

CHAPTER TEN

REMEDIES

10.1 Introduction

This text has discussed when contracts are enforceable (Chapters 1-7), how courts interpret what contracts mean (Chapter 8), and how courts analyze the performance of contracts (Chapter 9). It is now time to explain what courts resolving a contract dispute might actually do if they decide that some court action is appropriate in order to achieve justice, and what they might allow the parties to do, in order to give effect to the ideas discussed in Chapters 1-9. The options courts and parties have if they do decide to act in response to a legal problem are called remedies.

When there is a contract dispute or problem, the law gives courts and parties a number of potential remedies. It also provides many guidelines for when the remedies can be used. Of course, a court may decide that it should take no action at all in response to a contract dispute! That would be the proper response if a court finds that the claim or claims brought to it have no merit. But if the court decides that a claim about which it is deciding does have merit, and that some action is appropriate, then there are a number of things the court may do. What action is appropriate depends on the situation.

This Section will try to provide a general overview of the types of remedies courts may order or allow, and of some important limits on the power of the courts to order remedies. The two main groups of remedies available to a court deciding a contract dispute are:

- (1) money damages, and
- (2) non-monetary remedies.

Probably the most common type of remedy that common law courts deciding contract disputes order is money damages.

***** DEFINITION: Money damages** is an amount of money that a court or arbitrator orders one party to a legal dispute to pay to another party to the dispute because of some injury or loss the first party caused to the second party.

In contract disputes, money damages are generally designed to compensate injured parties for the harm they have suffered. They are not usually intended to penalize parties. And there are a number of different types of money damages a court may order.

Probably the damages remedy that is most often appropriate is expectation damages. These are damages which try to put the injured party in the position she would have occupied if parties had properly performed the contract or promise in dispute. The goal of expectation damages is to try to give the injured party the “benefit of her bargain.” Expectation damages are discussed in Section 10.2, below.

If expectation damages are not appropriate, courts may instead order reliance damages. These are damages that try to put the injured party back in the position she occupied before a contract or promise was made. Reliance damages are discussed in Section 10.3.

In appropriate situations, courts may choose to order that a party pay restitution damages. Restitution, as discussed in previous Chapters, tries to compensate the injured party for the value of a benefit she has given to another party, in order to prevent unjust enrichment. It is often used in quasi-contract situations. Restitution damages are discussed in Section 10.4.

Although the three types of damages described above are the most common, courts may choose to order other types of damages in particular situations. Courts may order a party to pay stipulated (liquidated) damages where the contract itself describes the damages to be paid for a breach, although there are limits on courts’ ability to enforce such contract terms. Courts may order a party to pay nominal damages where a breach has occurred but no real harm has been proved. Courts in many jurisdictions will also order a party to pay interest on the damages from the time of the court’s judgment until the judgment is paid. And courts may in certain situations even order parties to pay interest on the damages from the time of a breach! But courts deciding contract disputes--especially in common law jurisdictions--generally do not order that a party pay punitive damages because of a contract problem. Punitive damages are designed to punish parties for misconduct, rather than compensate the injured party for damage done to her. These other types of damages are discussed in Section 10.5.

There are several important general limits on the ability of courts to order parties to pay money damages to other parties where there is a contract dispute. These limits are designed to ensure that courts generally do no more than fairly compensate injured parties for the harm they have suffered. First, parties may generally recover only damages that they prove to the court with reasonable certainty. Second, parties can generally recover only damages that a reasonable person could have foreseen. Third, parties cannot recover damages that they could reasonably have avoided. These important limits may result in a big reduction in the amount of damages a party may recover--

or even result in the party not receiving any damages at all! These limits are discussed in Section 10.6

Courts may also order or allow non-monetary remedies in appropriate situations. That is, courts may order or allow parties to do things that do not involve paying damages to the other party to the dispute. First, courts may order specific performance of a contract, which means ordering a party to actually perform as she promised in the contract. This appears to be a common remedy in civil law jurisdictions. However, many common law jurisdictions only use this remedy in the limited situation where damages are inadequate and the courts believe they can adequately enforce the order. This generally occurs only in contracts for the sale of land or unique goods. Courts may also order rescission, which basically means canceling the contract and providing the parties with restitution. Courts may order reformation or severance of a contract, which generally means enforcing a contract without some part that cannot be enforced because of a formation problem. And other non-monetary remedies may be available to courts and parties in particular situations, such as specific restitution (the return of the actual benefit given to a party); remedies specified in the contract itself; or the withholding of a performance because of the failure of a condition. These remedies are discussed in Section 10.7.

Remedies vary depending on the type of contract involved and the situation of the parties. Most particular situations cannot be fully discussed here, and it is important to check the local law to find out exactly which remedies courts in a jurisdiction may use in a certain type of situation. However, this Chapter will briefly examine which remedies may be available in disputes about sale of goods contracts, where courts find a quasi-contract, and where courts apply the doctrine of promissory estoppel (detrimental reliance). These types of remedies are discussed in Section 10.8.

Before this text discusses the potential remedies noted above, it is important to understand two essential limits on the ability of courts to act in contract disputes in free market jurisdictions. First, in free market jurisdictions, contract disputes are civil matters--not criminal matters. Courts have no power to impose criminal penalties in contract disputes.

Of course, if parties have also committed a separate crime in connection with a contract, they may be prosecuted for that crime. For example, if a party makes a contract to rob a bank and then robs the bank, the party may be prosecuted under the criminal statute that prohibits robbing banks. If a party commits criminal fraud, and the party happens to use contracts to commit that fraud, the party may be prosecuted under the criminal statute that prohibits fraud. And there are certain carefully defined criminal statutes, such as prostitution laws or trade laws, that may impose criminal penalties for making certain illegal contracts whose performance may threaten the safety or basic well-being of society. But parties in such cases are not prosecuted for making contracts. They are prosecuted for violating carefully defined

criminal statutes. It is generally not a crime to make an unenforceable agreement. And it is never a crime to breach a contract.

The second important limit on courts' ability to act in contract disputes is not really a limit that the law imposes, but a problem that the law cannot completely solve. In reality, where there is a contract dispute, the law often cannot fully compensate the parties for the harm caused by the contract problem involved, and by the dispute about the problem. Even if a court or arbitrator orders one party to pay damages to another party because of a breach of contract, the law can never fully compensate an injured party for the time that party has spent dealing with the problem and the legal action. This is time the party could have spent being productive in her work, or pursuing other worthwhile activities. Legal problems take that time away, and it cannot really be recovered. In addition, while some jurisdictions say that the losing party in a civil lawsuit must generally pay the attorneys' fees of the winning party, other jurisdictions generally say that each party must pay her own attorney, no matter who wins the dispute. So in those jurisdictions, that money cannot be recovered. And no one can truly compensate a party for the mental stress that may be caused by a legal problem and by litigation--which can seem like a war fought with words and paper! The fact is that the law cannot solve all problems. As noted in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.1c, law is only a basic tool that is generally more useful and fair than the alternative ways to resolve disputes, such as violence.

This limit on the ability of law to fully resolve contract disputes means that it is often a good idea to try to resolve contract disputes in a less adversarial way, and without the use of the courts. As also discussed in Chapter 1, Section 1.1c, alternative dispute resolution ("ADR") may reduce the effect of some of the problems discussed above. Important forms of ADR include negotiation, conciliation, mediation, and arbitration. But ADR can rarely solve such problems completely. In addition, ADR may not be possible in some situations, such as where one party is very stubborn. And it is not always a good idea. For example, ADR may not be appropriate where one party has much more power than the other party, and the powerful party refuses to reach a fair solution to the problem without the involvement of a court. Even so, ADR is usually worth considering for contract disputes.

***** WHY IS THIS IMPORTANT?** Why do the laws of free market jurisdictions say that criminal penalties are not generally possible in contract disputes?

The reason for this limit is that the law provides different remedies for different problems. Some problems are more serious than others, and some are simply different from others. So the law tries to provide a remedy that is fair and appropriate for the particular problem it is trying to solve. Of course, this is not always easy, and the law is not always successful.

The law does not generally view breaching a contract, or simply making an unenforceable contract, as causing such serious harm to society that it justifies depriving a person of her liberty or imposing criminal fines. In fact, most jurisdictions do not generally view such actions as being a moral wrong that is even serious enough to justify punitive damages! Of course, contracts are important, and contract disputes are important. But in free market jurisdictions, persons may face the kinds of penalties described above only for serious moral wrongs that actually threaten the safety or basic well-being of society. It appears that contract disputes rarely meet that standard. The law in most jurisdictions (particularly common law jurisdictions) says that contract remedies are generally designed to compensate the party harmed for the actual harm caused to her, rather than to punish the other party.

In fact, breaches of contract are not always viewed as very wrong at all. Some authorities say that, in certain situations, it may actually be better for parties to breach contracts if that will achieve greater economic efficiency and prosperity, and if that can be done without undue permanent harm to the injured party. For example, it might be argued that it would be better for a party to breach a contract and pay damages, if that would actually be more economically efficient overall than performing the contract. This might be the case because the breaching party can be more productive by performing a contract with a different party.

Of course, this view may seem unfair to parties injured by contract problems. As discussed above, it may not be possible to compensate such parties fully for the harm done to them. More contract breaches might also lead to a loss of faith in contracts. In fact, sometimes such breaches may even be considered "bad faith," which can actually be a tort in certain situations, as explained in Chapter 9 ("Performance and Discharge of Duties"), Section 9.5c, and Section 10.5d below. Perhaps the harm caused by breaches of contracts is too high a price to pay for some apparent increase in economic efficiency.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.1c discusses the limits of the law and alternative dispute resolution, and Section 1.4i contains a more concise discussion of remedies; and Chapter 9 ("Performance and Discharge of Duties"), Section 9.5c explains how bad faith breaches of contracts can actually be torts in certain situations.

10.2 Courts Often Order a Party to Pay Expectation Damages, Which Try to Put an Injured Party in the Position She Would Have Occupied If the Parties Had Fully Performed the Contract

In general, when there is a breach of a contract, many courts try to put the injured party in the position she would have occupied if the parties had fully performed the contract. In other words, courts try to measure the difference between what should have happened (complete performance) and what actually did happen (less than complete performance). They try

to determine the amount of money that will reflect this difference as closely as possible. Then they order the breaching party to pay the non-breaching party this amount of money. This amount is called the expectation damages.

***** DEFINITION: Expectation damages** are damages that try to place a party injured by a contract breach as close as possible to the position she would have occupied if the parties had fully performed the contract.

Expectation damages is the damages remedy that is probably chosen most often by courts where there is a breach of contract. This is because it generally comes closest to giving the injured party the “benefit of her bargain.” In fact, in most situations, common law courts first see if they can fairly award expectation damages. In these cases, such courts generally consider other potential remedies only if expectation damages cannot be awarded. Expectation damages cannot be awarded in every case, because of the limits on the award of damages, as will be explained later in this Section and in Section 10.6, below.

For example, suppose Samean and Vipheap make a contract under which Samean agrees to sell Vipheap a number of tables for \$1,000. If Samean delivers all the tables according to the contract, but Vipheap fails to pay any money for them, Vipheap has breached the contract. In this situation, the difference between what should have happened--Vipheap paid Samean \$1,000 and received all the tables--and what actually did happen--Vipheap paid \$0 and received all the tables--is \$1,000. This is because \$1,000 minus \$0 is \$1,000. These are the expectation damages--the amount needed to put Samean in the position he would have occupied if the contract had been fully performed. These are the damages most courts would award in this situation.

10.2a How to Calculate Expectation Damages

Not all cases are as simple as the example above. So many jurisdictions have developed a two-step process to help courts determine expectation damages in a variety of cases. In this process, these courts determine:

- (1) the value in money of the additional benefits the injured party would have received if the breaching party had fully performed;
- and (2) the value in money of how much the injured party saved (if any) because she was not required to perform her own duties under the contract.

To find the expectation damages, courts take the first number (the expected additional benefits), then subtract the second number (the amount saved, if any). The result is the expectation damages.

The second number above will take account of any other damages to the injured party that a court believes should be paid by the breaching party. These would include incidental damages for money the injured party had to

spend to find another party with whom to make a new contract to take the place of the old one. Of course, that kind of damages will actually reduce the second number, since it will reduce the amount that the injured party saved by not having to perform the breached contract.

For instance, in the table example above, the value of the additional benefits Samean expected was \$1,000, since the contract required Vipheap to pay him \$1,000, and Vipheap had paid \$0 of this amount. The amount Samean saved was \$0, since he actually did fully perform by providing all the tables under the contract. In this case, $\$1,000 \text{ minus } \$0 = \$1,000$. So \$1,000 is the expectation damages.

However, if Vipheap had actually paid some of the money to Samean, then the result would be different. Suppose Vipheap had paid Samean \$300. The court would first find the value of the additional benefits Samean expected. That would be $\$1,000 \text{ minus the } \$300 \text{ Vipheap paid, or } \$700$. Then the court would find how much Samean saved by not having to fully perform. This amount is still \$0, since Samean did fully perform. So the expectation damages in this situation are $\$700 \text{ minus } \$0 = \$700$. The court would order Vipheap to pay \$700 to Samean.

The process of calculating expectation damages will also differ where the court must calculate the value of a performance other than money. This will happen whenever a party whose performance is not the payment of money does not fully perform. This could occur because that party breaches, or because the other party breaches. The examples above were simple, because the party whose performance was not the payment of money (Samean) fully performed, by delivering the tables. But in other cases, the court will have to determine the value of a non-money performance that has not occurred. This may be necessary in order to determine the amount of additional benefits the non-breaching party expected, or the amount that party saved by not having to complete her performance. For instance, in the table example, this would occur if Samean did not deliver all of the tables, perhaps because Vipheap repudiated. In this kind of situation, it will be more complex for the court to determine how much a non-breaching party like Samean saved by not having to perform. This is because her savings are that part of the performance that she has not provided to the breaching party.

Different courts have different ways of calculating the value of a non-money performance. There are at least three different ways to do so. These ways are described below.

(1) Market Value at Time Non-Breaching Party Learned of Breach -- It appears that many courts generally use the market value at the time the non-breaching party learned of the breach to calculate the value of a non-money performance. In the table example, that would be the market value of Samean's performance (providing the tables) when Samean learned of

Vipheap's breach. That time might actually be before the time that performance was due, in the case of a repudiation.

(2) Market Value at Time Performance Due -- Some other courts use the market value at the time the performance being valued was due. In the table example, that would be the value of Samean's performance at the time it was due. This would seem to be a fairly accurate way to measure the damage to a party like Samean.

(3) Actual Value of Substitute Performance Non-Breaching Party Reasonably Finds -- Finally, some courts use the value of what the non-breaching party actually received when she reasonably found another performance to take the place of the breaching party's performance. In the table example where Samean did not deliver all the tables because of Vipheap's breach, this would be the amount Samean actually received when she re-sold the tables to someone else after the breach. Finding a substitute performance in this way is very common, since the non-breaching party can only recover damages she could not reasonably have avoided. A court will not award her money for damages she caused herself unnecessarily in order to punish the breaching party! This limit on damages will be further discussed in Section 10.6c, below.

Some jurisdictions have different rules about this problem for different kinds of contracts. For example, the Uniform Commercial Code ("UCC") in the United States says that, for sale of goods contracts, courts should use the third method (the actual substitute performance price) if a non-breaching party actually does find a substitute performance; the second method (the market value at the time performance was due) for a non-breaching seller who does not find a substitute performance; and the first method (the market price at the time the non-breaching party learns of the breach) for a non-breaching buyer who does not find a substitute performance. In fact, this split method may come closest to measuring the actual harm to the non-breaching party. Remedies in sale of goods contracts will be further discussed in Section 10.8a, below.

In order to see how these three different methods work, consider the table example above. Suppose Vipheap made an anticipatory repudiation of the contract one week before Samean was scheduled to provide the tables, Samean chose to treat this as a material breach, and Samean did not perform. So neither party performed at all. In that case, the court would first find the value of the additional benefits Samean expected. That amount would still be \$1,000 minus the \$0 Vipheap paid, or \$1,000.

Then the court would determine how much Samean saved by not having to fully perform. Under the first method described above, the court would use the market value at the time Samean learned of the breach in order to determine how much Samean saved. Suppose that value was \$850. In fact, a market value lower than the contract price is one reason a buyer like Vipheap

might repudiate a contract like this. The reason is that, in that situation, Vipheap could have found someone else to supply the tables at a price that was lower than the price in his contract with Samean. Suppose also that Samean does not find a substitute performance. In that case, Samean would have saved the \$850 the tables were worth at the time he learned of the breach. Samean's expectation damages would be the \$1,000 in additional benefits he expected, minus the \$850 he saved by not having to perform, which is \$150. The court would award him \$150 ($\$1,000 - \$850$).

Under the second method described above, the court would use the market value at the time performance was scheduled to occur in order to determine how much Samean saved. Suppose that value was \$925. Suppose also that Samean reasonably spends \$50 in trying to find a substitute performance, but that he fails to find one. In that case, Samean would have saved the \$925 the tables were worth at the time he was scheduled to deliver them, minus the \$50 in additional damages caused to him by Vipheap's breach. So he would have saved \$875 ($\$925 - \$50$). Samean's expectation damages would be the \$1,000 in additional benefits he expected, minus the \$875 he saved by not having to perform, which is \$125. The court would award him \$125 ($\$1,000 - \$875$). This is the method the UCC would use in this situation.

Under the third method described above, the court would use the actual value of the performance Samean reasonably found to take the place of Vipheap's performance in order to determine how much Samean saved. Suppose Samean managed to re-sell the tables for \$975, and that was a reasonable price considering all the circumstances. Suppose also that Samean still had to spend \$50 to find the new buyer. In that case, Samean would have saved the \$975 he actually received when he re-sold the tables, minus the \$50 in additional damages caused to him by Vipheap's breach. So he would have saved \$925 ($\$975 - \$50$). Samean's expectation damages would be the \$1,000 in additional benefits he expected, minus the \$925 he saved by not having to perform the original contract, which is \$75. The court would award him \$75 ($\$1,000 - \$925$). This is the method the UCC would use in this situation.

As you can see, these three methods can lead to different results, depending on the facts of the case. In particular, the first method may not seem like a very accurate way to measure the real harm to a non-breaching party like Samean. This is because Samean's real damage would seem to depend on what happens to him as a result of the breach, not simply the value of his performance at the time he learns of the breach. The second and third methods would seem to be better ways to measure the harm to Samean in the situations where they would be applied. But the first method might be useful where it is hard to calculate the value of the performance of the non-breaching party at any other time. This might occur where the court must decide the case before the performance was actually scheduled to occur, or the performance was not scheduled to occur at a very specific time, and where the party has found no reasonable substitute performance.

