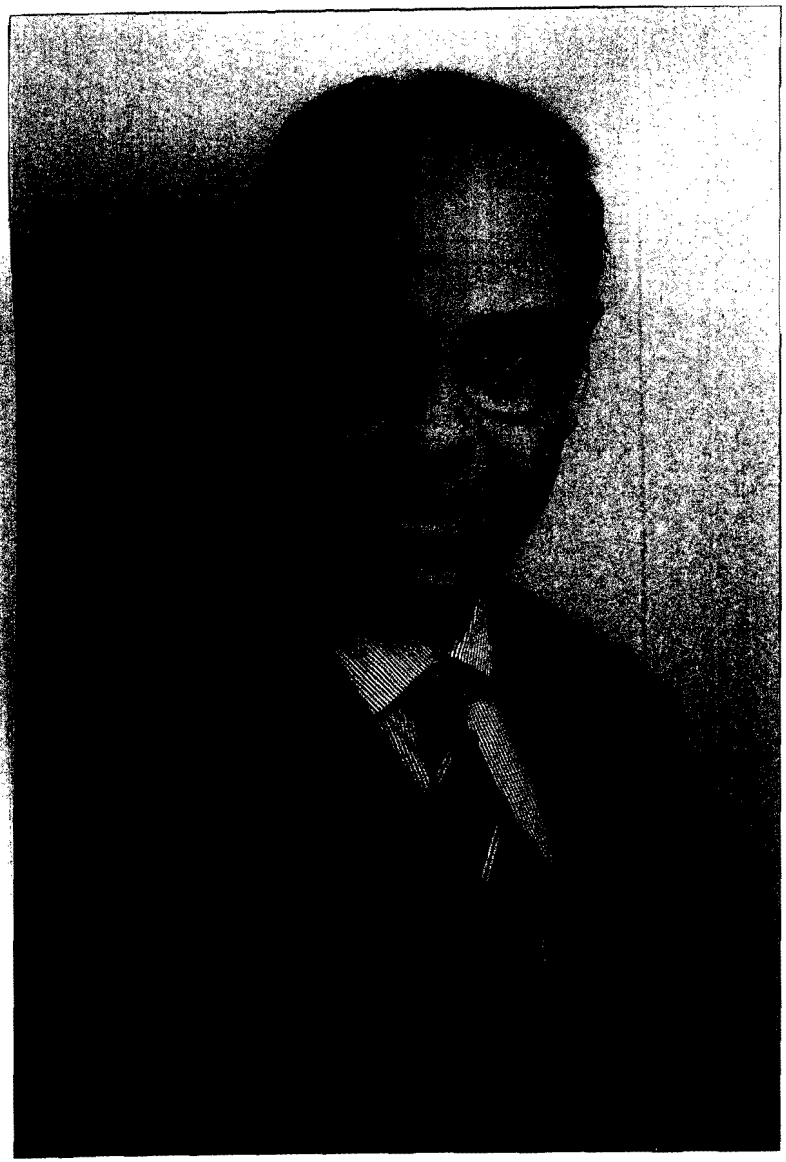

Günther Kühne

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Wirtschaftsbeziehungen sind kaum jemals bilateral; immer gibt es Nachbarn, die gleich oder besser behandelt werden wollen und dafür gute Gründe vorbringen.

Diese Grundregeln hat die EU nicht ausreichend genutzt, als sie mit dem Barcelona-Prozess die von der WTO betriebene Globalisierung regional beschleunigen wollte. Sie hat die politischen Preise allseits nicht ausreichend eingefordert,[63] sie hat – auch – nicht ausreichend Wert gelegt auf eine föderale Struktur der Autonomiegebiete[64] und subregionale Systeme[65].

Aber diese eher technische Kritik verblasst vor der Bewegung, die der Barcelona-Prozess mit visionären, erweiterbaren Zielen in Gang gesetzt hat; die Sarkozy-Initiative zeigt, dass für den Mittelmeerraum noch neue (Sub-)Inhalte und viel Dynamik möglich sind. Die neuen Inhalte und ihre Dynamik sollten einen gemeinsamen Schwung bringen, der - auch - Israel und seine Nachbarn mitreißt in neue Strukturen des Denkens, des Handelns und des Handels.

Beim Rennen gegen die Zeit zur Wahrung von Chancen ist Streit mit den Nachbarn eine Vergeudung. Er fußt, soweit nicht in religiösem Fanatismus, in einem seit Adam Smith veralteten Wirtschaftsdenken, wonach das Eigentum an Land und Ressourcen die Wirtschaftskraft bestimmt. Innovationen und geistige Güter als wichtigste Faktoren bleiben unerkannt, das gemeinsame Wachstum durch Austausch und Handel als Folge von Wettbewerb unbeachtet.

Es lohnt, an den Chancen, die der Barcelona-Prozess bietet, zu arbeiten: Er kann die Erkenntnis von der einen, gemeinsamen Welt und ihrer Verbesserung durch gesicherte Freiheit erleichtern und wachsen lassen und helfen, Ziele und Subziele zu definieren und – notfalls sanktioniert – erreichbar zu machen. Die gemeinsamen – nicht notwendigerweise einheitlichen, vielmehr auch parallelen und scheinbar gegenläufigen – Ziele werden, spätestens bei den ersten sichtbaren Erfolgen, die unsichtbaren Hindernisse aus gestrigen Mauern in den Köpfen wirkungslos machen[66] und damit eine goldene Zukunft ermöglichen. Alle haben sie verdient. Was für ein Potenzial!

63 So gibt es nach den Assoziierungsabkommen Widerrufsvorbehalte für den Fall ausbleibender Fortschritte bei Demokratisierung, Menschenrechten und Rechtsstaatlichkeit, die aus politischen Gründen nicht gezogen wurden und heute ohne neue Verschlechterung nicht mehr geltend gemacht werden können.

64 Vgl. *M. Johannson*, Dschihadisten in Palästina, Internationale Politik, Heft 7/8, S. 128 ff.

65 *Perthes*, Internationale Politik 2006, Heft 9, S. 62 ff.

66 Zum Verbreitungseffekt R. *Pundak*, Lernen, dem Frieden zu vertrauen, Internationale Politik 2006 Heft 9 S. 98 ff.

Distributive Justice in the Enforcement of Contracts*

Nili Cohen

A. Introduction

This paper examines the relationship between a legal rule and its exception – specifically, the rule in Israeli contract law that provides for enforcement as the primary remedy for breach of contract, and the exception to it that denies enforcement on grounds of justice, which results in an award of monetary damages as the sole remedy.

Enforcement as the primary remedy is predicated on the moral principle of autonomy and trust, and on the belief that a contract should be seen to completion despite its breach. What should be the rationale underlying the justice exception? Among the Aristotelian categories of justice – corrective, distributive and retributive – the last two play a crucial role in the application of corrective justice in the present context. In fact, if the remedy of enforcement is denied, what results is a forced sale to the breaching party of the injured party's entitlement. The principle that underpins this decision is distributive justice. The various theories underlying distributive justice, separately or in combination, apply arguments of fairness, dignity, wealth maximization, effort, investment, personal choice and need. The moral considerations at the heart of distributive justice must also take into account retributive or punitive considerations such as fault and deterrence, so that retributive justice is actually a factor in the application of distributive justice in enforcement. Both categories – distributive justice and retributive justice – treat the denial of the injured party's right to enforcement and, instead, the award of damages as an expression of corrective justice.

The elements that comprise distributive justice may be grouped into two broad categories, reflecting morality on the one hand, and efficiency on the other. This paper presents the claim that a commitment to the primacy of enforcement requires that equal importance should be ascribed to moral considerations in the application of distributive justice as an exception to enforcement. Nonetheless, considerations of efficiency should also play a role in the application of this exception, albeit a secondary one.

In order to illustrate the operating principles underlying the application of the concept of justice in enforcement, I shall refer to a number of key precedents. The basic assumption in the application of the justice exception is that in the absence of any fundamental defect in the formation of a contract or of changed circumstances, the original contract should be enforced as it stands, even if it seems unfair, and even if it imposes a substantial burden on the party in breach. Remedies for breach of contract should not function as a mechanism for judicial tampering with the substance of an

* I would like to thank my colleagues Ofer Groskopf and Roy Kreitner for their valuable comments, and my research assistants Eli Blechman and Elran Shapira-Bar-Or for their excellent work.

otherwise valid and binding contract. Thus, for example, the obligation to restore to its prior condition land that was used for mining should be enforced, even when the cost of such restoration far exceeds the monetary loss, in terms of the decline in value of the property as a result of the breach of this obligation. By contrast, changes in the preferences of the injured party after the formation of the contract, indicating his abandonment or renunciation of his right to such enforcement, should result in this remedy being denied on moral grounds of autonomy and trust.

Considerations of efficiency that relate to wealth maximization and the prevention of economic waste should be accorded lesser weight in the application of the justice exception to enforcement. Wealth maximization cannot serve as justification for the party in breach to enter into a transaction that violates a previous contractual undertaking merely because the new buyer is willing to pay a higher price for the asset that was the subject of the original contract. Consequently, the application of the justice exception is rejected in such a case, as is the theory of efficient breach. However, considerations of wealth maximization should allow for better exploitation of resources that are owned by the breaching party, for example, if the contract is to be performed on the land of the party in breach and the potential profit from the land changes and increases significantly after the contract is entered into. In such cases, the breach is tolerable and application of the justice exception to enforcement is justified.

As previously mentioned, considerations of prevention of economic waste do not constitute grounds for non-enforcement of an otherwise valid and binding contract merely because the contract appears unfair. Nonetheless, preventing economic waste may constitute appropriate grounds for denying enforcement *ex post* when, for example, the breaching party manufactured a defective product and the cost of curing the defect is disproportionate to the loss of the injured party. As a result of applying the justice exception, the injured party will be awarded damages in an amount that reflects only the loss in value. Similarly, an injured party must halt production of a good that is produced specifically for the breaching party if the injured party does not have a legitimate interest in its production and the breaching party provides notification of its wish that production be halted. An injured party that continues to produce an unwanted product that has no market generates economic waste. The remedy of enforcement – in this case, the payment of the contractual fee – will be denied him on grounds of justice, and he will have to be content with damages covering lost profits plus production costs for the period prior to the notification by the party in breach.

In the final section of this paper I will analyze the commitment in Israeli law to the primacy of the principle of enforcement through a review of cases dealing with construction that breached contractual provisions. Applying enforcement in such cases necessitates demolishing the offending sttuctures. I will address the Israeli Land Law and rulings pursuant to it, and I will examine these cases both from the perspective of the considerations of distributive justice that were applied in them, and from the perspective of the considerations that should be applied if the primacy of contractual enforcement is to be preserved.

B. The Primacy of Remedies – Theories of Morality and Efficiency

Legal systems differ as to the primary remedy they provide for breach of contract. The principal distinction is between remedies that impose a monetary liability for the breach, and those that grant the injured party with a proprietary right.[1] The former grants a monetary substitute, while the latter grants the injured patty specific performance. Is there a link between these rules and the underlying principles of private law in general and contract law in particular? The two principles that underpin contractual rights in private law are morality and efficiency. In contracts, moral considerations[2] are based on the Kantian imperative that promises are to be kept.[3] Of course, the law narrows the range of promises that are viewed as legally binding, but whenever a promise *is* binding, the obligation to honor it stems from moral considerations that are based on arguments of autonomy and trust: the autonomy of the party entering into the contract, and the trust that is created upon the formation of the contract itself. This trust obliges each party to refrain from actions that will harm the other party, who relies on the contract. Considerations of efficiency are based on the perception of contracts as mechanisms for maximizing the welfare of the parties, focusing on calculations of costs and benefits. Although many scholars hold that the two principles jointly provide the basis of contractual liability,[4] I shall preserve in this paper the analytical distinction between the two in order to refine the argument.

To what extent are these principles related to remedies for breach of contract? It would seem that granting a proprietary remedy is compatible with the moral considerations behind the principle of contractual liability, which require the performance of the contract. A remedy which grants the injured party exactly what she is entitled to under the contract reproduces her original right. This secondary right which is embodied in the remedy satisfies the moral imperative which stands at the heart of the fundamental right to see that promises are kept. Thus, subject to the intent of the parties (who may, of course, agree to waive such remedy), enforcement reflects the original and subjective

1 *Guido Calabresi & Douglas Melamed*, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972).

2 *Charles Fried*, Contract as Promise (1981). On corroborating the moral commitment that underlies a contract see *Stephen A. Smith*, Contract Theory 74 (2004). Smith argues that breach of contract is tantamount to taking from the promisee a valuable asset that belongs to her. For the argument that the principle of morality should be reconciled with the binding force of contract see *Seana Valentine Shiffrin*, The Divergence of Contract and Promise, 120 Har. L. Rev 708 (2007).

