COVID 19 & THE ASSESSMENT OF DAMAGES

Graham Dunning QC, Peter Webster & Wei Jian Chan

A INTRODUCTION

1. The events triggered by the COVID-19 global pandemic are likely to be significant when assessing the quantum of damages available to a Claimant, especially taking into account contractual rights to terminate. The developing crisis has already had significant impact across multiple market sectors between February-March 2020, not all of which have fallen:

   (1) **Financial markets**: The S&P500 index has fallen from 3369.25 on 20 February 2020 to 2514.75 on 30 March 2020 (**-25%**).[1] The FTSE100 index has fallen from 7436.64 on 20 February 2020 to 5378.44 on 30 March 2020 (**-28%**).[2]

   (2) **Commodities markets**: The Bloomberg West Texas Intermediate Crude index has fallen from $93.75 on 6 January 2020 to $29.94 on 30 March 2020 (**-69%**).[3] The LME Copper Index has fallen from US$5728/ tonne on 20 February 2020 to US$4774/ tonne on 30 March 2020 (**-26%**).[4]

   (3) **Shipping markets**: On the other hand, the Baltic Exchange Dry Index—which measures the cost of shipping goods around the world—has **risen** from $415 on 7 February 2020 to $556 on 30 March 2020 (**+34%**).[5]

2. Key questions arising will include (i) which date to use for the assessment of damages (including for inputs to a DCF model for such assessment) and, in particular, (ii) in cases where a contract has been terminated and damages are due as a result, whether post-termination events can be taken into account when quantifying damages. The answers to these questions will be of importance both for pre-existing disputes and also for new disputes arising out of parties' reactions to difficulties caused by the COVID-19 crisis.

---

1 https://www.bloomberg.com/quote/ES1:IND
2 https://www.bloomberg.com/quote/UKX:IND
3 https://www.bloomberg.com/quote/BCOMCL:IND
4 https://www.lme.com/en-GB/Metals/Non-ferrous/Copper#tabIndex=0
5 https://www.bloomberg.com/quote/BDIY:IND

B THE "GENERAL RULE"

3. In respect of the first question, it is often said that there is a general rule that damages for breach of contract are assessed on the date of the breach of contract: e.g. *Chitty on Contracts*, ¶26-096. Application of this rule can have a huge impact on the value of what is recovered, for example where the damages are adjudged to be awarded in a currency that has suffered a substantial devaluation as against other major trading currencies since that date: *Attorney General of Ghana v Texaco Overseas Tankships* [1994] 1 Lloyd's Rep 473 (HL).

4. Certainly, that is the appropriate starting point for contracts in respect of which substitute performance is readily available in the market. The paradigm example is sale of goods (see section 51(3) Sale of Goods Act 1979). Charterparties are another. The "*innocent*" party is assumed to have gone out into the market on the date of breach to obtain a substitute performance and damages are assessed by comparing the contract price against the price of that substitute performance: subsequent movements in market price are irrelevant.

5. However, even in respect of contracts to which the date of breach rule applies, the date of breach rule "*is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances*": *Johnson v Agnew* [1980] AC 367, 401A. The rule has been departed from in various circumstances, too numerous to summarise here.

6. Further, the so-called "*date of breach rule*" rule does not apply to all contracts. Thus, in *Hooper v Oates* [2013] EWCA Civ 91, [2014] Ch 287 Lloyd LJ stated at [38]:

> It seems to me that the breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset or, in the converse case, for the purchase of an equivalent asset. This is most unlikely to be the case where the asset in question is land. If the defaulting party is the buyer, much will depend on what the seller does in response to the breach …

7. In *Radford v De Froberville* [1977] 1 WLR 1262 at 1285–1286:

> It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the inquiry—at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?

8. In the current commercial context, breach of contract for the sale of a business is an obvious example where one can see it being argued that a later date is the appropriate date for valuation. However, in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB), [2014] Bus LR 1338 Popplewell J

considered the appropriate valuation date for claims under warranties in a share purchase agreement. He stated at [37] that:

> The prima facie rule, from which departure must be justified, is that damages are to be assessed at the date of breach and that only events which have occurred at that date can be taken into account.

Popplewell J stated that departure from this "*can only be justified where it is necessary to give effect to the overriding compensatory principle*" and also that whatever approach was adopted had to be consistent with the agreed allocation of risk in the contract. He did not consider that a departure from the general rule was justified in that case.

C THE GOLDEN VICTORY

9. A closely related question also arises, which has been the subject of recent controversy: when assessing damages, can the court take into account other contingencies (i.e. other than fluctuation in market price) that would have reduced or eradicated the value of contractual performance? [6] Obvious examples are:

    - if the contract would in any event have been terminated after the breach in respect of which damages are being awarded;
    - if the contract would in any event have been discharged after that breach because of frustration;
    - the party not in breach would not have been able to perform its obligations under the contract at the time when performance would have arisen.

10. If between the date of breach and the date of trial it becomes clear that one or more of these things would have happened, can the court take that into account to reduce damages?

11. Two leading authorities on this issue are *The Golden Victory* [2007] UKHL 12 and *Bunge v Nidera* [2015] UKSC 43, [2015] 2 All ER (Comm) 789.

