



# **REGULATIONS ON DAMAGES AND REMEDIES**

**AIFC REGULATIONS No. 17 of 2017**

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Astana, Kazakhstan**



**CONTENTS**

**PART 1: GENERAL**

- 1. Name**
- 2. Date of enactment**
- 3. Commencement**
- 4. Legislative authority**
- 5. Application of these Regulations**
- 6. Interpretation**

**PART 2: DAMAGES UNDER AIFC CONTRACT REGULATIONS**

- 7. Application of Part 2**
- 8. Right to damages**
- 9. Entitlement to full compensation**
- 10. General measure of damages**
- 11. Certainty of loss**
- 12. Foreseeability of loss**
- 13. Proof of loss by replacement transaction**
- 14. Proof of loss by current price**
- 15. Loss for which aggrieved party partly responsible**
- 16. Mitigation of loss**
- 17. Interest for Failure to pay amount**
- 18. Interest on damages**
- 19. Awards of damages**
- 20. Currency in which damages to be assessed**
- 21. Agreed payment for non-performance**
- 22. Limitation period for breach of contract Action**

**PART 3: DAMAGES UNDER AIFC REGULATIONS ON OBLIGATIONS**

- 23. Right to damages**
- 24. Right to full compensation**
- 25. General measure of damages**
- 26. Personal injury**
- 27. Certainty of loss**
- 28. Foreseeability of loss**
- 29. Loss for which injured party partly responsible**
- 30. Mitigation of loss**
- 31. Prohibition of double recovery: contribution**
- 32. Interest on damages**
- 33. Awards of damages**

**PART 4: REMEDIES**

**CHAPTER 1: GENERAL**

- 34. Remedies provided by these Regulations**
- 35. Other orders**

**CHAPTER 2: INTERIM REMEDIES**

- 36. Orders for interim remedies**

**CHAPTER 3: OTHER REMEDIES**



- 37. Declarations**
- 38. Injunctions**
- 39. Specific performance**
- 40. Damages as additional or substitute remedy etc.**
- 41. Accounts etc.**

**CHAPTER 4: ENFORCEMENT OF ORDERS AND JUDGEMENTS**

- 42. Powers of Court**
- 43. Charging orders and orders for sale**
- 44. Attachment of debts**
- 45. Execution against property**
- 46. Appointment of receiver**
- 47. Examination of judgement debtor**

**PART 5: RESTITUTION**

- 48. Right to restitution**
- 49. Damages instead of restitution**

**SCHEDULE 1: INTERPRETATION**



**PART 1: GENERAL**

**1. Name**

These Regulations are the *AIFC Regulations on Damages and Remedies 2017*.

**2. Date of enactment**

These Regulations are enacted on the day they are approved by the Governor.

**3. Commencement**

These Regulations commence on 1 January 2018.

**4. Legislative authority**

These Regulations are adopted by the Governor under article 4 of the Constitutional Statute and subparagraph 3) of paragraph 9 of the Management Council Resolution on AIFC Bodies.

**5. Application of these Regulations**

These Regulations apply within the jurisdiction of the AIFC.

**6. Interpretation**

Schedule 1 contains definitions used in these Regulations.



**PART 2: DAMAGES UNDER AIFC CONTRACT REGULATIONS**

**7. Application of Part 2**

This Part applies to a contract to which the AIFC Contract Regulations apply.

**8. Right to damages**

Any non-performance gives the aggrieved party a right to damages against the non-performing party either exclusively or in conjunction with any other remedies, unless the non-performance is excused under the AIFC Contract Regulations.

**9. Entitlement to full compensation**

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.

**10. General measure of damages**

Subject to the limitations provided by this Part, the aggrieved party has a right to damages as measured by:

- (a) the loss in the value to the aggrieved party of the non-performing party's performance caused by the non-performing party's Failure or deficiency; plus
- (b) any other loss, including incidental or consequential loss, caused by the non-performance; less
- (c) any cost or other loss that the aggrieved party has avoided by not having to perform.

**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.

**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.

**13. Proof of loss by replacement transaction**

If the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable way, the aggrieved party may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further loss. The aggrieved party is not liable to the non-performing party if a difference between the 2 prices negates part of the loss.

**14. Proof of loss by current price**



- (1) This section applies if the aggrieved party has terminated the contract and has not made a replacement transaction, but, at the time the contract is terminated, there is a current price for the contracted performance.
- (2) The aggrieved party may recover the difference between the contract price and the current price, as well as damages for any further loss.
- (3) For this section, the *current price* is the price generally charged, at the time the contract is terminated, for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no such price at that place, the current price at another place that appears reasonable to take as a reference.

