

HOLLAND & HART^{LLP}



Part Two of Three-Part Drafting Series: Remedies

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Limitation of Damages



Model Provision:

“Damages. Manufacturer and Purchaser acknowledge and agree that the Purchase Price has been negotiated in consideration of their agreement to limit certain of Manufacturer’s liabilities. Accordingly, in no event is Manufacturer liable for any consequential or incidental damages, however caused.”

Limitation of Damages



Some Definitions from Black's Law Dictionary, 8th Ed.

“Consequential” damages: Losses that do not flow directly and immediately from an injurious act but that result indirectly from the act.

Limitation of Damages



Definitions, cont'd

“General” Damages: Damages that the law presumes follow from the type of wrong complained of; specif. compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General damages do not need to be specifically claimed. – Also termed *direct damages*; *necessary damages*.

Limitation of Damages



Definitions cont'd

“Incidental” damages:

- 1.** Losses reasonably associated with or related to actual damages.
- 2.** A seller’s commercially reasonable expenses incurred in stopping delivery or in transporting and caring for goods after a buyer’s breach, UCC § 2-710.
- 3.** A buyer’s expenses reasonably incurred in caring for goods after a seller’s breach.

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

Contract provision: “Neither party shall be liable to the other for any indirect, special, consequential, incidental, or punitive damage with respect to any claim arising out of this agreement (including without limitation its performance or breach of this agreement) for any reason.” *Id.* at 803 (emphasis added).

What about lost profits?

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

“The agreement was not a simple resale contract, where one party buys a product at a set price to sell at whatever the market may bear. Rather, the price plaintiff [buyer] paid defendant [seller] reflected the actual sales and sales price, of CoStar stents.” *Id.* at 803.

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

“The agreement required plaintiff [buyer] to pay defendant [seller] a transfer price calculated as a percentage of plaintiff's net sales of Costar: 61% for direct sales and 75% for indirect sales.” *Id.* at 678.

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

“Lost profits from the breach of a distribution contract are subject to these principles, and we have recognized such profits as general damages where the nature of the agreement supported a conclusion that they flowed directly from the breach.” *Id.* at 806 (emphasis added).

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

“The distinction at the heart of these case is whether the lost profits flowed directly from the contract itself or were, instead, the result of a separate agreement with a nonparty.” *Id.* at 808.

Limitation on Damages



Biotronik A.G. vs. Conor Medsystems Ireland, Ltd.,
11 N.E.3d 676 (N.Y. 2014)

“Here, the agreement used plaintiff’s resale price as a benchmark for the transfer price. The contract clearly contemplated that plaintiff would resell defendant’s stents. That was the very essence of the contract. Any lost profits resulting from a breach would be the “natural and probable consequence” of that breach.” *Id.* at 808. (quotations in original, underline emphasis added).

Reading Provisions Together



Development Dispute

Parties intended to limit damages for a **material breach** to (1) a subset of available statutory damages, (2) provide for a type of remedy that was not available under statute, and (3) exclude types of consequential damages not expressly listed.

Parties intended to allow broad range of recovery for non-material breaches.

Structure-List Remedies



- Material Breach and Separate General Section
- Material Breach Section provided that “upon the occurrence of a **Material** Event of Default [Material Breach]” the Developer would be entitled to “exercise **one of the following** remedies[.]”
 - The list of remedies omitted any recovery of consequential damages
 - This was an express deviation from statute which provided for “any other amount to compensate”

Additional Provisions



- additional language allowing Developer “upon the occurrence of an event of default, to seek injunctive relief or damages as provided by law”
- “Except as otherwise specifically provided . . . , all rights and remedies set forth in this contract are cumulative and non-exclusive”

Opposition



Developer argued:

- words “exclusive”, “only”, or “limited to” are simply not there
- additional language allowing Developer “upon the occurrence of an event of default, to seek injunctive relief or damages as provided by law”

Ruling



Court ruled:

- “Motion denied—The fact Contract describes three remedies for material breach does not mean they are exclusive remedies. Had they wanted these fact to be exclusive the contracting parties could have easily made them such.”

Cumulative Remedies Model Provision



“Rights and Remedies Cumulative. The enumeration of Lender’s rights and remedies set forth in this Loan Agreement is not intended to be exhaustive. The exercise by Lender of any right or remedy under this Loan Agreement or under any Ancillary Agreement does not preclude the exercise of any other rights or remedies, all of which are cumulative and are in addition to any other right or remedy given under this Loan Agreement, under any Ancillary Agreement or under any other agreement between Lender and any Borrower or Guarantor or which may now or subsequently exist in law or in equity or by statute or otherwise.”

Partially Cumulative Remedies Model Provisions



“Mandatory Price Reduction for Late Delivery. If Manufacturer fails to deliver the Products by the Scheduled Delivery Date, the Aggregate Contract Price to be paid by Purchaser is reduced by an amount equal to 1% of the original Aggregate Contract Price for each business day that the failure continues. If delivery is achieved no later than 30 calendar days after the Scheduled Delivery Date, the price reduction is the exclusive remedy of Purchaser with respect to the delay. If the delivery delay persists for longer than 30 calendar days, Purchaser is entitled to the price reduction as well as any other rights and remedies available to it under law or equity or by statute or otherwise.”

“Rights and Remedies Cumulative. The rights and remedies set forth in this Agreement are not intended to be exhaustive and the exercise by either party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently exist in law or in equity or by statute or otherwise. Despite the previous sentence, and provided that Manufacturer achieves delivery no later than 30 calendar days after the Scheduled Delivery Date, the parties expressly intend that the mandatory price reduction mechanism set for in Section ___ be the Purchaser’s exclusive remedy for that delay in delivery.”



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