3 For a Kantian analysis which gives theoretical support to the distinction between contracts between individuals and contracts with organizations see *Daniel Markovits*, Contract and Collaboration, 113 Yale. L.J. 1417 (2004). For criticism of the narrow moral basis of contract and for the argument that contract has several theoretical explanations see *Ethan J. Lieb*; On Collaboration, Organizations and Conciliation in the General Theory of Contract, 24 Quinnipiac L. Rev. 1 (2005).

4 *Nathan Oman*, Unity and Pluralism in Contract Law: Contract Theory, 103 Mich. L. Rev. 1483 (2005). For a broad approach that examines the possibility of combining economic theory and moral ethics by expanding, within economic models, moral constraints that are clear and precise see *Barak Medina & Eyal Zamir*, Law, Morality, and Economics: Integrating Moral Constraints and Economic Analysis of Law, 96 Cal. L. Rev. 323 (2008).

spirit of the contract and its provisions,[5] and it is the natural remedy for breach of contract, to the extent that this is what the injured party desires.[6] From the perspective of the contracting parties, the implication is that despite the breach, the trust in the continued existence of the contract is not lost, and the injured party, to the extent that she is interested, is entitled to avail herself of the mechanism of enforcement of justice in order to rehabilitate the contract and restore it to its intended path. Indeed, this is the dominant approach in Continental legal systems, in which enforcement is the primary remedy for breach of contract, subject to certain exceptions,[7] and the injured party is entitled to enforcement as a matter of right. The common law takes a different approach. When a right has been harmed, the injured party is entitled to the monetary value of that which was promised to her, namely expectation damages or performance damages.[8] It should be noted that the principle according to which damages are the primary remedy for harming a right is not limited to contract rights. Even when the right of the injured party is a purely property right, the injured party is entitled under common law, to damages and not to a property remedy. It is therefore clear why the standard remedy for conversion is damages and not restitution *in specie*.[9] The same holds *a fortiori* for contractual rights: the primary remedy available to an injured party to a contract is damages. However, this principle is subject to an exception: in those cases where the injured party is not indifferent to the nature of remedy, and in particular in cases where there is no substitute for the original performance, she will be entitled to the original substantive right that is found in the contract, in other words, to the proprietary remedy of specific performance.[10] We see, therefore, that in common law the remedy is entirely different from the original right: the right is not replicated through the remedy.[11]

5 The remedy and the right therefore merge into one whole. On the diffetent models regarding the relation between right and remedy see *Daniel Friedmann*, Rights and Remedies, in Comparative Remedies for Breach of Contract 3 (Nili Cohen & Ewan McKendrick eds., 2005).

6 The argument is based on the assumption that parties typically elaborate what they should do in order to perform the contract, but not what should happen in case of breach. As a result, subject to familiar exceptions such as liquidated damages, the law provides default rules for interpreting their agreement. It follows that these default rules do not reflect the actual agreement between the parties (as the agreement did not address the possibility of breach), but are shaped in reference to other considerations (efficiency, corrective justice, and so on). See *Richard Craswell*, Contract Law, Default Rules and the Philosophy of Promising, 88 Mich. L. Rev. 489 (1989). But see *Smith*, supra note 2, at 398-408 for the argument that the persuasive power of rights theory regarding specific performance in English law is stronger than considerations of efficiency (in other words, that the promise to perform that the injured party holds outweighs the freedom of the breaching party).

7 *Guenter H. Treitel*, A Comparative Account of Remedies for Breach of Contract § 38, at 43 (1988) [hereinafter Treitel, Remedies].

8 For a general survey of the different systems and what distinguishes them from each other see *Treitel*, Remedies §§ 38-72, at 43-74.

9 *Nick Curwen*, The Remedy in Conversion: Confusing Property and Obligation, 26 J. Legal Stud. 570 (2006). The exception of equity which empowers the courts to grant restitutionary-proprietary remedies is now embedded in the Torts (Interfetence with Goods Act) 1977. In civil law systems the owner might protect her right through an action of rei vindicatio, see e.g. § 985 BGB.

10 *Guenther Treitel*, The Law of Contract §§ 21-016 to 21-062 (12th ed., 2007) [hereinafter Treitel, Contract].

11 *Stephen A Smith*, The Law of Damages: Rules for Citizens or Rules for Courts, in Contract Damages 45-46 (Djahhongir Saidov & Ralph Cunnington eds., 2008). The author notes that rraditional common law, which does not recreate the original right, creates a new right within the framework of public law.

Efficiency, the traditional argument goes, led the common law to the conclusion that payment of damages should be the primary remedy for breach.[12] English law assumes that the appropriate remedy is monetary damages, because in most cases the injured party can purchase a replacement good. This purchase is viewed as a more efficient mechanism than what would be achieved by court order. Under these circumstances, the assumption is that breach will in any case lead to the termination of the contractual relations, and the injured party will be made whole for his loss through a claim for damages. The result is that the initial entitlement of the injured party is to monetary compensation (rather than enforcement), while the breaching party is entitled to be released from the obligation to perform (subject to the payment of damages). This is the source from which arose the doctrine of efficient breach, which permits the breaching party to take of the counterparty's right without her consent and to retain that right. This doctrine is based on the assumption that when a breach occurs, both sides have an interest in terminating their contractual relations and in the administration by the injured party of the „self-remedy" of acquiring a replacement, rather than in a court-imposed remedy which would require the parties to maintain the contractual relations.

I have emphasized the different theoretical background for the primacy of enforcement in civil law systems, on the one hand, and of damages in common law systems on the other. This background can also be viewed as based on an understanding of the expectations of the contractual parties when the breach occurs, as though they stood behind a Rawlsian veil of ignorance.[13] However, the assumptions of the parties in the principal systems I have reviewed are entirely different: the starting point of parties in civil law systems is an interest in the continuation of the contractual relations and in the receipt of the benefit of the contract. It is for this purpose that they wish to avail themselves of the courts' powers of enforcement. By contrast, contractual parties under common law wish to terminate the relationship, to cure the breach independently, and to turn to the courts only for purposes of being made whole financially.

The difference between continental and common law systems also reflects different historical backgrounds which have provided theoretical justifications after the fact. English private law, including contract law, arose from the forms of action.[14] The focus of the legal scrutiny was the harm, the accident, the injury which brought the parties to court. As a result, torts and restitution are conceived essentially as being remedial

12 For a different approach which supports a comprehensive remedy of specific performance on grounds of efficiency see *Alan Schwartz*, The Case for Specific Performance, 89 YALE L. J. 271 (1979). See also *Richard Brooks*, The Efficient Performance Hypothesis, 116 Yale L. J. 568 (2006). The author assumes that the injuted party has the fundamental right to demand enforcement, and suggests various mechanisms that would enable the courts (which lack complete information) to reach results that are efficient, whether they grant damages or enforcement, without having to state in advance a preference for damages.

13 *Robin Bradley Kar*, Contractualism about Contract Law (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract id=993809 (text to notes 56-58). The author identifies the difficulty in reconciling the primacy of damages in common law and morality as a basis for contractual liability. See note 36 below.

14 *Alfred William Brian Simpson*, A History of the Common Law of Contract 199-315 (1987).

in nature, even though they occasionally served to create new substantive rights.[15] The emphasis that English law placed on procedure and on the remedy that followed as a result is encapsulated in the well-known maxim that stated that where there is a remedy there is a right (*ubi remedium ibi ius*). Not surprisingly therefore, a contract is defined in common law as "...a promise or a set of promises for the breach of which the law gives a remedy..."[16] Contract is derived from tort and is therefore scrutinised at the time of breach, not at the time it is formed.[17] When it is breached, the injured party is to a certain extent separated from his right, depending both on the causes for the breach and on subsequent events, and the result of this separation is that the remedy does not necessarily correspond to the original right.

In civil law systems a contract is defined as an agreement between the parties which entitles them to a right to its performance.[18] Unlike common law, the emphasis here is on the substance of the contract, which is examined as of the time it is formed. As the remedy is seen through the prism of the substantive right, it is only natural that primacy is accorded to enforcement, which is intended to replicate the contract and to achieve its performance in accordance with the agreement of the parties.

As stated, enforcement in common law is the exception rather than the rule. But in Continental systems, too, enforcement is subject to certain exceptions pursuant to which the right to enforcement is substituted by a monetary equivalent.[19] We have before us two systems that take diametrically opposed positions regarding the rule and the exception to it. But in order to assess the degree to which these systems differ, it is necessary to examine in practice where the general rule ends and where the exception begins. There are indeed those who claim that despite the doctrinal differences between the two systems, they ate not the polar opposites one might imagine.[20] From the civil-

15 *Daniel Friedmann*, The Protection of Entitlements via the Law of Restitution - Expectancies and Privacy, 121 L. Q. Rev. 400 (2005).

16 Restatement (Second) of Contracts § 1 (1981).

17 For a cleat exposition of the two systems as focused on different moments in the life of the contract and as making different assumptions regarding the completeness of the contract (civil law: contracts are complete; common law: contracts are incomplete and need to be completed when theit performance is in crisis), see *Barak Medina*, Efficient Breach and Adjustment: The Choice of Remedy for Breach of Contract as a Choice of Contract-Modification Theory, in Comparative Remedies for Breach of Contract 51 (Nili Cohen & Ewan McKendrick eds., 2005).

18 Section 1101 of the French Code Civil defines a contract as an agreement by which a person or persons obligate to each other or to others to give, do or abstain from doing. See also *Muriel Fabre-Magnan*, Les Obligations 137 (2004).

19 *Treitel*, Remedies, supra note 7, § 70, at 71. There are two civil law approaches to enforcement: one reflected in German law, where enforcement is the primary remedy, subject to exceptions, and another, reflected in French law, where enforcement is the primary remedy only for certain contracts and is in principle unavailable for others. Both approaches assume as their starting point the primacy of enforcement: *Treitel*, Remedies, supra note 7, § 41, at 47.

20 *Treitel*, Remedies, supra note 7, § 70, at 71; Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L .Rev. 687 (1990). See also Principles of European Contract Law (Ole Lando & Hugh Beale eds., 2000) [hereinaftet Principles of European Contract Law], which takes as its basic assumption the entitlement of the aggrieved party to specific performance (Article 9:102(1)). Comment b, at 395 clarifies that this principle is controvetsial (although in practice the differences are less apparent), and the compromise that was reached permits a claim for specific performance, which under certain circumstances is barred.

ian perspective, it is sometimes pointed out that in this system, too, the prevalence of enforcement is low, and that commercial parties prefer damages to enforcement.[21] From the perspective of the common law, thete is the argument that courts in common law jurisdictions have tended in recent years to grant specific performance (enforcement) on a considerably more generous basis than before.[22] Even so, the doctrinal starting points were different and have remained so, and this has had an impact which will be discussed below.[23] First, however, I will present in brief the position under Israeli law, which in this matter has turned away from the common law and has adopted the civil law approach.

C. Judicial Mapping – Enforcement as the Primary Remedy and the Justice Exception

Under Israeli law, the primary remedy to which the injured party is entitled for breach of contract is enforcement. The injured party is defined in the Law of Contracts (Remedies for Breach of Contract) 5731-1970 as "a person who is entitled to the performance of the broken contract ".[24] The primacy of the remedy of enforcement is found in section 2 of the Remedies Law, which enumerates the remedies that are available to the injured party. The section states that "the injured party is entitled to the enforcement of the contract or to its rescission, and is entitled to claim damages, in addition to one of the above remedies or instead of them..." Enforcement is the first remedy for breach of contract that is mentioned in section 2, and it is also the first remedy addressed in section 3 of the Remedies Law.

Section 3, which is entitled „the right to enforcement", stares that „the injured party is entitled to enforcement of the contract". In other words, this entitlement is not dependent on the injured party's right to claim damages. In this respect, Israeli law, which used to be governed by common law principles, follows the civil law tradition. The civilian influence in this area of the law can also be seen to a certain degree in the Contracts (General Part) Law which was enacted in 1973. The law ignores the temedial emphasis of the common law definition of a contract („a promise for the breach of

21 *Henrik Lando & Caspar Rose*, On the Enforcement of Specific Performance in Civil Law Countries, 24 Int'l Rev. L. & Econ. 473 (2004). The article relies on empirical data from the Netherlands, and the claim regarding Germany and France is not supported by empirical data.

22 *Andrew Burrows*, Remedies for Torts and Breach of Contract 504-05 (3rd ed., 2004); *Melvin Eisenberg*, Actual and Virtual Specific Performance, The Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 Cal. L. Rev. 975, 1016-1017 (2005); *Stephen A. Smith*, Performance, Punishment and the Nature of Contractual Obligation, 60 M. L. R. 360 (1997). Nonetheless, the House of Lords decision in Co-Operative Insurance Society v. Argyll Stores Ltd., [1998] AC 1 tends to a more restrictive view. See *Treitel*, Contract, supta note 10, § 21-017.

23 The starting point determines who bears the burden to prove entitlement to enforcement: in common law the burden is on the injured party, whereas in civil law, the party in breach has the burden of justifying the denial of enforcement to the injured party.