### **15. Loss for which aggrieved party partly responsible**

If the loss is partly as a result of an act or omission of the aggrieved party or to another event for which the aggrieved party bears the risk, the amount of damages must be reduced to the extent that these factors have contributed to the loss, having regard to the conduct of each of the parties.

### **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.

### **17. Interest for Failure to pay amount**

- (1) If a party does not pay an amount when it falls due, the aggrieved party is entitled to interest on the amount from the time payment is due to the time of payment, whether or not the non-payment is excused.
- (2) The rate of interest payable is the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment.
- (3) However, subject to section 12 (Foreseeability of loss), the aggrieved party is entitled to additional damages if the non-payment caused the party a greater loss.

### **18. Interest on damages**

Unless otherwise agreed between the parties, interest on damages for non-performance of obligations accrues from the time of non-performance.

### **19. Awards of damages**

Damages, including interest on them, are to be awarded in a lump sum.

### **20. Currency in which damages to be assessed**

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the loss was suffered, or in a combination of the two, whichever is more appropriate.

### **21. Agreed payment for non-performance**

- (1) If the contract provides that a party who does not perform is to pay a specified amount to the



## AIFC DAMAGES AND REMEDIES REGULATIONS

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.

### **22. Limitation period for breach of contract Action**

- (1) An Action for non-performance of contract must be commenced within 6 years after the cause of action arises. However, the parties may, by their original agreement, reduce the period of limitation to not less than 1 year but may not extend it.
- (2) The cause of action arises when the non-performance happens, irrespective of the aggrieved party's lack of knowledge of the non-performance. However, if the non-performance is or is combined with fraud, the cause of action arises when the aggrieved party discovers the non-performance.



**PART 3: DAMAGES UNDER AIFC REGULATIONS ON OBLIGATIONS**

**23. Right to damages**

The Breach of an obligation under the AIFC Regulations on Obligations gives the injured party a right to damages from the liable party to compensate the injured party for the losses, monetary and non-monetary, suffered as a result of the Breach. The right to damages can either be exclusive or in conjunction with other remedies.

**24. Right to full compensation**

The injured party is entitled to full compensation for loss suffered as a result of the Breach of the obligation under the AIFC Regulations on Obligations.

**25. General measure of damages**

The injured party has a right to damages as measured by the amount that would put the injured party in the same position as the party would have been in if the party had not suffered the wrong for which the party is to be compensated, plus any other loss caused by the Breach of the obligation under the AIFC Regulations on Obligations.

**26. Personal injury**

For personal injury, the injured party has the right to damages for non-monetary loss as measured by the amount that is fair and reasonable to compensate the injured party for the loss suffered.

**27. 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.

**28. Foreseeability of loss**

- (1) Subject to subsection (2), the liable party is liable for loss that is of a kind that a reasonable individual could reasonably have foreseen as a consequence of, and at the time of the commission of, the acts or omissions of the liable party.
- (2) In relation to that kind of loss, the liability is:
  - (a) for monetary damage—for the damage so far as it could reasonably have been foreseen; and
  - (b) for physical damage—for the full extent of the damage, whether foreseeable or unforeseeable in its extent.

**29. Loss for which injured party partly responsible**

- (1) If the loss is partly as a result of an act or omission of the injured party or to another event for which the injured party bears the risk, the amount of damages must be reduced to the extent that these factors have contributed to the loss, having regard to the conduct of each of the parties.





- (2) This section does not apply to:
  - (a) liability for deceit; or
  - (b) wrongful interference with property.

**30. Mitigation of loss**

- (1) The liable party is not liable for loss suffered by the injured party to the extent that the loss could have been reduced by the injured party taking reasonable steps.
- (2) The injured party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.
- (3) The injured party may not increase the damages claimed by the injured party's own unnecessary conduct subsequent to the Breach of obligation.

**31. Prohibition of double recovery: contribution**

- (1) If the Breach of the obligation under AIFC Regulations on Obligations gives rise to liability on the part of 2 or more liable parties, and the injured party has recovered an amount from a liable party or liable parties, then, in an Action commenced by the injured party against the other liable party or other liable parties, the Court must reduce any award to the injured party to the extent that it considers appropriate to take account of the amount recovered by the injured party and may if it considers that to do so is reasonable and appropriate, order the other liable party or other liable parties to reimburse the liable party or parties who have already made payment to the injured party.
- (2) This section does not affect the injured party's rights (if any) to recovery based on the joint and several liability of the liable parties (or some of them).

**32. Interest on damages**

Unless otherwise agreed between the parties, interest on damages for the Breach of the obligation under the AIFC Regulations on Obligations accrues from the time of Breach.

**33. Awards of damages**

Damages, including interest on them, are to be awarded in a lump sum.



