AIFC Court & IAC Webinars Programme 2020: WEBINAR 15: Assessment of Damages and the Consequences of Cancellation

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Impact on market sectors

The impact of the crisis has been significant across many market sectors. Between February- and March 2020 many, but not all, markets fell significantly, but since then there has been a recovery.

	20 February	30 March		15 June 2020	
S&P500	3369.25	2514	(-25%)	3130	(-7%)
FTSE100	7436.64	5378	(-28%)	6064	(-18%)
Bloomberg West Texas Crude	$93.75	$29.94	(-69%)	$37.24	(-60%)
LME Copper	$5728/tonne	$4774	(-26%)	$5646	(-1.4%)
Baltic Exchange Dry Shipping Index	$415	$556	(+34%)	$973	(+57%)
Amazon.com Inc	$2153	$1963	(-8.8%)	$2572.68	(+16.29)

Entitlement to full compensation: Contract

AIFC Damages and Remedies Regs. section 9 and AIFC Contract Regs. section 110:

"The aggrieved party is entitled to full compensation for loss suffered as a result of the non-performance. The loss includes **both any loss that the aggrieved party suffered and any gain of which the party was deprived**, taking into account any gain to the aggrieved party as a result of the party's avoidance of cost or loss."

Note that section 110 of the Contract Regulations uses the term "harm" rather than "loss".

Robinson v Harman (1848) 1 Ex. 850, 855

Baron Parke:

“The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.”

“Difference in value” or “cost of cure”

In many cases the assessment will be the **difference in value between the performance received and the performance promised** in the contract: **AIFC No 17 sections 9 and 14**.

By **section 13**, in the case of a replacement transaction the damages are the **difference between the contract price and the price of the replacement** as well as damages for any further loss.

In appropriate circumstances, the assessment will be what it has cost the innocent party to have the contract performed by a third party, **“the cost of cure”,** provided that is not disproportionate: ***Ruxley Electronics v Forsyth*** [1996] 1 AC 344.

Certainty of Loss (1)

AIFC Damages and Remedies Reg. No 17 of 2017

11. Certainty of loss

(1) Compensation is payable only for loss, including future loss, that is established with a reasonable degree of certainty.
(2) Compensation may be payable for the loss of an opportunity in proportion to the probability of it happening.
(3) If the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the Court.

See also section 112 of the Contract Regulations which uses the term "harm" rather than "loss".

Difficulty in assessing damages

Difficulty in assessing damages does not disentitle a claimant from attempting to do so unless they depend on entirely speculative possibilities.

Loss of a chance: A claimant who has lost a substantial chance of making a gain or of avoiding a loss from a future or hypothetical event may recover damages that are proportionate to the lost chance: ***Chaplin v Hicks*** [1911] 2 KB 786 (lost opportunity to participate in beauty contest) & ***Blackpool & Fylde Aero Club v Blackpool BC*** [1990] 1 WLR 1195 (lost opportunity to have tender considered)

Choice as to way contract is performed

Where the defendant had a choice under the contract as to the way in which the contract would be performed, damages will usually be assessed on the basis of the minimum legal obligation, assuming that the defendant would have performed in the way most favourable to itself: ***Re Thornett & Fehr and Yuills Ltd*** [1921] 1 KB 219.

It has, however, been suggestions that the "minimum obligation principle" is merely a default rule which corresponds to a defendant's most likely performance and which can be departed from if the claimant can establish that the defendant would have exceeded it: ***Durham Tees Valley Airport Ltd v BmiBaby Ltd*** [2010] EWCA Civ. 485.

Reliance loss

- An innocent party may elect to claim only its reliance loss, that is the expenses incurred in preparing to perform or in part performance of the contract which have been wasted as a result of the breach.
- Expenses incurred prior to and in anticipation of the contract are recoverable if it was reasonably in the contemplation of the parties that they would be wasted if the contract was broken: ***Anglia TV v Reed*** [1972] 1 QB 60.
- But an innocent party cannot escape from a bad bargain by recovering sums spent in reliance on the contract: ***C & P Haulage v Middleton*** [1983] 1 WLR 1461 and ***The Mamola Challenger*** [2010] EWHC 2026 (Comm).

“Hypothetical release” or “Negotiating” damages

In some cases damages have reflected at the price the claimant could have charged the defendant for releasing him from the contractual duty had the defendant approached him prior to the breach: ***Morris-Garner v One Step (Support) Ltd*** [2018] UKSC 20

Such damages will be advantageous to a claimant where damages assessed under the expectation measure would be nominal because no loss can be proved or the loss is otherwise irrecoverable.

But they may only be awarded in two situations:

(a) where the breach of contract consists of an interference with a proprietary right, or a similar right, of the claimant; “a valuable asset created or infringed by the right which was infringed”: Lord Reed at [92]

(b) Where a breach of contract is anticipated but has not yet occurred and damages are awarded in substitution for specific performance or an injunction

The date for assessment of damages for breach of contract

The determination of which date applies can have a huge impact on the value of what is recovered, for example where the damages are ordered to be paid in a currency that has suffered a substantial devaluation as against other major trading currencies since the date of breach: ***Attorney General of Ghana v Texaco Overseas Tankships*** [1994] 1 Lloyd's Rep 473 (HL).

