The operation of mitigation under Japanese and English commercial law: a comparative analysis.

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Abstract

A commercial contract is intended to lead to the mutual satisfaction of both parties to that contract. If there is dissatisfaction and such dissatisfaction is caused by a breach of the contract then, except in rare cases, the dissatisfied will seek a remedy either a commercially agreed one or a formal remedy in damages, as a monetary expression of loss, but the extent of damages has the potential to cause dispute; how much money is it appropriate for the court to award?

In considering this we should bear in mind that, it is often the case that the breach will arise because the party, although having the capability to fulfil its obligation, notes that at the time of discharge there are changed economic circumstances, which offer more lucrative returns, and it has been tempted into breach in order to obtain greater economic benefit. There is a very important debate amongst academics and jurists as to the way that such default should be viewed.

When considering the benefit and utility of breach in preference to performance, the "breaching" party needs to know the extent of likely damages; likewise, the "non-breaching" party needs to know its entitlement to redress. Quantifying the amount of damages has concentrated minds through the ages and in all countries and the task is not an easy one.

We propose to consider the issues related to limiting damages from the perspective of two of the legal regimes found in two commercially sophisticated countries: Japan and England and Wales.

I. INTRODUCTION

A commercial contract is intended to lead to the mutual satisfaction of both parties to that contract. If there is dissatisfaction and such dissatisfaction is caused by a breach of the contract then, except in rare cases, the dissatisfied will

seek a remedy either a commercially agreed one or a formal remedy in damages. This is unremarkable.

The subject becomes more interesting when we start to examine it in greater detail; damages, as a monetary expression of loss, have the ability to satisfy, but the extent of those damages has the potential to cause dispute; how much money is it appropriate for the court to award?

In considering this we should bear in mind that it may be the case that the breach comes about because a willing party is unable to discharge its duty for financial or practical reasons. However, it is often the case that the breach will arise because the party, although having the capability to fulfil its obligation, notes that at the time of discharge there are changed economic circumstances, which offer more lucrative returns, and it has been tempted into breach in order to obtain greater economic benefit. There is a very important debate amongst academics and jurists as to the way that such default should be viewed.

We do not wish to explore the question of moral obligation in this article and so will confine our discussion to purely economic motivation and consequences. Therefore, when considering the benefit and utility of breach in preference to performance, the "breaching" party needs to know the extent of likely damages; likewise, the "non-breaching" party needs to know its entitlement to redress. Quantifying the amount of damages has concentrated minds through the ages and in all countries and the task is not an easy one.

We propose to consider the issues from the perspective of two of the legal regimes found in two commercially sophisticated countries: Japan and England and Wales, (the UK of course has more than one legal regime, with Scotland being the prime example).

II. **REMOTENESS AND ASSESSMENT OF DAMAGE**S

1. Remoteness

A superficial consideration might start by asking what it is that the non-breaching party has lost. How closely connected is the loss with the breaching

event? In England, this is expressed as the concept of, "remoteness". This approach is found in leading English cases and can also be identified in the law of other countries including Japan.

In Japan, Article 416 of the Civil Code provides that (1) the purpose of the demand for the damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure; and (2) the obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.[1] The rule was adopted when the code was enacted (1896) under the influence of the leading English case at that time,that is *Hadley v. Baxendale*.[2]

In England the case of, *Hadley v. Baxendale*[3] remains a leading case and together with that *of Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*[4] are very influential cases in this area. It is interesting to note that in this regard and also in several others, that it is possible to trace a direct connection between the legal systems of Japan and England.

In *Hadley v. Baxendale,* the case had an industrial setting: Hadley had a flourmill in Gloucester, England known as the City Steam- Mills. The crankshaft on the mill broke and needed replacement, without it the mill could not work. W. Joyce & Co at Greenwich, London agreed to make another but required the original to use as a template. The defendant was a common carrier trading under the name Pickford & Co and was contracted to carry the crankshaft to Greenwich and back to Gloucester. The defendant delayed the return of the crankshaft and consequently the plaintiff was unable to operate the machine and so earn a living from it for five days more than would have been the case had the transport been accomplished as agreed. The plaintiff claimed loss and damages in respect of this period of time. Alderson B held for the plaintiff and in so doing noted that a