24 The Contracts (Remedies for Breach of Contract) Law, 5741-1970, 25 LSI 11 (1970-1971) (Isr.) § 1(a) [hereinafter: Remedies Law].

which the law gives a remedy"),[25] and instead treats a contract as the coming together of offer and acceptance.[26] It is true that this law does not contain a definition of a contract, but only to the manner in which a contract is formed, which is no different from common law. Howevet, ignoring the remedial definition and focusing on the elements that create the right fits in well with the approach that ascribes primacy to enforcement.

The right to enforcement is subject to a number of exceptions that are enumerated in section 3:

> "The injured party is entitled to enforcement of the contract, except if any of the following applies:
>
> (1) the conttact is impossible of performance;
>
> (2) enforcement of the contract consists in compelling the doing or acceptance of personal work or a personal service;
>
> (3) implementation of the enforcement order requires an unreasonable amount of supervision on behalf of a court or an execution office.
>
> (4) enforcement of the contract in the circumstances of the case is unjust."

These exceptions teflect the understanding that in some cases the remedy of enforcement may not be appropriate, for any of a number of reasons: it would be futile (section 3(1)); it would constitute inappropriate interference with the personal freedom of the breaching party (section 3(2)); or it would impose an undue burden on the administration of justice (3(3)). The fourth exception – enforcement as being unjust – is an open-ended standard that does not specify the factual circumstances to which it applies.

These exceptions (the justice exception included)[27] are not new. They were recognized even when the common law approach prevailed in the Israeli legal system, and they are recognized also in Continental systems. But whether the Remedies Law has indeed brought about a meaningful change is a question that can only be answered by analyzing the manner in which the justice exception is applied. This is because the broad and vague formulation of the exception creates the potential for the exception to overshadow the ptinciple of the primacy of enforcement, a rule that the courts repeatedly declaim and whose novelty they emphasize.[28]

25 Restatement (Second) of Contracts (1981) § 1.

26 The Contracts (General Part) Law, 5733-1973, 27 LSI 117 (1972-1973) (Isr.) §§ 1, 2, 5. [hereinafter Contracts Law].

27 The Draft Civil Code for Israel 5766-2006 adopts these exceptions, and adds one more. The new fifth exception to enforcement (section 448(a)(5)) applies when enforcement contravenes the nature of the obligation. This exception was added mainly in order to adjust the general rule to tort law, where compensatory damages are the standard remedy (see explanation to the Draft Civil Code, 5766-2006 at 186). It is to be boped that this exception does not serve to inject into Israeli contract law the English "inadequacy" test of damages, a test which has been rejected in the Israeli legal system in light of the primacy of enforcement. For an extensive description of the remedies in the Draft Civil Code see *Nili Cohen*, The Four C's: Coherence, Clarification, Continuity, Change – Remedies for Breach of Contract in Israeli Draft Civil Code, in The Draft Civil Code for Israel in Comparative Perspective 51 (Kurt Siehr & Reinhard Zimmermann eds., 2008).

28 CA 158/77 Ravinai v. Hevrat Man Shaked [1979] IsrSC 33(2) 281, 292; CA 84/80 Kasem v. Kasem [1983] IsrSC 37(3) 60, 67; FH 20/82 Adrass v. Harlow & Jones [1988] IsrSC 42(1) 221.

In the following pages I shall examine the impact of the justice exception in three stages. First, I shall address the concept of justice in enforcement according to Aristotelian notions of justice. Second, I shall compare justice in enforcement with the concept of justice that underpins contractual liability, referring to key cases for purposes of illustration. Finally, I shall analyze how Israeli case law has dealt with parties' demand for contract enforcement in cases where a building has been constructed in breach of the terms of a contract, and where consequently enforcement would require demolition of the structure. The examination of such cases may clarify to what extent the primacy of enforcement in Israeli law has been preserved.

D. Three Concepts of Justice in Enforcement

The principle of „justice" serves in Israeli contract law in several remedial contexts. Thus, for instance, a court, if it believes that this would serve the interests of justice, has discretion to rescind a contract that was created as a result of the mistake of one party, when the other party neither knew nor had reason to know of the mistake.[29] In case of an illegal contract, a court has a power to deny the standard remedy of restitution, or to order the performance of the contract if justice so requires.[30] Similarly, a court has discretion to refuse to grant the rescission of a contract for immaterial breach if rescission would be unjust.[31]

These examples have a common denominator: the court applies the criterion of justice either in order to provide an exceptional remedy (rescission for a mistake not known to the other party; performance of an illegal contract) or else in order to deny a standard remedy (restitution in the case of an illegal contract; rescission following immaterial breach). In other words, justice operates to deny an entitlement of one party to the contract, and to transfer it to the other party who prefers a different remedy. This common denominator also applies to justice in enforcement: justice operates to deny the injured party the remedy of enforcement, which is the primary remedy for breach of contract.

What does „justice" mean in the present context? How should it be applied in the administration of remedies?

This discussion of justice will be based on Aristotle's Nicomachean Ethics.[32] According ro Aristotle, *contractual justice* is part of corrective justice.[33] This means that the just exchange ratio of goods (i.e., their just price) should be in proportion to their *intrinsic worth* to people, in order to preserve the appropriate share of each party. However, this concept of justice is nor applicable to the present discussion because it focuses on the *content* of the contract. Aristotle's contractual corrective justice focuses on the value of

29 Contracts Law § 14(b).

30 Contracts Law § 31.

31 Remedies Law § 7.

32 *Aristotle*, Nicomachean Ethics, Book V (H. Rackham trans., Harvard Univ. Press 1934).

33 Nicomachean Ethics, Book V, Chapter V. A person has too much if he has taken something from another, and, in voluntary transactions, because benefits of unequal value have been exchanged. Justice in both cases is served by removing the excess in order to restore equality. See *James Gordley*, The Philosophical Origins of Modern Contract Doctrine 13 (1991).

contractual consideration in order to transform unjust contracts into just ones. Modern principles of contract law may find the unfairness of the substance of a content of the contract grounds for judicial interference in the contract where there is unequal bargaining power. But such unfairness, or the difference in the value that is exchanged between the contractual parties, does not in itself warrant such interference. The basic notion of justice of exchange in contract law that we are familiar with today is different from Aristotle's contractual justice: a price is considered "fair" or "just" when the contracting parties have agreed upon it voluntarily. This principle was expressed by Fouilleé who said: "qui dit contractuel, dit juste",[34] i.e., contract is synonymous with justice. In either case, contractual justice of exchange, as Aristotle understood it, is not central to the discussion, because the goal here is to understand the justice exception in its remedial context. In other words, we may assume that the substance of the contract we are dealing with is valid, and that the initial contractual distribution agreed to by the parties is not at issue.

We may therefore ignore the Aristotelian notion of contractual corrective justice in its substantive meaning, and examine other Aristotelian notions of justice that may be relevant to the analysis of remedial justice, namely corrective (remedial) justice,[35] distributive justice and retributive justice. The goal of corrective justice is to restore the injured party to her condition prior to the occurrence of the breach; the goal of distributive justice is to distribute societal resources in a fair and reasonable manner; and the goal of retributive justice is to impose sanctions on those who violate societal order. Which of these notions of justice may be applied in the context of justice as an exception to enforcement?

Corrective justice is designed to place the injured party in the same position she would have been had the breach not occurred. This is the basic meaning of justice in private law, and it is reflected in the Remedies Law; awarding the injured party the remedy of enforcement perfectly reflects contractual corrective justice.[36] But the justice exception

34 Cited by *Ripert*, La Règle Morale dans les Obligations Civils 38 (4th ed. 1949). *Daniel Friedmann & Nili Cohen*, Contracts I § 2.8 (1990). See CA 4839/92 Ganz v. Katz [1994] IsrSC 48(4) 749 (the fact that broker's fees are considerably higher than normal does not constitute grounds to interfere in the contract). Gordley also regards modern contract law justice as a manifestation of Aristotelian distributive justice, since fairness of the contract is a major factor in determining whether to recognize the contract or nor. See *James Gordley*, Contract Law in the Aristotelian Tradition, in The Theory of Contract Law 265, 307-323 (Peter Benson ed., 2001). See also *James Gordley*, Equality in Exchange, 69 Cal. L. Rev. 1587 (1981); *James Gordley*, Foundations of Private Law (2006). For critical evaluation: *Stephen A. Smith*, Troubled Foundations for Private Law, 11 Canadian Journal of Law and Jurisprudence 459 (2008).

35 *Aristotle* distinguished between correcting a distortion of something that was done voluntarily (contractual corrective justice) and correcting a distortion of something that was done involuntarily (Ethics, Book V, Chapter II). According to Arisrotle's categorization, remedial justice is part of correcting the distortion of something that was done involuntarily.

36 It would appear that according to Benson and Weinrib specific performance is as good a remedy as expectation damages, but their discussion of corrective justice refers only to expectation damages. *Peter Benson*, The Basis of Corrective Justice and its Relation to Distributive Justice, 77 Iowa L. Rev. 515, 538-547 (1992); *Ernest Weinrib*, The Idea of Private Law 56-83, 133-142 (1995); *Ernest Weinrib*, Punishment and Disgorgement as Contract Remedies, 78 Chi. Kent L. Rev. 55, 59-65 (2003). On the difficulty of reconciling the primacy of damages in common law and morality as the basis for contractual liability, see Kar supra note 13. See also *Andrew S Gold*, A Property Theory of Contract, 103 Northwestern U L Rev 1, 53-57(2009), clarifying that the rarity of specific performance is incompatible with a property theory

to enforcement serves to deny the remedy rather than to grant it (in such cases corrective justice is implemented through the remedy of damages). Thus, the application of the justice exception to enforcement does not reflect the principle of corrective justice, but rather its denial. Does it reflect, therefore, the principles of distributive or retributive justice?

Distributive justice, unlike corrective justice, does not assume that the status quo ante should be restored, but that societal resources should be distributed in a particular manner. Distributive justice is usually implemented through public law mechanisms, primarily taxes and grants. But principles of distributive justice are often expressed in contract law as well;[37] after all, the regulation of contracts through legislation or through judicial decisions that tamper with the agreement between the parties creates a new distribution of contractual wealth.[38] Moreover, some would argue that the basic principles of contract law serve as vehicles of distributive justice. Thus, for instance, an obligation that is imposed on a contractual party to disclose information to the other party has clear distributive consequences.[39] However, given the basic assumption, stated above, that the initial agreed-upon distribution between the parties by means of the contract is valid and is not at issue, all this is part of substantive contract law, and thus not within the scope of this paper.

As far as remedies are concerned, the injured party is entitled to demand the performance of the contract, and therefore, assuming that she values the remedy of enforcement more than the remedy of damages, she is entitled in principle to demand the performance of the contract.[40] The enforcement of a contract as a result of the injured party's choice is a quintessential expression of corrective justice. By contrast, the „justice" here under discussion, as an exception to enforcement, is justice that *restricts* the entitlement of the injured party to enforcement. By her very objection to enforcement, the party in breach seeks to undertake a new distribution: instead of performing the contract and transferring the contractual benefit to the injured party, she wishes to avoid performing the contract and to keep the benefit to herself (subject to payment of damages to the injured party). Thus, denying enforcement means a forced sale of the contractual benefit back to the party in breach. Denying enforcement is clearly an application of distributive justice, but since the operation of contractual remedies is grounded in the idea

of the entitlement of the injured party to performance of the contract, but is compatible with the need to defend the autonomy of the breaching party.

37 The most important modern work on distributive justice is *John Rawls*, A Theory of Justice (Cambridge, MA: Harvard University Press 1971). Some argue that its application is limited to public law. For the view that it has application also in contract law see *Kevin Kordana & David Tabachnick*, Rawls and Contract Law, 73 Geo. Wash. L. Rev. 598 (2004), and Kar supra note 13.

38 *Duncan Kennedy*, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 584 (1982).

39 *Anthony T. Kronman*, Contract Law and Distributive Justice, 89 Yale L.J. 472, 498-510 (1980). Kronman believes that redistribution through contract law might be cheaper than redistribution through taxation, due to savings in administrative costs. For an argument along similar lines see *Daphna Lewinsohn-Zamir*, In Defense of Redistribution Through Private Law, 91 Minn. L. Rev. 326 (2006).

40 On whether the subjective value of a contract can be obtained either through specific performance or damages see *Daniel Friedmann*, Economic Aspects of Damages and Specific Performance Compared, in Contract Damages 65 (Djahhongir Saidov & Ralph Cunnington eds., 2008) (hereinafter: Friedmann, Economic Aspects).

of corrective justice, it follows that corrective justice has redistributive implications.[41] Given that in the scenario under discussion the initial distribution was conducted by the parties themselves through the contract, what we have here is redistribution.

When would it be appropriate to deny enforcement and to impose a forced transfer of the contractual benefit from the injured party back to the breaching party? According to Aristotle, the fundamental basis of distributive justice is that the share of the recipient (i.e., the party in breach), should be adjusted to a certain value she owns. How should this criterion, defined by Aristotle as „the basis of division",[42] be applied to the remedy of enforcement?

