

LESSON 2: REMEDIES

Script:

One of the most important considerations when talking about contracts is what happens in the situation of **breach of contract** by one of the parties. The party who **commits the breach** is called the **breaching party** the party who suffers the consequences of the breach or in other words **incurs losses** as a result of the breach is called the **non-breaching party**.

The non-breaching party usually has a range of solutions or as we call in legal English **remedies** to **compensate** them for their losses as a result of the breach.

Now as we have seen in the previous lesson, the remedy available to the non-breaching party will depend on the type of breach; for example, in a case of **minor breach** usually only **damages** (meaning **monetary compensation**) will be available; in a situation of a **fundamental**, also called **material breach**, meaning a breach that cannot be remedied in any way, then they will be able to **terminate** the contract; of course, once terminated, the non-breaching party can still also **sue for damages**. When we talk about suing, we mean, of course, **submitting or filing a lawsuit** in court (we will come back to this in the module dealing with litigation).

Now, in common law non-breaching party can **seek** different types of **damages**; these distinctions in the types of damages don't necessarily exist in civil law and they are often difficult to understand by Continental European lawyers. To simplify things, we will only deal with the most common types of damages that are available under common law.

The first, and most common type of damages are those which we call **Liquidated or stipulated** damages. Now as the name suggests, these damages are actually stipulated or set in the contract itself, so in a case of a breach there is no need to go to Court or engage in mediation or arbitration, because the specific amount or at least a formula to calculate the amount, has been agreed on by the parties in the contract.

All other types of damages that have not been stipulated in the contract are called **unliquidated damages**.

These include, among others, **general or actual damages** (lawyers use both of these terms and they mean the same thing), this is simply the compensation for the most immediate and logical losses that occur as a result of the breach.

There are also what we call **consequential damages**; these damages may not necessarily be the immediate consequence of the breach but given the special circumstances of the parties they should have been **predictable**, or as we say in legal English, **foreseeable** by the breaching party. So, for example, if you rent a car or in other words you enter into rental agreement and the rental company knows that this is your only means of getting to work and the car subsequently breaks down and you miss several days of work, the **loss of income** that you suffer as a result could be classified as consequential damages.

Another type of damages are **restitution damages** and these damages basically have to do with **unjust enrichment** by the breaching party. So, imagine that you are commissioned to design some creative work for somebody for a specific purpose and later that work is used for a

completely different purpose; the author of that creative work would then be able to sue for restitution damages in other words the money that the other party unjustly obtained by using the creative work in an unauthorized manner.

Punitive or exemplary damages are another type of damages that are quite common in common law countries but are almost unheard of in civil law countries. These damages are **awarded** by courts as a warning or punishment against a **malicious or gross misconduct** by one of the parties. For example, in cases involving a gross misconduct by a large corporation, for example in cases of extensive environmental pollution or in cases having to do with health issues, involving big Pharma or tobacco companies, in the United States and Canada it is quite common for the Court to award punitive damage against them as a punishment and in order to discourage other companies from engaging in similar activity.

The final example of a remedy that I wish to mention is that of **specific performance**. This simply means that the breaching party is being **ordered** by the court to perform the contract because there is no adequate monetary award (in other words, there are no damages) that would compensate the non-breaching party for the loss suffered. So, for example, imagine that you contract a famous painter to do a specific painting for you and you later learn that this painting was done by somebody else; in that situation only specific performance would adequately compensate you.