[6] See *Bunge SA v Nidera BV*]2015] UKSC 43 at para [16] where Lord Sumption distinguishes between (i) the question of what date is to be used for assessing market price (assuming an available market) and (ii) the question whether subsequent events can be taken into account to reduce damages.

12. *The Golden Victory* is a 3-2 split decision of the House of Lords concerning the repudiation of a seven-year Charterparty which contained a clause permitting the contract to be terminated if war broke out between Iraq and America, among other countries. The timeline of events went as follows:

14 December 2001	Charterer repudiates the Charterparty
17 December 2001	Owner accepts Charterer's repudiation
20 March 2003	War broke out
6 December 2005	Earliest contractual date for termination

13. The Charterers argued that damages should be assessed at the date of trial, so that the outbreak of the Iraq War and the likelihood of contractual termination based on that occurrence created a limit on the payable damages and damages were recoverable from 17 December 2001 to 20 March 2003. The Owners argued that damage should be measured at the date of acceptance of breach, such that damages were recoverable for the whole period from 17 December 2001 – 6 December 2005.

14. The Arbitrator ruled in favour of the Charterers, considering that the outbreak of war and the right to terminate could be taken into account and they had combined to create a limit on damages.

15. The majority in the House of Lords (Lords Brown, Carswell, and Scott) dismissed the appeal, concurring with the arbitrator that the outbreak of war and the right to terminate could be taken into account when assessing damages. Lord Scott held at [30] that:

> "If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. And if it is certain that the event will happen, the damages must be assessed on that footing."

16. The minority (Lord Bingham and Lord Walker) would have held that damages should be assessed on the date of the breach and later developments left out of account, expressing concerns about certainty, finality, and ease of settlement: see Lord Bingham at [22]-[24].

D BUNGE V NIDERA

17. More recently, in *Bunge SA v Nidera BV* [2015] UKSC 43, the UK Supreme Court applied *The Golden Victory* in a case concerning a claim by a buyer for damages under the standard form GAFTA 49 sale contract.

18. The significance of the case is two-fold: first, it approved *The Golden Victory*, despite that decision having been the subject of some criticism; second, it made clear that that could apply to "*one-off*" contracts, not just to long-term contracts.

19. *Bunge* concerned a contract for the sale of Russian wheat. Russia introduced a legislative embargo on wheat exports. After the embargo had been announced but before it came into effect the seller notified the buyer of the embargo and purported to cancel the contract. The buyer treated that as a repudiation, which it accepted. It claimed damages in excess of USD $3m as the difference between the contract and market price at the date when it accepted the repudiation. The seller's position was that even if it had jumped the gun and the termination had been premature, it would have been possible to terminate later because of the embargo; therefore the buyer suffered no loss.

20. The seller succeeded before GAFTA's first-tier arbitration tribunal, but the GAFTA Appeal Board found for the buyer and awarded damages in full. That decision was upheld both at first instance and in the Court of Appeal, because of the interpretation given to clause 20 of the GAFTA 49 contract. The Supreme Court allowed the seller's appeal.

21. Two judgments were given in the Supreme Court by Lord Sumption and Lord Toulson. Lords Neuberger, Mance, and Clarke agreed with both.

22. The judgments demonstrate the importance of careful analysis of the relevant contractual terms: the Supreme Court held that clause 20 of GAFTA 49 was not a complete code that covered the entire field of damages and, in particular, did not address or exclude the relevance of supervening events.

23. The Court had therefore to consider whether the principle in the *Golden Victory* applied to the circumstances of the case. Both Lord Sumption (*Bunge* [22]) and Lord Toulson (*Bunge* [87]) held that the rule applies to "*one-off*" contracts, not just long-term or instalment contracts, contrary to what some had understood to be the position based on Lord Scott's judgment in *Golden Victory* [35]. Lord Sumption said at [22]:

> The most that can be said about one-off contracts of sale is that the facts may be different. In particular, if the injured party goes into the market and enters into a substitute contract by way of mitigation, it will not necessarily be subject to the same contingencies as the original contract.

24. *The Golden Victory* therefore remains good law, despite what Lord Sumption described in *Bunge* as "*a certain amount of academic criticism and judicial doubt*", which in his view was "*unjustified*":

Bunge [23]. Indeed, Lord Sumption emphasised at *Bunge* [23] that there is "*no principled reason*" to disregard what would have happened if the repudiation had not occurred:

> "There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach."

25. Similarly, Lord Toulson held at *Bunge* [86] that there was "*no virtue*" in attempting a retrospective assessment of prospective risk when the answer is known, which would "*run counter to the fundamental compensatory principle*".

26. These are strong passages in favour of being able to take into account when assessing damages what is known by the date of trial about whether the contract would have remained in force. As it may be argued that a contract would have been terminated for example by reason of frustration or force majeure arising either from COVID-19 or from a governmental response to it, one can see how these passages will be relied upon in the coming months and years.

This note does not constitute, and should not be relied upon, as legal advice.

GRAHAM DUNNING QC

PETER WEBSTER

WEI JIAN CHAN

24 Lincoln's Inn Fields

London

WC2A 3EG

30 March 2020

.