The starting point is normally the date of the breach of contract but in English cases (particularly recent ones) it is subject to a more flexible approach to enable compensation to be more accurately calculated.

Flexibility as to contract breach date:

It is *“not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances”*: ***Johnson v Agnew*** [1980] AC 367, 401A.

It is not appropriate if substitute performance is not available on that date: ***Hooper v Oates*** [2013] EWCA Civ 91 at [38].

Departure “*can only be justified where it is necessary to give effect to the overriding compensatory principle*” and where this is consistent with the agreed allocation of risk in the contract: ***Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*** [2014] EWHC 2178 (QB) at [37].

Taking account of events after contract is terminated

The Golden Victory [2007] UKHL 12: outbreak of war which would have entitled charterers to terminate 7 year charter-party was taken into account although it was two years after charterer's breach of contract. *per* Lord Scott at [30]:

> "If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. And if it is certain that the event will happen, the damages must be assessed on that footing."

Bunge v Nidera [2015] UKSC 43 held that this principle applies to "one-off" contracts as well as long-term or instalment contracts.

Limiting factors (1): Causation

The breach of contract must be the “effective” cause of the loss. It is not enough to show that “but for” the breach, the loss would not have been suffered, in the sense that the breach was an event which merely gave the opportunity for the innocent party to sustain the loss.

The courts have avoided laying down any formal tests for causation. They have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the plaintiff's loss which makes it difficult to articulate the relevant rules of law: see *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196 and *Galoo Lts v Bright Grahame Murray* [1994] 1 WLR 1360, 1374-75.

Limiting factors (2): Remoteness

AIFC *R*egs. No. 17 of 2017

“12. Foreseeability of loss

The non-performing party is liable only for loss that the non-performing party foresaw, or could reasonably have foreseen, at the time of the party’s non-performance as being likely to result from the non-performance.”

AIFC Regs. No 3 of 2017

“113. Foreseeability of harm

The non-performing party is liable only for harm that the party foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.”

Limiting factors (2): Remoteness

Damages are recoverable where:

- they are "such as may fairly and reasonably be considered as **arising naturally, according to the usual course of things** from the breach, and
- they are such as may **reasonably be supposed to have been in the contemplation of the parties at the time they made the contract**.

Hadley v Baxendale (1854) 9 Exch. 341

Limiting factors (2): Remoteness

Recent decisions have emphasized that loss will be too remote if the defendant did not assume responsibility for that loss and will not be too remote if the defendant did assume responsibility for that loss.

The Achilleas **[**2008] UKHL 48 (breach by overrun of 9 days in re-delivering ship at end of charter; owner had to renegotiate the follow-on charter at lower rates held could recover difference in rates for the 9 days ($158K) but in the light of the understanding of the shipping industry not the whole of the period of follow-on charter ($1.3million)).

Supershield Ltd v Siemens Building Technologies Ltd **[**2010] EWCA Civ. 7 (loss by flooding because of the defective installation of a fire-sprinkler was not reasonably contemplatable as serious possibility at the time of the contract, but the contract breaker had assumed responsibility for the loss because the very purpose of its duty was to stop there being excess water and thus the flooding).

Limiting factors (3): Mitigation

AIFC Damages and Remedies Reg. No 17 of 2017

16. Mitigation of loss

(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the loss could have been reduced by the aggrieved party taking reasonable steps.

(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Note that section 117 of the Contract Regulations uses the term “harm” rather than “loss”.

AIFC Reg 17 sections 16 and 117 reflect the mitigation principles that have been developed in the English decisions

Reasonableness is a question of fact, and the English cases show there is a margin afforded to what the innocent party will be expected to do.

For, example, the innocent party:

- is only expected to do what is in "the ordinary course of business": ***Dunkirk Colliery Co v Lever*** (1878) 9 Ch D 20, 25.
- is not expected to accept goods of an inferior quality (***Heaven & Kesterton Ltd v Et Francois Albiac & Cie*** [1956] 2 Lloyd's R 316.
- is not expected to take steps which he cannot financially afford: ***Lagden v O'Connor*** [2003] UKHL 64.

Compensating advantages may reduce damages

Sections 9 and 110 (see slide 3) reflect the position in English common law.

If a party mitigates its loss and obtains a compensating advantage, that advantage will be deducted from the damages provided it arose directly from the breach and the act of mitigation: ***British Westinghouse Co v Underground Rys of London*** [1912] AC 673 (damages reduced where turbines not compliant with contract specification were replaced by ones which resulted in overall saving of fuel over contract period).

