

Specific Performance in the Absence of an Enforceable Contract and the Consent Prism – A Remedial Outlook at Antidiscrimination Legislation in Modern Contract Law

Nimrod Abramov & Omri Rachum-Twaig

In different venues in Israeli law, the case law and legislation allows the granting of a specific performance remedy even in the absence of an enforceable contract (bad-faith termination of a negotiation process, illegal contracts and antidiscrimination law). This option, so it seems, cannot fit the basic rule of contract remedies law, according to which a contractual remedy will not be granted in the absence of a material contractual right. However, upon analysis of these venues of Israeli law it seems that in most cases a specific performance will be granted in the absence of an enforceable contract but not in the absence of consent. Adopting the consent prism in contract law, which perceives the contractual consent – autonomy – as the heart of the contractual sphere, could justify the granting of specific performance in the absence of a legally enforceable contract. But what about specific performance in the absence of consent? This may be found in two central venues of antidiscrimination law: the Antidiscrimination in Products, Services and Public Accommodation Act and The Equal Opportunity in Labor Act. The most common view has recognized a direct collision between the classical contractual doctrines (which laud private autonomy) and the antidiscrimination legislation which seeks to enroot the value of equality in contract law.

In this article our aim is to outline how that collision exists, *de facto*, only in a small amount of instances in the real world. In fact, in most cases, the granting of specific performance due to a breach of an antidiscrimination law could be justified according to the consent prism of contract law — that is, if consent is to be interpreted with flexibility, as appropriate under the purposes that stand at the basis of the contractual consent question. Our argument posits the Israeli antidiscrimination legislation within the common contractual debate and not outside it. However, in places where the lack of consent will stretch towards significant details of a transaction that is not yet complete, granting a specific performance remedy will be, in our opinion, very difficult in terms of contract law theory. In such cases, a political decision is required – which is superior: equality or autonomy?