On the whole, if the non-breaching party does act reasonably to find another performance to take the place of the breaching party's performance, the third method would appear to be the easiest and most accurate way to measure her actual expectation damages. Of course, as will be discussed further in Section 10.6c, the non-breaching party cannot recover damages she could reasonably have avoided. Parties take risks if they do not find a substitute performance, including the risk that a court will not determine the real value of the performance in a way that is favorable to them, and the risk that they will suffer damages they cannot recover in court. They may also have to spend time and effort arguing about what the performance was worth. And they may have to wait some time for a court case to be resolved. Many parties wish to avoid these risks and problems. So they often find substitute performances. This third method to measure damages is used in Example 3 in the following Illustration.

Illustration: <u>How to Calculate Expectation Damages</u>			
STEPS	EXAMPLES (Samean and Vipheap)		
	Example 1	Example 2	Example 3
Step 1: What happened?	Samean delivers tables, Vipheap fails to pay the \$1,000 the contract requires	Samean delivers tables, Vipheap fails to pay \$700 of the \$1,000 the contract requires	Vipheap repudiates, Samean does not deliver tables; neither party performs; Samean reasonably re-sells tables for \$975, and has \$50 in extra expenses
Step 2: How much <u>more</u> would injured party have received if contract fully performed?	\$1,000	\$700 ((\$1,000 minus the \$300 Vipheap paid)	\$1,000
Step 3: How much did injured party <u>save</u> because she did not have to perform her own duties?	\$0	\$0	\$925 (the \$975 re-sale price of the tables minus the \$50 additional damage to Samean)
Step 4: What is the <u>difference</u> between the amounts in Steps 1 and 2? This is the EXPECTATION DAMAGES	\$1,000 (\$1,000-\$0)	\$700 (\$700-\$0)	\$75 (\$1,000-\$925)

It is also possible that courts may use a combination of more than one of the above methods of valuing non-money performances. This might occur where a party finds a substitute performance for only part of the performance

she expected to receive from the breaching party. Consider the following Case Study.

CASE STUDY 228

FACTS A professional home builder named Oun makes a contract with Marady. Under the contract, Oun agrees to build a big new house for Marady on a lot Marady owns. The total price for the work is to be \$70,000. The work is to be completed in six months. Marady agrees to pay Oun \$10,000 right way, and \$10,000 at the end of each month until the work is completed. These monthly payments are conditioned on Oun making satisfactory progress, and Oun's continuation of the work is conditioned on Marady making these payments on time.

Marady pays Oun \$10,000. Oun makes all the arrangements for building materials, equipment and a work crew, and Oun's crew works on the house for one month. However, at the end of the first month, Marady fails to make the next payment. When Oun asks Marady why, Marady says he has lost all his money at the casino, and that he will be unable to pay any more money.

Oun tells Marady that he is stopping performance, as the contract allows. Oun does his best to reasonably compensate his workers, return the equipment he has rented, and sell the materials he has purchased, or use them in some other way on other jobs. However, he cannot get refunds for some of the equipment he has rented, and he is unable to sell or use some of the materials he has purchased. Paying for all of this costs Oun \$10,000. Oun had reasonably estimated that the entire job would cost him \$50,000 to perform.

Oun tells Marady about the money he has had to pay as a result of Marady's breach. Oun says he wants to be compensated so that he is in the position he would have occupied if Marady had fully performed. However, Marady says that the \$10,000 he already paid was enough to cover Oun's expenses, so he should not be required to pay any more. Oun tries to reach some agreement with Marady to resolve the problem, but when this fails, he asks the court for help.

QUESTION OF LAW Can Oun recover further damages for Marady's breach of this contract?

DECISION Yes. Oun will likely be able to recover his expectation damages because of Marady's breach of this contract. In this case these damages will probably be about \$20,000, assuming Oun provides sufficient proof of what it would have cost him to finish building the house and what it cost him to react to Marady's breach.

In general, when many courts award damages because of a contract breach, they try to order the breaching party to pay expectation damages,

in order to put the injured party as close as possible to the position she expected to occupy after the parties had fully performed the contract. These damages can be calculated by determining how much more the injured party would have received if the parties fully performed the contract, and subtracting any amount that party saved by not having to perform the rest of the contract.

In this case, Marady breached a contract under which Oun was to build him a new house. Oun would have received \$60,000 more in additional benefits if Marady had fully performed. This is because Oun had received only \$10,000 of the \$70,000 contract price. Oun's savings because he did not have to finish his performance were about \$40,000. This is because he had to spend \$10,000 of the total of \$50,000 he planned to spend to build the house in order to pay for the first month's work and otherwise react to Marady's breach. So in this case, Oun's expectation damages are the \$60,000 in additional benefits he expected to receive, minus the \$40,000 he saved because he did not have to perform fully. So his expectation damages are \$20,000 (\$60,000-\$40,000). Assuming Oun provided adequate proof of the above costs, the court would order Marady to pay Oun \$20,000.

In the Case Study above, the court in calculating the savings to Oun actually used a combination of the methods discussed above. The court had to find the value of the non-money performance that Oun did not have to provide to Marady because of Marady's breach. In making this calculation, the court used the amounts that Oun actually received by selling some of the materials he had planned to use (which is basically a substitute performance). But the court also used market values, such as the estimated market value of the total amount it would have cost Oun to finish building the house (\$50,000). It appears that which market value the court uses (the value at the time of performance or at the time the non-breaching party learned of the breach) will depend on the court and the circumstances of the case. The basic idea is to come as close as possible to finding the value of the performance Oun was not required to provide.

In some situations, the value of a non-money performance may actually be less than 0! This could occur where the non-money performance a party provides actually causes more harm than benefit. For example, in the Case Study 228 situation, suppose Marady made all payments and did not breach. However, Oun did breach by building a defective house--a house so defective that it could not be repaired, but had to be torn down. So construction had to begin again. In that situation, a court might say that the additional benefits Marady expected to receive would be not only the cost to have the house built correctly, but also the amount it would cost to have the defective house torn down. Suppose it costs Marady \$10,000 to have the defective house torn down, and \$75,000 to have the new house built. Altogether, the cost of the additional benefits Marady expected would be \$85,000. The amount Marady saved by not having to perform fully would be \$0, since he did perform fully. So the expectation damages would be \$85,000 minus \$0. The court would award

Marady \$85,000. It would take \$85,000 to put Marady in the position he expected to occupy after the contract was performed.

10.2b Limits on Expectation Damages

As noted above, there are some limits on the ability of courts to award expectation damages. These limits may result in a court being unable to award these damages, and they may force the court to choose a different type of remedy. Or they may simply result in a court calculating the damages in a different way.

The ability of courts to order expectation damages is subject to the important general limits that such damages must be reasonably certain and reasonably foreseeable, and that the party seeking to recover could not reasonably have avoided the damages. These three important limits will be discussed in more detail in Section 10.6 below, but some are especially important in considering expectation damages.

First, the amount of expectation damages must be reasonably certain. If that amount is too speculative, courts will refuse to award such damages, and may select reliance damages instead. Speculative damages may be a problem in cases involving lost profits, especially those involving new businesses such as restaurants. For example, a party who is injured by a contract breach in trying to open a new business in a field in which she has never worked may be unable to recover damages for lost future profits. This is because the amount of such potential profits might be too uncertain. On the other hand, a party in a new business situation might still be able to get expectation damages if she can persuade a court to use estimates based on similar businesses she ran in the past, or other similar ventures. This limit will be discussed in more detail in Sections 10.3 and 10.6a, below.

Another general limit that can be especially important in cases involving expectation damages is that such damages must have been reasonably foreseeable at the time the contract was made. The non-breaching party generally cannot recover damages the breaching party could not reasonably have foreseen. For example, suppose a shoe repair shop breaches a repair contract by failing to deliver a pair of shoes to a person on time. Suppose one result of that breach is that the shoe owner cannot interview for and get a new job because she has no shoes to wear. Such damage might be beyond what the repair shop could have reasonably foreseen. This limit will be discussed in more detail in Section 10.6b, below.

Another important limit on expectation damages occurs where the amount it would take to put the injured party in the exact position she expected to be in is clearly far greater than the real loss in value to the injured party. Sometimes it would cost much more to put the injured party in the exact position she expected to occupy--to actually fix the problem caused by the breach--than it would to simply compensate the injured party for the difference

in value between what she expected and what she received. Many courts say that if the cost of actually fixing the problem caused by the breach is clearly far greater than the real loss in value caused by the breach, then the injured party cannot generally recover the amount required to actually fix the problem. The reason is that to award such damages in that situation would be economically wasteful. In that case, the injured party would probably receive only the amount of the loss in value caused by the breach. The court is still ordering that the breaching party put the injured party in a position that is basically as good as the position she expected to be in.

The two-step process explained in Section 10.2a appears to account for this "loss in value" problem. That process focuses on the value in money of the additional benefits the non-breaching party expected to receive--not on what it would cost to put that party in exactly the position she expected to occupy.

CASE STUDY 229

FACTS Suppose the story in Case Study 228 happens a different way. Suppose Oun builds the house, and Marady pays the contract price. Oun performs according to the contract, except that he puts one of the pillars inside the house in the wrong place. The result of this breach is that part of the interior of the house is less attractive. As a result, the house is worth \$200 less than it would have been if Oun had put the pillar in the right place. However, because the pillar supports important parts of the house, it would actually cost \$10,000 to remove the pillar and put it in the correct place.

Oun admits his mistake, and offers to pay Marady the \$200 loss in value to house. But Marady is very angry. He demands the full \$10,000 it would take to get the pillar in the right place--to put him in the exact position he expected to be in.

QUESTION OF LAW Can Marady recover the \$10,000 it would take to actually fix the problem of the pillar?

DECISION Probably not. The amount it would take to actually fix this problem (\$10,000) is clearly far greater than the loss in value caused by the breach (\$200), so Marady's damages will probably be limited to \$200.

Where the amount required to actually fix a contract breach--to actually put the injured party in the exact position she expected to occupy--is clearly far greater than the actual loss in value to the injured party, many courts will limit the damages to the loss in value.

In this case, Oun breached the contract by failing to put a pillar in the proper place in the house he built for Marady. This caused part of the house to be less attractive. The actual difference in value of the house was about \$200, but the amount it would have taken to actually move the pillar was \$10,000.

This is clearly far greater than the real loss involved here. So many courts would limit Marady's recovery to \$200.

A variation of this rule seems to occur where the damages caused by a breach are extremely large in relation to the contract price. For example, suppose a party breaches a contract to fix a restaurant generator for \$10 just before a busy weekend, perhaps by failing to come to fix the machine at all. Because the restaurant has no working generator that weekend, it loses \$300 in business. Some courts would say that the restaurant could not recover the full \$300 it lost, even though that damage was reasonably foreseeable. The reason seems to be that some courts believe that parties often do not expect that damages of that size will result from a breach of a \$10 repair contract. Or perhaps courts believe that it is simply not fair to hold the repairer liable in that situation. Of course, the restaurant could recover other kinds of damages, if it had suffered any. These issues will be further discussed in Section 10.6b, below, on foreseeability.

One apparent exception to the "clearly far greater than" rule occurs where the parties knew that the performance involved very personal or special elements. For example, suppose a party makes a contract to have a large statue of herself built in front of her house. However, the builder creates a statue of a famous monarch instead! In that case, the cost to fix the problem would probably be very high, since the old statue would have to be removed and a new one built. But there might actually be no loss in value, since the statue of the monarch might be more valuable than that of the owner. Even so, a court might award the cost to actually fix the problem. This is because the parties probably understood that the real reason for the contract was very personal, and was not simply to create a valuable statue.

10.3 Courts May Order a Party to Pay Reliance Damages, Which Try to Put an Injured Party in the Position She Occupied Before a Contract or Promise Was Made

As noted above, reliance damages try to put the injured party in the position she occupied before a contract or promise was made. That is, they try to compensate the injured party for the amount she has lost by reasonably relying on the contract or promise. Reliance damages may include compensation for money or other consideration that the injured party gave to the breaching party, such as services. But they may also include compensation for things that the injured party did not give to the breaching party, but that the injured party spent otherwise in reasonable reliance.

***** DEFINITION:** **Reliance damages** are damages that try to place a party injured by a contract breach or failure to perform a promise as close as possible to the position she occupied before the contract or promise was made.

Reliance damages are often awarded where expectation damages are not appropriate in a particular contract dispute. For example, where a contract is breached, expectation damages are sometimes too uncertain or too difficult to prove. This often occurs where lost profits are too difficult to measure. Expectation damages may also be inappropriate for other reasons, such as where there is no enforceable contract, but the court applies the doctrine of promissory estoppel (detrimental reliance). In these types of situations, courts may order one party to pay another party reliance damages.

Reliance damages may be especially useful where expectation damages are hard to calculate. In particular, this may occur with contracts that relate to new businesses. Where there is a breach involving the formation of a new business, it can be very difficult to determine and prove with reasonable certainty what position a party would have occupied if the parties had fully performed the contract. This is because the business involved in the contract is a new one that has not even opened yet! Of course, as discussed in Section 10.2 above, a party in a new business situation might still be able to get expectation damages if she could persuade a court to use estimates based on similar businesses she ran in the past, or other similar ventures. But that can often be difficult. The requirement that damages be proved with reasonable certainty will be further discussed in Section 10.6a, below.

In any case, parties can often prove reliance damages much more easily than expectation damages. That is because those damages are based on things the parties have already done, and for which they often have receipts or other strong proof. And of course, such damages are generally available whether any of the money or other consideration transferred actually went to the breaching party or not.

One area in which expectation damages may be hard to calculate, and reliance damages may be more appropriate, is when a contract breach relates to the opening of a new restaurant. Consider the following Case Study.

CASE STUDY 230

FACTS Chan and Yutho had little experience in the restaurant business. But they made a contract to start a big new chicken restaurant together. The restaurant's specialty was to be young chickens. As part of the contract, each party agreed to buy certain equipment and supplies, to negotiate with suppliers, and to hire and train staff, in order to get ready for the restaurant to open. In the weeks before the opening date, Yutho spent \$2,000 on equipment and supplies, and in negotiating with suppliers. Unfortunately, two weeks before the restaurant was scheduled to open, Chan breached the contract and refused to perform.

Yutho asked Chan to compensate her for the lost profits the restaurant would have made. Chan refused, saying there was no way to calculate those

profits. Chan said Yutho had not actually given him anything, so he owed her nothing. Now Yutho asks the court for help.

QUESTION OF LAW Can Yutho recover expectation damages because of the breach of the restaurant contract by Chan?

DECISION Probably not, because those are likely to be too uncertain, but she probably will be able to recover her reliance damages for the money she spent preparing to open the restaurant.

Where a breach of contract involves the formation of a new business, expectation damages may be difficult to calculate with reasonable certainty, since it may be hard to show how much money the new business would have made. In those situations, reliance damages may be more appropriate.

In this case, Chan breached a contract with Yutho to open a new chicken restaurant. Yutho wants expectation damages. But she may have trouble proving them with reasonable certainty, particularly since she does not have substantial experience in the restaurant business. In addition, the restaurant business is especially risky and hard to predict. Many new restaurants lose money for some time, and many actually fail and close down. So it would be very difficult to say with reasonable certainty how much money the new restaurant would have made.

The court would be much more likely to award Yutho reliance damages. These would be the \$2,000 she spent on equipment and supplies in reasonable reliance on the contract, getting ready for the restaurant to open. She should be able to prove these damages to the court much more easily, especially if she has receipts for the items she has purchased. And she can get these damages even though none of the money she spent actually went to Chan.

Another situation where courts may use reliance damages is construction contracts. For example, suppose Sem makes a contract to build a new office building for Ear for \$1,000,000. Sem spends about \$20,000 on materials, machine rentals, and labor. Then Sem starts work. But Ear soon makes an anticipatory repudiation. In this situation, Sem could try to prove expectation damages. He will have to show what he will save by not having to finish the construction. If he can show that, then he may be able to recover the difference between that amount and \$1,000,000. However, in some cases like this, which involve large, complex projects, it might be difficult to prove with reasonable certainty how much it would have cost to finish the construction. Sem might actually spend a lot of time and money simply trying to prove this to the court!

In this situation, Sem might choose to ask the court for his reliance damages. Those damages would basically be the amount he reasonably spent in preparing to perform and actually performing up until the time Ear breached. Of course, this amount might not be as much as the expectation

damages. But it might be better to recover this than to spend a lot of time and money trying to prove expectation damages--and risk failing to do so well enough to recover the damages at all.

Promissory estoppel (detrimental reliance) is another important area where courts may order reliance damages. Promissory estoppel was already discussed in detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8. The doctrine basically says that a promise is enforceable, even though there is no valid contract, where a party has acted in justifiable reliance on it and it would be unjust not to enforce the promise. Obviously, reliance damages are essential to promissory estoppel, since the doctrine was intended to resolve the problems created by reasonable reliance.

For example, in Case Study 176, Ken relied on Margo's promise to give him a job in Battambang. Although the promise was probably too indefinite to form a valid contract, a court might find that Ken was justified in relying on it. If a court found that, it would be unlikely to award Ken expectation damages, as those would probably be too uncertain. But the court would be likely to award Ken reliance damages. That would be the amount he spent in quitting his old job, selling his house, and moving to Battambang. Suppose that amount was \$1,000.

Illustration: <u>How to Calculate Reliance Damages</u>			
STEPS	EXAMPLES		
	Example 1 (Case Study 230 (restaurant))	Example 2 (Office construction)	Example 3 (Case Study 176 (Ken's job))
Step 1: What happened?	Yutho spends \$2,000 in reliance, Chan breaches, Yutho has trouble proving expectation damages	Sem spends \$20,000 in reliance, Ear repudiates, Sem has trouble proving expectation damages	Ken justifiably relies on Margo's job promise, spends \$1,000 in reliance, Margo says there is no job
Step 2: How much has the injured party lost because of <u>reasonable reliance</u> on the contract or promise? This amount is the RELIANCE DAMAGES	\$2,000	\$20,000	\$1,000

There are several important limits on the reliance damages parties may recover. The three general limits described in Section 10.2--that damages be reasonably certain and reasonably foreseeable, and that the party seeking to recover could not reasonably have avoided them--also apply to reliance damages. These general limits will be further discussed in Section 10.6, below.