The advantage will not be deducted where it is merely an "indirect" or "collateral" benefit, such as sums due under an insurance policy (***Arab Bank plc v John Wood Commercial*** [2000] 1 WLR 857) or the proceeds of sale of a ship which had been redelivered two years before the charterparty ended: ***The New Flamenco*** [2017] 1 WLR 2581.

AIFC Reg 17: Agreed payment for non-performance

“21.

(1) If the contract provides that a party who does not perform is to pay a specified amount to the aggrieved party for non-performance, the aggrieved party is entitled to that amount irrespective of the party’s actual loss.

(2) However, despite any agreement to the contrary, the specified amount may be reduced to a reasonable amount if it is manifestly disproportionate to the loss envisaged as capable of resulting from the non-performance and to the other circumstances.”

See also AIFC No 3 section 122

Agreed damages and penalties

Paraphrased from A Burrows, *Restatement of the English Law of Contract* (OUP 2016) s. 23 and see *Cavendish Sq Holding v Talal El Makdessi* and *ParkingEye Ltd. v Beavis* [2015] UKSC 67

- A sum stipulated in the contract as the damages payable in the event of breach will be payable (as 'liquidated damages') instead of damages assessed by the court only if the stipulated sum is not a penalty (which is unenforceable).

- The stipulated sum is not a penalty if, judged at the time of the making of the contract, it is not out of all proportion to a legitimate interest of the claimant in the performance of the contract (so that, in particular, a genuine pre-estimate of the claimant's loss from the breach is not a penalty). A term which requires a sum to be paid on an event other than breach cannot be a penalty.

Penalties and forfeiture

Paraphrased from A Burrows, *Restatement of the English Law of Contract* (OUP 2016) s. 23

- A a term which in the event of breach requires the defendant to do something other than to make a stipulated payment (for example, to transfer shares); or allows the claimant not to pay the defendant a sum that would otherwise be owed will be unenforceable for being a penalty if it is out of all proportion to a legitimate interest of the claimant in the performance of the contract.

- A term which allows the claimant, in the event of the defendant's breach, to take away ('forfeit') from the defendant a personal right to the repayment of money, or a proprietary or possessory right may be unenforceable or the defendant may otherwise be granted relief against forfeiture (for example, by being given further time for payment).

Consequences of *Force majeure*

- A contracting party whose non-performance is due to an impediment beyond its control which could not reasonably have been taken into account at the time of the contract is excused or, if the impediment is temporary, is excused for a period that is reasonable having regard to the effect of the impediment: AIFC Contract Regs. section 82(1)(2)

- But a party who is obliged to pay money and does not do so may be required to pay notwithstanding section 82: AIFC Contract Regs. section 83

- At common law whether a *force majeure* clause suspends or terminates performance and whether it provides a mechanism for allocating past losses/expenses or those which will be incurred depends on the construction of its terms.

AIFC Reg. No 17 PART 5: RESTITUTION

48. Right to restitution

Restitution is available if:

(a) the remedy is expressly provided by the AIFC Contract Regulations; or

(b) there has been unjust enrichment of a party at the expense of another party and there has been no subsequent change in the position of the enriched party that would make it unjust to order the enriched party to restore the benefits received.

49. Damages instead of restitution

If the Court decides that restitution is not available, the Court may award the injured party damages sufficient to put the injured party in the same position the party would have been in if the conduct giving rise to the loss had not happened.

Recovery of money paid at common law

The innocent party: may recover money paid under the contract provided the contract has been discharged by the breach and the consideration for the payment has totally failed: ***Kwei Tek Chao v British Traders & Shippers*** [1954] 2 QB 459, 475

The party in breach: recovery depends on the construction of the contract and the purpose for which the money is required. If the payment:

- is merely an advance payment of the price it is recoverable less any damages suffered by the payee: ***Dies v British and International Mining*** [1939] 1 KB 724
- is a deposit and security for performance it is generally irrecoverable unless it is a penalty which it would be unconscionable for the payee to retain: ***Cavendish Sq. Holding BV v El Makdessi*** **and** ***PArkingEye Ltd v Beavis*** [2015] UKSC 67

Recompense for Goods and Services

The innocent party: where the person providing the services or goods has no accrued right to payment under the contract the innocent party may recover the reasonable value of the services or goods provided the contract has been discharged by the breach. Such recompense is not limited to a pro-ration of the contract price, it may be a more favourable remedy than damages: ***Mann v Paterson Construction*** [2019] HCA 32.

The party in breach: has no entitlement to restitutionary recompense except possibly where the other party freely accepted the goods or services: ***Sumpter v Hedges*** [1898] 1 QB 673.

Restitution following frustration of contract

Where a contract is discharged for frustration in English Law:-

(a) money paid is recoverable and money payable ceases to be payable, but the court may allow a deduction where the payee has incurred expenses

(b) where a valuable benefit has been conferred before the frustrating event the court may order a suitable sum to be paid.

LR (Frustrated Contracts) Act 1943 s. 1(2) and 1(3)

BP Exploration (Libya) v Hunt (No. 2) [1979] 1 WLR 783, [1983] 2 AC 352

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