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[1] Civil Code of Japan (Act No. 89 of 1896).
[2] Yoichi Sakaguchi, Hadley v. Baxendale (1854) and Article 416 of the Japanese Civil Code in Tokyo University of Foreign Studies (ed), *Are and Cultural Study Issue 24* (Tokyo University of Foreign Studies 1974), 245-250.
[3] *Hadley v. Baxendale (1854) 9 Exch 341.*
[4] *Victoria Laundry (Windsor) Ltd V. Newman Industries Ltd [1949] 2 KB 528.*

similar practice could be found in America and also in France under that country's code. He also referred favourably to an earlier decision of Parke J, (as he then was) in *Brandt v. Bowlby*[5], a case about non- delivery of wheat carried by sea. Where Parke J said:

"…the plaintiffs are entitled to be put in the same situation as they would have been in, if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by the non-performance of the defendants' contract."

This deals with damages but is only a starting point; it makes an assumption that damages must be directly connected to a financial loss. This assumption is sometimes described as the claimant's "expectation interest".[6]

2. Is non-financial loss excluded?

In England there are circumstances however, where an insistence that financial loss is the sole basis of the claim might lead to no remedy in damages because there is no financial loss; as in the leading case of *Ruxley Electronics and Construction Ltd v. Forsyth*[7] but here Lord Mustill said that the measure of damages was:

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[5] *Brandt v. Bowlby 2 B & Ald 932.*

[6] H G Beale and others (eds), *Chitty on Contracts* (33rd ed, Sweet & Maxwell 2018) Vol 1, 26-022. This is an issue for those with an interest in contract law theory and one that has excited much academic activity in the common law world. What should be the basis upon which the dispute is to be resolved? Expectation damages seek to put the injured party in the position it would have been if the contract had been performed while Reliance damages seek to put that part in the position it would have been if the contract had not been made. The former may be characterised as being a "traditional "position while the later find more favour, (though not completely so) with the ideas of the "Wisconsin School " in the US led by Stewart Macauley and Ian Macneil and By David Campbell in the UK. Key articles include:

Fuller L.L and Purdue W.R. Jnr, The reliance interest in contract damages In two parts. (1936) 46 Yale LJ 52 and 373.For alternative view see: Macauley S, The reliance interest and the world outside the Law School's doors [1991] Wis L Rev 247; D, The Relational Constitution of Remedy: Co-operation as the implicit Second principle of Remedies for Breach of Contract. 11 Tex Wesleyan L. Rev 455 (2005)

[7] *Ruxley Electronics and Construction Ltd v. Forsyth [1996] AC 344.*

"…the loss truly suffered by the promisee" and that although there was no monetary loss he awarded "loss of amenity" damages.

In Japan, to the contrary, the measure of damages is not limited to financial loss.[8] However, in most cases where damages for both financial and non-financial losses are claimed, the courts do not award non-financial loss damages, deciding that such loss shall be recovered by compensation of financial loss.[9] Non-financial loss may be found only in the case where the claimant's life, body, liberty, honour or other personal interests is injured as a result of the defendant's breach of contract.[10] Even in such cases, the amount of damages, decided by the court in its discretion, is relatively small. Accordingly, decisions of Japanese courts in respect of non-financial loss would not be so different from those of UK court.

3. When should damages be assessed?

In England, another relevant question, which must be answered, is when should damages be assessed and when should the non- breaching party get a substitute and so be able to calculate loss. Surely this is at the time of breach?

In *Johnson v. Agnew*.[11] Lord Wilberforce considers the point and says that this is not necessarily so:

"The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this 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."

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[8]Judgment of Great Court of Cassation Grand Court of 26 January 1915 Minroku 21-49.
[9] Judgment of Fukuoka High Court of 31 January 2006 Hanta 1235-217.
[10] Judgment of Tokyo District Court of 31 March 2004 LLI/DB.
[11] *Johnson v. Agnew [1980] AC 367.*

A later English court says that because all factors must be taken into account, including those that arise during the time between breach and trial; this will include the effect of the operation of agreed terms of the contract. This approach caused some controversy following the decision in *Golden Strait Corp v. Nippon Yusen Kubishika Kaisha, The Golden Victory* [12] but this has to some extent been subdued by the case's affirmation in *Bunge SA v. Nidera BV*[13] and now seems to be more generally accepted as correct.