Another important limit on reliance damages in many jurisdictions is that the injured party cannot recover reliance damages that are any greater than her expectation damages. The reason for this limit is that courts generally do not wish to order that parties receive more than they even expected to receive under the contract! If the “injured” party would have made no money on the contract, she may be unable to recover reliance damages.

For example, in the construction example above, suppose Ear can prove that Sem would have actually lost \$50,000 on the contract, perhaps because Sem had misjudged how much effort some part of the work would take. In other words, the project would have cost Sem \$1,050,000 to complete--even though he was only being paid \$1,000,000 for the work! Suppose also that Sem had spent \$20,000 on the project before Ear breached. So the reliance damages would be \$20,000. If there is no evidence in court about what the expectation damages were, Sem could probably recover those reliance damages. But if Ear proved in court that Sem would have lost \$50,000 on the project, that would mean that Sem actually saved money by not having to perform the rest of the contract! In fact, Sem would have saved \$30,000, since he lost only \$20,000 of the \$50,000 he would have lost if the parties had fully performed. So Sem's expectation damages would be:

	\$1,000,000	(what Sem expected to get)
minus	\$1,030,000	(Sem's savings by not having to complete the work, which is the \$1,050,000 it would have cost Sem to do all the work, minus the \$20,000 he already spent)
equals	<u>\$0</u>	(actually -\$30,000).

Sem's expectation damages are \$0, because if the contract was fully performed, he would have earned no profit at all! Most courts will not award reliance damages that are bigger than expectation damages. So in this situation, Sem could probably recover no reliance damages. Of course, it might be hard for Ear to prove that Sem would have lost money on the contract, just as it might be hard for Sem to prove expectation damages. In addition, even if Sem's expectation damages are \$0, he might still be able to recover restitution damages. This will be further discussed in Section 10.4 below.

***** ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.8, discusses promissory estoppel (detrimental reliance) and the situations in which it might be appropriate.

10.4 Courts May Order a Party to Pay Restitution Damages to Compensate an Injured Party for the Benefit She Provided to That Party

When a court orders a party to pay restitution damages as a result of a contract dispute, the court orders that party to pay the value of the

benefit that party has received from another party, in order to prevent unjust enrichment. This is different from expectation and reliance damages, which are measured by the harm to the injured party.

***** DEFINITION: Restitution damages** are damages that try to compensate a party for the value of the benefit she has given to another party, in order to prevent unjust enrichment.

Courts often award restitution damages when they decide that neither expectation damages nor reliance damages are appropriate in a particular case. This may occur where the party seeking the court's help cannot enforce a contract, but the court finds a quasi-contract exists. Quasi-contract has already been discussed in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5, and elsewhere. Restitution damages may also be appropriate where there was a valid contract, but there is some problem, and for some reason the party seeking a remedy cannot get or does not want other types of damages. These two groups of situations will be discussed in more detail in Section 10.4a, below.

Many authorities say that restitution is actually measured by the value of the benefit provided to the defendant. In theory, this means that if for some reason the benefit has no value to the defendant, there will be no damages. However, it also appears that in practice, the measure of restitution will still generally be the reasonable value (or market value) of the benefit.

10.4a Important Situations Where Restitution Damages May Be Awarded

Restitution damages may be awarded in a number of situations where the other kinds of damages discussed above are not available. In fact, there appear to be two important groups of situations where restitution damages are often awarded. These are:

- (1) where there was no valid contract, but one party gave some benefit to the other party, and there would be unjust enrichment if the other party was allowed to keep the benefits she received;
- and (2) where there was a valid contract, but
 - (a) there is a unilateral or bilateral rescission;
 - (b) the contract's duties are discharged by impracticability or frustration of purpose;
 - (c) one party breaches and the other party chooses to seek restitution because she cannot recover as much with expectation or reliance damages;
 - or (d) a breaching party wishes to recover what she has provided to the other party.

Most of these are quasi-contract situations. Although it is not an award of "damages," a party may also seek the return of the actual object she provided to the other party. This is called specific restitution. It appears that this remedy mainly occurs in land disputes. It will be further discussed in Section 10.7d, below.

There are a number of examples of the first group of situations, where there was no valid contract. These include situations where the parties thought they had a valid contract, but they actually did not. This might occur because of a number of the formation problems discussed in Chapters 2-7 above, such as that an agreement was too indefinite, failed to meet a writing requirement, or was the result of a mistake. In these cases, although the agreement is not valid, restitution may be awarded to avoid unjust enrichment, under the doctrine of quasi-contract.

Restitution damages may also be awarded where the parties have not even tried to make a valid contract. Consider the following Case Study.

CASE STUDY 231

FACTS One day, a doctor named Nikea was riding his moto to the hospital where he worked. On the way, he found an accident victim named Neth lying unconscious by the side of the road. Neth, who was a wealthy restaurant owner, had many injuries and was in serious condition. Since Neth was unconscious and Nikea could not ask him whether he agreed to have Nikea treat him, Nikea simply treated Neth. Nikea provided a real benefit with a reasonable value of \$50 to Neth, and Neth recovered from his injuries.

When Neth was feeling better, Nikea went to see him. Nikea told Neth that he was glad to see that he was better. He also said that helping Neth had caused him to miss work and lose some pay, so he would very much appreciate it if Neth could help him by compensating him for his services that morning. But Neth told Nikea that he had never made any promise or contract to pay Nikea, so he owed him nothing.

QUESTION OF LAW Can Nikea recover compensation from Neth for the care he provided to him by the side of the road?

DECISION Yes. Nikea will be able to recover restitution--the reasonable value of the services he provided to Neth--under the doctrine of quasi-contract.

Restitution may be awarded in situations where the parties have no valid contract, but there has been unjust enrichment of one party by another party. In this case, Nikea provided a valuable benefit to Neth by taking care of him when he was seriously injured in an accident. Of course, since Neth was unconscious, there was no real agreement between the parties, and no valid contract. However, because Nikea provided a real benefit to Neth in

a desperate situation, and Nikea actually lost some pay as a result, there would be unjust enrichment if Neth was not required to compensate Nikea. In this situation, a court would award Nikea restitution--the reasonable value of the benefit he provided to Neth, which in this case was \$50--under the doctrine of quasi-contract.

Restitution is also often awarded in the second group of situations, where there was a valid contract. This can occur in a number of different circumstances.

First, it might happen where there is a rescission. This could be a unilateral rescission, when one party breaches and the other party decides to rescind and ask for restitution. It could also occur where parties decide to mutually rescind a contract. The remedy of rescission is discussed in Section 10.7b, below. It was also explained in Chapter 9 ("Performance and Discharge of Duties"), Sections 9.6b and 9.7a. For example, after a mutual rescission such as that of the parties in the Speedy Car Company contract in Case Study 218, many courts would say the appropriate remedy was restitution damages. Of course, as explained in Chapter 9, some courts allow other types of damages even where there is a rescission.

In addition, it appears that parties may be able to get restitution where duties in a valid contract are discharged by impracticability or frustration of purpose. These types of discharge were already discussed in Chapter 9 ("Performance and Discharge of Duties"), Sections 9.8a and 9.8b. Impracticability may occur because of many things, including illegality and different types of disasters. If one party gave something to another party under a valid contract which later became impracticable, or whose purpose was frustrated, it would seem that the giving party should be able to get restitution. Otherwise, there would probably be unjust enrichment.

For example, if the Special Fish Company in Case Study 224 had made payments to Nareth for fish Nareth had not yet supplied, and the contract then became impracticable, it would seem that the Fish Company could get restitution. That is because it would probably be unjust if that benefit was not returned to the Fish Company.

***** ADDITIONAL REFERENCE:** Chapter 9 ("Performance and Discharge of Duties"), Sections 9.6b and 9.7a discuss situations in which unilateral and bilateral rescissions might occur, and Sections 9.8a and 9.8b discuss the effects of impracticability and frustration of purpose on contracts.

Another important situation of the second group of situations is where the non-breaching party chooses to seek restitution because she would actually recover less money--or none at all--if she asked for one of the other measures of damages. Many courts say that parties can actually recover restitution even if that would result in them getting more than if they were awarded expectation remedies. This is generally true even if the party seeking restitution

had made a "losing" contract--one where the breach actually saved her from having to perform a contract where she would have lost money!

For instance, consider the last example in Section 10.3 above. In that example, a builder named Sem wanted \$20,000 in reliance damages for Ear's breach of a construction contract. But Ear showed that Sem would actually have lost \$50,000 on the contract. Because reliance damages cannot exceed expectation damages, and the expectation damages were \$0, Sem could not get any reliance damages. However, suppose Sem had provided \$20,000 in benefits to Ear before Ear breached, perhaps by building part of the offices on Ear's land. In that case, Sem could probably recover \$20,000 in restitution from Ear--even though his expectation damages were still \$0! This is because restitution damages can be more than the expectation damages.

In fact, restitution can even be more than the entire contract price! Suppose Sem completed most of the office building before Ear breached. Suppose also that Sem actually provided Ear with a benefit with a reasonable value of \$1,100,000, which is more than the total contract price of \$1,000,000. This is actually quite possible where the builder has miscalculated how much it will cost him to build the building. Ear will argue that Sem's damages should be limited to the contract price, since that was all he expected to get. But many courts would say that Sem can actually get the full value of the benefit he has given to Ear (\$1,100,000) in restitution. This is true even though that value is more than the contract price, because that is the amount of the unjust enrichment to Ear.

Finally, an important situation where parties may seek restitution occurs where the breaching party herself seeks restitution of benefits she has provided to the other party. In the past, many courts denied such a breaching party any recovery. But today it appears that most courts will often allow such a breaching party to recover restitution, under the doctrine of quasi-contract. For example, the Uniform Commercial Code in the United States allows restitution for a breaching buyer of goods. The reason for this rule seems to be that many courts feel it might be unjust if a party were allowed to keep a benefit that was not a measure of the actual harm caused to her by the breach. In fact, not allowing restitution to a breaching party could result in a penalty to that party.

There are some limits on the restitution the breaching party can get. First, the restitution such a breaching plaintiff can get will be reduced by the amount of any damage she caused to the other party. In addition, many jurisdictions do limit the amount such a breaching party can recover to the contract price. And it appears that many courts generally still deny restitution to a breaching party where that party's breach was intentional, rather than merely negligent or accidental. However, the general rule about intentional breaches may not always apply so strictly in employment contracts. Consider the following Case Study.

CASE STUDY 232

FACTS Peo agrees to work for Chandara as an administrative officer for one year for a total salary of \$12,000. The salary is to be paid in 12 \$1,000 installments, one every month. Everything goes well for about six months, but at that time Peo fails to come to work. Chandara contacts Peo at her home to find out what the problem is, and why she is not coming to work. All Peo will say is that she "prefers not to" come to work.

Chandara tries to be patient, but finally she becomes angry. She refuses to pay Peo the \$1,000 for the last month Peo worked, saying Peo gets nothing because she breached the contract, especially by failing to give adequate notice that she was leaving. Chandara also says the breach caused her to suffer \$500 in damages, because of lost work and problems in finding a good replacement for Peo. But Peo wants her money, and she asks the court for help.

QUESTION OF LAW Can Peo recover compensation for her work?

DECISION Probably. Even if the court finds that Peo breached her employment contract, it will probably allow her to recover restitution for the benefit she has provided to Chandara (minus any damage to Chandara) under the doctrine of quasi-contract.

Courts generally allow a breaching party to recover restitution of the reasonable value of the benefits she has provided to the other party, minus the damage she has caused to the other party. Although many courts will generally not allow restitution where the breach has been intentional, that general rule often does not apply in employment contracts.

In this case, a court might find that Peo breached her employment contract with Chandara. Even so, Peo could probably get restitution for the reasonable value of the work she provided to Chandara, minus the damage she caused to Chandara by her breach, under the doctrine of quasi-contract. In this situation, suppose a court found that the reasonable value of the work Peo provided in the six months she worked was actually \$6,000, or the amount she would have been owed under the contract itself. Chandara has only paid \$5,000 of this amount, and \$1,000 remains. However, suppose Chandara proves that she has suffered \$500 in damages because of the breach. The court would subtract that \$500 from the \$1,000 Chandara did not pay, and award Peo \$500 in restitution damages.

Many jurisdictions also have statutes that generally require employers to pay employees like Peo in Case Study 232 at certain intervals, and require that employers pay such employees for work they have actually done--even if those employees have breached their employment contracts. Of course, employers are still entitled to damages for any harm caused to them by such breaches.

The following illustration provides some examples of how restitution damages are calculated.

Illustration: How to Calculate Restitution Damages			
STEPS	EXAMPLES		
	Example 1 (Case Study 231 – Nikea)	Example 2 (Sem and Ear (construction))	Example 3 (Case Study 232 – Peo)
Step 1: What happened?	Nikea provides needed health care with a reasonable value of \$50 to the unconscious Neth lying by the side of the road	Sem provides \$1,100,000 in benefits to Ear, Ear breaches, Ear claims Sem's damages limited to contract price of \$1,000,000	Peo breaches employment contract, Chandara has not paid Peo for \$1,000 worth of work, breach causes \$500 in damage to Chandara
Step 2: How much unjust enrichment has a party received? This amount is the RESTITUTION DAMAGES	\$50	\$1,100,000	\$500 (\$1,000-\$500)

Restitution is more flexible in some ways than the other kinds of damages discussed above, since it is available in situations where those other kinds of damages are not. But restitution is still subject to the important limits which are discussed above and will be further discussed in Section 10.6, below. Specifically, restitution damages must be reasonably certain and reasonably foreseeable, and the party seeking to recover must not have been able to reasonably avoid them.

10.4b Restitution Compared to Other Kinds of Damages

As noted above, restitution is different in important ways from other kinds of money damages. This Section will briefly compare restitution to expectation and reliance damages, which were discussed in Sections 10.2 and 10.3, above.



Illustration: <u>Expectation vs. Reliance vs. Restitution Damages</u>			
	EXPECTATION	RELIANCE	RESTITUTION
Step 1: What is the goal?	Put injured party in position she <u>would have occupied if parties had fully performed contract</u>	Put injured party in position she <u>occupied before contract</u>	Prevent <u>unjust enrichment</u> of party who has received some benefit from another party
Step 2: How is it determined?	Additional benefits injured party expected <u>minus</u> any amount she saved by not having to fully perform	Amount needed to compensate injured party for her efforts or expenses in <u>reasonable reliance</u> on the contract or promise	Value of the benefit given to a party that constitutes <u>unjust enrichment</u> (usually the market value or reasonable value)
Step 3: When is it likely to be used?	General money damages remedy used where party breaches contract; used if appropriate	Where expectation damages not appropriate for some reason, especially where expectation too uncertain; in promissory estoppel situations	Where no valid contract but court finds quasi-contract; where valid contract but rescission, impracticability or frustration of purpose; non-breaching party cannot recover as much in other ways; or breaching party seeks remedy for benefit she gave

In some cases, parties may wonder whether they should ask a court for restitution or reliance damages. In general, restitution will be no more than reliance. This is because whatever a party gives to another party will generally be part of her reasonable reliance. In fact, in many cases, restitution damages will be the same as reliance damages. For example, suppose Ann and Reth agree that Ann will pay Reth \$1,000 for Reth's moto. Suppose Ann pays Reth \$300 as a down payment, and then Reth breaches the contract by failing to deliver the moto. Ann may decide to rescind and ask a court to order restitution damages, perhaps because expectation damages will be difficult to prove. In this case, restitution damages would be \$300. That is the reasonable value of what Ann has given to Reth, and that would be the amount of the unjust enrichment to Reth. But it would also be the reliance damages. This is because \$300 would also be the amount of money Ann has spent in reasonable reliance on the contract. So in this case, and many others, restitution and reliance would be the same amount.

However, in other cases, restitution will be less than reliance. For example, in the restaurant example in Section 10.3 above, where Yutho spent \$2,000 getting ready for a new restaurant to open before Chan breached, Yutho's reliance damages were \$2,000. But her restitution damages might be \$0, if she had not actually given any benefit to Chan.

In that situation, Yutho would be wise to ask a court for reliance damages, not restitution damages.

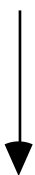
Another situation where restitution and reliance might not be the same would occur in the accident victim example in Case Study 231, involving Neth and Nikea. Suppose Nikea was actually a famous surgeon, with a highly specialized practice, who charged very high rates. In that situation, courts awarding restitution would probably say that the reasonable value of what Nikea had given to Neth--the amount of unjust enrichment--was the fee usually charged in the community where the accident occurred for services like those he provided to Neth. In other words, Neth would have been "unjustly enriched" to this extent, but not more. The reasonable value would probably not be the surgeon's usual fee, which would be far more expensive, unless Nikea had actually performed the kind of specialized surgery he normally did. That usual higher fee would be more like reliance damages. This is because that fee is what would be required to compensate Nikea for the efforts he made in reasonable reliance. In any event, restitution--not reliance--damages would probably be ordered in this situation.

Finally, in some situations, the amount of restitution damages parties can recover might actually be more than the reliance damages they can recover. This could happen in the situation where a party is seeking to recover damages for breach of a losing contract--a contract on which that party would actually have lost money. This was discussed in Section 10.4a above. Many jurisdictions say that parties cannot recover reliance damages greater than their expectation damages. So a party who would have lost money on a contract may not be able to recover any reliance damages. But that party may be able to recover restitution damages, if she has given some benefit to the breaching party, and unjust enrichment might otherwise occur. This was the case in the construction example with Ear and Sem discussed in Section 10.4a.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5, and many other Chapters in this text, discuss quasi-contract and the situations in which it might apply.

10.5 Courts May Order a Party to Pay Other Damages or Monetary Awards in Certain Situations

In many jurisdictions, the three types of remedies discussed in Section 10.4 are the main types of damages remedies courts order when they decide that some action is appropriate in a contract dispute. However, in some



situations, courts may consider other types of damages remedies or monetary awards. This Section will discuss four of these:

- (1) stipulated (liquidated) damages (Section 10.5a);
- (2) nominal damages (Section 10.5b);
- (3) interest (Section 10.5c);
- and (4) punitive damages (Section 10.5d).

10.5a Courts May Order a Party to Pay Stipulated (Liquidated) Damages Where the Contract Itself Describes the Damages to Be Paid for a Breach

Sometimes the parties actually agree in their contract what the amount of damages will be for a breach of the contract, or how those damages will be calculated. These are called "stipulated" (or "liquidated") damages, because the amount is actually stipulated in the contract.

***** DEFINITION:** A **stipulated or liquidated damages clause** is a contract provision that specifies the amount of damages one party must pay another party in the event that the first party breaches the contract.

