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# How to draft and interpret Clauses on Consequential Damages

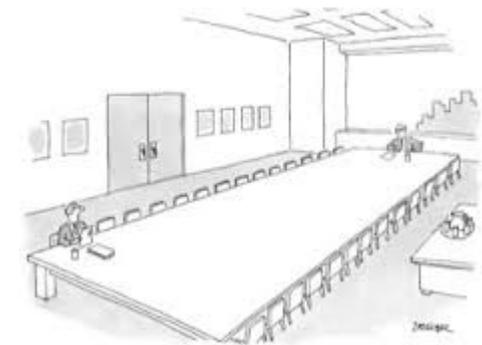
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# Types of contractual damages

- Breach of contract: what it means?
- Differentiation between damages and contractual penalties; compensatory and punitive damages.
- Direct damages and actual damage.
- Indirect damages; loss of profit.
- Consequential damages, consequential economic loss.
- Let's see how to overcome these differences?

**Note:** *direct damages immediately stem from the contractual breach, while consequential damages are still related to the breach but without a direct correlation.*



# Causal Link



## Notes:

- Causation required before consideration of appropriateness of claim, i.e. remoteness of loss
- Proof of causation requires demonstration of 'dominant cause or 'effective cause', but not necessarily the sole cause
- Court will apply a common sense test to establish 'effective cause' [Galoo v Bright Graham Murray [1994]]
- Degree of risk is a key consideration - mixture of factual cause and legal duty [March v Stramare [1991] HCA]

# Consequential damages in the loop

- When a party breaches a contract and the contract does not contain a valid liquidated damages clause, the non-breaching party may be entitled to compensatory damages.
- The appropriate measure of damages arising from a breach of an enforceable contract is usually “the difference between the value expected from the contract and the value actually received by the non-breaching party.”
- The degree of proof as to the amount of consequential damages is higher than for direct damages. **Consequential damages must also be documented with greater specificity.**
- The plaintiff has the burden of proving that the damages are not only the proximate consequence of the breach, but that they were also “reasonably foreseeable” or within the “contemplation of the parties” at the time the parties entered into the contract.”
- Once the non-breaching party establishes that the consequential damages it must then prove the amount in damages actually caused by the breach of contract, sometimes with “**reasonable certainty**.”
- Note: ***Loss of profit will not inherently be categorized as an “indirect or consequential loss” such that it may be caught by an exclusion clause for such losses. Financial losses, including loss of profit, which one would normally expect to flow from the breach, are likely to be classified as direct loss.***

# Consequential damages | Contracting

✓ Good to know:

- i. Different models of clauses.
- ii. Pros and cons.
- iii. Implementation.
- iv. Governing law issues.



Note:

Best practice, for contractors and principals alike, is to **ensure that the clause is clear and does not rely on undefined concepts** of “consequential loss” to capture the particular losses that should be excluded.

Commonly, the following kinds of loss are expressly excluded:

1. Loss of profit
2. Loss of use of any plant or facility
3. Loss of opportunity
4. Loss of goodwill
5. Special or punitive damages
6. Loss of contract.

# Consequential damages | Exclusions & Examples

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under:

## FIDIC 2017

- The main limitation on liability clause has now been moved from Sub-Clause 17.6 to Sub-Clause 1.15 (Silver Book Sub-Clause 1.14) – in part to indicate its importance and also to make it clear that it applies more generally and is not limited to the parties' indemnities.
- Carve-outs from the exclusion of liability for loss of profit/indirect and consequential loss have been expanded to include also now Delay Damages, Variations, and claims under the IP indemnities.
- A new carve out also exists for losses incurred following termination for convenience under what is now Sub-Clause 15.7, and also for losses incurred in respect of omissions of work to give it to third parties (see Section 9 above in this respect) – although there is still no carve out for the Employer's termination losses following a default based termination (even though there is for the Contractor's termination losses). Also gross negligence has been added to the list of issues in respect of which liability is uncapped.

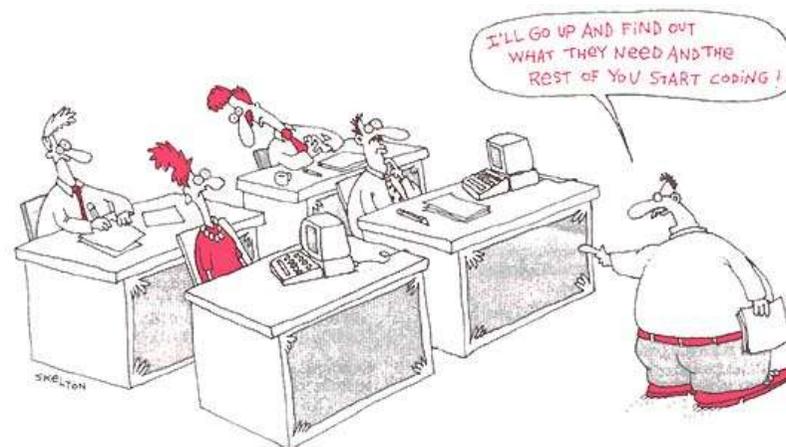
# Consequential damages | Exclusions & Examples

## SUPPLY CONTRACT

- Notwithstanding any other provision of this Supply Contract, the Supplier's total aggregate liability to the Company arising under, out of or in connection with this Supply Contract, the delivery or non-delivery of the Goods [...] shall (to the extent permitted by Law) be limited and excluded as follows:
  - (i) (except as provided for in clause [...]) the Supplier shall have no liability whatsoever to the Company for Consequential Loss [...]
- For the purpose of this clause, "Consequential Loss" means any:
  - (i) Loss arising from business interruption (including any standstill costs), loss of revenue, loss of production, loss of opportunity, loss of product, loss of contract or loss of profit; or
  - (ii) indirect, special or consequential loss or damage as described in the second limb of Hadley v Baxendale [1854] EWHC Exch 170;

Note: Outcome of Hadley v Baxendale, the Court found for the defendant, viewing that a party could only successfully claim for losses stemming from breach of contract where the loss is **reasonably viewed to have resulted naturally from the breach**, or where the fact such losses would result from breach **ought reasonably have been contemplated of by the parties when the contract was formed**.

Thank you!



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