In the first of these two cases the subject of the dispute was the breach of a time charter for a sailing vessel. The shipowner claimed the hire unpaid for the remaining duration of the charter. The second case concerned the non -delivery of wheat from Russia under a sale contract. Each contract contained a clause allowing for its termination before the end of its term in certain specified circumstance. These events did occur but took place after breach and before trial; should they be taken into account at the trial? Yes, was the answer in both cases.

In Japan, rules concerning time for assessment are not clear and there are no cases similar to *The Golden Victory or Bunge SA v. Nidera BV*. However, in consideration of the following cases, Japanese courts would possibly hold the same decisions as those in England under the same circumstances.

Likewise in England, Japanese courts take into account various factors in deciding the point of assessment of damages. In one leading case about a sale of real property, where the seller failed to deliver such property to the purchaser but disposed of it to a third party, the Supreme Court indicated the following rules for assessment of damages:[14]

1) In principle, damages should be calculated on the basis of the market value of the object of sale at the time when the defendant's duty to deliver it becomes impossible.

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[12] *Golden Strait Corp v. Nippon Yusen Kubishika Kaisha [2007] UKHL 12.*
[13] *Bunge SA v. Nidera BV [2015] UKSC 43.*
[14] Judgment of Supreme Court of 16 November 1962 Minshu 16-11-2280.

2) However, if the market price of the object is increasing and the seller should have foreseen such increase, the amount of damages should be the market price at the time of conclusion of the hearing.

3) Notwithstanding (ii) above, the claimant should not be awarded the market value of the object at present if he or she could have disposed of it before its market value reached such level. Further, if the price is decreasing after it reached the highest level, the claimant should not be awarded damages on the basis of the highest value unless the claimant proves that the object should have been disposed of at that point.

There are also cases where the court assessed the amount of damages at the time (i) when the contract was terminated on the basis of breach,[15] (ii) when the obligation in breach was due,[16] (iii) when the claim for damages was made,[17] (iv) when the lawsuit was commenced,[18] or (iv) when the hearing was concluded.[19]

It is difficult to establish general rules from the above cases. It seems that Japanese courts chose a time for assessment in the flexible manner so as to grant fair and reasonable compensation to the non-breaching party, taking account of contents of the claim and relevant incidents that occurred up until the conclusion of the hearing.

III. MITIGATION IN ENGLAND AND WALES

1. General Rule

It is clear that there are many unresolved questions on the calculation of damages but in this article, we wish to focus on another aspect and one that has the potential to affect expectation interest; mitigation. We are prompted to examine this because of a recent and controversial case that came up before the

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[15] Judgment of Supreme Court of 18 December 1953 Minshu 7-12-1446.
[16] Judgment of Supreme Court of 28 April 1961 Minshu 15-4-1105.
[17] Judgment of Supreme Court of 7 July 1961 Minshu 15-7-1800.
[18] Judgment of Great Court of Cassation of 18 March 1908 Minroku 14-290, Judgment of Great Court of Cassation of 2 October 1915 Minroku 21-1560.
[19] Judgment of Supreme Court of 21 January 1955 Minshu 9-1-22.

UK Supreme Court, that *of Fulton Shipping Inc of Panama v. Globalia Business Travel SAU of Spain. The New Flamenco*[20]

Now in its twentieth edition the leading textbook in English law on the subject, *McGregor on Damages*[21] says that there are various meanings of mitigation but that there is one principal meaning, which in turn can be reduced to three "rules". In short these are:

1) The claimant must take all reasonable steps to mitigate their/its loss consequent upon the defendant's wrong and cannot recover damages for any loss which, through unreasonable action or inaction, has not been avoided. This means that the claimant cannot recover for reasonably avoided loss.
2) The claimant can recover for loss incurred in reasonable attempts to avoid loss.
3) Where the claimant does take reasonably necessary steps to mitigate the loss the breaching party is entitled to the benefit arising from the claimant's action and is liable only for the loss as lessened.