Often stipulated damages provisions are enforceable, but sometimes they are not. If such a provision is enforceable, then the party who is seeking damages may recover only the damages the clause says she can recover. But if such a provision is not enforceable, courts in many jurisdictions will award only damages that a party can prove actually occurred.

The requirements for stipulated damages clauses to be enforceable appear to vary in different jurisdictions. It appears that civil law jurisdictions are more likely to enforce stipulated damages clauses, even if they may appear to be a kind of "penalty" for the breaching party. Obviously, a severe stipulated damages clause might strongly motivate a party to perform her contract duties as required by the contract. However, it appears that the recent trend in civil law jurisdictions such as France is to allow a court some discretion to reduce or increase the amount specified in the clause if it is clearly excessive or too small with regard to the circumstances of the case.

Courts in many common law jurisdictions will generally not enforce a stipulated damages clause if they feel that the clause is really a punishment of one of the parties. This is because of the general view of such courts that punitive damages are not appropriate in contract situations. These courts will not enforce such punitive clauses because they believe that the goal of awarding contract damages should be to compensate the injured party for the actual harm she has suffered--not to punish. This view will be discussed further in Section 10.5d below.

Common law jurisdictions do not appear to agree on exactly how to decide whether a stipulated damages clause is enforceable. Many common law jurisdictions now say that clauses providing for stipulated damages are enforceable only if the amount of damages specified in the stipulated damages clause is:

- (1) reasonable compared to the damages the parties might have expected when they made the contract;
- OR (2) reasonable compared to the damages that actually resulted from the breach.

It appears that such jurisdictions say that if the party seeking to enforce the stipulated damages clause can meet either one of these requirements, the clause will generally be enforced.

Some common law courts also appear to consider a number of other factors, in addition to the "reasonable" requirement noted above. Many courts say that, in analyzing whether a stipulated damages clause should be enforced, they also consider whether the damages that actually result from a breach are difficult to estimate or to prove. If such damages are difficult to estimate or to prove, these courts are more likely to enforce the stipulated damages clause. It appears that this difficulty could be measured at the time the contract was made, or at the time of a lawsuit about the breach. An example of such a difficult situation might be where the contract relates to a new business. In any case, although courts consider this factor, it seems less important than the "reasonableness" requirement above. In addition, it appears that some courts will not enforce these clauses if no actual damage or only trivial damage occurred because of the breach. Other courts may have variations of the above rules. Obviously, it is important to check the local law to see which (if any) of these additional factors apply.

For example, suppose Thunna agrees to buy a large quantity of cement from Chheng for \$200,000. The contract requires that all the cement be delivered on a certain date, and says that if the delivery is late, Chheng must pay Thunna \$50,000 in stipulated damages. Chheng is one day late delivering the cement, and as a result Thunna loses about \$1,000 in labor and equipment costs, because he is delayed in starting a construction job. In this case, the contract's stipulated damages clause is probably not enforceable. This is because it is probably punitive. It does not seem reasonable compared to what the parties might have expected at the time they made the contract, and it was certainly not reasonable compared to the actual damages of \$1,000. It would also not seem that Thunna's damages would be difficult to prove. So Thunna would probably be limited to the damages he could prove.

CASE STUDY 233

FACTS Sitha agrees to build a big new house for Hong for \$100,000. Hong plans to rent the house after it is built, and expects to receive around

\$3,000 per month for it when it is finished. The written contract says that Sitha must complete the house by March 1. The contract also contains a clause saying that if Sitha fails to complete the house by March 1, Sitha must pay Hong \$5,000 per day for every day after March 1 that the house is not finished.

Sitha and his crew work hard, but they are unable to complete the house by March 1. They finish four days late. As a result, Hong is unable to get rent for the house for those four days, which causes Hong to lose about \$400. Sitha admits that he is late, and offers to pay Hong some money because of the delay. But Hong points to the contract and demands \$20,000.

QUESTION OF LAW Can Hong enforce the clause which requires Sitha to pay him \$5,000 for every day the house is late?

DECISION Probably not, at least in common law jurisdictions. The clause requiring Sitha to pay Hong \$5,000 for every day the house was late does not appear to be reasonable compared to the damages Hong might have expected or his actual damages, so it is unlikely to be enforced.

Stipulated damages clauses are generally enforceable in common law jurisdictions if they are reasonable in comparison to the damages a party could have expected when she made the contract, or reasonable compared to her actual damages because of the breach. Many courts are more likely to enforce such clauses if the damages are hard to estimate or prove.

In this case, the contract Sitha and Hong signed said that Sitha had to pay Hong \$5,000 for every day Sitha was late in completing the construction of a new house for Hong. Sitha was four days late, and as a result Hong lost about \$400 in rent for the house. In this situation, the stipulated damages clause does not appear reasonable based on the expected or actual damages, which were only around \$300. There is no evidence that Hong had any reason to expect \$5,000 per day in damages at the time of the contract. In fact, it would seem that around \$100 per day would have been reasonable, since that is about the amount Hong expected to get in rent--and that was the amount he actually lost. There is no evidence that damages were difficult to calculate or prove. So a common law court would probably consider this stipulated damages clause to be a "penalty," and not enforce it. Hong would be limited to the damages he could actually prove under the usual rules--probably about \$300.

Some authorities might argue that courts should enforce clauses like the one in Case Study 233. One reason to enforce such clauses might be that it would provide a strong motivation for parties to perform their contract duties in a diligent way. It could also be argued that parties like Sitha assume the risk of having to pay such penalties when they sign such contracts, so they should have to pay, even if the amount seems too high.

In general, where there is a severe stipulated damages clause in a contract, a party can also ask a common law court not to enforce the clause on the basis that it is unconscionable. For example, where an extremely unfair stipulated damages clause appears in an adhesion contract, a court may refuse to enforce it on this basis. Such a clause might provide for unreasonably high damages for the more powerful party, or unreasonably low damages for the weaker party. However, as discussed in Chapter 7 ("Other Contract Formation Problems"), Section 7.7, unconscionability is applied only in limited cases.

Contracts might also say that certain kinds of remedies will or will not be available to a party in the event of a breach by the other party. For example, a sale of goods contract may contain a clause limiting the damages a party can get if the goods are defective. A lease contract might limit the damages a lessee can get in the event that the leased property is defective or causes harm. As discussed in Chapter 5 ("Legality") and Chapter 7, these kinds of clauses may be unenforceable where they violate statutes or public policy, or where they are found to be unconscionable. These remedies will be further discussed in Section 10.7d, below.

***** ADDITIONAL REFERENCE:** Chapter 5 ("Legality"), Section 5.4g, and Chapter 7 ("Other Contract Formation Problems"), Section 7.7, discuss when contract provisions may be unenforceable because they violate public policy, or because they are unconscionable.

10.5b Courts May Order a Party to Pay Nominal Damages Where a Breach Has Occurred but No Real Harm Is Proved

Sometimes a party proves that a contract breach occurred, but cannot or does not prove that any actual damage occurred. In that situation, a court may choose to order nominal damages for the party seeking a remedy.

***** DEFINITION:** **Nominal damages** are a small sum set by the court and awarded to a party seeking damages principally to show that another party has committed a legal wrong against the first party, even though the party seeking damages has proved no real harm.

Nominal damages may not seem to be worth the trouble it would take to get them! However, there may actually be some important advantages to an award of nominal damages. One advantage in many jurisdictions is that such an award may allow parties to recover their court costs from the other party. This is because civil procedure rules in many jurisdictions say that losing parties must pay the court costs of winning parties. Court costs are basically things like filing fees and witness fees required by standard court rules. In general, few of these individual fees are likely to be very high by themselves, but altogether they could add up to a substantial sum. In addition, as noted in Section 10.1 above, some jurisdictions (such as England) say that the losing party must generally pay the attorneys' fees of the winning party.

Attorneys' fees can be very large. So proving a contract breach occurred could be very important in that situation, even if no actual damages can be proved.

CASE STUDY 234

FACTS Vichett makes a contract with Kesaro. In the contract, Vichett agrees to paint a portrait of Kesaro's beloved daughter in time for Kesaro to give the portrait to his wife for the New Year celebrations. However, Vichett never even starts to paint the painting, and he simply laughs when Kesaro comes to ask for it at the New Year.

Kesaro is angry. He has not yet paid any money. He knows he probably cannot show any great amount of damages, and that it is too late to have anyone paint the portrait now. But he finds an inexpensive attorney and asks the court for help anyway. It takes a few months for the case to be decided, during which Kesaro must pay certain court costs.

QUESTION OF LAW Can Kesaro recover any damages for Vichett's breach?

DECISION Yes. Kesaro can recover nominal damages, even if he is unable to show any real damage.

Where a party does not or cannot show any real damage because of a contract breach, that party may still be able to get a small sum as nominal damages. These show that the other party did breach the contract. In many jurisdictions, this showing also gives the non-breaching party the right to recover her court costs from the breaching party. In some jurisdictions, the breaching party may also have to pay the other party's attorneys' fees.

In this case, Vichett breached the contract to paint a portrait of Kesaro's daughter. Even though Kesaro cannot show any real damages, the court may award him nominal damages. In many jurisdictions, this will mean that Vichett will have to reimburse Kesaro for his court costs. In some jurisdictions, Vichett will also have to pay Kesaro's attorneys' fees. Vichett is unhappy. Kesaro uses the nominal damages to take his wife and daughter out to a restaurant.

10.5c Courts May Order a Party to Pay Interest in Contract Disputes

Where a court awards money damages to a party, that party may also be able to recover interest on her damages. This can occur in several ways.

First, most jurisdictions say that parties may recover interest on the amount of the court judgment from the time of the judgment until the judgment is paid. The rate of interest is generally set by a statute.

Second, many jurisdictions say that a party may also be able to recover interest on the amount of the damages for a contract breach from the time of the actual breach to the time of the court judgment. This is called "pre-judgment interest." Many courts have traditionally ordered pre-judgment interest only if the amount of damages was certain at the time of the breach. Generally this occurs where a party simply fails to pay some amount of money as required by the contract. If a party fails to pay a specific amount of money as required by a contract on a certain date, it is easy to calculate the amount of interest from that date until the date of the judgment. The rate of such interest is usually set by a statute.

In addition, some jurisdictions now appear also to allow the non-breaching party to recover interest from the time of the breach even where the amount of damage is not so clear. An example would be where Sikoeun breached by providing defective services to Sary under a service contract. Sikoeun might not know how much he owes Sary until a court actually determines the damages. But some jurisdictions now allow their courts some discretion to award pre-judgment interest even in these situations. In the above example, a court might be able to determine some amount that would basically be the value of the services that Sikoeun failed to provide. Then the court might order that Sikoeun pay interest on that amount from the time of the breach. Of course, determining this amount might not be easy. And it is debatable whether it is fair to expect a breaching party like Sikoeun to have made this calculation at the time of the breach.

Finally, the contract itself may provide for interest if there is a breach. Courts enforce such clauses as long as they do not violate usury laws, as discussed in Chapter 5 ("Legality").

*** **ADDITIONAL REFERENCE:** Chapter 5 ("Legality"), Section 5.3c discusses when contract provisions may be unenforceable because they violate usury statutes.

Interest can make a big difference in the amount a breaching party finally pays for her breach. Consider the following Case Study.

*** **CASE STUDY 235**

FACTS The Peerless Power Company signed a contract with the Ministry of Power to build several big new power plants for a total price of \$50,000,000. The contract called for a \$20,000,000 payment at the time of the signing, and for the remaining \$30,000,000 to be paid when the plants were completed two years later.

The Ministry made the first payment, and Peerless completed the plants according to the contract. Unfortunately, the Ministry did not make the final \$30,000,000 payment when it was due. Peerless and the Ministry tried to negotiate about the problem, but the negotiations failed.

Several months after the breach, Peerless brought a lawsuit. One year after the breach, Peerless obtained a court judgment for \$30,000,000, plus interest from the time of the breach at the statutory rate, which was 10% simple interest per year.

Peerless had difficulty collecting the judgment. Finally, one year after the judgment, the Ministry tried to pay Peerless \$30,000,000. Peerless told the Ministry it wanted the interest also. The Ministry said "what interest?"

QUESTION OF LAW Can Peerless recover interest on its damages in this situation?

DECISION Yes. Peerless can recover 10% per year simple interest on the \$30,000,000 judgment from the time of the breach two years earlier until the judgment is paid, for a total of about \$36,000,000.

When a contract is breached, the non-breaching party can recover interest on the damages from the time of judgment until the judgment is paid. In many jurisdictions, that party can also recover interest from the time of the breach itself until the time of the judgment, at least where the amount of damages was certain from the time of the breach.

In this case, the Ministry breached its contract with Peerless by failing to pay the \$30,000,000 it owed for the construction of the power plants. Peerless got a court judgment for this amount and interest from the time of the breach. But Peerless was unable to collect the judgment until two years after the breach. In this situation, the Ministry does not owe Peerless merely the amount of the judgment. It also owes interest on those damages from the time of the breach until the judgment is paid. That will be \$30,000,000 plus 10% simple interest per year for two years, or about \$36,000,000. So the interest on the judgment in this case was worth \$6,000,000.

10.5d Courts Resolving Contract Disputes Generally Do Not Order Parties to Pay Punitive Damages

As explained in Section 10.1, courts in free market jurisdictions generally do not order a party to pay punitive damages solely for a breach of contract, or for making an unenforceable contract. The reason is that the basic idea of contract remedies in these jurisdictions is to compensate the injured party for the actual harm done to her--not to punish the other party.

***** DEFINITION: Punitive damages** are damages a court awards in order to punish a party who has committed some civil wrong, and to deter her and others from committing such wrongs in the future.

Punitive damages are usually used to punish people who have committed some serious moral wrong, such as a tort. So such damages may be based on the wealth of the defendant and the moral seriousness of the wrong.

But contract breaches are not generally considered to be such serious wrongs. Of course, if a party actually commits a tort such as fraud, then punitive damages may be available. But the general rule is that punitive damages are not available in contract disputes.

There may be some differences in the approach of different jurisdictions to this subject. In particular, civil law jurisdictions may be somewhat more willing to allow damages that are more "punitive" in certain particular situations. This was explained in the discussion of stipulated damages clauses in Section 10.5a, above. However, it appears that the main goal of damages in civil law jurisdictions (as in common law jurisdictions) is to compensate the non-breaching party for the actual harm to her, not to punish the breaching party. So the approaches of these systems seem to be generally comparable.

As noted above, one situation in which punitive damages might be available is where a party commits a wrong related to a contract that is also a tort. This might occur because a party uses a contract to commit a tort. Or it might occur where a party's breach of a contract actually is a tort, in addition to a breach. The exact situations where this may occur will depend on the law in each particular jurisdiction, so it is important to check the local law.

One important example might be where a party's breach of a contract is also fraud. For instance, suppose Hy intentionally misrepresents to Chanty that Hy's car has traveled only 500 kilometers since it was made. However, Hy has altered the odometer to hide the fact that the car actually has traveled 10,000 kilometers! If Chanty buys the car from Hy on the basis of Hy's statement about the distance the car has traveled, it would probably be fraudulent misrepresentation. That would create a voidable contract, as discussed in Chapter 7 ("Other Contract Formation Problems"), Section 7.4. But since fraud is also a tort, Chanty might also be able to recover punitive damages in order to punish Hy and deter such conduct in the future. Of course, in these cases, the award of punitive damages occurs because of the tort, not because there is a contract problem.

Another situation involving contracts in which punitive damages might be available is where there is a "bad faith" breach of a contract. This was discussed in Chapter 9 ("Performance and Discharge of Duties"), Section 9.5c. Many jurisdictions say that, in certain special situations, to breach a contract in bad faith--in violation of the duty of good faith and fair dealing--is actually a tort. However, courts have had trouble defining exactly when the tort exists. Most courts have been careful to limit this tort to certain types of cases. Basically, these cases seem to occur where:

- (1) there is some special relationship between the parties to the contract which involves elements such as the public interest and adhesion;
- or (2) a party's conduct in breaching is notably malicious, oppressive, unreasonable, or unjustifiable.

Obviously, it is difficult to say exactly when these requirements might be met. Probably the most important area in which courts have found this to occur is in insurance contracts. Specifically, it may occur where an insurance company refuses in bad faith to pay a claim submitted by one of its policyholders, even though the company has no legitimate reason to refuse. Of course, such conduct would be a breach of the insurance contract. But some courts have also found it to be a tort. Another situation where some courts have found the tort of bad faith to exist is where a party denies without any legitimate reason that a contract even exists. In situations like these, punitive damages may be available to punish the breaching party, and deter others from doing the same thing. Consider also the following Case Study.

CASE STUDY 236

FACTS Suppose that the facts in Case Study 211 happened in a somewhat different way. Suppose that Better Homes Construction and the Queen Group real estate development company had the same contract for Better Homes to build 10 houses, except that the contract contained no arbitration clause.

However, in this new case, before Better Homes even starts to perform the contract, Better Homes decides that it is not a good deal for it to continue with the contract. This is because Better Homes has made a mistake in setting the price for the job. The result of that mistake is that the contract is not profitable for Better Homes. In order to escape the contract, Better Homes falsely claims that the Queen Group has failed to supply it with the construction plans it needs to build the houses. Better Homes says it is terminating the contract before work has even begun.

The Queen Group asks the court for help. It claims \$30,000 of damages to compensate it for Better Homes' breach, and an additional \$20,000 in punitive damages for what it says was the tort of bad faith breach by Better Homes.

QUESTION OF LAW Can the Queen Group recover punitive damages on the basis that Better Homes has acted in bad faith?

DECISION Perhaps. The Queen Group may be able to recover both compensatory damages and punitive damages, if it can show that Better Homes' breach of the contract was actually in bad faith and a tort.

Although punitive damages are generally not available for breach of contract, they may be available, at least in certain cases, where a party can show that a breach was also an act of bad faith and a tort. In this case, Better Homes wanted to escape from the contract because it was a bad deal. In order to do that, Better Homes falsely claimed that the Queen Group had failed to supply it with the required construction plans, and terminated the contract without justification. Some courts might find this conduct to be

a bad faith breach of the contract and a tort--and award the Queen Group the \$20,000 it seeks in punitive damages, in addition to the \$30,000 it seeks in compensatory damages.

A court might do this if it believed that the conduct of Better Homes was so unjustifiable and malicious that it was a serious moral wrong for which such damages should be available. Obviously, this is not an easy question. What do you think?

***** WHY IS THIS IMPORTANT?** Why do some jurisdictions say that a "bad faith" breach of a contract can actually be a tort which would justify punitive damages?