Several theories have been developed in other contexts to describe the "basis for distribution".[43] Their elaboration and comparison is beyond the scope of this paper. I will therefore mention them in brief as a basis for the discussion. One of the basic theories holds that societal resources should be distributed in an egalitarian manner.[44] A further elaboration, at the heart of which are personal dignity and fairness, states that the purpose of distribution is to achieve a result in which everybody is entitled to a fair living and equal opportunities, irrespective of personal capabilities or prior background.[45] Resource-based theory continues the approach of the fairness theory, but emphasizes the individual goals and personal needs of members of society.[46] Utilitarian theories wish to maximize wealth or welfare.[47] Other theories yet, emphasize investment and contribution in addition to individual will as distributive considerations.[48]

These theories may be applied to the realm of remedies[49] in considering whether it is just to withhold enforcement from the injured party. This point and the underlying principles behind the various approaches will be discussed below.

Finally, we turn to *retributive justice*, which is at the heart of criminal law. In the contractual context, retributive justice has narrow – although not negligible – application. Public policy considerations play an important role in demarcating the boundaries of valid and legal contracts.[50] Similarly, the doctrine of good faith reflects external public and societal values that are extrinsic to contract, alongside intrinsic contractual values.[51] As far as contractual remedies are concerned, considerations of retributive justice come to the fore primarily in provisions that allow for the imposition of punitive damages[52] on the party in breach.[53]

Like any court-imposed remedy, the administration of the remedy of enforcement requires the operation of public powers.[54] It is therefore not surprising that public policy considerations that scrutinize the compatibility between the contract and societal values may affect the entitlement of the injured party to enforcement. Moreover, contract liability is fundamentally strict liability, but the degree of fault of the injured party is a legitimate consideration in deciding whether she is entitled to enforcement.[55] It follows that the two characteristic considerations of retributive justice – deterrence of both the particular injured party and the public at large, and fault, aimed at providing a new internal balance between the injured party and the breaching party – also play a role in contract law in the area of enforcement. These considerations operate to deny enforcement and to redistribute the contractual benefit by leaving it in the hands of the party who breached the contract. In this manner, retributive justice, too, becomes a major element in the distributive justice of enforcement.

To summarize this point: considerations of distributive and retributive justice comprise the substance of justice as the exception to enforcement. They may be based on notions of human dignity, individual choice, maximization of wealth, effort, investment, fault and deterrence.

41 On the close connection between corrective and distributive justice see *Hanoch Dagan*, The Distributive Foundation of Corrective Justice, 98 Mich. L. Rev. 138 (1999); *Robert E. Goodin*, Utilitatianism as a Public Philosophy 219–227 (New York: Cambridge University Press 1995). For approaches that distinguish between corrective justice and distributive justice see Arthur Ripstein, Private Order and Public Justice, 92 Va. L. Rev. 1391, 1395 (2006); *Stephen Perry*, On the Relationship between Corrective and Distributive Justice, in Oxford Essays on Jurisprudence 237, 247 (Jeremy Horder ed., Fourth Series 2000); *Benson*, supra note 34, at 601-607; *Weinrib*, The Idea of Private Law, supra note 34, at 56-113.

42 Nicomachean Ethics, Book V, Chapters IV-V.

43 See Stanford Encyclopedia of Philosophy: http://plato.stanford.edu/entries/justice-distributive/.

44 *Joseph Carens*, Equality, Moral Incentives and the Market (Chicago: Chicago University Press 1981).

45 *Rawls*, supra note 37; *John Rawls*, Justice as Fairness: A Restatement (Cambridge: Harvard University Press 2001).

46 *Ronald Dworkin*, What is Equality? Part 1: Equality of Resources, Philosophy and Public Affairs, 10: 185-246 (1981); *Ronald Dworkin*, What is Equality? Part 2: Equality of Welfare, Philosophy and Public Affairs, 10: 283-345 (1981); *Ronald Dworkin*, Sovereign Virtue (Cambridge, MA: Harvard University Press 2000).

47 Goodin, supra note 41, at 183-265.

48 *George Sher*, Desert (Princeton, NJ: Princeton University Press 1987); *David Miller*, Market, State, and Community (Oxford: Clarendon Press 1989). See also *Menachem Mautner*, A Justice Petspective of Contract Law: How Contract Law Allocates Entitlements, 10 Tel-Aviv Univ. Stud. In Law 239 (1990).

49 Egalitarian theory appears to be less applicable in the present context, due to the absolute charactet of the contractual ttansfer in most contracts. But where the contract is based on joint interests, this theory may apply as well. See e.g. the case of CA 4796/95 Alubara v. Alubara [1997] IsrSC 51(2) 669, infra text to notes 112-121.

50 The operation of public policy considerations typically involves external values, but in the area of standard contracts it was used as a vehicle to guarantee freedom of contract.

51 CA 4628/93 State of Israel v. Aptofim [1995] IsrSC 49(2) 265. The case was subject to considerable criticism, and its holding was recently restricted, if not overtuled. See two important decisions of Judge Danziger: „I believe that despite the principles of interpretation that were established in the Aprofim and Fruit Growers Organization decisions, it is appropriate, in cases where the language of the agreement is clear and unambiguous, as is the case before us, to give it decisive weight in interpteting the agreement." CA5856/06 Levi v. Norkeit Ltd. [2008]; CA 5925/06 Blum v. Anglo-Saxon Ltd. [2008], patagraph 43 of Judge Danziger's decision. But these statements do not address the scope of the good faith principle.

52 The notion is not alien to tort law. See Restatement (Second) of Torts § 908(1) (1965) which states that punitive damages, as opposed to actual or nominal damages, are awarded against a person in order to punish him for his flagrant conduct and to deter him and others like him from similar conduct in the future. Punitive considerations may also be taken into account in unjust enrichment: *Daniel Friedmann*, Unjust Enrichment (Second ed., 1988) Sections 18.7-18.13, 607-617 (Isr.).

53 For an example, see the Consumer Protection Law, 5741-1981, 35 LSI 298 (1980-1981) (Isr.) which includes penal sanctions alongside the civil ones.

54 *Stephen A Smith*, The Law of Damages: Rules for Citizens or Rules for Courts, in Contract Damages 45-46 (Djahhongir Saidov & Ralph Cunnington eds., 2008).

55 Infra text and notes 59-61. For a discussion of fault in the formulation of contractual liability see *Oren Bar-Gill and Omri Ben-Shahar*, An Information Theory of Willful Breach, available at http://ssrn.com/abstract=1334316 (January 2009).

E. Morality and Efficiency in Distributive Justice in Enforcement

1. Morality as an Overriding Principle

The complex operation of distributive justice involves a variety of considerations of fairness and efficiency. Is there a connection between these considerations of distributive justice in enforcement and the underlying principles of contract liability? At the outset of this discussion, I presented the theories of morality and efficiency – the two major rival theories underlying contract liability – as competing theories also with regard to the primacy of remedies: morality is the justification for the primacy of enforcement; efficiency is the basis for the primacy of damages. I noted that some observers base contract liability on a fusion of the two, and there are also those who believe that the primacy of enforcement should be recognized on grounds of efficiency. However, as indicated above, I will preserve for present purposes the theoretical distinction between the two in order to refine the argument. It bears emphasizing that each of these competing approaches contains within it restrictions whose scope brings them closer to each other and blurs the differences between them: a system based on enforcement leaves room for exceptions under which only damages will be awarded, and a system based on damages allows for a limited application of enforcement. The question that needs to be addressed is what principles underlie the exceptions. Is there a correlation between the principle underlying the rule and the principle underlying the exceptions?

The range of considerations behind distributive justice exposes a complex world in which considerations of both efficiency and morality play an important role: dignity, personal choice, fault – these are considerations that reflect morality. Effort, investment and need may be regarded as considerations that combine morality and efficiency. Wealth maximization is a consideration that is a reflection of efficiency. Could the two competing theories converge when considerations of justice result in the denial of enforcement? The answer is that they do, and for the following reason. At the enforcement stage, matters are much more complex than at the formation of the contract. The contract has already veered from its intended course, the parties are in crisis, and the joint contractual relationship is at risk. The passage of time between formation and breach has wrought changes. Courts need to strike a delicate balance between past undertakings (which gave rise to the moral obligation to maintain the contractual promise) and the parties' new circumstances, choices, needs and aspirations. But a judicial system that wishes to preserve the primacy of enforcement should give precedence to moral considerations. Ascribing too much weight to efficiency within the justice exception to enforcement may put the primacy of enforcement and the moral principle on which it is based at risk.

2. Considerations of Morality – Autonomy and Fault

Considerations of morality, which are a central component of the elaboration of the remedy of enforcement, may operate as much against the injured party as in her favor.[56]

56 On the various grounds for denying enforcement out of considerations of fairness see *Treitel*, Remedies, supra note 7, § 64, at 66.

Therefore the moral obligation to keep a promise may result in no more than an award of damages if the injured party has waived her right to enforcement after the contract was signed. In such case, this initial moral obligation is outweighed by the moral obligation stemming from the autonomy of the injured party – her ability to waive her rights and the interest in protecting the reliance of the breaching party. The later autonomous act of the injured party, by which she waives her right to enforcement, erases her earlier right to enforcement.[57] Similarly, when the injured party fails to undertake the cooperation that is necessary in order to continue the contractual enterprise, her actions may be regarded as a proxy for waiving enforcement.[58] The injured party's autonomy which is reflected in her later choice of action supersedes the „historic" autonomy embodied in the contract and alters its substance.

The fault of the injured party, to the extent that it is reflected in deception or misrepresentation in the performance of the contract,[59] is an appropriate measure for redistributing the contractual benefit and for denying enforcement.[60] This type of conduct eradicates the basis of trust, which is a sine qua non for continuing the contractual enterprise (which is what enforcement is intended to achieve).

At times, the incompatibility of the contract with the values of the system renders the contract void. Occasionally, however, a minor deviation from conventional values may result in a court concluding that an otherwise valid contract does not give rise to the right of the injured party to enforcement of the contract if it is breached. In such case, the justice exception reflects a retributive-moral approach whose purpose is to protect societal values.[61]

57 This might explain also the doctrine of laches, which may be regarded as a latent waiver of the right of enforcement. Principles of European Contract Law, supra note 20, Article 9:102(3) states that the aggrieved party loses his right to enforcement if he fails to seek it with a reasonable period of time. See CA 581/80 Buchhalter v. Kinneret [1984] IsrSC 38(2) 89 (denying a land purchaser's claim to enforcement inter alia because of laches).

58 See Restatement (Second) of Contracts § 369 (1981), according to which the party in breach may be awarded specific performance but not when the breach is serious enough to justify repudiation by the other party.

59 For the plaintiff's conduct as grounds for denying enforcement see *Treitel*, Remedies, supra note 7, § 64, at 66. Compare the Israeli case of CA 2643/97 Ganz v. British Colonial [2003] IsrSC 57(2) 385, where enforcement was denied due to the failure of the plaintiff, over a period of 17 years, to register a cautionary note with respect to the property, which resulted in the defendant being able to present clear title to a third party. The element of fault is comparable to a waiver of the right to enforcement. Due to the fact that the injured party's failure to act harmed a third party who relied on the non-registration of the cautionary note (as opposed to harming an injured party who is a party to the contract), the denial of enforcement was based on the principle of good faith and not on the justice exception. But the distinction between justice and good faith in this context does not appear to be significant.

60 This idea is related to Kronman's argument concerning „advantage taking" as an incentive for promoting distributive justice. See Kronman, supra note 39, at 478-483, 494-497.

61 For denying specific performance if it is contrary to public interest see *Treitel*, Remedies, supra note 7, § 64, at 66. See also CA 3833/ 93 Levin v. Levin [1994] IsrSC 48(2) 886, in which the Israeli Supreme Court held that an alimony agreement which stated that it was not binding and could not be presented before any court was valid but unenforceable for reasons of justice. This would allow the wife to file a claim based on the agreement. The rationale of the decision was to protect free access to the courts. The decision also involved distributive considerations which support the protection of women and children in divorce proceedings. See *Hila Keren*, Contracts Law from a Feminist Perspective 134-135, 106-108 (2004) (Hebrew). For criticism of the decision see *Ariel Porat*, Justice Considerations and Behavior Gui-

3. Limited Application of the Principle of Efficiency – Wealth Maximization

Autonomy and moral considerations outweigh considerations of wealth maximization as grounds for non-enforcement. Therefore, the theory of efficient breach,[62] which allows a seller to breach a contract if she receives a higher offer from a third party, should be rejected, even when the property in question is not unique. This was the approach taken by the Israeli Supreme Court in *Adras v. Harlow & Jones*, in which it held that the injured party who bought non-unique goods, was entitled to the gains received by the breaching party from the sale of the goods to a third party.[63] The Court based the injured party's entitlement to receive the profits both on his substantive contractual right and on his right to enforcement as the primary remedy.

