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Calculation of Damages & Liquidated Damages: The Egyptian Perspective

This article discusses the issue of contractual damages under Egyptian Law in light of the recent court trends in the past decade. First of all, the general rule dictates that the basic elements of liability must be present (fault, damage and causal link) in order that the claimant be awarded damages. In this regard, this article focuses upon four issues, namely, (a) calculation of damages; and (b) liquidated damages.

A) Calculation of Damages:

In 2018, the Court of Cassation has conducted a detailed study of the aspects relating to the calculation of damages. First, the Court underlined that, pursuant to articles (170), (221) and (222) of the Civil Code, compensation is based on the principle of full compensation, as the Court must remediate every direct damage whether it was physical or moral including the direct loss and the loss of expected profits. This is because the goal of the principle of full compensation is to restore the creditor to its prior position before the mistake took place. However, the Court of Cassation emphasized that the scope of compensation in the case of tortious liability is broader than that in the realm of contractual liability. In the case of tortious liability, the compensation of both foreseeable harm and unforeseeable harm are included when calculating the damages. As for contractual liability, the compensation is limited to the foreseeable harm in the moment of the conclusion of the contract as long as there is no fraud or gross negligence by one of the parties. The Court of Cassation highlighted that the loss of expected gains or profits has a special nature that requires a special treatment what results in the application of a less stringent standard of proof, as the concerned party is only required to prove a but-for-scenario that did not take place in reality.

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In this regard, the Court of Cassation has held that one of the most significant factors that the court could draw in assessing the adequacy of evidence of loss of profits is:

1) The degree to which it is assured that damage has already been done to the creditor;
2) Whether the creditor has provided the best possible evidence to establish the loss of profits;
3) The nature of the debtor's mistake, tortious or contractual, intentionally or not;
4) The extent to which the creditor knows about the market conditions and risks;
5) Whether the creditor's activity has a previous record of profits, or is based upon the promotion of a new service or product that has not been brought before;
6) The reasonableness of the amount claimed in relation to the nature of the economic activity in question; and
7) The degree of the Court's assurance to the method of calculating loss of profits, whether by the creditor or the expert appointed by the Court.

B) Liquidated Damages:

In application of article (223) of the Civil Code, the Court of Cassation considers that the parties to a contract could agree in advance upon the value of compensation by stating such value in a clause within the same contract or under a subsequent agreement. Nevertheless, if the contract is terminated by the creditor due to non-performance instead of claiming liquidated damages, the whole contract and the agreed-upon liquidated damages become terminated and the creditor is then faced could only have recourse to the court for compensation in accordance with the general rules for calculation of damages. It must be noted that in case the creditor is contributing to

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the delays of the debtor, the creditor may not be awarded any liquidated damages for such delays.

It was also established that for liquidated damages to be awarded, the basic elements of liability must be present (fault, damage and causal link). The only difference is that the parties by virtue of the liquidated damages clause have foreseen the damages, and hence, the creditor will not have the obligation to prove the extent of damages. In the case where liquidated damages were found to be exaggerated, or if the debtor has executed part of its contractual obligations, it is within the court's discretionary powers to reduce the value of such a compensation.

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