As discussed above, torts are serious moral wrongs. Societies generally say that courts may award punitive damages for such wrongs, in order to punish those who commit them and deter those who might commit them in the future. There may be situations where a breach of contract is in fact such a serious moral wrong that it would justify punitive damages. Case Study 236 may be an example of such a situation. This is because a court might find that Better Homes' breach in that case was so malicious and unjustifiable--perhaps because it involved knowingly making a false claim to escape the contract--that Better Homes should be subject to punitive damages.

On the other hand, as noted in Section 10.1 above, some authorities have argued that it might sometimes be more economically efficient for parties to breach unproductive contracts, and pursue activities that are more productive, as long as the non-breaching party is adequately compensated for the breach. For example, in Case Study 211, Better Homes breached the contract in order to pursue a much larger project to build 50 houses for the Big White Villa Company. Although the Queen Group would obviously be compensated for damages caused by Better Homes' breach, it is debatable whether punitive damages should be used in a situation like that to deter conduct such as that of Better Homes. The reason is that it is arguably more productive if economic actors like Better Homes do the work in which they can be most productive, which in this case would probably be the larger contract. Some authorities have called this an "efficient breach." This argument might even be made for the situation in Case Study 236, in the sense that it might be more efficient for Better Homes not to perform a losing contract, but to try to find other work. It may be that the "bad faith" that case was not so much that Better Homes breached, but that it knowingly made a false claim in order to escape its obligations.

Of course, the "efficient breach" theory may not seem fair to parties like the Queen Group. It might also lead to less faith in contracts--which could hurt the economy. As noted above, courts can never fully compensate parties for contract breaches in any case. In addition, the fact that parties and courts must devote time and resources to resolving legal disputes is itself a burden on the economy. So it is not an easy issue to resolve.

*** **ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.4 discusses contracts which are the result of misrepresentation; and Chapter 8 ("Interpretation of Contracts"), Section 8.3j, and Chapter 9 ("Performance and Discharge of Duties"), Section 9.5c discuss the duty of good faith and fair dealing.

10.6 There Are Several Important General Limits on Damages Parties Can Recover in Contract Disputes

When courts award damages to a party harmed by a contract breach or other contract problem, the goal is generally to compensate the party for the losses she has suffered. However, the ability of courts to award such damages is limited by a number of rules. In general, these rules are designed to try to ensure that the amount of damages awarded is fair to both the party harmed and the party who has caused the harm. The rules also try to promote economic and judicial efficiency. Some limits apply especially to certain types of damages, or only to certain types of damages. Many of those limits were discussed in Sections 10.2-5 above.

As noted earlier, three of the most important general limits on the damages that a party can recover in a contract dispute are that such damages must:

- (1) be proved with reasonable certainty;
- (2) be foreseeable by a reasonable person;
- and (3) not be damages that the party seeking them could reasonably have avoided.

Each of these general limits is discussed below.

10.6a Parties Can Generally Recover Only Damages That They Prove with Reasonable Certainty

One important general requirement for a party to recover damages in a contract dispute is that the party must prove the damages with reasonable certainty. This means that a party who wishes to recover damages must not only show that she has suffered some harm, but also show the amount of such harm with reasonable certainty. If she cannot show this, then she cannot recover those damages. This rule is especially important when courts are considering whether to order that a party pay expectation damages, especially for lost profits. However, it is important to remember that courts do not require that the amount of such damages be completely certain--only that it be reasonably certain.

For instance, in the restaurant example in Section 10.3 above, Chan and Yutho made a contract to form a partnership and start a new restaurant. But Chan breached the contract before the new restaurant could open.

In that situation, Yutho would have difficulty proving her expectation damages with reasonable certainty. That is because, as discussed in Section 10.3, Yutho's expectation damages would involve proving what profits the restaurant would have made if it had opened. This can be very difficult to do with new businesses, especially restaurants. Therefore, Yutho might be unable to get expectation damages. Of course, she could still ask a court to award her reliance damages.

The reasonable certainty rule makes it difficult for parties to recover for lost profits when a new business is involved. However, as noted in Section 10.3, parties may be able to recover such damages if the business is not so new, or if the person starting the new business can offer good evidence of the profits from her operation of a similar business in the past, or even of the profits of other comparable businesses. That kind of evidence could be used to make a reasonable estimate of future profits of the business affected by the breach.

For instance, in the restaurant example above, suppose Chan breached the contract after the restaurant had been open for some time. If the breach caused a clear negative effect on the restaurant--such as if it had to close down, or the volume of its business went down sharply--Yutho might be able to show expectation damages with reasonable certainty. This is because she could use the history of the profits the business had already made to show what the restaurant could reasonably have expected to earn in the future. Or suppose Yutho had years of experience successfully running chicken restaurants like the one she planned to open with Chan. In that situation, Yutho might be able to use evidence of the profits in those prior businesses to help her show what the new restaurant would have earned. Of course, it might still be fairly difficult to do this, because of the many uncertainties of the restaurant business.

The reasonable certainty rule is also important in other types of situations. One is construction contracts, such as in the case of Ear and Sem which was discussed in Section 10.3 above. In one of the examples relating to that case, Sem had trouble showing how much it would have cost him to finish a construction job. So he was unable to prove his expectation damages with reasonable certainty, and he could not recover those damages. However, he could probably have proved his reliance or restitution damages more easily.

Another type of situation in which the reasonable certainty rule can be important is where parties ask for profits they have lost because of breaches of contracts that involve the "public whim," such as entertainment or sports events. Consider the following Case Study.

CASE STUDY 237

FACTS The Royal Dance Company and a dancer named Vannrath sign a contract under which Vannrath is to dance the crucial part of the apsara

in the biggest dance performance of the year. The performance is scheduled to occur at the Royal Theater two months after the contract is signed.

However, only two weeks before the performance, Vannrath gets a big part in a film that some well-known filmmakers are about to make about Cambodian dance. Vannrath cannot do both things. So she makes an anticipatory repudiation of her contract with the Royal Dance Company. The Dance Company is stunned, and they are unable to find anyone else to perform the part on such short notice.

The Dance Company asks Vannrath to compensate them for her refusal to perform. But they cannot reach her because she is too busy traveling the world to make the film. Finally, they ring her lawyer in Sydney and ask for the profits they would have made if Vannrath had performed (their expectation damages). Vannrath's lawyer says "sorry, mate," but those profits cannot be shown with reasonable certainty, so they cannot be recovered. The Dance Company says it has evidence that comparable performances by Vannrath in recent years have earned the dance companies with which she danced \$30,000-50,000, and that the Company's own recent performances have earned it \$25,000-40,000.

QUESTION OF LAW Can the Royal Dance Company recover the profits the Company lost because of Vannrath's breach?

DECISION Perhaps. The Company could have trouble showing the amount of such lost profits with reasonable certainty, but it might be able to do so with evidence of profits made in comparable performances in the past.

When parties try to recover profits lost because there has been a breach of a contract involving the public whim, they may have difficulty proving those damages with reasonable certainty. However, they may be able to do so if they can find good evidence of profits made from comparable performances in the past.

In this case, Vannrath breached her contract to dance for the Royal Dance Company, and the Company almost certainly lost some profits as a result. However, the Company may have difficulty showing its losses with reasonable certainty. It could try to use evidence of profits earned by comparable performances in the past, such as the evidence it has that performances by Vannrath in recent years have earned the dance companies with which she danced \$30,000-50,000, and the evidence that its own recent performances have earned it \$25,000-40,000. A court might accept these figures as reasonable estimates of what the Company would have earned from Vannrath's dancing, taking into account all the circumstances of the case. Or the court might decide that it simply cannot say whether the performance would have earned the Company \$25,000, or \$50,000, or some other figure, and refuse to award those damages. In that case, the Company might at least try to recover reliance or restitution damages.

10.6b Parties Can Generally Recover Only Damages That a Reasonable Person Could Have Foreseen

Another important limit on damages is that a party can generally recover only damages that a reasonable person could have foreseen at the time the contract was made. If a reasonable person could not have foreseen some damages that occurred because of a breach, then the party harmed cannot recover those damages--no matter how severe they are!

In applying this "reasonably foreseeable" rule, many jurisdictions say that parties may recover two types of contract damages:

- (1) damages that are a natural and usual result of a breach of the type of contract involved in a dispute ("general damages");
- AND (2) damages that occur because of special circumstances in the particular case only if the non-breaching party shows that the breaching party actually knew about the special circumstances ("consequential damages").

Courts generally assume that damages in the first category--those that are the usual and probable result of a particular breach--are reasonably foreseeable. But damages of the second type--which depend on the special circumstances of a particular case--are considered to be reasonably foreseeable only if the breaching party actually knew about those circumstances. Therefore, those "consequential" damages can be recovered only if the non-breaching party shows that the breaching party knew about the special situation that caused them.

For example, suppose Ponnarith has a contract to make certain forms (documents) for the government and supply them by a certain date. The contract has a stipulated damages clause that says Ponnarith must pay a certain amount to the government for every day the forms are late. In order to make the forms, Ponnarith makes a different contract to buy paper from Tahvay for \$5,000. Unfortunately, Tahvay fails to deliver the paper on time. Ponnarith is able to find another supplier to get the paper, but despite his reasonable efforts to get a good price he must pay \$7,000 for the substitute paper. In addition, he is unable to get the paper in time to meet the deadline in his contract with the government. As a result, he also owes the government an additional \$1,000 because of the stipulated damages clause in the government contract.

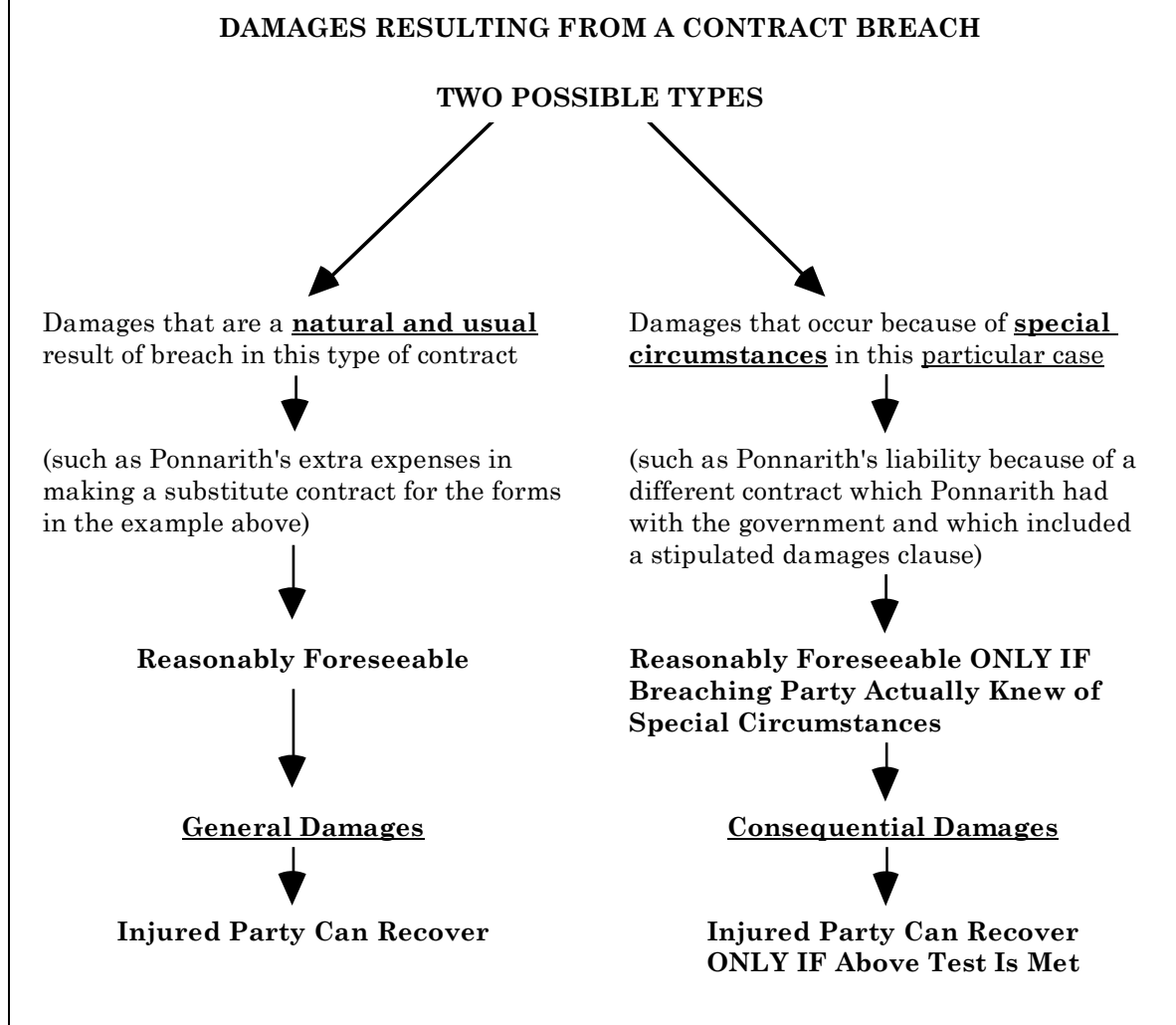
In this case, Ponnarith has suffered damages of both of the types described above. His damages in having to pay more for the replacement paper (the extra \$2,000) are of the first type described above. That is because they are a natural and usual result of a breach of this type of contract. It is generally known that prices of goods go up and down, and that a breach of any sales contract may result in this kind of harm. Because these damages

are reasonably foreseeable, Ponnarith will probably be able to recover them from Tahvay.

But Ponnarith has also suffered damages of the second type above. The damages Ponnarith had to pay to the government for the delay (the \$1,000) are not a natural and usual result of this kind of breach. Instead, they are the result of the special circumstances in this case, which are that Ponnarith had a different contract with a strict due date and a stipulated damages clause. This kind of damage is reasonably foreseeable only if Ponnarith can show that Tahvay actually knew of the particular situation that caused the damage. In this case, that would probably mean Tahvay would have to have known about the government contract and the stipulated damages clause, and to have known that Tahvay's breach would be likely to prevent Ponnarith from performing the government contract on time. Ponnarith might have difficulty showing that Tahvay knew these things, unless Ponnarith had actually told Tahvay about them. So Ponnarith might not be able to recover the additional \$1,000 from Tahvay.

The chart below illustrates when parties can recover the two types of damages discussed above.



Illustration: Recovery of Reasonably Foreseeable Damages

The following Case Study also illustrates the difference between general and consequential damages.

CASE STUDY 238

FACTS The Big Bear Beer Corporation operated a huge brewery. One day, a very important piece of machinery at the brewery broke, forcing the entire brewery to shut down until the machinery could be repaired. The president of Big Bear Beer had the machinery taken to Yoeung, a carrier. Yoeung promised to deliver the machinery within two days to the Machine Repair Company, which was very far away, so the part could be fixed. Big Bear Beer did not tell Yoeung what the broken part was, or that the brewery had been shut down.

Unfortunately, Yoeung did not deliver the part to the Repair Company until a week later. As a result, the part was not returned to Big Bear Beer until five days later than it would have been if Yoeung had delivered it

on time. The Big Bear Beer Corporation lost five extra days of profits. Yoeung did not learn that until after the part was delivered to Big Bear Beer. But the President of Big Bear Beer was very upset with Yoeung. She threatened to bring a lawsuit to recover the five days in lost profits from him.

QUESTION OF LAW Can Big Bear Beer recover damages for the five days of profits it lost because Yoeung failed to deliver the broken part to the Repair Company on time?

DECISION Probably not. Big Bear Beer probably cannot recover damages for the lost profits because such consequential damages were due to special circumstances, and Yoeung did not know of those circumstances until after the damage occurred.

When damages caused by a contract breach are not a natural and usual result of the kind of breach involved--when they are consequential damages--a party can recover those damages only if she can show that the breaching party actually knew about the special circumstances that caused them at the time the contract was made.

In this case, Yoeung breached his contract with Big Bear Beer to deliver the broken part to be repaired. As a result, Big Bear Beer's brewery was shut down for an additional five days, and the company lost five days of profits. However, this kind of loss is not a natural and usual result of a simple failure to deliver a broken part to a repair shop on time. In fact, the loss was consequential damages, because it resulted from the special circumstances in this case. Those circumstances were that the part was so important to the brewery that the brewery could not operate without it. Big Bear Beer will be able to recover its lost profits here only if it can show that the carrier Yoeung actually knew about the fact that the entire brewery was shut down because of the broken part. It is unlikely that Big Bear Beer can do this. Big Bear Beer did not tell Yoeung about how important the part was, or what effect the loss of the part was having on the brewery. Yoeung did not learn those facts until after the damage occurred. And a carrier like Yoeung would have no reason to know about the problem unless Big Bear Beer told him. Therefore, Big Bear Beer probably cannot recover these damages from Yoeung.

Of course, Big Bear Beer could recover damages that were reasonably foreseeable. For example, the company probably could recover the difference between what it paid Yoeung for the fast delivery and the reasonable value of the slower delivery. This is because such damage would be a natural and usual result of a breach such as this one (general damages).

Sometimes parties who tend to be in situations like Yoeung in Case Study 238 put clauses in their contracts that expressly limit their liability for consequential damages. Examples of such parties are carriers and photographic film developers. Parties insert such clauses in order to limit their liability for damages that actually were foreseeable. They may also do so

to protect themselves from claims that they actually did know of the special circumstances that led to the damages. For example, Yoeung might have put a clause in his contract with Big Bear Beer that said any remedy for his failure to deliver according to the contract would be limited to the actual replacement value of the item he failed to deliver properly, or some other amount. Likewise, photographic film developers often limit their liability for damage related to film developing to the cost of a replacement roll of film. These clauses, if they are enforceable, may limit a breaching party's liability for damages that actually were reasonably foreseeable.

Of course, such a clause is really a kind of stipulated damages clause. So it is subject to the same kinds of limits that other stipulated damages clauses are, such as limits relating to unconscionability and regulation by statutes. For example, the Uniform Commercial Code in the United States regulates the ability of parties to limit their liability for losses resulting from their breaches of sale of goods contracts. Stipulated damages clauses are discussed in Section 10.5a, above.

Another problem related to whether damages are reasonably foreseeable is whether parties can recover damages for emotional distress caused by contract breaches. In general, it seems that such damages cannot be recovered, since they will not usually be foreseeable, particularly in commercial contracts. However, in some types of contracts, such damages might be foreseeable.