PART 4: REMEDIES

CHAPTER 1: GENERAL

34. Remedies provided by these Regulations

If these Regulations provide that a Person may claim or otherwise has a right to or is entitled to compensation, damages, restitution, specific performance, or any other relief or remedy, the Court may, on application made by the Person, make orders accordingly, together with any other order that the Court considers appropriate, unless the making of any particular order is excluded under these Regulations or any other AIFC Regulations or any AIFC Rules.

35. Other orders

- (1) If a Person commits a Breach of any requirement, direction, duty, prohibition, responsibility or obligation (however described) that is imposed by or under any AIFC Regulations or AIFC Rules, the Court may, on application of any Person who is aggrieved by the conduct or has suffered loss or damage caused by the conduct, make 1 or more of the following:
  - (a) an order for damages;
  - (b) an order for compensation;
  - (c) an order for restitution;
  - (d) an order for specific performance of a contract or part of a contract;
  - (e) a declaration of the rights, liabilities and obligations of a Person;
  - (f) an injunction;
  - (g) any other order that the Court considers appropriate.
- (2) If a Person (the *relevant Person*) has engaged, is engaging, or is proposing to engage, in conduct that was, is or will be a Breach of any AIFC Regulations or AIFC Rules, the Court may, on application of any Person who is or will be aggrieved by the conduct, make 1 or more of the following orders:
  - (a) an order restraining the relevant Person from re-engaging, continuing to engage or engaging in the conduct;
  - (b) an order requiring the relevant Person to do, or not do, anything, including, for example, anything for the purpose of preventing or minimising likely or possible loss or damage;
  - (c) any other order the Court considers necessary for the purpose of:
    - (i) preventing the Breach or its reoccurrence or continuation; or
    - (ii) preventing the relevant Person from profiting from the Breach or its reoccurrence or continuation (or from Contravening the law with impunity), or
    - (iii) otherwise avoiding an unjust result.
- (3) The Court may make an order under this section in addition to, or as an alternative to, any other order that it is authorised to make, or any remedy that it is authorised to give, under any AIFC Regulations or AIFC Rules, except so far as any AIFC Regulations or AIFC Rules otherwise



provide.

**CHAPTER 2: INTERIM REMEDIES**

**36. Orders for interim remedies**

- (1) The Court may grant the following interim remedies:
  - (a) an interim injunction;
  - (b) an interim declaration;
  - (c) an order for the detention, custody or preservation of relevant property;
  - (d) an order for the inspection of relevant property;
  - (e) an order for the sale of relevant property if the property is of a perishable nature or it is desirable for another reason to sell the property quickly;
  - (f) an order for the payment of income from relevant property until the claim or Action is decided;
  - (g) an order authorising a Person to enter onto or into any land or premises in the possession of a party to the proceeding to carry out an order mentioned in paragraphs (c) to (f);
  - (h) an order restraining a party from removing property from the Republic of Kazakhstan;
  - (i) an order restraining a party from dealing with any property, wherever located;
  - (j) an order directing a party to provide information about the location of relevant property or to provide information about relevant property that is or may be the subject of an application for a freezing injunction;
  - (k) an order requiring a party to admit another party to land or premises for the purpose of preserving evidence;
  - (l) an order for disclosure of documents or inspection of property before a claim has been made or an Action commenced;
  - (m) an order for disclosure of documents or inspection of property against a non-party;
  - (n) an order for payment by a defendant on account of any damages, debt or other amount (except costs) that the Court may hold the defendant liable to pay;
  - (o) an order for a specified fund to be paid into court or otherwise secured, if there is a dispute over a party's right to the fund;
  - (p) an order permitting a party seeking to recover personal property to pay an amount into court pending the outcome of the claim or Action and directing that, if the party does so, the property is to be given up to the party;
  - (q) an order directing a party to prepare and file accounts relating to the claim or Action;
  - (r) an order directing any account to be taken or inquiry to be made by the Court;
  - (s) any other remedy provided by any AIFC Regulations or AIFC Rules.



(2) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

(3) In this section:

*relevant property* means property that is the subject of a claim or Action or in relation to which any question may arise on a claim or in an Action.

### **CHAPTER 3: OTHER REMEDIES**

#### **37. Declarations**

The Court may make binding declarations on points of law or fact, whether or not any other remedy is claimed.

#### **38. Injunctions**

(1) The Court may, by order, grant an injunction in all cases in which it appears to the Court to be just and convenient to do so, including an order:

(a) restraining a party from doing a particular act (either for a specified period or indefinitely);  
or

(b) compelling a party to do an act within a specified period.

(2) An order under subsection (1) may be made either unconditionally or on the terms and conditions the Court considers just.

#### **39. Specific performance**

(1) The Court may order a party to a contract to perform the party's contracted obligations if:

(a) the obligations to be performed are specific or the subject matter of the obligations is specific; and

(b) the Court decides that damages are unquantifiable or are not a sufficient remedy.

