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公司实务

如何主张可得利益损失

How to Claim Loss of Acquirable Interest

可得利益损失，是指在合同一方违约的情况下，另一方因对方违约而导致的在合同正常履行情况下可预期获得的利益的损失。

Loss of acquirable interest refers to the loss of expected interest due to the breach of contract by one party. The expected interest can be acquired by the other party if the contract is properly fulfilled.

I. 主张可得利益损失的法律依据

Legal ground for claiming loss of acquirable interest

根据《合同法》第113条规定：当事人一方不履行合同义务或者履行合同义务不符合约定，给对方造成损失的，损失赔偿额应当相当于因违约所造成的损失，包括合同履行后可以获得的利益，但不得超过违反合同一方订立合同时预见到或者应当预见到的因违反合同可能造成的损失。

According to Article 113 of the Contract Law of P.R.China: where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement and cause losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract.

II. 可得利益损失的类型

Several types of loss of acquirable interest

根据双方交易的类型、合同的目的等因素，可得利益损失大致可分为以下几大类型：

Depending on the nature of transaction, purposes of the contract etc, generally speaking, there are several types of loss of acquirable interest as below:

- 生产利润损失。例如，在生产设备和原材料买卖合同违约中，因出卖人违约而造成买受人

的可得利益损失通常属于生产利润损失；

Loss of production profit. For example, in a sales contract in relation to the sales of production equipments and raw materials, which is for purpose of production, the loss of expected interest suffered by the buyer due to the breach of contract by the seller shall belong to the loss of production profit.

- 经营利润损失。例如，在承包经营、租赁经营合同以及提供服务或劳务的合同中，因一方违约造成的可得利益损失通常属于经营利润损失；

Loss of operation profit. For example, in a service contract, the loss of expected interest suffered by the service provider due to the breach of contract by the other party shall belong to the loss of operation profit.

- 转售利润损失。先后系列买卖合同中，以原合同出卖方违约而造成其后的转售合同出售方的可得利益损失通常属于转售利润损失。

Loss of resale profit. In a sales contract where the buyer intends to resell to a third party, if the goods are not delivered due to the breach of contract by the seller, the loss of acquirable interest suffered by the buyer shall belong to the loss of resale profit.

III. 主张可得利益损失诉讼过程中的举证责任分配

Distribution of burden of proof in the litigation for claiming loss of acquirable interest

对于主张可得利益损失的一方来说，如因对方的违约行为而导致的可预期利益的损失，则应当在诉讼中提出如下证据：

For the party claiming loss of acquirable interest, the following evidences shall be collected and submitted:

- 有关对方违约的事实；
The fact of breach of contract by the other party;
- 可得利益损失的总额、依据和计算；
The total amount, ground and calculation of the loss of acquirable interest;
- 必要的交易成本。
The necessary transaction cost.

在计算可得利益损失的时候，非违约方应当提供相应证据，据以证明其在合同正常履行情况下可能获得的利益。例如，在转售情况下，非违约方应当提供转售合同，相应的转售价格等。

When calculating the loss of acquirable interest, the non-breaching party shall provide corresponding evidences to prove the acquirable interest which can be obtained if the contract is fulfilled. For example, if the goods is for resale, the non-breaching party shall provide resale contract, the price for resale, etc.

但是，作为违约一方来说，在面临非违约方主张的情况下，其也并非完全被动，为合理减少自己的损失，违约一方可以从以下几个方面提出要求减轻其责任的抗辩：

However, for the breaching party, he is not always passive when facing the claims by the non-breaching party. To reasonably reduce the loss, the breaching party may defend himself from the following aspects:

- 可预见规则抗辩。根据《合同法》第 113 条的上述规定，违约方承担的可得利益损失不得超过其订立合同时预见到或者应当预见到的因违反合同可能造成的损失。在主张可得利益损失的诉讼中，几乎所有的违约方均会提出类似抗辩。但是，违约方也必须就此向法院提供可以参考的证据，证明非违约方主张的可得利益损失超过了其预见的范围。否则，法院将依据自由裁量原则自行确定该等抗辩是否成立；

Defense in respect to foreseeability. According to Article 113 of Contract Law, the loss of acquirable interest due to the breach of the contract by the breaching party shall not exceed the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the breaching party concludes the contract. In the litigations, almost each of the breaching party will defend himself on the basis of foreseeability. It could be a good defense but the breaching party must submit evidences of foreseeability for courts' reference and prove the claimed loss by the non-breaching party has actually exceeded the one he can foresee. Without any solid evidences, the court will determine whether to accept the defense or not at its discretion.