For example, some authorities say that damages for emotional distress might be foreseeable in a contract for funeral services. Suppose a party made a contract to transport a recently deceased person's body from that person's home to the wat as part of the funeral ceremonies. If the transporting party somehow lost or damaged the body, it would probably be reasonably foreseeable that such actions would cause emotional distress to the deceased person's family.

***** WHY IS THIS IMPORTANT?** Why do courts say that parties cannot generally recover damages that the breaching party could not reasonably have foreseen?

There are several important reasons for the rule that damages must be foreseeable in order to be recovered. On the whole, the rule attempts to promote both fairness and a more efficient economy.

One important reason for the rule is that the law feels that it might not always be fair to the breaching party to hold her responsible for all damage caused by a breach, no matter how unforeseeable that damage was. A related reason for the rule is that holding such breaching parties responsible for unforeseeable damages might deter such parties from making certain contracts--such as contracts of carriage--and thus harm the free market economy. Of course, if parties did not have the benefit of this rule,

it might motivate them to perform their contracts more carefully, since the potential unknown risks to them might be so great. But on the whole, it seems that the law does not feel that subjecting parties to this kind of unpredictable risk would be productive.

The rule also helps to motivate parties to think carefully about the risks that may be involved in the performance of a contract, and to plan for those risks to the extent they can. Thinking about these matters may cause one party to tell the other party to the contract about special risks that may not be obvious. That kind of disclosure may actually decrease the risk! That is because the party who becomes aware of the risk may perform the contract more carefully as a result.

For example, in Case Study 238, if Big Bear Beer had actually told Yoeung about the effect that the broken part had on the brewery, Yoeung might have been more careful about delivering the part to the Repair Company on time. That would have been better for both parties, and would also have promoted a more efficient economy and judicial system.

Thinking about these risks may also cause some parties to actually allocate the risk in the contract itself. This might occur through a clause limiting a party's liability for consequential damages. For example, the parties in Case Study 238 could have carefully defined the extent of Yoeung's potential liability for consequential damages in the contract. That might have helped them (and the courts) avoid the dispute they had.

10.6c Parties Cannot Recover Damages That They Could Reasonably Have Avoided

When there is a breach of contract, the injured party must often decide what to do in response to the breach. If that party chooses not to ask a court for a remedy, then the party generally need not avoid damages. But if that party does decide to ask a court for damages, the party will not be able to recover damages that she could reasonably have avoided (or “mitigated”). The reason for this rule, as with the rules above, is that it promotes fairness to the breaching party and efficiency in the economy.

As a practical matter, this rule means that a party should stop her performance of the contract if continuing that performance would increase her losses. On the other hand, in some cases stopping performance would actually increase a party's losses!

The rule may also mean that a party should use reasonable efforts to find a substitute performance at a reasonable price. For instance, this is what Ponnarith did in the form example above, when he used reasonable efforts to find a substitute supplier for the paper following Tahvay's breach. Non-breaching parties often do try to find substitute performances. Such parties may face risks and problems if they do not find a substitute performance.

These include the risk that a court will not determine the real value of the performance in a way that is favorable to such parties, and the risk that they may suffer damages they cannot recover in court. Such parties also may have to spend time and effort arguing in court about what the performance was worth. Many parties wish to avoid those risks.

A party can generally recover the expenses she has in using reasonable efforts to avoid damages--even if those efforts are unsuccessful. For instance, Ponnarith in the example above could probably have recovered his expenses in looking reasonably for a substitute supplier, even if he failed to find one. The important question is whether such a party's efforts were reasonable or not.

This rule about avoiding damages may have different results in different situations. Four of these situations are discussed below.

(1) Sale of Goods -- In sale of goods contracts, either party may generally try to find a substitute performance if a breach occurs. If the buyer breaches, the seller may use reasonable efforts to re-sell the goods. If the seller breaches, the buyer may use reasonable efforts to find substitute goods. In some jurisdictions, if parties fail to use reasonable efforts to find substitute performances, their damages may be limited to the difference between the contract price and the market price of the goods. These rules about sale of goods contracts can be complex. Some of them will be discussed in more detail in Section 10.8a, below.

(2) Construction Contracts -- In construction contracts, where the owner breaches, the builder should generally stop work on the job, unless that would actually increase the damages. The builder should generally stop purchasing supplies, and try to sell or use the materials she has already purchased for the job. If she fails to act reasonably in these ways, she will be unable to recover for damages she suffers that she could reasonably have avoided.

For example, suppose a builder named Monika is hired to build a new part onto Ra's house. Monika buys a lot of equipment and materials for use on the job. But Ra breaches soon after the work starts. Monika will not be able to recover for damages she could reasonably have avoided by selling the equipment or materials, or using them in some other way. Obviously, this also means parties like Monika cannot recover for losses they create themselves simply to increase the damages the breaching party must pay. That might occur if Monika were to actually destroy some of the materials, just to increase the damages Ra would have to pay!

Of course, in some cases, not stopping the construction would be the best way to avoid damages. That might happen if materials or labor would otherwise go to waste, or if the building was in danger of being seriously damaged, if it was left in its unfinished state. So in that kind of case, the builder would be permitted to complete the construction.

(3) Manufacturing Contracts -- Similarly, in manufacturing contracts, where a party for whom a manufacturer is making goods breaches, the manufacturer can generally avoid damages best by stopping her work. However, in some cases, the best way to avoid damages might be to actually finish making the goods. This might occur with partly manufactured goods that would have little or no value unless they were completed. In that situation, completing the goods might actually decrease the manufacturer's damages. So the manufacturer would have the right to complete the goods.

(4) Employment Contracts -- In employment contracts, when an employer breaches a contract by terminating an employee, the employee cannot recover for damages that she could have reasonably avoided by finding another job. However, the employee is not required to take any job at all--no matter how inappropriate for her--in order to avoid damages. Specifically, the employee is not required to take another job that is substantially different from or inferior to the job she lost. In general, the employee should use reasonable efforts to find another job of roughly comparable type, salary, and geographic location.

CASE STUDY 239

FACTS Happy Market hired Krui to work as a sales clerk for one year. Krui worked at the Market for about six months, and both parties were happy. Unfortunately, at that time, Happy Market told Krui he had to leave, and paid him no more money. Happy Market did say it would try to help Krui find another job. But Krui refused, and kept asking for the money for the six months remaining on his contract.

Krui brought a lawsuit claiming that Happy Market had breached its contract with him and claiming the remainder of his salary as damages. The court agreed that Happy Market had breached the contract, and began to consider what damages might be appropriate.

Happy Market argued that Krui had failed to use reasonable efforts to avoid damages. Happy Market provided good evidence that there were sales clerk jobs with similar pay available at the Big Market at the time Krui was fired, and that Krui should have been able to get one of those jobs within a month from the time Happy Market asked him to leave. Krui admitted that he could probably have gotten one of those jobs. But Krui said those jobs were not comparable because it would have taken him 10 more minutes to get from his house to the Big Market every day.

QUESTION OF LAW Can Krui recover damages he could have avoided by taking one of the sales clerk jobs at Big Market?

DECISION Probably not. It appears that the job Krui could have gotten at Big Market was basically comparable to his old job,

and so he probably cannot recover damages that he could have avoided by taking that job.

When an employer breaches an employment contract, an employee can recover only damages that she could not have reasonably avoided. This usually means that she should use reasonable efforts to find other employment of a roughly comparable type, salary and geographic location.

In this case, Happy Market breached its employment contract with the sales clerk Krui. Krui did not look for other employment, even though sales clerk positions at similar pay were available at Big Market. Krui probably will not be able to recover damages that he could have avoided by taking a job at Big Market. This is because the positions available there appear to be roughly comparable as to type, pay, and geographic location. The fact that Big Market would require a little longer trip to work each day is probably not enough for a court to find that the Big Market jobs were substantially different or inferior. So Krui could probably not recover damages he could have avoided by taking that job. The damages he could have avoided would probably include most or all of the pay he could have earned during the last five months of his contract with Happy Market. Of course, Krui could recover damages that he could not have avoided. Such damages would include the pay for the one month that Happy Market's evidence showed it would probably have taken him to find the job at Big Market.

Although Krui was unable to recover damages he could have avoided by taking the other sales clerk job in Case Study 239, it is important to remember that parties are not required to take any job they can find in order to avoid damages. Suppose Krui had been unable to find any other job except that of selling gasoline along the side of the road, at a salary ten times less than his sales clerk salary. A court would probably say that was not comparable employment, and that Krui would not be required to take that job in order to avoid damages. In that situation, Krui could probably recover damages for his lost wages until he could reasonably have found a comparable job.

10.7 Courts May Order or Allow Non-Monetary Remedies

Sometimes courts resolving contract disputes decide to order or allow a remedy other than money damages. Courts may do this for a variety of reasons. These reasons include the type of contract involved, the type of dispute that has occurred between the parties, and the positions of the parties involved in the particular case.



This Section explains some of the more important non-monetary remedies that courts may decide to order or allow. In particular, this Section discusses:

- (1) specific performance (Section 10.7a);
- (2) rescission (Section 10.7b);
- (2) reformation and severance (Section 10.7c);
- and (3) other remedies courts may order or allow (Section 10.7d).

10.7a Courts May Order Specific Performance of the Contract, Although They Do So Only in Certain Situations

Sometimes courts decide to actually order that a party perform a contract. In these cases, instead of ordering a party to pay money damages to another party, the court simply orders the party to perform the contract, such as by actually delivering the goods she promised to deliver in a sale of goods contract. In many jurisdictions, this is called an order for specific performance.

***** DEFINITION:** An **order for specific performance** occurs where a court orders a party to actually perform according to the terms of a contract.

An effective order of specific performance may actually achieve the goal of expectation damages better than expectation damages do! This is because an order for specific performance may place the injured party closer than damages will to the exact position she would have occupied if the parties had fully performed the contract. Of course, even if an injured party gets expectation damages and buys a substitute performance, that substitute performance will not give the injured party exactly what she was promised in her original contract: complete performance by the breaching party. But an order of specific performance could nearly provide that, except that the performance would generally be late.

Courts in different jurisdictions apply the remedy of specific performance in different situations. It appears that specific performance is available in civil law jurisdictions in more situations than it is in common law jurisdictions. In fact, in civil law jurisdictions such as Germany, specific performance is considered to be one of the most important types of remedies courts order. However, it appears that such jurisdictions will not order parties in contract disputes to actually perform personal services. It also seems that damages remedies are growing more common in commercial contract cases in civil law jurisdictions.

In common law jurisdictions, courts prefer to order the remedy of money damages in most cases. In these jurisdictions, specific performance is ordered

only in limited situations. In particular, many common law jurisdictions say it should be ordered only where a court believes that:

- (1) money damages are not adequate to compensate the injured party;
- AND (2) the court can adequately enforce the order of specific performance.

With regard to the first requirement, common law courts feel that damages may not be adequate in some situations because the subject matter of the contract is unique. This often means that the injured party cannot get the benefit of what she was promised under the contract unless she actually gets the promised subject matter from the other party to the contract. The two most important situations where this may occur are contracts for the sale of land, and contracts for the sale of unique goods. These will be discussed later in this Section. Other situations in which the subject matter might be unique are contracts for the sale of patents, copyrights, or businesses, and contracts that involve promises not to do something, such as promises not to compete. In these cases, damages might not be adequate.

The second requirement is that common law courts must believe that they can adequately enforce the order. Obviously, courts feel that they can adequately enforce certain orders, such as orders for the payment of money, or the transfer of property. But many courts feel they will have difficulty enforcing orders that are more complex or likely to lead to problems, such as orders for the performance of personal services. It appears that many courts may also require that the terms of a contract be more clear and definite in order for them to order specific performance. This requirement exists so that courts are able to make sufficiently specific orders, and able to tell whether those orders are being obeyed.

Because many common law courts do not order specific performance unless the two requirements above are met, there are not many situations where they actually do order specific performance! As noted above, the two most important ones are in cases involving the sale of land and the sale of unique goods. In both of these situations, damages may not be adequate. That is because a buyer of such unique items cannot use money to get a truly comparable performance anywhere else. Common law jurisdictions believe that no two pieces of land are truly the same. They also believe that no two sets of truly unique goods--like unique works of art--are the same. In addition, in both situations, it is generally not too difficult to supervise the transfer of land or goods from one party to the other.

Here is an example of a situation where a court might order specific performance of a land sale contract. Suppose Chhoeun agrees to sell a particular piece of land to Sarin. Chhoeun breaches the contract and refuses to sell the land to Sarin, and Sarin requests specific performance. A common law court would be likely to order that Chhoeun specifically perform

the contract. Damages would probably not be adequate to compensate Sarin for the breach, since Sarin cannot buy that particular piece of land from anyone but Chhoeun. And supervising this kind of order for specific performance should not be too difficult for a court. It is probably not difficult to determine whether or not Chhoeun has transferred the land to Sarin.

An example of a sale of goods contract that might be appropriate for specific performance in common law jurisdictions would be if Chhoeun agrees to sell Sarin a painting of Angkor Wat done several years earlier by a famous artist. Suppose that, after the contract is made, Chhoeun changes his mind and refuses to sell the painting. In that case, a court might order specific performance. The reason is that damages would not be adequate to compensate Sarin for the loss he would suffer because of the breach. No amount of money can adequately replace an original work of art. And again, it is not too difficult for a court to supervise this performance, which merely involves the transfer of a piece of personal property.

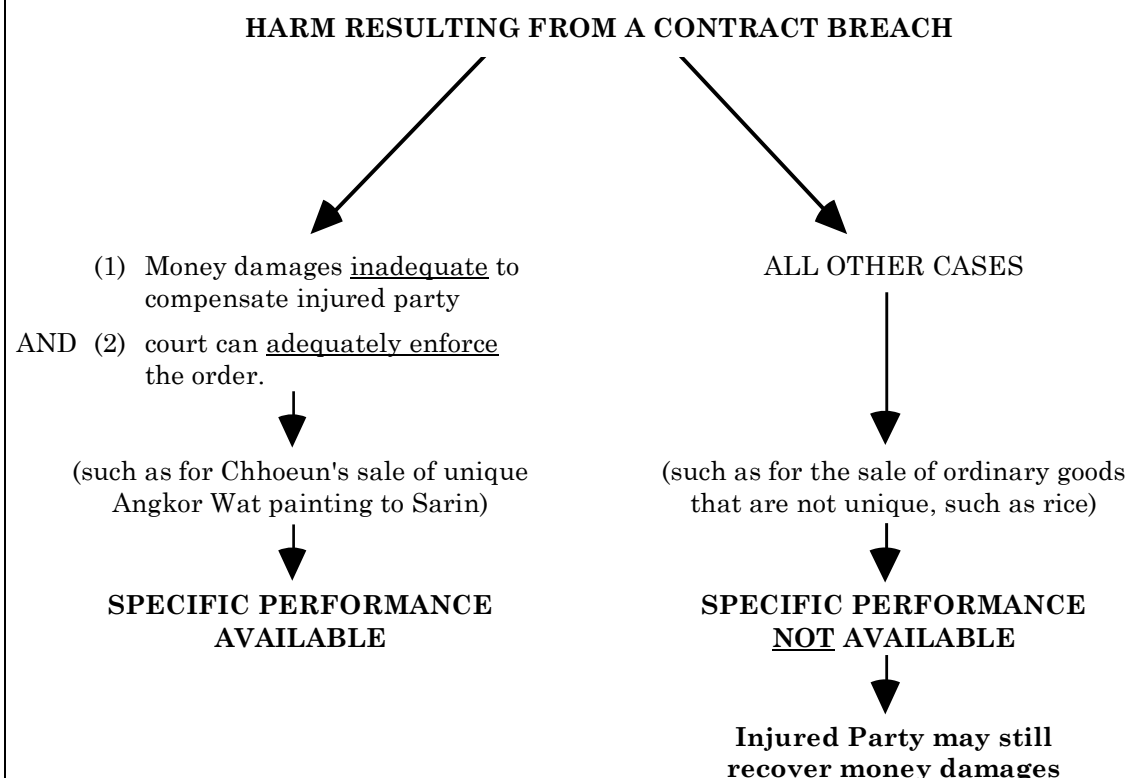
However, most common law courts are very unlikely to order specific performance of a contract for the sale of goods that are not unique. The Uniform Commercial Code in the United States provides for specific performance where goods are unique or in "other proper circumstances." These other circumstances appear to be rare. For example, suppose there is a breach of a contract for the sale of rice. Rice is one of the least unique goods in the world. In general, anyone with money can buy rice. Most common law courts feel that damages should be adequate to compensate a buyer injured by a contract breach in that situation. By contrast, it appears that civil law courts like those in Germany might order specific performance even for common goods such as rice.

One situation in which some common law jurisdictions may order specific performance in sale of goods contracts even if the goods are not really "unique" is where the injured party cannot find replacement goods anywhere else. This might occur because of the current state of the market. For example, it might happen with regard to the supply of large quantities of oil or gas under a long-term requirements contract. In that kind of situation, the buyer might have difficulty finding a substitute performance in the event of a breach. A buyer might have such difficulty because the market is too uncertain or chaotic at a particular time.

The chart below illustrates when many common law courts will order specific performance in a contract dispute.



Illustration: When Many Common Law Courts Order Specific Performance



The practical result of the above rules is that, in most situations, common law courts will not order specific performance. For example, such courts are very reluctant to order specific performance of contracts for personal services or construction contracts. In these kinds of situations, the subject matter of the contract may or may not be unique. However, the difficulties in enforcing these kinds of orders seem to be the main reason that courts will not usually make them. It might be very difficult for a court to supervise the performance of a large, complex construction contract. Likewise, ordering a party to perform a personal services contract that she does not wish to perform could lead to many serious problems. This is true whether the breaching party is the employer or the party providing services. It appears that even civil law jurisdictions will not make such orders in these cases. In fact, some courts have even compared ordering workers to supply such services to involuntary servitude! For example, an employee who was ordered to work for an employer she hated might suffer great mental and other damage. She might also start to consider inappropriate responses to such an order. Courts wish to avoid such results.

CASE STUDY 240

FACTS Suppose the facts of Case Study 237 happen in a somewhat different way. The Royal Dance Company and a dancer named Vannrath

make a contract under which Vannrath agrees to dance the part of the apsara in the biggest dance performance of the year. Unfortunately, only two weeks before the performance, Vannrath makes an anticipatory repudiation. The Dance Company is unable to find anyone else to perform the part on such short notice.

Suppose the Dance Company realizes that it will have trouble proving expectation damages, because of the uncertainty about the amount of profits it will lose because of Vannrath's breach. Not long before the performance is scheduled to occur, the Dance Company goes to court and asks for an order compelling Vannrath to actually dance in the performance--an order for specific performance.

