis must be employed and eventually, its results must be explained using the aforementioned analysis.

An impediment expressed toward the reasons put forth by the advocates of the precedence of the execution of the specific performance or the termination of contract and the payment of damage is that, overall, the precedence of the execution of the specific performance or the termination of contract cannot be accepted unless it is done according to the contracts' characteristics such as being regular, consumable, or commercial. The result obtained from the comparative theory is a combination of the reasons put forth by the advocates and the opponents of the precedence of executing the specific performance over the contract termination which is more compatible with the economic components such as efficiency, efficient specification of resources and their optimal usage, increase in social wealth, and the internalization of foreign expenses resulted from the breach of contract.

According to the formal theory, in regular contracts with the subject of transporting present goods, the precedence belongs to the execution of the specific performance; however, in regular contracts with orders on manufacturing goods and providing services, the promisee must be able to choose between the necessity of executing the specific performance or termination of contract. Furthermore, in consumable contracts, the precedence should also belong to the execution of the specific performance, while in commercial contracts, the termination of contract is prioritized.

Given section 2 of Article 716 in the Uniform Commercial Code presented by American legislators, the execution of the specific performance is not accepted as a general remedy of the breach of contractual obligation and, the precedence of executing the specific performance over the payment of damages are taken into account with regards to the certain conditions and states of both claims, leaving the final authority to the judge. As a result, contemporary legislative developments are inclined toward accepting the formal theory on the precedence of executing the specific performance or the termination of contract.

In addition, the factor proving the efficiency of the formal theory is that contractual remedies of necessitating the execution of the specific performance and the termination of contract are closely connected to the majority of legal institutions such as the civil liability of a third party intervener in breach of contract, efficient breach of contract, the rules of the game concerning contract execution/breach, and the ability to accumulate contractual remedies. In this regard, the precedence of executing the specific performance would prevent the realization of these institutions. Meanwhile, accepting the formal theory would provide the context to the Iranian law in which such institutions are realized.

**Key words:** Economic analysis of law, Efficiency, Enforcement to the specific performance, termination of contract, Payment of damages

## References

### In Persian

- Ansari, M. (2014). *Tahlile eghtesadie hoghooghe gharardaha [Economic analysis of contract law]*, (2<sup>nd</sup> ed.). Tehran: Javdaneh.
- Badini, H. (2003). *Mabanie negareshe falsafi be hoghoogh [The philosophical foundations of the economic attitude to law]*. *Journal for the Faculty of Law and Political Sciences*, 16 (215), 98-99.
- Dadgar, Y. (2006). *Pishdaramadi bar santeze hoghoogh va eghtesad [An introduction to the synthesis of law and economics]*. *Legal Research Quarterly of the Shahid Beheshti University*, 43, 165-166.
- Darabpour, M. (1998). *Ghaede moghabeleh ba khesarat [Doctrine of mitigation of damages]*. Tehran: Ganje Danesh Publication.
- Daroui A. (2014). *Faskh be jahat naghze ghardad (faskhe ebtedai) [Termination for the reason of breach of contract (Primary termination)]*. *Journal of Studies in Islamic Law & Jurisprudence of Semnan University*, 6 (10), 117-144.
- Hosseini, M., Shahi, A., & Parsapour, M. B. (2015). *Ghabeliate jame shivehai jobrane khesarat gharardadi dar hoghooghe eslam va Iran moghayse ba asnade binolmelali [Cumulativeness of contractual remedies in Islamic and Iranian law and in the relevant instruments: A comparative study on Islamic & Western law]*, The

- Quarterly Journal of the University of Qom, 2 (1), 18-19.
- Katouzian, N. (2014). Doreye hoghooghe madani: ghavaede omoomi ghardadha [Course of civil law: General principles of contracts] (8<sup>th</sup> ed., Vol. 4). Tehran: Enteshar Publication Co.
- Olfat, N., & Safai, H. (2010). Ejraye ejbarie ein taahod va taghaddom an bar hoghooghe bar faskhe ghardad [Enforcement to specific performance and its precedence over termination of contract]. *Comparative Law of the Mofid University*, 5 (3), 43-62.
- Sadeghi Neshat, A. (2009). Haghe faskhe gharadad ba vojoode emkane elzam be ejra dar hoghooghe Iran [Termination of contract with the possibility of enforcement to specific performance in Iranian law]. *Journal for the Faculty of Law and Political Sciences*, 39 (4), 297-314.
- Shahidi, M. (2014). Hoghooghe madani: asare gharardadha va taahodat [Civil law: Effect contracts and obligations](8<sup>th</sup> ed.). Tehran: Majd Publication.

