**Contracts: remedies**

**Reading** 1: Introduction to contract remedies

The concept of damages is central to the topic of contract remedies. *Damages* can be defined as 'money awarded by a court in compensation for loss or injury', The term should not be confused with the word damage, which means 'loss or harm which is actionable in law'

* 1. Read the first two paragraphs of the text. Which of the key terms in the second paragraph is a synonym for *damages*?
  2. Read through the whole text quickly and decide whether these statements are true or false.

1 According to the foreseeability rule, damages are awarded when it can be proven that harm or injury could have been seen or known in advance by the breaching party when the agreement was made.

1. Reliance damages are recovered when the breaching party is forced to give up profits it acquired under the breached contract.

3 Exemplary damages are collected from the breaching party as a kind of punishment for particularly objectionable behaviour

When there has been a breach of contract, the non-breaching party will often seek remedies available under the law. This area of the law, known as 'remedies'. is a broad area, but can be summarised generally.

Most remedies involve money damages, but non-monetary relief is also available in some cases. The basic remedy for breach of contract in the Anglo-American legal system is pecuniary compensation to an injured party for the loss of the benefits that party would have received had the contract been performed. Some examples of this kind of remedy include expectation damages or 'benefit of the bargain' damages. Certain damages are recoverable regardless of whether the loss was foreseeable, while the recovery of other damages hinges on foreseeability. Where the damage is the direct and natural result of the breach, the breaching party will be held liable to pay damages for such without regard to the issue of foreseeability. When lawyers plead these damages in court, they commonly refer to general damages. However, where the damage arises due to the special circumstances related to the transaction in question, damages are limited by the foreseeability rule, which states that they are only recoverable when it can be established that the damage was foreseeable to the breaching party at the time the contract was entered into. When lawyers plead these damages in court, they commonly refer to special or consequential damages.

Where it is not possible to prove expectation damages, the non-breaching party can seek reliance damages, where the compensation is the amount of money necessary to compensate him for any expenses incurred in reasonable reliance on the contract. The non-breaching party is thus returned to the status quo ante with no profit or benefit from the contract.

Another measure of damages is restitution damages, which compel the breaching party to give up any money benefit it obtained under the breached contract. Restitution damages are, for example, awarded when one party (the breaching party) completely fails to perform its obligations under the contract.

The parties to a contract may, however, agree at the time they enter into the contract that a fixed sum of money shall be awarded in the event of a breach or to a formula for ascertaining the damages or for certain other remedies, e.g. right of repair. This type of damages is known as liquidated damages or stipulated damages.

In some cases, a party will be able to obtain punitive or exemplary damages through the court which are designed to punish the breaching party for conduct which is judged to be particularly reprehensible, e.g, fraud. This type of damages is normally only awarded where specifically provided by statute and where a tort in some way accompanies the breach of contract.

Where monetary damages would not be an adequate remedy, such as in a case where the parties contract for a portrait by a famous painter, but the portrait is painted by an inferior artist, the court may order specific performance. Specific performance involves an order by the court compelling the breaching party to perform the contract.

Finally, there are other remedies available, including the right to rescind or cancel the contract in the event of certain kinds of default by the other party. This constitutes an undoing of the contract from the very beginning. In addition, legislation such as sale of goods legislation also allows for various remedies, including a right to reject goods in certain cases and a right to return or demand repair or replacement.

**Key terms: Types of damages**

**Match** these types of damages (1-7) with their definitions (a-g).

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| 1. expectation damages / 'benefit of the bargain' damages | 1. compensation agreed upon by the parties and set forth in the contract that must be paid by one or the other in the event that the contract is breached |
| 1. general/actual damages | 1. compensation determined by the amount of benefit unjustly received by the breaching party |
| 1. liquidated/stipulated damages | 1. compensation for losses which are as a result of special facts and circumstances relating to a particular transaction which were foreseeable by the breaching party at the time of contract |
| 1. reliance damages | 1. compensation which seeks to put the non-breaching party in the position he would have been had the contract been performed |
| 1. restitution damages | 1. compensation for a loss that is the natural and logical result of the breach of contract |
| 1. special/consequential damages | 1. compensation which is imposed by the court to deter malicious conduct in the future |
| 1. punitive/exemplary damages | 1. compensation necessary to reimburse the non-breaching party for efforts expended or expenses incurred in the reasonable belief that the contract will be performed |

**Listening A: A Danish remedy**

Remedies for breach of contract and their enforcement differ from jurisdiction to jurisdiction. You will hear a law student talking about a type of remedy in Denmark as part of a university seminar on contract remedies in Europe.