QUESTION OF LAW Will a court order Vannrath to actually dance in the upcoming performance of the Royal Dance Company?

DECISION No. A court will not order Vannrath to actually dance in the performance of the Dance Company, because that would be an order for specific performance of a personal services contract.

Courts will almost never order parties to specifically perform personal services contracts. Common law jurisdictions will not usually make such orders because, even if a party can show that damages are inadequate, the party is very unlikely to be able to show that the court will be able to enforce the order adequately.

In this case, Vannrath breached her contract to dance for the Royal Dance Company, and the Company will almost certainly be harmed as a result. The Company fears it cannot prove expectation damages, so it asks a court for an order of specific performance. A court is extremely unlikely to grant such an order, because this is a personal services contract.

The Company can probably meet the first common law requirement for such an order, that damages are inadequate, by showing that Vannrath's services are unique. They probably are unique, since she is a highly skilled dancer and the Company has been unable to find any other dancer to dance the part on such short notice.

However, the Dance Company will not be able to meet the second requirement, which is that the court be able to enforce adequately the order of specific performance. This is a personal services contract, and one in which the parties will probably have strong negative feelings for each other by the time of any such performance a court might order. This could lead to many problems in the enforcement of an order for specific performance. In addition, the subject matter of the contract is an artistic performance. It will be very difficult for a court to measure whether Vannrath is really complying with the contract if it orders her to perform. On the whole, it would be very difficult for a court to enforce adequately an order for specific performance

in this situation. So a court is unlikely to make such an order. Of course, as noted above, the Company might at least try to recover its reliance or restitution damages.

One thing a court might order in a personal services situation would be that a breaching worker not perform those services for anyone else during the term of the contract. This kind of court order--an order not to do something--is called an injunction. However, it seems that such injunctions are available only in very limited circumstances. Some courts make such orders only where the services involve unique skills; the injunction would leave the worker with some other reasonable way to make a living; and, if it seems that the injunction will probably influence the worker to actually perform the original contract, it appears that the worker will perform it in good faith.

***** WHY IS THIS IMPORTANT?** Why do courts in common law jurisdictions order specific performance only in the limited situation where they believe that damages are inadequate and that they can adequately enforce the order?

One basic reason common law courts order specific performance only in these limited situations is that they are generally reluctant to order parties to do extensive activities they do not wish to do, or may be unable to do. For example, the law in these jurisdictions does not wish to force persons to perform services they do not wish to perform. In fact, if a court made such an order, it might also lead to even more serious problems in performance, possibly including a breach of the peace or other criminal acts. This is because many people who are involved in legal disputes against each other find it difficult and unpleasant to continue to work together after the dispute. And even in sale of goods contracts, common law jurisdictions seem to feel that it would not be productive to try to force parties to perform, unless there was a special reason, such as that the goods were unique. Even though such contracts may not involve much contact between the parties, the law may feel that even such minimal contact is not worthwhile where damages can adequately compensate the injured party.

In addition, it might be very difficult for a court to continually supervise the performance of many kinds of contracts. It is much easier to enforce a court order for money damages or transfers of property than an order that requires a party to perform some other tasks. It may be difficult to judge if the other parties to such contracts are performing properly, especially in contracts involving services, such as the highly skilled dancing involved in Case Study 240. Of course, courts must often make this kind of decision in order to determine if a contract was breached! But perhaps they wish to avoid it if they can, or avoid spending their time supervising complex tasks as they are happening. That might leave the court with more time to decide other cases.

Another reason specific performance is not usually ordered might be that, in some cases, courts do not wish to stop parties from performing

other contracts they have made. This was already discussed in Section 10.5d, above, which dealt with punitive damages for bad faith breaches, and explained the idea of "efficient breach." As noted above, in some situations the law may actually not wish to stop such parties from breaching certain contracts and making others! Some authorities appear to feel it may be economically more efficient if parties such as Better Homes in Case Study 211 do sometimes breach their contracts when they get a better opportunity. As the reader will recall, Better Homes breached its contract to build homes for the Queen Group in order to perform a much bigger contract with the Big White Villa Company. A better opportunity like that often means that parties like Better Homes can do more business, and create more wealth and economic activity. This may seem unfair to the Queen Group. Of course, courts generally try to put parties like the Queen Group in the situation they would have occupied if the contract had been fully performed, by ordering expectation damages.

On the other hand, as noted above, an effective order of specific performance may get closest to what the injured party was actually promised under the contract. Such an order may come closest to placing that party in the position she expected to occupy if the contract had been fully performed--which is the real goal of expectation damages. Apparently civil law courts may order specific performance of contracts in a much broader range of situations, including the sale of commonly available goods, though they will not order parties to perform personal services. It would not seem to cause substantially greater bad feelings to simply order a party to deliver goods than it would to order the party to pay money. So orders for specific performance might be appropriate and effective in more situations than common law jurisdictions use them. What do you think?

10.7b Courts May Order or Allow Rescission of the Contract

Another non-monetary remedy courts may order or allow is rescission. As explained in several Chapters above, rescission is basically the cancellation of a contract. Rescission is likely to be used where a contract has resulted from a formation problem like mistake, duress, or misrepresentation, or where one party has materially breached the contract. When a court allows a party to rescind, the court will generally provide a party with restitution of the benefits she has given to the other party, to the extent needed to prevent unjust enrichment. Rescission has already been explained in detail in Chapter 9 ("Performance and Discharge of Duties"), Section 9.7a.

In general, parties may or may not need the assistance of a court order where they have mutually rescinded a contract. But in the case of unilateral rescission, it seems more likely that a party may need the assistance of a court in order to get restitution after her cancellation of the contract.

CASE STUDY 241

FACTS Chantha and Sareth agree that Sareth will sell 500 eggs to Chantha for \$30. The contract requires that Chantha pay \$10 one day before the eggs are delivered, and \$20 at the time of delivery.

Chantha makes the first payment. But Sareth breaches the contract by failing to deliver the eggs. Chantha tries to persuade Sareth to perform, but she fails. So Chantha rescinds the contract, and asks Sareth for her \$10 back. But Sareth refuses to give the money back, saying he may perform some time. So Chantha asks the court for help.

QUESTION OF LAW Will the court order Sareth to return the \$10 to Chantha?

DECISION Yes. The court will order Sareth to return the \$10 to Chantha, because she had the right to rescind the contract, and also the right to restitution of what she had provided to Sareth as part of the contract.

Parties have the right to rescind contracts when the other party commits a material breach. In that situation, the rescinding party also has the right to restitution of what she has provided to the other party, to the extent needed to avoid unjust enrichment. In this case, Sareth materially breached his contract with Chantha by failing to deliver 500 eggs to her as the contract required. Chantha has the right to rescind the contract. She also has the right to restitution of the \$10 she gave to Sareth, since otherwise Sareth would be unjustly enriched. The court will order Sareth to pay Chantha \$10.

*** **ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.7a, Chapter 7 ("Other Contract Formation Problems"), Section 7.3c, and Chapter 9 ("Performance and Discharge of Duties"), Section 9.7a discuss situations where courts may order or allow rescission.

10.7c Courts May Order Reformation or Severance of the Contract

As explained elsewhere, the basic rules of contract law do not allow courts to rewrite contracts. The reason is that courts generally wish to let parties make and perform their own agreements, without any interference. However, in a few limited circumstances where there are contract formation problems, courts may actually be able to reform agreements, or sever parts of them, and then enforce what remains. The practical result is that the court will enforce the altered contract like any other contract, and that the full range of remedies discussed in this Chapter might be available.

When a party asks a court to sever or reform part of an agreement, the basic question is whether the court can fairly and effectively enforce the agreement between the parties after the reformation or severance occurs. If the answer is yes, then the court may generally enforce

the changed agreement. But obviously, this is often impossible, as it generally is with problems related to real agreement, consideration, capacity, and in many cases legality.

In general, formation problems where reformation or severance may be possible seem to relate to legality, unconscionability, or mistake. The rules about exactly when a court may reform or sever parts of agreements vary in different circumstances, as discussed in preceding Chapters. The following are examples of situations where some courts may order that an agreement be enforced after a change to some part that is affected by a formation problem:

- (1) courts might enforce a usurious loan agreement at the maximum legal interest rate;
- (2) courts might enforce a non-competition clause in a contract for employment or the sale of a business, but only to the extent of a reasonable restraint;
- (3) courts might reform a written agreement that does not correctly reflect the real prior oral agreement of the parties because of a mistake;
- (4) courts might enforce an adhesion contract without a part such as an exculpatory clause that a reasonable weaker party would not have expected and to which she would not have agreed; and
- (5) courts might enforce agreements without unconscionable parts if those parts can be effectively severed.

CASE STUDY 242

FACTS Kimhok and Sok Y sign a written agreement in which Kimhok agrees to buy Sok Y's farm in Kompong Thom. Sok Y owns only one farm. The boundaries of the farm are clearly marked, and Kimhok and Sok Y both understand where they are. The parties try to record these boundaries as precisely as they can in their contract. The contract says that Kimhok is buying Sok Y's farm in Kompong Thom.

Unfortunately, when Kimhok goes to give Sok Y the money for the land, Sok Y refuses to give him the title to the land! Sok Y shows him the agreement, and explains that, because of a mistake the parties made, it actually does not describe accurately the boundaries of Sok Y's farm. In fact, it describes a piece of land that includes part of Sok Y's farm and part of his neighbor's farm.

Sok Y says the agreement cannot be enforced, and anyway he does not want to sell anymore at the price in the agreement, since changes in the real estate market have made his land more valuable. Kimhok asks the court to reform the agreement to reflect the parties' real intentions when they made it, and to enforce the agreement.

QUESTION OF LAW Will the court reform the agreement for the sale of Sok Y's land to reflect the correct boundaries of his farm and enforce the agreement?

DECISION Yes. The court will reform the agreement to reflect the true boundaries of Sok Y's farm and enforce the agreement, since the written agreement did not reflect the real agreement of Sok Y and Kimhok, because of a mutual mistake.

Where a written agreement does not accurately reflect the real prior agreement of the parties because of a mutual mistake, the court may be able to reform and enforce the agreement, as long as that can fairly and effectively be done. In this case, Sok Y and Kimhok made a mistake in recording the correct boundaries of Sok Y's farm in the agreement in which Sok Y was to sell the farm to Kimhok. Despite the mistake, it was clear from the rest of the contract and other evidence that the parties meant the contract to be for the sale of Sok Y's farm. The court will reform the written agreement to reflect the real agreement, and enforce the reformed agreement. In this case, Kimhok could probably choose to ask for either money damages or specific performance.

*** **ADDITIONAL REFERENCE:** Chapter 5 ("Legality"), Section 5.3c discusses usurious loan agreements, Section 5.4f discusses non-competition clauses, Section 5.4g discusses exculpatory clauses, and Section 5.5b discusses the general effects of severance or reformation of contracts; Chapter 7 ("Other Contract Formation Problems"), Section 7.3 discusses mistake, and Section 7.7c discusses unconscionability; and Chapter 9 ("Performance and Discharge of Duties"), Section 9.4k discusses severance with regard to contract performance.

10.7d Courts May Order or Allow Other Remedies

There are a variety of other non-monetary remedies that may be available to courts or parties in particular situations. Some of these are briefly described below.

In some cases, restitution may involve a court ordering a party to actually return a particular benefit that another party has provided to her, rather than merely paying the reasonable value of that benefit. This is called specific restitution. In general, a court may order this if the party who has provided the benefit requests it and the benefit can easily be returned. Perhaps the most important situation where this may occur is where a party seeks specific restitution of land after the other party breaches a land sale contract, or after deciding to avoid the contract because of some formation problem.

CASE STUDY 243

FACTS Suppose the facts in Case Study 242 happen in a different way. In this new case, Sok Y agrees to sell his farm only after Kimhok tells him that a big company will soon be building a factory on the property next to the farm. Sok Y does not want to live next to this factory. So he agrees to sell the farm to Kimhok at a low price.

Soon after the parties have performed the contract, Sok Y discovers that there will be no factory, and that Kimhok knew that when he told Sok Y about the factory. Sok Y gives the money back to Kimhok, and asks for the farm back. Kimhok refuses to give it back. Sok Y asks the court for help.

QUESTION OF LAW Will the court order Kimhok to return the farm to Sok Y?

DECISION Probably. The court will probably order specific restitution of the farm to Sok Y, since Sok Y sold the farm because of Kimhok's misrepresentation about the factory.

Courts may order specific restitution where a breach or formation problem entitles a party to restitution, and where the benefit given to the other party can easily be returned. In this case, Kimhok made a material misrepresentation to Sok Y about the construction of a factory next to Sok Y's farm, and Sok Y justifiably relied on that statement in selling his farm to Kimhok. This entitles Sok Y to avoid the contract and ask for restitution. In this case, the court will probably order the specific restitution Sok Y seeks, since the benefit here--Sok's farm--can easily be returned.

In addition, the contract itself may stipulate that a party has or does not have certain non-monetary rights. For example, a contract may say that a buyer of goods has the right to repair or replacement of a non-conforming product. Or it may provide that a buyer has that remedy if the goods fail to work, but no other remedies! This is comparable to stipulated damages clauses, which were discussed in Section 10.5a, above.

Contracts may also try to limit the remedies of a party through exculpatory clauses. Of course, many jurisdictions say such clauses are not enforceable if they are unconscionable or in violation of statutes. This was already discussed in Chapter 5 ("Legality"), Section 5.4g, and Chapter 7 ("Other Contract Formation Problems"), Section 7.7.

A party may be able to use the remedy of withholding her performance of a contract duty if a condition on which that duty depends fails to occur. Parties may also gain other rights when there is some problem in the performance of contracts. For example, where there is a prospective unwillingness or inability to perform, laws in many jurisdictions say that the other party gains the right to demand adequate assurances of performance

from the party whose performance seems unlikely. Conditions and performance were discussed in detail in Chapter 9 ("Performance and Discharge of Duties").

The law in some jurisdictions may provide for other remedies in specific kinds of cases. For example, in some jurisdictions, laws may change the remedies available to buyers and sellers in sale of goods contracts. For instance, such laws may describe the circumstances in which buyers may reject a performance, withhold their own performance, demand adequate assurances of performance, or ask the other party to cure her performance. Some of these problems were already discussed in Chapter 9, Section 9.5b, which explained performance of sale of goods contracts. These and some other remedies for specific kinds of cases will be further discussed in Section 10.8, below.

***** ADDITIONAL REFERENCE:** Chapter 5 ("Legality"), Section 5.4g discusses the enforceability of exculpatory clauses; Chapter 7 ("Other Contract Formation Problems"), Section 7.7 discusses the nature and effects of unconscionability; and Chapter 9 ("Performance and Discharge of Duties") discusses performance and the effect of conditions, including Section 9.4e's explanation of prospective inability or unwillingness to perform.

10.8 Remedies in Particular Situations

As noted in Section 10.7d above, the law in some jurisdictions provides that certain remedies are available to parties in particular situations. In many jurisdictions, sale of goods contracts are probably the most important type of contracts that are affected in this way. An example of the range of potential remedies provided by one statute for sale of goods contracts will be discussed in Section 10.8a. In addition, the law may specify what kinds of remedies are available in cases where courts find quasi-contracts, as discussed in Section 10.8b, and in cases where courts apply the doctrine of promissory estoppel (detrimental reliance), as discussed in Section 10.8c.

10.8a Remedies in Sale of Goods Contracts

Statutes in many jurisdictions provide for an extensive set of special remedies for the parties to sale of goods contracts. One example is the Uniform Commercial Code ("UCC") in the United States. The remedies provided by the UCC can be very complex. This text will examine only a few of the more important ones below.

This text has already discussed certain rights of parties to sale of goods contracts. Chapter 9 ("Performance and Discharge of Duties"), Section 9.5b discussed the right of a buyer to reject non-conforming goods or to revoke her acceptance under the UCC. In addition, Section 10.2 of this Chapter discussed

methods of calculating expectation damages where parties breach sale of goods contracts.

The UCC also provides specific remedies to the seller where the buyer breaches the contract. Suppose a buyer breaches without finally accepting the goods. This could occur where the buyer repudiates, fails to pay before acceptance if the contract requires it, wrongly rejects, or wrongly revokes her acceptance. In those situations, the seller may resell the goods. If the resale is made:

- (1) in good faith,
- (2) in a commercially reasonable manner,
- and (3) in accord with other UCC requirements,

then the seller may recover:

- (1) the difference between the resale price and the contract price,
- plus (2) incidental expenses the seller had in performing the resale,
- minus (3) any damages the seller could reasonably have avoided.

If the seller does not resell in this way, then she can recover:

- (1) the difference between the contract price and the market price at the time and place of tender,
- plus (2) incidental expenses,
- minus (3) reasonably avoidable expenses.

In cases where neither of these remedies will really provide the seller with her true expectation damages, the seller may ask for her lost profits in failing to make the sale to the buyer who breached--even if she re-sold the goods for the same price! This might occur where the seller actually depends on "volume sales" (meaning high volume sales) for her profits. Often sellers--such as many retailers, wholesalers, and manufacturers--sell as many as they can of the goods they sell. If they lose one sale because of a buyer's breach, they can often re-sell the goods to another buyer for basically the same price. But they would have sold to that second buyer anyway! So their real losses actually include the profit they would have made from the sale to the breaching buyer. In this situation, the UCC allows the seller to recover such lost profits.

For example, suppose a truck dealer normally sells new trucks for \$30,000 each, a price which includes a \$4,000 profit for the dealer on each truck sold. If one buyer breaches, the dealer can probably sell that truck to another buyer for about the same price, which would seem to mean her expectation damages are almost nothing. But in fact, the dealer has lost all

the profits she would have made on the sale to the breaching buyer. The dealer would have sold a truck to the new buyer anyway, but she will probably never sell to the breaching buyer. The UCC would probably allow the dealer to recover the \$4,000 in lost profits.

Finally, under the UCC, the seller may be able to recover the full contract price in three situations:

- (1) if the buyer accepted conforming goods;
- (2) if the goods were destroyed after the risk of loss passed to the buyer;
- or (3) if the goods are "identified to the contract" and the seller cannot resell them at a reasonable price.

"Identified to the contract" basically means the seller has decided that a particular set of goods is the set she will supply to the buyer under the contract. Apparently the seller cannot recover the "consequential" damages that occur because of "special circumstances" like those discussed in Section 10.6b above--damages that do not occur naturally and usually from breaches like these. However, it would appear that a seller of goods would rarely have such damages.