(2) Contracts for personal services may not be specifically enforced.

(3) An order for specific performance may be made together, or in combination, with any other order that the Court considers appropriate to make.

#### **40. Damages as additional or substitute remedy etc.**

If the Court has jurisdiction to decide an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

#### **41. Accounts etc.**

(1) The Court may, at any time, order that an account be taken in relation to any party and that any amount certified on taking the account be paid to the other party within the period specified by the Court.

(2) The Court may give the directions that it considers appropriate in relation to the taking of accounts.



- (3) The Court may order immediate payment of a party's share in a fund even though the identity of some of the Persons entitled to share the fund have not been ascertained.

### CHAPTER 4: ENFORCEMENT OF ORDERS AND JUDGEMENTS

#### 42. Powers of Court

- (1) Without limiting or otherwise affecting any other remedy available to the Court under any other AIFC Regulations or any AIFC Rules, a judgement or order may be enforced by the following means:
  - (a) a charge over property;
  - (b) attachment of property (whether present or future);
  - (c) execution against property;
  - (d) appointment of a receiver.
- (2) The Court may use the powers under subsection (1)(a) to (d) in the combination that it considers appropriate in the interests of justice.

#### 43. Charging orders and orders for sale

- (1) The Court may make an order (a *charging order*) restraining dealings with any property (including real property) owned or co-owned by a judgement debtor, and located in the AIFC, if satisfied that:
  - (a) there is a final judgement or order that is unpaid by the judgement debtor; and
  - (b) the judgement or order is for a liquidated amount.
- (2) A charging order may be enforced by the Court on application by the judgement creditor for an order for the sale of all or part of the charged property.
- (3) A charging order must not be enforced against a judgement debtor for 28 days after the day it is served on the judgement debtor. During the 28-day period, the judgement debtor may challenge the order or its terms.
- (4) A charging order is discharged on satisfaction of the judgement or order for which it was made or on further order of the Court.

#### 44. Attachment of debts

- (1) The Court may order the judgement debtor to pay to the judgement creditor the amount of any debt owing to the judgement debtor by a third party, including, for example, credit balances with a bank or other deposit-taking institution in the AIFC.
- (2) The Court may attach debts expected to become owing at some time in the future.

#### 45. Execution against property

- (1) The Court may order the seizure and sale of the judgement debtor's property wherever located sufficient to satisfy the judgement debt, interest on the judgement debt, and the costs of enforcement.
- (2) However, an order must not be made under subsection (1) in relation to any of the following:



- (a) real property;
  - (b) money and banknotes;
  - (c) personal belongings;
  - (d) tools of the judgement debtor's trade;
  - (e) goods that are co-owned, or are in the hands of an administrator, executor, liquidator, or receiver, (however described).
- (3) The sale of the property must be by public auction or in any other way the Court decides is appropriate.

**46. Appointment of receiver**

The Court may appoint a receiver to execute any judgement or order of the Court, having regard to the cost of appointing the receiver, the amount owed, and the likelihood of making a substantial recovery.

**47. Examination of judgement debtor**

The Court may order the judgement debtor to attend court and be orally examined on the judgement debtor's assets and liabilities, and the Court may also order the production of any documents in the judgement debtor's possession relevant to the examination.



**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.



SCHEDULE 1: INTERPRETATION

1. **Definitions for these Regulations**

In these Regulations:

**Action** includes counterclaim and set-off.

**AFSA** means the Astana Financial Services Authority.

**AIFC** means the Astana International Financial Centre.

**AIFCA** means the Astana International Financial Centre Authority.

**AIFC Regulations** means regulations adopted by the Management Council or the Governor, and includes, for example, these Regulations.

**AIFC Rules** means rules adopted by the Board of Directors of the AFSA, the Board of Directors of the AIFCA or the Governor.

**Breach** includes Contravene.

**Constitutional Statute** means the Constitutional Statute of the Republic of Kazakhstan dated 7 December 2015 *On the Astana International Financial Centre*.

**Contravene** includes Fail to comply with.

**Court** means the Astana International Financial Centre Court.

**Fail** includes refuse.

**Governor** means the Governor of the Astana International Financial Centre.

**Management Council** means the Management Council of the Astana International Financial Centre.

**Management Council Resolution on AIFC Bodies** means *The Structure of the Bodies of the Astana International Financial Centre*, adopted by resolution of the Management Council on 26 May 2016, as amended by resolution of the Management Council, *The Amendments and supplementations to the Structure of the Bodies of the Astana International Financial Centre*, adopted on 9 October 2017.

**Person** includes any natural person or incorporated or unincorporated body, including a company, partnership, unincorporated association, government or state.