- 减损规则抗辩。减损规则的基础是《合同法》第 119 条的规定：当事人一方违约后，对方应当采取适当措施防止损失的扩大；没有采取适当措施致使损失扩大的，不得就扩大的损失要求赔偿。此减损规则抗辩将给予违约方针对非违约方主张的可得利益损失的合理性进行质疑。如果违约方可予以证明部分可得利益损失系非违约方的不作为或者放任行为而发生的扩大损失，则此类损失将不得作为合理损失要求违约方赔偿；

Defense of loss mitigation. The ground for loss mitigation defense lies in Article 119 of the Contract Law: where a party breaches the contract, the other party shall take the appropriate measures to prevent the losses from increasing; where the other party's failure to take appropriate measures results in additional losses, it cannot demand compensation for the additional losses. Loss mitigation defense will grant the breaching party the chance of questioning the reasonability of the claimed loss of acquirable interest. And if the breaching party is able to prove that the additional loss is caused due to non-breaching party's failure to take necessary measure, which leads to the expansion of loss, such additional loss cannot be deemed as reasonable loss and shall not be compensated.

- 损益相抵规则抗辩。在某些特别的情况下，例如，在买卖合同中，因买方未能按约定付款，卖方为避免货物变质，导致损失扩大，将该货物转卖他人，卖方由此所得价款为其所有利益，应当从向卖方主张的损失中予以扣除；

Defense of loss and benefit offset. In some special situations, for example, in a sales contract in relation to perishable goods, the buyer fails to make payment as agreed. In order to avoid more losses due to delay in sale, the seller resells the goods to others. The proceeds from the sale shall be deemed as benefit to the seller and such benefit shall be deducted from the loss claimed by the seller.

- 过失相抵原则。如非违约方对违约行为的发生也存在过错的，违约方有权要求非违约方就该等过错导致的损失存在一定的责任。

Defense of contributory negligence. If the non-breaching party shall also be blamed to the occurrence of the breach of contract by the breaching party, the breaching party is entitled to request the non-breaching party to take responsibility for the loss.

IV. 如何正确主张可得利益损失

How to correctly claim the loss of acquirable interest

为了在诉讼中所主张的可得利益损失得到最大限度的支持，根据我们的经验，非违约方应当注意如下事宜：

In our experience, in order to have its claim for loss of acquirable interest support by the court, the non-breaching party shall take into the followings consideration:

- 合理评估违约风险。在订立正式合同时，一方应当合理评估对方的履约能力、履约信誉、市场供求、价格变化等可能导致对方违约的风险，并根据该等风险发生的可能性确定合理的应对方案；

To reasonably evaluate the risk of breach of contract. Before the contract is concluded, one party shall fully evaluate the other party's capacity for contract performance, level of credit, supply and demand condition in the market, price risk, etc. which may result in potential risk for breach of contract. A reasonable plan shall be prepared for this risk;

- 适当界定合同目的。如上所述，合同性质和目的的不同可能导致可得利益类型的不同，而对举证的证据类型会有不同的要求。同时，考虑到违约方基于预见性规则的抗辩，我们认为在订立合同时，应当合理阐述合同目的，例如，在买卖合同中，买方需要大致说明购买产品的目的是用于自身生产用途，或者是用于转售目的。该等目的的适当阐述有助于非违约方的举证证据获得法院的认可，且被视为合理的可预见性的损失；

To properly define the purpose of contract. As mentioned, the various nature and purpose of the contract may lead to different types of acquirable interest. Accordingly, the required evidences for claiming the loss of acquirable interest may vary. Meanwhile, in consideration of the defense to be raised by the breaching party on the basis of foreseeability, we suggest the purpose of the contract shall be clarified in the contract. For instance, in sales contract, the buyer needs to generally clarify that the goods purchased will be used for its own production or for resale purpose. The proper statement of purpose of contract will make the evidences in relation to the claims more acceptable to the court and make the loss claimed by the non-breaching party as foreseeable loss.