There are those who challenge the view that a breach by a seller who finds a buyer who is willing to pay a higher price than the first buyer leads to greater efficiency,[64] and this view, which I shall not elaborate on here, seems to me convincing. The claim that efficient breach is not in fact efficient at all rejects categorically the justification for applying the justice exception on grounds of efficiency, and puts an end to the debate between advocates of morality and advocates of efficiency. Furthermore, it is doubtful whether there is any basis for the factual assumption that underlies the theory of efficient breach, according to which a contractual obligor will not hesitate to breach a contract the moment she finds someone who is willing to buy the goods at a higher price. Not only does this assumption completely contradict basic moral principles, but it also conflicts with empirical data that show that most people believe rhat breach of contract is immoral.[65] But in the present context I wish to emphasize the normative aspect related to the change in Israeli law in this respect.

As mentioned, the prototypical case relates to the enforcement of a contract for the sale of a non-unique good. Under English law, such a demand by an injured party would be rejected outright. This is the classic case in which damages are sufficient: as the good is not unique, the assumption is that a replacement for it can be acquired in

ding Considerations in the Law of Contracts, 22 Tel-Aviv U. L. Rev. 647, 661-667 (1999) (Hebrew); *Nili Cohen*, Remedies for Breach of Contract – From Right to Remedy; From Remedies Law to the Civil Code, in Daniel's Book – Inquiries in the Scholarship of Professor Daniel Friedmann 57, 72-73 (Nili Cohen & Ofer Grosskopf eds., 2008) (Isr.).

62 *Richard A. Posner*, Economic Analysis of Law 118-30 (7th ed. 2007).

63 FH 20/82 Adras v. Harlow & Jones [1988] IsrSC 42(1) 221, discussed in Daniel Friedmann, Restitution of Benefits Gained Through Breach of Contract, 104 L. Q. Rev. 383 (1988). See also *Stephen Waddams*, Gains Derived from Breach of Contract: Historical and Conceptual Perspectives, in Contract Damages 187 (Djahhongir Saidov & Ralph Cunnington eds., 2008) (pointing to the complexity of considerations regarding awarding profits from breach, among them being the availability of enforcement). For a critical appraisal see *Hanoch Dagan*, Restitution and Unjust Enrichment: Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory, 1 Theoretical Inq. L. 115 (2000).

64 *Daniel Friedmann*, The Efficient Breach Fallacy, 18 J. Legal Stud. 1, 3-4 (1989), and see also *James Gordley*, Contract Law in the Aristotelian Tradition, in The Theoty of Contract Law 265, 328-329 (Peter Benson ed., 2001); *Dapha Lewinsohn-Zamir*, The Impact of Economic Theory on the Israeli Case Law on Property, 39 Isr. L. Rev. 5, 27-30 (2006). For a critical view see *Ariel Porat*, Under what Conditions the Parties to a Contract Will Allow 'Efficient Breach'?, in Daniel's Book – Inquiries in the Scholarship of Professor Daniel Friedmann 171 (Nili Cohen & Ofer Grosskopf eds., 2008) (Isr.).

65 *Tess Wilkinson Ryan*, Do Liquidated Damages Clauses Encourage Efficient Breach (2008) available at: http://ssrn.com/abstract=1299817.

the market.[66] As a result of the breach, the injured party is essentially able to effectuate private enforcement by purchasing a replacement good, and she will sue the breaching party for damages to recover the loss that she incurred. In other words, despite the entitlement to see the contract through to completion, the implication of which is that the burden to execute the transaction (whether the original one or its replacement) is on the breaching party, it follows from the remedy that English law provides that the burden to execute the replacement transaction is on the injured party.

As for Israeli law, the injured party would appear to be entitled to enforcement, except that the breaching party may argue that enforcement is unjust because the injured party could have entered into a replacement transaction immediately after the breach, thus sparing the breaching party the inconvenience of executing the contract and sparing herself the transactional costs that she incurred by delaying the replacement transaction and waiting for an enforcement order.[67] Moreover, on the assumption that the enforcement order will be denied, the injured party may come up against similar difficulties in an action for damages. There too the argument will be made that the injured party should have mitigated the loss she suffered and entered into a replacement transaction immediately after the breach without trying to seek enforcement. As a result, the amount of damages that she will receive will be the difference between the contract price and the market price at the time of breach, rather than the difference between the contract price and the market price at the time the decision is given.[68] It follows that the breaching party has the power to revoke the contract (unless the asset is unique).[69] We thus find that the doctrine of efficient breach might be in force in Israeli law as well. In other words, the result of such arguments being accepted will be that the remedy of enforcement in Israeli law will become identical to specific performance, i.e., the injured party will be entitled to this remedy when the good is unique but not when the good is not unique.

Such an outcome does not sit squarely with the primacy of enforcement. The injured party's choice of enforcement should entitle her to demand enforcement of the con-

66 This assumption may be contradicted either on objective grounds (market conditions: even though the good is not unique, the market does not always trade in goods of this type) or on subjective grounds (the condition of the injured party: if the injured party has already paid for the good, she will not be required to take out a loan in order to execute the alternative transaction). The damages that the injured party is awarded will enable her to enter into the alternative transaction at the time the court's decision is made. See infra note 71.

67 The assumption is that the remedy of enforcement does not cover all the loss to the injured party, and delaying the replacement transaction caused the injured party loss that she could have mitigated by immediately entering into a replacement transaction.

68 This outcome brings us back to section 11 of the Remedies Law which provides that an injured person is entitled to damages without proof of harm in an amount equal to the difference between the contract price and the value of the asset on the date of breach. This is precisely the position of English law on the matter: upon breach, the injured party is expected to terminate the contract, enter into a replacement transaction and demand the difference in price from the breaching party in an action for damages.

69 See *Uri Yadin*, The Contracts (Remedies for Breach of Contract) Law, 5741-1970, at 50-51 (1979) (Isr.), noting that such arguments should not be made formally to the injured party, but that "as a practical matter, one may assume that a sensible injured party will in this situation opt for the 'replacement transaction'... rather than choosing the long path of an action for enforcement, and will claim from the breaching party only the unrecovered amount of the loss that was caused to him by the breach...".

tract even if she has not yet paid the price of the good, thus shifting the burden of a replacement transaction on the breaching party. This is precisely the position taken by French law, in which enforcement is the primary remedy.[70] The inability to execute the original transaction gives rise to the entitlement of the buyer (the injured party) to a replacement transaction from the seller (the breaching party), should the buyer so wish. Consequently, it follows that if enforcement is denied (for reasons that do not pertain to the conduct of the injured party), the court will not accept a breaching party's argument that the loss should be calculated as of the date of breach, and the relevant date for calculating the loss will be the date of the decision by the court.[71]

Up to now I have argued that the justice exception to enforcement should not apply to the typical case of the sale of an asset to a third party at a higher price. But this is not to say that considerations of efficiency should be excluded entirely as grounds for denying enforcement.

For instance, a landowner enters into a contract with a contractor to build a single-storey residential dwelling on her land. After the contract is signed, authorization is granted to build on the land a high-rise apartment building. The landowner wishes to repudiate the contract with the contractor, and it would appear that there is justification for this. The contractor wishes to compel the breaching party to create a unique good (the house) that she no longer desires,[72] and that, if built, would need to be demolished in order for the true potential of the land to be realized. This fact, and the difference between the benefit that the present contract yields and the potential benefit its breach would yield due to the change in circumstances, result in a tolerable breach.[73] The concern to prevent economic waste (by avoiding the construction of an unwanted house) and the need to prevent a situation in which the realization of the property's potential (which did not exist at the time the contract was entered into) is

70 *Yves Marie Laithier*, Comparative Reflections on the French Law of Remedies for Breach of Contract, in Comparative Remedies for Breach of Contract 103, 108-116 (Nili Cohen & Ewan McKendrick eds., 2005). It is also the approach advocated for American law in Melvin Eisenberg, Actual and Virtual Specific Performance, The Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 Cal. L. Rev. 975, 1009-1010 (2005); *Melvin Eisenberg*, The Disgorgement Interest in Contract Law, 105 Mich. L. Rev. 559, 578-597 (2006).

71 Compare the position of English law on this matter, Wroth v. Tyler, [1974] Ch. 30 (1973), in which the seller's claim for specific performance was rejected because of concerns that the breaching party, against whom the order was issued, would need to initiate proceedings against a third party in order to comply with the order); *Treitel*, Contract, supra nore 10, para 21-029. Damages were awarded instead of specific performance, the measure of damages being the difference between the contract price and the market price on the date of the decision, not least because the buyers did not have the means to enter into a replacement transaction beyond the contract price. *Treitel*, Contract, supra note 10, para 20-065. For similar reasoning see the Canadian decision in Semelhago v. Paramadevan, [1996] 2. S.C.R 415, in which damages were calculated based on the value of the house on the date of the decision, except that from this amount were deducted the interest costs that the plaintiff would not have incurred had he been required to repay the outstanding mortgage on the house, as well as the interest that he gained as a result of not having to pay advance fees and court fees that were not incurred due to the non-completion of the transaction. Lionel Smith, Understanding Specific Performance, in Comparative Remedies for Breach of Contract 3 (Nili Cohen & Ewan McKendrick eds., 2005) 221, at 228-230.

72 Compare White & Catter (Councils) Ltd v McGregor [1962] AC 413 and text to notes 93-96.

73 *Friedmann*, Economic Aspects, supra note 40 at 74-83; Waddams, supra nore 63 at 197-198.

blocked, provide justification for the breach.[74] The difference between this example and the previous one is clear: unlike the case of the sale of a property to a third party, in which a good that may be viewed as belonging to the buyer (the injured party) was taken from her, there is in this case a clear line separating the ownership rights to the land (which belongs to the landowner) from the contractual right of the contractor (the injured party). Although the contractor is entitled to build on the land, he does not derive any benefit from it in terms of the property itself. The entire property remains in the ownership of the landowner (the breaching party), and it is appropriate to permit her to enjoy the benefit of the potential that it holds.

4. Limited Application of the Efficiency Principle – The Doctrine of Economic Waste

A valid contract gives rise to a moral obligation to perform, absent a meaningful change of circumstance. This moral obligation is translated into the remedy of enforcement, which preserves the distribution agreed upon by the parties themselves. The mere fact that the contract imposes a heavy burden on one of the parties or that in retrospect it does not seem fair, does not constitute grounds for denying enforcement. As emphasized earlier, the agreement of the parties itself reflects the fairness of the contract, and if there is no substantive cause to tamper with its provisions, what purpose does it serve to tamper with it by denying one of the remedies? If the remedy of enforcement is denied, the injured party is in any case entitled to claim damages in the amount of the enforcement, and the position of the breaching party is thus not improved. However, reality is complex, as are legal rules, and an award of damages is not straightforward. Occasionally, if the injured party is not awarded the remedy of enforcement, the choice of a particular measure of damages may result in an alteration of the distribution of wealth that was agreed upon between the parties, even though this outcome contradicts basic principles of contract law.

In the well-known case of *Peevyhouse v Garland Coal*,[75] the Oklahoma court dealt with the obligation of a tenant to pay damages to the landowner for not restoring the surface of the land after conducting strip-mining operations on it, as agreed in the contract. The cost of restoring the land to its prior condition was $29,000, whereas the landowner's loss, as measured by the decrease in the land's value as a result of non-performance, was only $300. The court, in a majority vote, noted that the injured party was not in fact interested in restoring the land to its prior condition, and did not intend to use the monetary award for this purpose. Under these circumstances, the court applied the doctrine of economic waste, and ruled that the cost of restoring the land was disproportionate by any reasonable measure to the owner's loss, and directed the tenant to pay damages only in respect of the loss of value to the property ($300).

74 *Daniel Friedmann*, Restitution of Benefits Obtained rhtough the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 525-526 (1980).

75 Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962). For a similar English case see Tiro v. Wadell (No 2) [1977] Ch.106. For a detailed analysis see Treitel, Contract supra note 10, §§ 20-035 to 20-043.

The decision stirred – and continues to stir – vigorous theoretical debate, which already found expression in the majority and dissenting opinions. As the dissent noted, the tenant was awarded a considerable non-bargained-for benefit at the expense of the owner and in explicit contravention of the provisions of the contract. In practice, the tenant was almost entirely exempt from fulfilling his contractual obligation to restore the land to its original condition, even though it is reasonable to assume that this obligation was a factor in the contract negotiations.[76] In fact, not everyone agreed with the outcome, and a separate line of American case law developed which rejected the rule of damages measured in terms of the loss of value and adopted the criterion of the cost of cure, in particular given the fact that the breach was wilful.[77]

The mining case was analyzed by the court in terms of damages. After all, this was the remedy that the injured party (the lessor) requested. Had he requested specific performance – a secondary remedy that was at the discretion of the court – it is doubtful that it would have been granted. One may assume that the court would have rejected it on various grounds, such as the fact that it would have compelled personal service[78] or that it would have required an unreasonable degree of monitoring.[79] In all events, I believe that the line of reasoning upon which the decision is based, according to which the tenant is entitled only to the measure of damages with respect to the decline in value of the property, is erroneous under common law. *A fortiori*, it is erroneous in a jurisdiction where enforcement is the primary remedy.