*** CASE STUDY 244 (U.S. commercial code)
FACTS Sara makes a contract to sell a certain quantity of preventative health care books to Mony for \$1,000. Payment is to occur at the time of delivery. However, when Sara delivers the books, Mony wrongly rejects them, claiming they are not the correct books.
Sara promptly and reasonably resells the books to a different buyer for \$950. She also has expenses of \$30 in finding this new buyer. After re-selling the books, Sara asks Mony to compensate her for her lost profits and incidental expenses. Mony refuses. So Sara asks the court for help.
QUESTION OF LAW Can Sara recover her lost profits and incidental expenses in this situation?
DECISION Yes. After Mony's breach of the contract, Sara re-sold the books in good faith and in a commercially reasonable manner, so she can recover her lost profits and incidental expenses, which in this case would be \$80.
When a buyer breaches a sale of goods contract by wrongly rejecting the goods, the seller may re-sell the goods. If she does re-sell in good faith, in a commercially reasonable way, and in accord with other UCC requirements, then she can recover the difference between the contract price and the re-sale price, plus any incidental expenses, minus any damages she could reasonably have avoided.

In this case, Sara made a contract to sell Mony preventative health care books for \$1,000. But Mony wrongly rejected the books Sara delivered. Sara promptly and reasonably re-sold the books for \$950, and had \$30 in incidental expenses in finding the new buyer. Sara acted in good faith and in a commercially reasonable manner, and in accord with other UCC requirements. She avoided all unnecessary damages. So she will be able to recover the difference between the contract price (\$1,000) and the re-sale price (\$950), which is \$50, plus her incidental expenses, which are \$30. So she can recover a total of \$30 plus \$50 = \$80 from Mony because of the breach.

The UCC also provides several remedies to the buyer where the seller breaches the contract. If the seller breaches the contract and the buyer does not accept the goods--whether because the seller repudiates, or because the buyer rightly rejects or revokes acceptance--then the buyer may choose to "cover," which means to find and buy substitute goods. If the buyer covers by:

- (1) making a reasonable purchase of substitute goods,
- (2) in good faith, and
- (3) without unreasonable delay,

then the buyer may recover:

- (1) the difference between the cost of the cover and the contract price,
- plus (2) incidental and "consequential" damages,
- minus (3) reasonably avoidable damages.

In fact, as long as the cover is made in good faith, the price of the cover goods need not even be the lowest price available! In addition, the goods are not required to be exactly the same as those in the contract, if that is justified by the circumstances. Consequential damages were discussed in detail in Section 10.5b above, which explained the requirement that damages be reasonably foreseeable in order for parties to recover them.

If the buyer does not cover in this way, then the buyer may recover:

- (1) the difference between the contract price and the market price at the time the buyer learned of the breach,
- plus (2) incidental and consequential damages,
- minus (3) reasonably avoidable damages.

If the buyer accepts non-conforming goods, she may recover the difference between the actual value of the goods and the value the goods would have had if they were conforming, all measured at the time and place of acceptance.

CASE STUDY 245**(U.S. commercial code)**

FACTS Suppose the events in Case Study 244 happened in a different way. As in Case Study 244, Sara makes a contract to sell a certain quantity of preventative health care books to Mony for \$1,000. Mony tells Sara that he needs the books at exactly the time of delivery for a short course he will be teaching, though he will also need them for a long time in the future. Payment is to occur at the time of delivery. However, when Sara delivers the books, Mony rightly rejects them, because they are not the correct books. In fact, they are law books, which Mony hates.

Without delay, Mony looks for other health care books. But at first he cannot find any that are similar enough to the ones Sara agreed to sell him. He cannot find any in time for his course. As a result, he loses \$50 in course fees of students who do not wish to study without materials.

Mony eventually finds books that are basically similar to the ones Sara had agreed to sell him, and buys those in good faith for \$1,100, which is a reasonable price. Mony also has \$30 in incidental expenses in covering in this way. He asks Sara to compensate him for the amount he lost because of the breach. Sara refuses. Mony asks the court for help.

QUESTION OF LAW Can Mony recover the amount he lost because of Sara's breach in this situation?

DECISION Yes. After Sara's breach, Mony covered by finding similar goods in a reasonable way, so he will be able to recover the difference between the contract price and the cover price, plus any incidental and consequential damages, which in this case would be \$180.

When a seller breaches a sale of goods contract, the buyer may attempt to cover by finding other goods to substitute for the ones in the original contract. If she does cover by making a reasonable purchase of substitute goods without unreasonable delay, she can recover the difference between the contract price and the cover price, plus any incidental or consequential damages, minus any damages she could reasonably have avoided. This is true even if the cover goods are not purchased at the lowest price available, as long as the cover is in good faith, and even if the cover goods are not exactly the same as the goods in the original contract, if the circumstances justify it.

In this case, Sara breached the contract for the sale of preventative health care books by delivering law books, and Mony rejected them. Mony covered in good faith and in a reasonable way. Mony suffered incidental damages of \$30 in finding the substitute goods, and consequential damages of \$50 because of the lost course fees, which were reasonably foreseeable because Mony had told Sara about the special situation that caused them. Mony also had to pay \$1,100 for the substitute goods, which were similar to but not exactly the same as the original contract goods. In this situation,

Mony will be able to recover the difference between the cover price (\$1,100) and the contract price (\$1,000), which is \$100, plus her incidental expenses, which are \$30, plus her consequential damages, which are \$50. This means that Mony can recover \$100 plus \$30 plus \$50, for a total of \$180.

The UCC provides that the buyer may get specific performance of a sale of goods contract where the goods are unique or in “other proper circumstances.” The “other proper circumstances” language would allow a court to order specific performance in a situation where market conditions would prevent a buyer from making a comparable contract. This language might also allow a court to order specific performance in other circumstances. Specific performance was already discussed in detail in Section 10.7a above.

***** ADDITIONAL REFERENCE:** Chapter 9 ("Performance and Discharge of Duties"), Section 9.5b further discusses performance of sale of goods contracts, and options parties have when there is some problem with performance.

10.8b Remedies Where Courts Find a Quasi-Contract

As discussed above, quasi-contract is basically a doctrine courts apply when they impose contract obligations in order to avoid unjust enrichment of a party. In fact, a court may find that a quasi-contract exists where the parties do not even attempt to make a real agreement! A quasi-contract may also occur where the parties do attempt to make an agreement, but the agreement is unenforceable for some reason, such as a lack of formality, mistake or other formation problems.

As explained in Section 10.4 above, where courts find a quasi-contract exists, they will generally award restitution, in order to prevent unjust enrichment of a party. This is the most common type of remedy in quasi-contract cases, because the common goal of both restitution and quasi-contract is to prevent unjust enrichment of a party. Restitution generally involves the court ordering one party to give another party the reasonable value of the benefit that the first party received from the other party. Specific restitution is also possible where the benefit can be easily given back to the party seeking it, as explained in Section 10.7d, above.

Although restitution is the most common remedy in the event of a quasi-contract, it appears that courts may also occasionally order reliance damages in particular cases. This might occur where the enrichment is difficult to measure, or where providing only restitution will not achieve justice.

For example, in the Case Study 23 situation, suppose Lam was on holiday when a rain storm threatened to destroy his house. Chito saw what was happening, but he could not contact Lam to tell him about the problem in time. Finally, Chito had to spend his own money to fix Lam's house and prevent it from collapsing.

In that situation, a court would be likely to find a quasi-contract between Chito and Lam, in order to prevent unjust enrichment of Lam--even though the parties never made a real agreement. The damages a court would probably order Lam to pay would be the reasonable value of the benefit Chito gave to Lam in fixing his house--the value of his services--which would be restitution.

However, suppose Chito also had to buy tools to do the work. That expense might not normally be considered part of the “enrichment” of Lam. But it might still be unjust to require that Chito pay for all of the tools himself. In that situation, a court might consider ordering Lam to pay for some or all of the tools Chito bought--which would be more like reliance damages.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 and other Chapters in this text contain further discussion of quasi-contracts.

10.8c Remedies Where Courts Apply Promissory Estoppel (Detrimental Reliance)

Sometimes parties change their position--such as by spending money--in reliance on promises made by other parties, even when there is no enforceable contract. When this occurs, many common law jurisdictions may apply the doctrine of promissory estoppel (detrimental reliance). Under promissory estoppel, a promise may be enforceable to the extent needed to prevent injustice if a party justifiably relied on it and the party who relied will suffer an unjust loss if the promise is not enforced. This was discussed in detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8.

When courts apply the doctrine of promissory estoppel, it appears that they will generally order that reliance damages for the party who relied. The reason is that the whole idea of promissory estoppel is to compensate a party for her reasonable reliance on a promise. If courts ordered only restitution, they would not always achieve this goal, since parties often have reliance damages without actually giving any benefit to the other party.

For example, in Case Study 176, Ken sold his house, quit his job, and moved to Battambang in reliance on Margo's promise to give him a new job. In that situation, Ken reasonably relied and suffered reliance damages--but he conferred no benefit on Margo. So awarding him restitution would probably not achieve justice.

It also appears possible that courts might order expectation damages when they apply promissory estoppel. For example, some authorities appear to think such damages might be appropriate if the party who made the promise did not act in good faith. However, such cases would seem to be unusual.

Finally, in rare cases, it also seems possible that specific performance could be an appropriate remedy where promissory estoppel applies. For example, in Case Study 175, Kosal justifiably relied on his parents' promise to transfer their farm to him. Since land is unique, and even common law courts will order specific performance for land cases, a court might decide that ordering specific performance in this situation was the only way to achieve justice for Kosal.

*** **ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and Chapter 7 ("Other Contract Formation Problems"), Section 7.8 contain further discussion of promissory estoppel.

10.9 Remedies in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of the Cambodian law tradition and the civil law tradition to remedies appear to be generally compatible with the approach discussed in this Chapter. However, specific performance seems to be more commonly used in civil law jurisdictions than it is in common law jurisdictions, and civil law jurisdictions may be somewhat more willing to order contract remedies that may be viewed as punitive than common law jurisdictions are.

*** **CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) and other Cambodian laws contain a number of provisions relevant to our discussion of remedies. They seem generally compatible with the remedies discussed earlier in this Chapter. Some of these provisions are discussed below.

Remedies Where There Is a Formation Problem

Articles 18-21 in Decree 38 describe some general remedies available to parties when there is a problem in the formation of a contract, as described in previous articles within Decree 38. Article 18 provides that any person "can sue to absolutely rescind" contracts defined in Article 5. Those are contracts that are illegal or inconsistent with public order, good custom, social interests, or social ethics, or whose subject matter is impossible to perform.

Article 19 provides for remedies where a contract is voidable because of incapacity, mistake, duress or fraud. It says that an "aggrieved party" or anyone with a "lawful interest in a claim" can claim to avoid such a contract. It also provides that the claiming party must notify the other party of the claim, and requires that the claiming party sue within 12 months of the notification.

Article 20 provides that the right to sue of parties making claims under Article 19 ceases to exist if such parties agree to perform the contract or agree in writing to withdraw the lawsuit. It is not clear if this means that parties

such as minors really lose their right to claim to avoid contracts if they simply agree at some later time to perform the contract.

Article 21 provides that, where there is avoidance of a contract, "the situation prior to entering the contract shall be restored." This would appear to be a kind of reliance remedy. It might sometimes provide parties in such situations with a greater remedy than that usually available for rescission (restitution) under the rules discussed elsewhere in this Chapter.

Remedies Where There is a Failure to Perform

Article 31 appears to discuss remedies where there is a failure to perform according to a contract. It provides that a "creditor party" shall not be compelled to accept an object other than what she is due under the contract or to accept part performance. However, it also provides that the People's Court can, with regard to "the spirit of goodwill and the financial situation of the debtor party," extend or delay the time for execution of the contract and suspend the creditor's action. Article 31 requires that a court state clearly its reasons for any such decision and exercise this power with great care. This remedy appears to give courts some power to protect financially weaker parties from the enforcement of valid contracts. It seems that courts in many free market jurisdictions do not generally have this power, though they do have other doctrines (such as unconscionability) to protect weaker parties from unfair contracts.

Remedies in Particular Situations

Decree 38 also contains a number of articles that provide for certain remedies in particular situations. A few of these are discussed below.

Decree 38 provides many remedies to parties to sales contracts. For example, Article 38 appears to provide that the buyer can cancel the contract if an item has been lost or substantially damaged prior to delivery and no substitute is provided by the seller, and that the seller must pay damages "relating to the loss of the object or any damages resulting from fault on the part of the vendor." Articles 42-49 contain a number of remedies related to non-conforming tenders and claims related to the true ownership of the property. For example, Article 48 provides that a buyer can ask a court for rescission where the seller obtained the property through a crime. Article 51 provides that parties can stipulate in the contract that the buyer must pay interest if payment is late. It basically says no pre-judgment interest is available unless the contract provides for it, but adds that "where the sale item yields income or profit," the interest "shall be calculated according to the rate set by law." Article 54 provides for rescission by the seller where the buyer fails to pay in full. Article 55 states that a rescission requires the parties to "return to each other what they have received." This would appear to be basically a restitution remedy.

Decree 38 contains a number of other remedies for particular situations. For example, Article 60 provides that, in loan contracts, interest charged in excess of the legal rate shall be returned to the borrower, together with interest on that excessive amount. Article 70 states that a personal property mortgage creditor can ask the court to have mortgaged property sold if a debtor fails to pay, and provides procedures for such sales and for the disposal of the proceeds.

Decree #100D (the Land Law) contains remedies related to the transfer of interests in real estate. For example, Articles 183-187 provide remedies related to the sale of estates. Article 183 appears to allow rescission by the seller where "the estate is sold at lower than half the price at which it should be sold..." It is not completely clear what this means, but it may give a court more power to allow rescission than many free market jurisdictions would in this situation.

Finally, the Labor Law (1997) provides a number of remedies related to labor contracts. For example, Articles 73-95 specify a number of remedies where an employment contract ends. Article 89 describes the compensation an employer must pay to a laborer where the employer terminates the contract and there is no serious offense by the worker. Article 91 appears to say that where one party terminates an employment contract without proper cause, the other party may request compensation.

***** CIVIL LAW PERSPECTIVE:** The civil law approach to remedies appears to be generally compatible with the one discussed in this Chapter. However, specific performance seems to be more often used in civil law jurisdictions than in common law jurisdictions. And civil law jurisdictions may be somewhat more willing to order contract remedies that may be viewed as punitive than common law jurisdictions are. Of course, the exact rules about remedies vary from one jurisdiction to another, so it is important to check the relevant local law.

It appears that the most important difference between the civil law approach to remedies and the one discussed in this Chapter is that civil law jurisdictions are more likely to order specific performance than common law jurisdictions are. As explained above, courts in many common law jurisdictions order specific performance only if they believe that damages are inadequate and that they can adequately enforce the order of specific performance. However, in civil law jurisdictions, it appears that specific performance is ordered more frequently, and that it is even available for goods that are commonly available. This appears to be the case in Germany. In France, specific performance seems to be available for most contract breaches, except for personal service contracts. In general, French contract law with regard to remedies seems to aim primarily to ensure that the rights of the parties are protected, rather than primarily to compensate the non-breaching party, as is the main goal in many common law jurisdictions.

This somewhat different focus may account for the greater willingness of civil law jurisdictions to order specific performance.

Other remedies available in civil law jurisdictions include withholding of performance and rescission. Many civil law jurisdictions seem to allow some remedies for breach that may be more flexible than those discussed in this Chapter. For example, for sale of goods contracts, German law appears to allow a buyer who receives a non-conforming tender the option of accepting the goods and reducing the price she pays. This apparently is closer to the way many parties actually conduct their business. As the reader will recall, the rules discussed earlier in this Chapter and earlier in this text are that the buyer's duty to pay becomes due if she accepts, though of course she would have the right to bring a claim for damages for the harm caused to her by the seller's breach.

Of course, damages are awarded in civil law jurisdictions. In fact, requests for damages seem to be growing more common in such jurisdictions, especially in commercial disputes. When such jurisdictions do order damages, their goal appears to be similar to the goal in common law jurisdictions: to compensate the non-breaching party for the loss suffered as a result of non-performance. There are also a number of requirements comparable to those discussed earlier in this Chapter, such as that damages be foreseeable and reasonably certain.

However, there are also some different aspects to the damages remedy in civil law jurisdictions such as France. In France, it appears that courts do not distinguish so clearly between expectation and reliance damages, although the *Code civil* does differentiate between actual loss and lost gain. In addition, in order for the non-breaching party to recover damages in France, the party must generally provide notice to the breaching party to perform (*mise en demeure*). This apparently means that the party suffering harm must notify the breaching party that she has failed to perform properly and that the notifying party wants proper performance.

Finally, civil law jurisdictions may be somewhat more willing than common law jurisdictions to use contract remedies that might be considered punitive. French courts may order *astreintes*, which are orders to pay a fixed sum for each day or other period that a breaching party remains in default. In addition, French courts may be more willing to enforce stipulated damages clauses that may appear to penalize parties for non-performance. However, as discussed above, there are limits. French courts now have authority to raise or lower the amounts specified in such clauses if they are clearly excessive or too small with regard to the circumstances of the case. In addition, punitive damages would not appear to be ordered often under French law.

10.10 Questions for Review

CHAPTER 10 – QUESTIONS FOR REVIEW

1. Do courts in free market jurisdictions have the power to impose criminal penalties in contract disputes?
2. What is the goal of expectation damages?
3. When are expectation damages awarded?
4. What method do many jurisdictions use to calculate expectation damages?
5. What are some important limits on expectation damages?
6. What is the goal of reliance damages?
7. When are reliance damages awarded?
8. What is the goal of restitution damages?
9. When are restitution damages awarded?
10. What is a stipulated damages clause?
11. When are stipulated damages clauses enforced?
12. What are nominal damages?
13. When do courts order parties to pay interest in contract disputes?
14. Do courts generally order parties to pay punitive damages in contract disputes? Why or why not?
15. What are three important limits on the damages that parties can recover in contract disputes?
16. With regard to foreseeability, what are the two types of contract damages, and when is each awarded?
17. When do courts order specific performance of a contract?
18. What other non-monetary remedies might courts order?
19. Describe remedies that might be available in contract disputes involving the sale of goods.

20. What remedies might be available where courts find a quasi-contract or apply promissory estoppel?
21. Is the Cambodian law approach to contract remedies generally compatible with the approach discussed in this Chapter?
22. Is the civil law approach to contract remedies generally compatible with the approach discussed in this Chapter?