### In English

- Al – Tawil, T. (2014). Damages, breach of contract: Compensation, cost of cure and vindication. *Adelaide Law Review*, 34, 353.
- Arbel, Y. A. (2015). Contract remedies in action: Specific performance. *West Virginia Law Review*, 118, 113.
- Berryman, J. (1985). The specific performance damages continuum: A historical perspective, *Ottawa Law Review*. 17, 306 ; 312.
- Birmingham, R. (1970). Breach of contract, damages measures, and economic efficiency. *RUTGERS LAW REVIEW*, 24, 280.
- Cavendish Law cards Series. (2004). Contract law (4<sup>th</sup> ed.). London: Cavendish Publishing Ltd.
- Cooter, R., & Eisenberg, M. A. (1985). Damages for breach of contract. *California Law Review*, 73 (5), 1465.
- Cooter, R., & Ulen, T. (2000). Law and economics (3<sup>rd</sup> ed. New York: Library of Congress Cataloging in Publication Data.
- Cooter, R., & Ulen, T. (2012). Law and economics (6<sup>th</sup> ed.). New York: Library of Congress Cataloging in Publication Data.
- Dobbs, D. B. (1993). Law of remedies: Damages-equity-restitution (2<sup>nd</sup> ed.). New York: West Publishing Co.
- Eisenberg, M. A. (1982). The Bargain principle and its limits. *Harvard Law Review*, 95 (4),743-748.
- Eisenberg, M. A. (2005). Actual and virtual specific performance, the theory of efficient breach, and the indifference principle in contract law. *California Law Review*, 93 (4), 977-978.
- Eisenberg, T., & Miller, G. P. (2015). Damages versus specific performance : Lessons from commercial contracts, New York University School of Law, Working Paper No. 13-09, 11-12, available at : //ssrn.com/abstract= 2241654.
- Gergen, M. A. (2009). A theory of self\_help remedies in contract. *Boston University Law Review*, 89, 1397-1399.
- Klass, G. (2014). Efficient breach. Georgetown University Law Center, Georgetown Public Law and Legal Theory Research Paper, 13 (18) 372-374.
- Kronman, A. T. (1978). Specific performance. *The University of Chicago Law Review*, 45, 367-369.

- Markovits, D., & Schwartz, A. (2017). Efficient breach contract. *Oxford Handbook of Law and Economics*, Parisi, F. (ed.), Oxford University Press, available at: <http://ssrn.com/abstract=2758741>.
- Miceli, T. J. (1997). *Economics of the law: Torts, contracts, property, litigation*. New York: Oxford University Press.
- Nehf, J. P. (1999). Contract damages as substitute for full performance, *Indiana Law Review*, 32, 766.
- Perillo, J. M. (2000). Misreading Oliver Wendell Holmes on efficient breach and tortious interference. *Fordham Law Review*, 68 (4), 1085.
- Posner, E. A., (2003). Economic analysis of contract law after three decades: Success or failure? *The Yale Law Journal*, 112, 836.
- Scalise, R. J. (2007). Why no 'efficient breach' in the civil law? A comparative assessment of the doctrine of efficient breach of contract. *The American Journal of Comparative Law*, 55, 732.
- Schmitt, M. A., & Pasterczyk, M. (1976). Specific performance under the Uniform Commercial Code: Will liberalism prevail? *DEPAUL LAW REVIEW*, 26 (1), 64-66.
- Schwartz, A. (1990). The myth that promisees prefer supra-compensatory remedies: An analysis of contracting for damage measure. *The Yale Law Journal*, 100.
- Schwartz, A. (1979). The case for specific performance. Yale Law School Legal Scholarship Repository, Faculty Scholarship Series, 89, 274-278.
- Shavell, S. (2003). Economic analysis of contract law (Part of foundations of economic analysis of law). Cambridge: Harvard University Press.
- Shavell, S. (2005). Is breach of contract immoral?, Harvard Law School, Discussion Paper No. 531, 1, available at [http://www.law.harvard.edu/programs/olin\\_center/papers](http://www.law.harvard.edu/programs/olin_center/papers).
- Shavell, S. (2006). Specific performance versus damages for breach of contract: An economic analysis. *Texas Law Review*, 84 (4), 831-837.
- Treitel, G. H. (2003). *The law of contract*. (11<sup>th</sup> ed.). London: Thomson Sweet & Maxwell.
- Varadarajan, D. (2001). Tortious interference and the law of contract: The case for specific performance revisited. *The Yale Law Journal*, 111, 741-742.
- Wittman, D. (2006). *Economic foundation law and organization*. (1<sup>st</sup> ed.), New York: Cambridge University Press.