The argument that enforcement under these circumstances would be unjust stems directly from the substance of the contract and from the gap between the cost of restoring the land to its original condition and the decreased value of the land if this restoration does not take place. But the obligation to restore the land is established in the contract, and the court is not empowered to change, on grounds of fairness, prevention of economic waste or need, the terms of an otherwise valid contract that has no defects. In addition, the fact that the injured party does not intend to apply the monetary award to restore the land should not be relevant,[80] despite the crucial importance ascribed to this argument.[81]

76 See *Judith L. Maute*, Peevyhouse v Garland Coal Co Revisited: The Ballad of Willie and Lucille, 89 Nw. U. L. Rev. 1341 (1995). The article claims that the lessor negotiated for the covenant to restore the land. This obligation was included in the contract in consideration for the lessor's relinquishment of the advance payment for surface damage, as was customary in such contracts.

77 Groves v. John Wunder Co., 286 NW 235 (1939). But the wilfulness of the breach does not constitute a factor in the Restatement (Second) of Contracts, which states in section 348(2) that the injured party may recover the cost of cure „if that cost is not clearly disproportionate to the probable loss in value to him"; *E. Allan Farnsworth*, Contracts 791-792 (4th ed 2004) [hereinafter Farnsworth, Contracts].

78 Tito v. Waddell (No 2) [1977] Ch 106, 326; *Treitel*, Contract, supra note 10, § 21-029.

79 *Alan Schwartz & Robert E Scott*, Market Damages, Efficient Contracting and the Economic Waste Fallacy. 108 Colum.L.Rev. 1610 (2008). The authors do not support the award of specific performance but they enthusiastically support the award of cost of cure for efficiency reasons. [Hereinafter Schwartz & Scott].

80 This proposition is clearly stated in CA 9085/00 Shetreet v. Achim Sharbat [2003] IsrSC 57(5) 462, 479-477. See also Ruxley Electronics and Construction Ltd. v. Forsyth [1996] 1 A.C. 344, 359 (H.L.) (appeal taken from Eng.).

81 *Treitel*, Contract, supra note 10, § 20-014. See Calabar Properties Ltd v. Stitcher [1984] 1 WLR 287, 292 for the argument that if the injured party disposes of the defective property without the defect having been cured, he should be awarded damages only for the loss of value.

From a moral perspective, granting enforcement, the effect of which is to restore the land to its prior condition, is justified; it is difficult to identify an argument of any kind that justifies redistribution of the contractual benefit and its transfer to the lessee. Moreover, an order of enforcement also removes the counter-argument that the sum awarded is going to be spent on something other than its intended purpose.[82] But aside from the question of enforcement, the same applies *mutatis mutandis* to damages. Damages, after all, are meant to reflect the monetary value of performance, and if performing the contract means restoring the land to its prior condition, then the lessor should be awarded the cost of performance, which is the translation into monetary terms of the contractual obligation.[83] Any other outcome distorts the distribution made by the parties in the contract. Nor is any other outcome justifiable: the fact that the contract imposes a considerable burden on the party in breach and that the loss to the injured party is minimal (if examined in terms of the decline in value of the asset), is not a sufficient reason for redistributing the benefits and risks of the parties as agreed to in an otherwise valid contract.

A similar issue was addressed by an Israeli court from a tort perspective. In *Yoram Gadish Infrastructure & Building (1992) Ltd.*,[84] the company conducted digging and quarrying operations on the land. As a result of its negligence, the damage was caused to adjacent property, creating a deep hole covering a substantial area. As in *Peevyhouse*, the cost of cure (i.e., restoring the land to its condition prior to the occurrence of the tortious event) was considerably higher than the loss to the land's economic value. The District Court held that the injured party was entitled to full compensation that would reflect the restoration of the land to its prior condition. The Supreme Court accepted the appeal and remanded the case to the District Court with the following instructions: When there is a significant difference between damages as measured by the cost of restoring the property to its prior condition and as measured by the loss in the asset's value, one cannot conclude that the injured party is automatically entitled to the higher level of damages for the cost of restoring the property to its prior condition. In such circumstances, the interests of the injured party must be balanced against those of the injuring party and of third parties. The Supreme Court added that the choice of the higher amount of damages by the injured party is subject to the good faith principle, and the injured party must indicate the special reasons that justify the award of the higher amount.[85]

82 For support of cost of cure awards where the injured party has not cured the defect or has no intention of doing so, see Tito v Waddell (No 2) [1977] Ch 106, 332, 335; Radford v De Froberville [1977] 1 WLR 1262; *Treitel*, Contract, supra note 10, § 20-039.

83 As is strongly advocated by *Schwartz & Scott* for efficiency reasons.

84 9474/03 Yoram Gadish Tashtit U'vniya (1992) Ltd. v Bahjat Mussa (unpublished, 21/11/06).

85 Ibid., paras 18-21 of the decision by Justice *Barak*. A somewhat different approach was expressed by Justice *Rubinstein*, who concurred. Justice *Rubinstein* noted that the court should examine the reasonableness of the injured party's choice of the higher damages award, and that in the context of this examination consideration should be given primarily to public interests and the interests of third parties who would rely on the new situation, and only to a limited exrent to the interests of the injuring party. It would seem that the difference between the Justices is not purely semantic but goes to the heart of the issue – what is the primary and fundamental right of the injured party.

The Israeli Supreme Court relied explicitly on *Peevyhouse*, and reached a similar result. This views would appear to be problematic, particularly as in both cases the decision favored business enterprises that harmed the property rights of private persons. It may be that the position of the Supreme Court is less harsh than the approach adopted in *Peevyhouse*, as it does not reject *a priori* the right of the injured party to full compensation reflecting the restoration of the land to its prior condition. Instead, it leaves the decision and the balancing to the court, based on the particular facts of the case. The injured party will draw the attention of the court to specific considerations such as effort, investment and need that justify full compensation. The injuring party, for its part, will be able to make arguments based on prevention of economic waste and on wealth maximization in order to reduce the right of the injured party to full compensation.

But the overall approach raises a number of questions: why should the burden of proof and of persuasion (with respect to the existence of particular reasons justifying full compensation) be imposed on the injured party and not on the injuring party? Once the liability of the injuring party has been established, would it not be more appropriate to shift this burden to him, to explain why full damages should not be imposed? Under *Gadish*, if the injured party does not identify special reasons, the court will compel him to transfer part of the benefit of ownership to the injurer. This is not a theoretical question – what was at issue in the case was a landowner who was left with a huge sinkhole on his property; and the damages that were awarded to him were insufficient to restore the property to its prior condition. This is hardly a desirable outcome, and it would have been apptopriate to reject it, or at least to state that it constitutes a limited exception to the rule (and that it would apply, for instance, when contributory fault can be ascribed to the injured party).

In the context of contract law, as noted above, the doctrine of prevention of economic waste should be rejected when the contract was not petformed and when its purpose is to alter the substance of the contract. But where the contract *was* performed and performance was defective, the application of this doctrine is appropriate. In the familiar case of *Jacobs & Young*, although the contractor installed plumbing of a type that was not specified in the contract, no loss was caused to the injured party. Specific performance of the contract would have required the demolition of the house (in full or in part) and the replacement of the plumbing in accordance with the specifications in the contract.[86] This outcome seems harsh and inefficient, and from it we can deduce the following rule: when the breach is minor and unintentional and the loss to the injured party is negligible, enforcement of the contract is unjust if it leads to economic waste. In such circumstances what is justified is a redistribution of the contractual benefit.[87]

86 Jacobs & Young v. Kent 230 NY 239, 129 NE (1921). Justice Cardozo, writing for the majority, observed that the loss in the value of the house as a result of the installation of the wrong kind of plumbing was immaterial, and he invoked the doctrine of economic waste in order to limit the right of the injured party to damages that reflected the loss in market value. A similar problem arose in Ruxley Electronics and Construction Ltd. v. Forsyth [1996] 1 A.C. 344 (H.L.) (appeal taken from Eng.) where a swimming pool was supposed to be built to a certain depth but the builder built it to a different depth. The House of Lords regarded the loss as non-financial and awarded the injured party £2,500 for loss of amenities. See also Treitel, Contract, supra note 10, § 20-043.

87 In other words, that the proposed damages would be the measured by the loss in value. This is the prevailing view.

Some observers see a clear similarity between the plumbing and mining cases, a similarity that justifies the application of the same rule to both cases.[88] Indeed, both cases concern a breach of contract, and both raise the question of the proper measure of damages. But there is disagreement regarding which rule is applicable to both cases – is it the rule that requires full damages for the cost of cure or the rule that requires partial damages for loss of value only. According to one view, both cases justify the application of an approach that is lenient (as far as the party in breach is concetned). In both cases the breach was tolerable, and, based on the doctrine of economic waste, the damages imposed on the breaching party should only reflect the loss of value. According to a different view, in both cases there was a clear breach of contract, and in both the damages imposed on the breaching party should reflect the cost of cure.[89] The latter approach is supported in the legal literature by the efficiency argument,[90] although it would appear that the principal rationale supporting it is the moral principle that promises should be kept.

To my mind, there is a marked difference between the mining case, in which the breaching party intentionally ignored a contractual obligation, and the plumbing case, in which the breaching party performed the contract almost completely, although it ultimately emerged that he had unintentionally deviated slightly from the provisions of the contract. The difference between the two relates to the somewhat arbitrary distinction between *misfeasance* (the plumbing case) and *nonfeasance* (the mining case). It is fair and reasonable to compel a party to a contract to perform a valid obligation that he took upon himself and that he knowingly ignored (the mining case). However, it is neither fair nor reasonable to order the demolition of an existing structure in order to cure an unintended deviation from the contract that does not cause harm to the injured party (the plumbing case).[91] Therefore from the perspective of enforcement, it is appropriate to entitle the injured party to enforcement in the mining case – this cannot be considered economic waste – and inappropriate to do so in the plumbing case. In the latter case, which in retrospect may be regarded as a kind of unavoidable accident, a redistribution based on considerations of efficiency is unavoidable, and the injured party will be entitled to damages reflecting loss of value.[92]

88 *Treitel*, Contract, supra note 10, §§ 20-035 to 20-042; Farnsworth, Contracts, supra note 77, § 12.13 at 788-792.

89 This approach, expressed by the dissenting justices in both Jacob & Youngs and Peevyhouse, is supported by *Schwartz & Scott*, supra note 79.

90 *Schwartz & Scott*, supra note 79.

91 The emphasis placed on the fact that in the latter case the breach was unintentional is meant to deny the breaching party an incentive to rush construction while deviating from the contractual agreement. For a cost of cure application in case of deliberate breach see *Glare v. Schwartz* 176 NE 616 (1913). The careful analysis of *Schwartz & Scott* (in section B of their article) reveals that modern American case law adheres to the rules in Jacob & Youngs and Peevyhouse.

92 Article 9:102(2)(b) of Principles of European Contract Law, supra note 20, states that specific performance will not be obtained if it would cause the debtor unreasonable effort or expense. The case of Peevyhouse is cited as an authority (p. 396). In Portugal there is an express provision stating that enforcement is unavailable where it results in demolition of a house constructed in violation of a obligation (p. 400). A similar approach was adopted in Israeli law in the context of torts. See section 7 of the opinion of Justice *Rubinstein* in Gadish, supra note 84.

Similarly, an injured party should halt the manufacture of a product that was designed specifically to meet the needs of the breaching party (a unique good), if the injured party does not have a legitimate interest in continuing its manufacture. Continued manufacture of an unwanted product that has no market constitutes economic waste. Under such circumstances, it would be unjust to grant the injured party enforcement (reflected in the payment of the contractually agreed price), and he would have to be satisfied with damages covering loss of profits (to which will be added the cost of production up until the time of the breach). Prevention of economic waste means that at the time of the breach (which typically is an anticipatory breach), the injured party should cooperate and mitigate his losses by halting production of the unwanted product.