- 合理保持计算可得利益损失的证据。大多数具以计算可得利益损失的证据，可能系非违约方所提供的与自身或者第三方相关的证据。在这种情况下，违约方往往会对该等证据

的真实性、合理性等提出质疑。因此，非违约方有必要确保在收集该等证据时尽可能做到以下几点：(i) 真实性。非违约方提供的证据应当符合历史发生逻辑。例如，在主张转售利润损失时，非违约方提供的转售合同中应当明确包含合同订立的时间，且该等订立的合同应当与原合同具有合理推定的时间先后顺序。在客观性方面，非违约方应当尽可能避免后补证据的情况发生，因为后补证据很容易受到对方律师对其真实性的质疑；(ii) 关联性。非违约方提供的证据往往会受到对方有关关联性的质疑，也就是说，违约方会就非违约方提供的有关损失的证据与违约行为发生的损失的因果关系提出质疑。在这方面，非违约方除了应当作出事先铺垫性措施（例如上述 2 中对合同目的的适当阐述）外，非违约方应当确保提供的损失的证据与对方违约行为之间存在合理的且可推定的因果关系；(iii) 合法性。所有非违约方提供的证据应当具有合法性，不能伪造证据。这是因为尽管在大多数情况下，非违约方提供的有关可得利益损失的证据与违约方并无直接关联，但是，违约方也会想尽一切办法调查该等证据的合法性，如果一旦法院有合理怀疑该等证据系伪造，则会对可得利益损失的主张产生不利后果。

To properly collect and keep the evidences for determining and calculating the loss of acquirable interest. In the litigation in respect to the claim of loss of acquirable interest, most of the evidences submitted by the non-breaching party are related to itself or a third party. Under such circumstances, the breaching party usually will question the authenticity and reasonability of the evidences. Therefore, the non-breaching party shall particularly pay attention to the points mentioned below when collecting evidences: (i) Authenticity of the evidences. The evidences provided by the non-breaching party shall be consistent with historical logic. For example, when the non-breaching party claims for the losses of resale profit, the date for concluding the resale contract with the third party shall be contained in the contract so that the time sequence of the two contracts can be identified. (ii) Relevance of the evidences. During the litigation, the evidences provided by the non-breaching party usually will be questioned by the other party in terms of relevance. That is, the breaching party will question the causal relationship between the evidence relating to the loss and the act of breaching. In this aspect, besides the demonstrative measures such as the statement of the purpose of the contract, the non-breaching party shall ensure the reasonable and presumable causal relationship exists between evidences relating to the loss and the act of breaching. (iii) Legitimacy. All evidences provided by the non-breaching party shall be legal ones and cannot be forged. This is because although the evidences provided by the non-breaching party in relation to the loss of acquirable interest may have no direct links to the breaching party, the breaching party will try its best to find out the legitimacy of such evidences. Once the court has reasonable doubt towards the legitimacy of the evidences, then non-breaching party may find difficult to have the court support its claim for loss.

- 采取必要措施避免损失的扩大。在一方发生违约行为的情况下，非违约方有义务采取必要措施防止损失的进一步扩大。具体采取的措施，根据具体情况的不同会有所区别。但是，从诉讼技巧来看，我们建议在已经发生违约行为的情况下，非违约方可以向对方发出

通知等方式说明已经或者即将采取的防止损失扩大的措施。此等证据将给予法院积极的信号，即非违约方是在积极采取措施减少损失的扩大，这样也有助于回应对违约方所可能提出的减损规则的抗辩。

To take necessary measures to prevent the losses from increasing. In case of breach of the contract by one party, the non-breaching party shall have an obligation to take necessary measures to prevent the losses from increasing. The required measures may vary depending on the situations. However, from the perspective of litigation skills, we suggest the non-breaching party send written notice to other party stating the measures taken or to be taken to prevent the losses from increasing after the breach of contract has occurred. Such evidence may deliver a positive signal to the court that the non-breaching party has actively taken measures to prevent the losses from increasing, which may help respond to the defense by the breaching party on the basis of mitigation of damages.

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