1. Listen to the first part of the student’s talk. Decide whether these statements are true or false.

1 Specific performance means that the breaching party is ordered to fulfil the original obligations of the contract.

2 Specific performance can be applied in all breach of contract cases.

3.When the court grants an order for specific performance, the breaching party always complies.

4. The non-breaching party who files a claim for specific performance is usually awarded money as damages from the judicial enforcement agent.

**B**. Listen to the rest of the talk and complete the notes about the five situations where specific performance can be applied. using no more than three words in each space.

1 Goods already ………………

2 Goods procured from ………………..

3 Only a………………….. is needed

4 Involves…………………. of pledged security

5 When breaching party needs to be stopped from performing acts that are …………………….. to non-breaching party

**Using repetition to aid understanding**

The speaker in the previous listening exercise uses an effective technique for making information easier for her listeners to understand: repetition. People listening to complex information in a foreign language often have trouble understanding everything. In real-life speaking situations, listeners cannot go back to something they missed and listen to it again. Experienced speakers know this. and therefore repeat words and ideas (often in the form of a paraphrase) in order to aid understanding.

Read this excerpt from the transcript of the law student's presentation. Underline important words that are repeated more than once, as well as any paraphrases of ideas which serve to repeat a previous idea.

The whole system works like this: the court must first determine whether an order for specific performance should be granted. Of course, the breaching party can do two things: either comply or not comply with the order. In other words. the defaulting party either takes the action necessary to perform the contract or he doesn't. If he doesn't, the other party can decide to go to the judicial enforcement agent. This judicial enforcement agent is called the *foged* in Denmark. A *foged* is similar to the bailiff. He basically fulfils the functions of a bailiff. The Danish Code of Procedure 17 regulates what the *foged* has to do. This code stipulates that the *foged* can convert the plaintiff's claim into money damages. So, in reality. most claims for which specific performance is granted are converted into money damages.

**Listening B: Remedies**

You are going to hear a dialogue in which an attorney, Mrs Hayes, is consulted by a client, Mr Anderson, who has been having difficulties in connection with a contractual agreement, In order to establish the facts of the case, the attorney asks a number of questions. She also informs the client about the various remedies which may be available to him.

**Listen** to the first part of the lawyer-client interview and answer these questions:

1. Why couldn't the client deliver the website to the customer on time?

2. What was the client forced to do so that he could deliver the website?

**Listen** to the second part of the interview and answer these questions.

1. According to the lawyer, what should her client have done to mitigate his damages?

2. What is the lawyer going to do next?

**Listen** to both parts again and tick the questions asked by the lawyer.

1 Did they not deliver on time or did they deliver something that didn't work?

2 What are some of the features of the website you designed?

1. Did you draft the contract yourselves or did you engage an attorney?
2. Were you able to deliver your website on time?
3. Did you get in touch with anyone besides your cousin, say, another programmer here in town?
4. How much do programmers get paid per hour in New York?
5. Did they know what your deadline was?
6. Do you expect to lose the customer as a result of this?

**Choose** the correct answer to each of these questions.

1.What was wrong with the software program delivered to the client?

**a** It was completed too late to meet the deadline

**b** It didn't work on all of the ferry company's PCs

**c** It wasn't designed in accordance with the specifications of the client.

2. Provided the contract doesn't waive the right to consequential damages, under which circumstances might the client be entitled to receive such damages?

**a** If the reputation of the client in his town suffers

**b** If the quality of the software turns out to be unsuitable for the purposes of the customer

**c** If the loss of the customer and the necessity to grant a discount could have been foreseen

3.Why can't the client expect to be awarded punitive damages?

**a** Weight gain does not qualify as emotional injury.

**b** Punitive damages are not awarded in a breach of contract case of this type.

**c** The possibility of personal injury was not foreseen in the contract.