Naturally, this case should be distinguished from the case in which the injured party has a legitimate interest in continuing production, as when, for example, as a result of termination of production his reputation is hurt or he is likely to be sued by third parties with which he has already contracted for purposes of performing his obligations to the breaching party. As will be remembered, in common law the action for the receipt of an agreed sum is not an equitable one but rather an action in debt, which historically did not provide discretionary power. In the well-known case of *White & Carter (Councils) Ltd v McGregor*[93] the court upheld the claim for the debt made by the injured party who continued to manufacture the unique good despite the objections of the breaching party, but Lord Reid restricted the scope of recovery for this claim, such that it would not be recognized if the injured party did not have a legitimate interest in continued production. This restriction was not applied in the case, but it was adopted in the Principles of European Contract Law, which provide that where the creditor has not yet performed and the debtor is unwilling to receive performance, the creditor will not recover if performance would be unreasonable.[94] Under the Israeli Remedies Law, ‚enforcement' includes "enforcement by an order for the discharge of a monetary obligation..."[95] The claim of debt is therefore within the scope of the remedy of enforcement, and the justice exception permits a flexible approach in this matter, as part of which a court may take into account efficiency considerations resulting from the changed preferences of the party in breach.[96]

The scope of the justice exception to enforcement has been examined here through an analysis of a number of issues. When the injured party explicitly or implicitly waives

93 White & Carter (Councils) Ltd v McGregor [1962] AC 413; *A. L. Goodhart*, Measure of Damages When A Contract is Repudiated, 78 L. Q. Rev 263 (1962); *P. M. Nienaber*, The Effect of Anticipatory Repudiation: Principle and Policy [1962] Cam. L. J. 213; *Friedmann*, Economic Aspects, supra note 40, at 86-88.

94 Principles of European Contract Law, article 9:101(2)(a).

95 Remedies Law, supra note 24, § 1(a).

96 *Nili Cohen*, Enforcement of Debt, in Festschrift fuer Andreas Heldrich (Stephan Lorenz et al eds., 2005) 39, 49-51. See also the provision in section 524(b)(1) of the Draft Civil Code 5766-2006, which states that the rule that an enforcement order will not be issued if enforcement of the obligation is unjust under the circumstances (section 524(a)(4) of the draft law) will not apply in case of a „monetary debt pursuant to a contract, provided that the injured party met his obligations under the contract, which entitle him to the repayment of the debt, without the breaching party having objected to the performance of the obligations".

his initial entitlement to enforcement or when his actions are tainted by fault, moral considerations result in his being deprived of his entitlement to enforcement. In the mining case, which presents a discrepancy between the cost of cure and the loss of value, as in the case of the sale of the subject of the contract to a third party for profit (efficient breach), there is a tension between moral considerations requiring full enforcement and considerations of efficiency justifying non-enforcement of the contract. My view is that in both cases it is appropriate to give precedence to considerations of morality. In the case of the manufacture of a defective product that does not cause loss to the injured party, as in the case of the manufacture of the unique good that is no longer wanted by the breaching party and in whose continued production the injured party has no legitimate interest, efficiency considerations justify the application of the exception to enforcement.

In the next section I will examine the commitment to the primacy of enforcement in Israeli law by reference to the issue of construction that is carried out in breach of a contractual provisions. What is the approach of the courts in the related problem of construction that harms property rights? Do the courts give doctrinal precedence to the property remedy, even if it entails the demolition of the structure, when the harm is to a contractual right? What are the considerations underlying such decisions, and what are the considerations of distributive justice that should be taken into account in such cases?

F. Testing the Primacy of Enforcement – Enforcement Entailing the Demolition of a Structure that Was Built in Violation of a Contract

In Israel, illegal construction, which is a common phenomenon, usually involves the violation of public norms. But it also has a private law aspect, when the construction violates the rights of individuals. Unlawful construction may infringe property rights of individuals, as well as contract rights. In such cases, it is difficult to reconcile the various competing considerations, which include enforcement of laws, administrative constraints and arbitrariness, protection of private contract and property rights, and the prevention of economic waste.

Property rights are protected under Israeli law through property principles. The property owner is entitled to the protections that the Land Law 5729-1969 provides with respect to ownership and possession. Unlike the "property" protection of a contract right, which is limited by the justice exception to enforcement, the protections specified in sections 16-19 of Land Law[97] are not subject to any explicit reservation. Nor are there any exceptions to the owner's right to demand demolition of a structure that was

97 Land Law, 5729-1969, 23 LSI 283 (1968-1969) (Isr.). These protections also apply to moveable property by virtue of section 13(a) and 8 to the Moveable Property Law, 5731-1971, 25 LSI 175 (1970-1971) (Isr.).

built *mala fide* by another person on the owner's land.[98] In the landmark case of *Roker v Solomon*, which deals with a conflict among condominium neighbors, the Supreme Court, in a majority decision, ordered the demolition of the unlawful structure whose construction entailed bad faith exploitation of common developments rights and the appropriation of storage space in the part of the basement.[99] The Court ordered the return of the property to the original owners, and rejected the argument of the usurping neighbor who was willing to compensate the other neighbors and to build new storage facilities to replace those that he had appropriated for his own use. The Court took a clear position according to which redistribution – a compelled transfer of their ownership rights to the usurping neighbor – could not be imposed on the original owners.

As will be recalled, English courts were originally guided by the common law principle of the primacy of damages. Further legislation expanded courts' authority to grant injunctions and the present rule entitles a person whose right has been violated to an injunction prima facie. The right to injunction is excluded, however, if the injury is small, is capable of being estimated in money, the injury is one which can be adequately compensated by a small money payment, and the case is one in which to grant an injunction would be oppressive to the defendant.[100] This may result in the compelled transfer of ownership rights to the injuring party. In *Jaggard v Sawyer*,[101]

98 Land Law § 21(a). This provision also applies to bad faith construction in a condominium pursuant to section 53, which provides that „Every provision of this Law, and every other law applying to immovable property, shall apply mutatis mutandis to dwellings in a cooperative house…"

99 CA 6339/97 Roker v. Solomon [1999] IsrSC 55(1) 199. For an assessment of this decision see *Daphna Lewinsohn-Zamir*, The Impact of Economic Theory on the Israeli Case Law on Property, 39 ISR. L. REV. 5, 23-25 (2006), arguing that the inefficient outcome in the case is a price worth paying in order to create a proper incentive for efficient behavior and consensual transfers, and noting that, interestingly, the Justices who objected to economic analysis were those who applied a correct economic analysis which took into account long-term economic considerations, whereas the Justice who conducted a cost-benefit analysis ignored the probable effect that the outcome that he favored would likely have on future behavior.
The decision in Roker is based on a line of previous decisions in which the Supreme Court expressed a clear and inflexible approach to all that relates to construction at the expense of cooperatively owned property. In CA 136/63 Levinheim v. Schwartzman [1963] IsrSC 17 1722, the Court issued an injunction to prevent the construction of a rooftop apartment, despite the fact that the roof was adjacent to the apartment of one of the neighbors. The Court stated that the neighbor in question was barred from building on the roof in the absence of the consent of the other neighbors, due to the fact that construction would utilize all available construction rights which were common property of all the apartment owners. In other cases demolition orders were issued when it emerged that the construction was undertaken on jointly-owned property. See CA 515/65 Ravovski v. Galsberg [1966] IsrSC 20(2) 290 (injunction to demolish construction that affected stairwell and altered the look of the building and to restore affected areas of the building to their prior condition); CA 93/81 Elias v. Schiffer [1983] IsrSC 37(2) 444 (order to demolish an extension to a balcony that was built with the agreement of most, but not all, of the owners in the building).

100 The leading case is Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, at 322–323, which states that „…a person by committing a wrongful act … is nor thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance… In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is primâ facie entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction…".

101 Jaggard v. Sawyer [1995] 1 WLR 269 (CA). *Friedmann*, Economic Aspects, supra note 40, at 80-82.

which was decided at roughly the same time as *Roker*, the defendant built a house whose only access was through the neighboring property. When the neighbors refused the defendant permission to cross their land, he became in effect a trespasser (as well as being in breach of contract). The neighbor sued for enforcement of his property right, and requested the court to prevent the defendant from crossing his property. Had an injunction against the trespasser been issued, he would not have been able to make use of his new house. The court refused to issue an injunction, stating that to do so would be unduly harsh on the defendant, who had acted in good faith. The combination of the good faith of the defendant and the undue harshness of the impact of an injunction led to a forced transfer of a benefit (the right of way across the neighbor's property).[102] The approach of the Israeli Supreme Court in *Roker* was different, but the context was different as well: the trespasser (who built the unlawful structure) acted in bad faith, and the burden that was imposed on him as a result of the decision was not excessive.

The holding in *Roker* provided unambiguous protection to property rights. However, without exception the Justices based their decision on the principle that despite the non-restrictive language of the protection of ownership provided in the Land Law, owners' rights are nonetheless subject to the discretion of the court. A number of the Justices suggested wide discretionary power to enable the balancing of interests, but the majority held that judicial discretion was limited to exceptions relating either to abuse of rights[103] or to lack of good faith.[104]

The *Roker* decision confirms basic truths regarding the protection of the property right: ownership rights are accorded broad and encompassing protection; the entitlement of a landowner to the property itself will not be easily denied or restricted, particularly when the injuring party has acted in bad faith; redistribution relating to property will be undertaken on rare occasions only, and will be applied with great care. This reflects the elevated status of ownership. In *Roker* the issue was raised in the context of ownership of a residential dwelling, which for most people is the most important asset that they own. Indeed, there is a difference between ownership of an apartment and possession of contractual rights to an apartment. The endowment effect – the effect of

102 Compare section 74 of the Israeli Civil Wrongs Ordinance (New Version), 5728-1968, 2 LSI NV 5 (1972) (Isr.), which, following the common law rule, states that an injunction will not be granted if the loss is minimal and damages are adequate. But in a case of nuisance caused by operation of a plant, the court rejected the economic consideration, and granted an injunction pursuant to section 74, noting that the effect of viewing economic considerations as decisive would be the forced creation of an easement on the land of the injured party in favor of the injurer. See CA 44/76 Ata v. Shwartz [1976] IsrSC 30(3) 785, 805.

103 Land Law § 14.

104 Specified in section 39 of the Contracts Law which applies by virtue of section 61(b) to private law as a whole. See also section 74 of the Israeli Civil Wrongs Ordinance, which was bortowed from the common law, under which enforcement of property rights is discretionary. See note 9 supra and accompanying texr and note 102 supta. For the argument that in common law discretion in the operation of remedies served as a substitute for the absence of a doctrine of good faith: *Daniel Friedmann*, Good Faith and Remedies for Breach of Contract, in Good faith and Fault in Contract Law 399, 400-401 (Jack Beatson & Daniel Friedmann eds., 1995); *Treitel*, Remedies, supra note 7, § 64, at 66.

owning a certain asset – is not based purely on legal doctrines, but also on the psychological ramifications of owning real property.[105]

But reality is more complex than legal doctrines and rules. Land ownership is usually perfected by the administrative act of registering the ownership with the Land Registry.[106] As long as the apartment or the parcel of land has not been registered, the rights to the property are treated as contractual rights only.[107] But to the extent that the party in question resides in, or otherwise uses, the property that she has not yet registered, or even if she owns unregistered property for investment purposes -- is there any difference between registration and non-registration in terms of the psychological implications or the subjective value that she ascribes to her right in the property?[108] And if in fact there is no difference, is it justified to apply different distributive considerations in such cases? The justice exception to enforcement should be applied narrowly when dealing with a substantive ownership right which is formally treated as a contractual right. Consequently, distributive considerations should play a limited role in the case of unlawful construction that violates a contract and that infringes upon the contractual right of the injured party, for the reason that the contractual right is in effect a property right.

This approach was in fact adopted by the Supreme Court in *Pomerantz*,[109] in which a contractor entered into a contract to sell an apartment to a buyer. Subsequently, and in breach of that contract, the contractor attached part of the stairwell of the building to another apartment and sold it to a second buyer. The first buyer was surprised to see the construction work taking place in the stairwell, and sent a letter to the contractor demanding that construction be halted and that the construction irregularities be removed. The parties entered negotiations, in the course of which the first buyer considered accepting compensation for the unlawful construction. However, the negotiations failed, and the first buyer filed an action for the enforcement of his contractual rights. In a majority decision, the Court ordered the demolition of the unlawful construction. The Justices split over whether the first buyer had delayed in filing his action to enforce the contract and whether laches applied in the case (which would have justified the application of the justice exception to enforcement). As previously stated, moral considerations, including autonomy and trust, are given considerable weight in applying the justice exception. Laches is an autonomous act of the injured party which may be relied upon by the party in breach and from which the party in breach may deduce that the injured party has waived enforcement.

105 On the endowment effect, see *Daniel Kahneman* et al, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 Journal of Political Economy 1325 (1990); *Daniel Kahneman* et al, The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 Journal of Economic Perspectives 193 (1991).

106 Land Law § 7(a).

107 Land Law § 7(b).

108 See for instance the case of CA 842/79 Ness v. Golda [1981] IsrSC 36(1) 204, in which a conflict over an apartment was categorized as a contract dispute due to the fact that the apartment was not registered. For a critical appraisal see *Nili Cohen*, Rescission of a Contract and its Impact on Unregistered Land Transactions, 35 Hapraklit 215 (1983) (Hebrew).