Mitigation is an expression with common currency in the world of commerce and commercial law but it is open to differences of interpretation to the extent that some would accept it as a concept but would like to see its effect reduced [22]

In order to examine mitigation in more detail we should consider the language we use; it is commonly said that there is a "duty" to mitigate. This is not so:

in *Darbishire v. Warran*, Pearson LJ[23] makes that clear when he says:

> "…it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage." The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to

[20] *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU of Spain. The New Flamenco [2017] UKSC 43.*
[21] J. Edelman, S Colton and J Varuhas, *McGregor on Damages* (20th ed, Sweet & Maxwell 2017).
[22] *From British Westinghouse to The New Flamenco: misunderstanding mitigation.* The Journal of International Maritime Law 22 (2016) 5, 370-378 by Professor Victor Goldberg.

[23] *Darbishire v. Warran*[1963] 1 W.L.R. 1067 at p. 1075.

adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant."

Other common law jurisdictions take the same view.[24] McGregor says:

> *"Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss."*[25]

This statement found judicial articulation by Viscount Haldane LC in:

British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd[26] [1912] AC 673.

Where he says:

> *"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

British Westinghouse may be a leading case but it has not put an end to the matter; issues still arise.

2. The New Flamenco

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[24] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675.
[25] McGregor (n 21) 9-014.
[26] *British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd* [1912] AC 673.

A case on this point is that of *The New Flamenco*.[27] This concerned the New Flamenco, a small cruise ship. The vessel was timechartered i.e. the subject of a contract giving the chartering party the right to exclusive use of the vessel, subject to certain exceptions set out in the charter, for a fixed period of time and with an obligation, again, subject to some exceptions, to make continuous payment, (known as "hire"). The period of the charter was from 13th February 2004 to 2nd November 2009. In the event the charterer redelivered the vessel to the owner on 28th October 2007 saying that it was unable or at any event unwilling to pay further hire.

The owner treated this act as being an anticipatory repudiatory breach (i.e., the charterer's renunciation before the time fixed for payment). A London arbitrator initially heard the case. He found that as a matter of fact there was no substitute two- year time charter available in the market at that time. Thus, implying that damages should be on the basis of the total payment of the unpaid hire for the remainder of the full charter period.

In October 2007, the owner sold the vessel for US$ 23,765,000. The timing of this sale is important because it took place before the occurrence of the global financial crisis, following which there was a serious drop in international trade, sea carriage, (both for cargo and for passengers), and decimation of ship values.

It was agreed, by the parties to the dispute, that because of this collapse in ship prices the vessel would have achieved only US$ 7,000,000 had the charter continued its anticipated duration and been returned to owners in November 2009.

The owners claimed damages of US$ 7,558,375, a sum representing the net loss of profits for the period from breach to the end of the charter.

The charterer refused to pay this and justified its position by arguing that the owner was obliged to mitigate and in so doing to give credit for the difference between the actual sale price achieved and the likely value in November 2009. In

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[27] *The New Flamenco* [2014] 2 Lloyd's Rep 230. It later went on appeal to both the Court of Appeal at [2016] Lloyd's Rep 1 383 and the Supreme Court at [2017] 2 Lloyd's Rep 177.

other words, US$ 23,765,000 minus US$ 7,000,000; which would equal US$16,765,000; enough to discharge the sum being claimed. The owner argued that this should not be taken into account.

It was an unusual argument that was employed by the charterer i.e. that the sales proceeds of the subject matter of the charter, the vessel, should be applied for the benefit of a party who had failed to pay for the use of the vessel. Unusual since there was no obligation for the owner to sell the vessel. What of the situation where the owner simply kept the vessel in port, was this a failure in mitigation? Additionally, the owner did not have to retain ownership of the vessel until the end of the charter; it could have sold it on to a new buyer who would have had to honour the existing charterparty.

London arbitration is normally a closed and final procedure. However, The Arbitration Act 1996 allows for appeal in some circumstances to the High Court[28] and this was the case here with the matter being considered further on appeal by the Court of Appeal and ultimately by the Supreme Court.

Popplewell J [in the High Court] analysed the concept of mitigation in some detail and considered what a non-breaching party should do. In summary, he said that there was no general rule but he concluded that there were eleven principles to be taken into account:

1) The benefit claimed must be caused by the breach.

2) The "causation test", which is referred to in several of the leading cases, requires that all circumstances be taken into account including the nature and effect of the breach and the nature of the benefit and of the loss.

3) Did the breach cause the benefit? It is not enough that the breach gave the opportunity to trigger the benefit.