109 CA 48/81 Pomerantz v. K.D.S. Building and Investments Ltd. [1984] IsrSC 38(2) 813.

The discussion in *Pomerantz* centered on the legal conclusion that should be drawn from the conduct of the first buyer in his interaction with the contractor. Did his conduct indicate that he was waiving his right to enforcement, or should it be viewed merely as a waiver that was conditional upon successful conclusion of the negotiations and payment of damages? The majority viewed the waiver as conditional only, and therefore once negotiations failed, the first buyer could sue for enforcement.[110] The dissent viewed the conduct of the first buyer as a waiver of the right to enforce the contract -- a waiver that induced not only the contractor to continue construction but also the second buyer to acquire the apartment which contained the building irregularities.[111]

Of the two approaches, that of the majority opinion seems preferable. The first buyer had a contractual right to the apartment that he purchased from the contractor. The apartment was his chief asset – his home and his dwelling place, to which he was attached emotionally and which, for all intents and purposes, he owned. He therefore deserved property protection. Such protection should reduce the incentive of the other party (the contractor) to violate the contract and compel a transfer by means of the law of damages. In other words, the first buyer's right takes precedence, and it warrants granting enforcement and defeating arguments whose effect would be forced redistribution. The view of the majority of the Court, which in this case granted the injured party identical protection to the property protection granted in *Roker*, is therefore justified.

A different approach, and under different circumstances, was adopted in *Alubara*. Two relatives, Ali and Hassin Alubara, jointly acquired from the Israel Land Authority contractual rights to a plot of land. The Authority was approached for this purpose by Hassin alone, and the rights to utilize the property (and to receive at some future date the right to lease it) were recorded by the Authority in his name only. This was because Ali already possessed rights to another parcel of land nearby, and the Authority's regulations at the time did not permit multiple acquisitions of parcels of land. Ali and Hassin agreed between them that when the rights to the land ripened and the Authority issued authorization to lease it, the rights would be transferred to their joint ownership. After ten years during which the land lay untouched, Hassin began construction work on the property without notifying Ali. When Ali protested, the parties agreed that Ali could build on the other half of the plot. The parties entered into an agreement for the partition of the land between them. It transpired, however, that Hassin had exhausted the available construction rights of the property, and therefore partition was impossible. Under these circumstances, Ali wished to enforce the original contract, for which purpose he filed an action to have Hassin's building demolished. The District Court decided in his favor, but the Supreme Court reversed, in large part because the Land Authority had not been joined as a respondent. In reference to the contractual-remedial aspect of the case, the Supreme Court noted that Hassin's breach was flagrant. Nonetheless it regarded enforcement under the factual conditions of the case as impossible, among other reasons because it would require the demolition of the structure. The Court also noted that demolition would be unjust, both because of Ali's passivity and

110 Id. at 822-823.

111 Id. at 818-819.

because the injustice to Hassin would be greater than that to Ali. In remanding the case, the Supreme Court instructed the District Court that Ali should be directed to file an action for damages to compensate for his loss.[112]

The case raises difficult questions, and for purposes of the present discussion I shall ignore the issue of the validity of the agreements with the Authority (which neither court addressed). The District Court treated the parties as joint owners and Hassin's actions as violating reasonable use of a joint property, and for this reason it required him to restore the status quo ante.[113] The Supreme Court rejected this view,[114] treating the litigants solely as parties to a contract. By transferring the analytical discussion from the realm of property to that of contract, the Court concluded that the appropriate remedy was damages and not enforcement.

This reasoning is problematic. As mentioned earlier, when it comes to land ownership, the act of registering title distinguishes between property and contract.[115] However, the line between the two categories is in fact blurred, and one often encounters a property right in the guise of a contract right. *Alubara* appears to be one such case in which the facts could be read one way or the other. In essence, Hassin and Ali were partners in the property (both had invested equally in its acquisition). Alternatively, Hassin could be viewed as Ali's trustee, in which case Ali would be the one with the stronger property interest in the asset. Even if they were not formally joint owners, Hassin and Ali were potential partners. Ultimately, even if Ali is treated as holding a mere contract right to the land, he deserved the effective protection of his right through the remedy of enforcement.

The Supreme Court held that the circumstances warranted application of the justice exception to enforcement on three grounds: first, the fact that construction of the building on the land had been completed made enforcement impossible; second, enforcement was unjust due to the passivity of Ali; and finally, when the interests of the parties were balanced against each other, enforcement appeared unjust: the loss to Hassin from enforcement of the contract (demolition of the structure) was greater than the loss of Ali from denying enforcement.

If we examine these arguments in terms of the theories underlying distributive justice, the first argument – the very existence of the structure – stands as a proxy for effort and investment. However, it would be inappropriate for this consideration to be determinant, as it creates an incentive for unlawful construction as a means of achieving forced transfers. This argument was not applied – and rightly so – either in *Pomerantz* or in *Roker*, in both of which the breaching party (a trespasser who build unlawfully) was ultimately subject to a demolition order, without taking into account the investment and effort involved. The second argument – Ali's passivity in face of Hassin's actions

112 *Alubara v. Alubara*, supra note 49, at 672, 676. The Supreme Court remarked that in the past Ali could not have acquired the land, because he had another parcel of land. Do we hear a hint that now this obstacle does not exist anymore and that the Land Authority's policy has since changed?

113 Id. at 657-676.

114 Id. at 676-677.

115 In the case under discussion, at issue was registration not with the Land Registry but with the Israel Land Authority. Such registration is of buteaucratic import, but it does not transform Hassin's tight into an ownership right.

– stands as a proxy for renouncing enforcement. This argument represents moral considerations of autonomy, trust and reliance. But passivity in itself is hardly equivalent to renouncing the entitlement to enforcement.[116] The third argument – the balance of interests and the determination that Hassin's loss was the greater one – stands as a proxy for considerations of need, and it would appear that this is the strongest argument for redistribution.

Although the decision provides scant factual information, it notes that Hassin owned no land other than the plot in dispute, whereas Ali also owned another property. A place of residence is viewed as an important element in the identity of its owner, as an integral part of him.[117] Demolition of the structure risked leaving its owner and his family without shelter. Therefore the argument of need – i.e., the intolerable burden that would be placed on Hassin – is compelling. But the Court did not ascribe much weight to the flagrant breach of the contract or to retributive considerations (which form an integral part of the justice exception and its distributive aspects). Ultimately, the outcome of the case was that the flagrant breach was beneficial to Hassin: he was able to force on Ali a sale of the property and to expel him in effect from the parcel of land that they jointly owned.

It is interesting to compare this decision to *Jaggard*,[118] in which the English court forced a transfer of an easement (the right to cross the plaintiff's property) to a trespasser (the defendant) whose conduct also constituted a breach of restrictive covenant. The court refused to grant an injunction against the defendant, who had acted in good faith, due to the intolerable burden that would result. The court emphasized in its decision the combination of the two arguments – the oppression that an injunction would place on the defendant, and the defendant's good faith. But in *Alubara* the element of good faith on the part of the breaching party is entirely absent.

The Israeli Supreme Court recognized Ali's right to claim damages, and remanded the case to the District Court. An award of damages in an amount that exceeded Ali's objective loss – a remedy that could have taken into account punitive elements because of Hassin's flagrant breach – would have gone a certain way toward mitigating the implications of the distributive effect of denying enforcement. But the Court made no reference to this possibility in its decision.

Partial enforcement is another solution that would have saved the house from demolition and preserved Ali's rights in the land. Under partial enforcement, Hassin could have been required to transfer half of his rights in the building to Ali when the rights in the land matured. Naturally, this remedy would have had to be accompanied by a full settling of accounts by the parties, in which would have been included, among other items, the investments of Ali and Hassin in acquiring the property and the loss caused by the breach of contract.

116 CA 1559/99 Zimbler v. Turgemann [2003] IsrSC 57(5) 49; CA 177/87 Weinfeld v. Director of Land Improvement Tax [1990] IsrSC 44(4) 607.

117 *Maragaret Jane Radin*, Property and Personhood, 34 Stan. L. Rev. 957 (1982).

118 Cf *Jaggard v. Sawyer*, supra note 101.

An approach somewhat along these lines was adopted by the Supreme Court in *Sofaiov*.[119] In 1965 an agreement for the sale of rights in land was made among the Sofaiov brothers (hereinafter: the brothers-sellers and the brother-buyer). The land was left untouched for many years. Twenty years after the agreement was signed, the brothers-sellers constructed an apartment building on the site, and sold some of the apartments to third parties who acquired them in good faith. The brothers-sellers retained ownership of the ground floor and basement. When legal proceedings between the brothers commenced, the brothers-sellers argued that brother-buyer had renounced his rights, but this argument was rejected by the Court. The Court regarded the brother-buyer's right as an equitable right that was the equivalent of a property right,[120] and therefore granted the brother-buyer strong and appropriate protection of his right. The court held that as third parties were involved in the contractual relationship, their rights took precedence, and it awarded the brother-buyer the ground-floor and basement apartments which had not yet been sold by the brothers-sellers. As for the remaining rights of the brother-buyer, it was decided that this matter should be litigated separately.

The *Sofaiov* outcome is a good one. The brothers-sellers wished to prevent the brother-buyer from receiving his share after they flagrantly breached their contract with him. They were aware of the brother-buyer's rights in the land, and they could not claim that they had relied on changed circumstances or that their situation had changed for the worse. Nonetheless, the fact that the brothers-sellers constructed a building on the land clearly raises a problem. The Court awarded the brother-buyer developed property, while denying him part of the built-up land that had already been sold to others. In this part of the property which was sold to third parties, the buyer had contractual rights. This change in circumstance required a separate settling. The Court did indeed recognize that the parties could now claim monetary damages. In order to do so, the cost of construction, the loss of the apartments that were transferred to buyers and the value of the apartments that were transferred to the brother-buyer would have to be assessed. The fact that a building was constructed or that brother-buyer was passive for many years did not defeat his entitlement to enforcement. As between the litigious brothers (as opposed to third parties), the Court did not order a redistribution.

Returning to *Alubara*, no third parties acting in good faith were involved. The contractual dispute was between the contracting parties only (although the Land Authority was indirectly involved as well). The limited factual information available is insufficient for a thorough analysis of the facts of the case, but it is difficult to conclude from Ali's passivity that he waived his rights to the land. Equally, it is difficult to conclude that the existence of a structure on the property, the very construction of which was in flagrant breach of the contract, constituted a bar to enforcement. The consideration of need – the key distributive justice argument in the case – could have been dealt with adequately by recognizing Ali's rights in part of the building and the land (as was done in *Sofaiov*). Such a solution, which would have preserved the joint ownership by Ali

119 CA 2907/04 Sofaiov v. The Estate of Sofaiov [2007].

120 Following CA 1559/99 Zimbler v. Turgeman.

and Hassin,[121] would appear to be fairer to all the parties involved. It would also signal a real commitment to the moral considerations that underpin both the primacy of enforcement and the justice exception to it.

G. Conclusion

The principle of morality underlies the primacy of enforcement as a remedy for breach of contract. The expansion or restriction of the scope of the justice exception to enforcement determines as a practical matter the extent to which enforcement is indeed the primary remedy. The appropriate considerations in support of the justice exception are above all moral ones – the same considerations that govern the general rule. The consideration of autonomy is reflected in the changed preference of the injured party, which may lead to denial of enforcement. Fault is reflected in the undeserving conduct of the injured party, which undermines the cooperation and trust between the parties to the contract. Fault and autonomy are appropriate reasons for denying enforcement to the injured party and for redistributing the contractual benefit.

Events that occur as a result of the passing of time since the formation of the contract may undermine the contractual balance. The application of distributive justice as a restraint on enforcement must take these changes into consideration. In this context, efficiency should also be taken into account, albeit cautiously. This hierarchical structure of considerations in the justice exception to enforcement, which combines moral considerations as the principal considerations and efficiency as a secondary one, will buttress the primacy of enforcement.

The case of unlawful construction in breach of contract creates a dilemma regarding the justice exception to enforcement. Fairness, personal dignity, effort, investment, need, fault and deterrence – all these considerations compete in the battleground of the residential home. Israeli case law has by and large taken note of moral considerations in order to protect the initial entitlement of the injured party through the remedy of enforcement. But the picture is not uniform, and remnants of the old common law tradition which views enforcement as a secondary remedy can still be seen.

121 If a joint owner unlawfully builds on the jointly-owned property, the other owner may demand the removal of the structure (sections 46 and 21(c) of the Land Law). This raises concerns similar to those dealt with in Roker (supra notes 99–105 and accompanying text). In Alubara the issue of Hassin's need for a residence could have been cited as an argument for restricting Ali's right to demand the removal of the structure. Had the Court recognized Ali's rights in the land, it would have turned them into joint owners of the building. Of course, the joint owners could at some point in the future apply to sever their joint ownership of the rights to the property under sections 37–45 of the Land Law. In such event, the Court would have had to revisit and settle the issue of who should retain ownership of the building, but the status of Ali as a holder of property rights in the building would have been much stronger than his status as a holder of contractual rights whose rights in the building were taken away and who was left with the right to monetary damages for breach of contract.