4) The name is not relevant and so it does not matter if the question is seen as one of mitigation or of the measure of damages.

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[28] See for a helpful analysis of the position in *Kyla Shipping Co Ltd v. Bunge SA [2013] EWCA 734.*

5) The fact that a mitigating step, (either by an action or by inaction) may be a sensible business decision with a view to reducing the impact of the breach does not of itself make it one that is sufficiently caused by the breach.

6) For there to be mitigation there must be a sufficient causal connection between the breach and the mitigating step but it is not enough to just show that there is a two-step process, (i.e. a causal link between breach and mitigation and between mitigation and benefit) there must also be a direct link between breach and benefit.

7) Where benefit comes about from a transaction that the non- breaching party could have made irrespective of the breach- this suggests that that the breach is not sufficiently causative of the benefit.

8) While there is no requirement for the benefit to be of the same kind as the loss claimed or mitigated then this difference between the two might indicate that the benefit is not caused by the breach.

9) Common sense should prevail when deciding if the benefit flows from the breach.

10) A causal link between breach and benefit is generally necessary but this may not be enough; there must also be consideration of justice, fairness and public policy.

11) One example of a breach of fairness and justice would be if the breaching party were allowed to benefit from something which the non-breaching party has done for its own benefit e.g. an insurance policy or a pension scheme. In support of this Popplewell J referred to the case of *Parry v. Cleaver*[29].

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[29] *Parry v. Cleaver* [1969] 1 Lloyd's Rep 183, 187 particularly Lord Reid's judgment.

> *"Then it is said that instead of getting a pension he may get sick pay for a time during his disablement - perhaps his whole wage. That would not be deductible, so why should a pension be different? But a man's wage for a particular week is not related to the amount of work which he does during that week. Wages for the period of a man's holiday do not differ in kind from wages paid to him during the rest of the year. And neither does sick pay; it is still wages. So during the period when he receives sick pay he has lost nothing. …*

Popplewell J provides us with a handy list of principles for our guidance but it might be argued that some overlap and that in practice amount to the same thing, particularly principles nine, ten and eleven.

3. Analysis

We suggest that it would have been helpful if the question of the availability of replacement employment for the vessel had been more thoroughly explored by the arbitrator, (the subsequent court hearings relying on that first tribunal's assessment of fact). We know that no two- year charter was available but what about shorter term employment? One or perhaps a series of six-month contracts might have provided an opportunity for mitigation if it had been found to exist. We know that the vessel was sold so we presume that those purchasers thought that there were employment prospects.

The New Flamenco in its passage through the legal system gave rise to opportunities, which the High Court and the Court of Appeal in particular used in order to work through the legal principles. The Supreme Court has given judgement for the owner. So, have we reached a definitive position on mitigation? As we have noted, the arbitrator and the court were presented with an unusual argument i.e. that the proceeds of a voluntary sale of the vessel should be given to the credit of the party breaching a time charter. Unfortunately, the Supreme Court judgement was brief and this leaves us with some anxiety that this is not the end of the matter and that there will undoubtedly be more cases on the nature and extent of mitigation.

IV. JAPANESE RULES EQUIVALENT TO MITIGATION IN ENGLAND

1. Rules of limiting damages

> *A pension is intrinsically of a different kind from wages. …. wages are a reward for contemporaneous work but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind."*

The above has been a brief examination of some current issues concerning damages and more particularly mitigation in England and Wales. What then of the position in that other sophisticated commercial country, Japan. The same issues will occur. What is likely to be the approach and outcome under Japanese Law?

Firstly, in Japan the judicial approach is to consider doctrines that reduce the amount of damages

Under Japanese law, the amount of damages that should be payable for breach of contract or negligence may be reduced on the ground of three doctrines:

The claimant's failure to comply with his/her/its duty of mitigation. This is referred to as *songai-keigen-gimu*).

Secondly. deduction of the claimant's benefit accrued from the cause of breach or negligence (*son-eki-sosai*), or

Thirdly, on the basis of the claimant's comparative negligence (*kashitsu-sosai*).

It seems to us that the first two doctrines have a close similarity to those English law principles of mitigation but that the third doctrine i.e. that of comparative negligence has a different basis. It is more closely related to the cause of the breach and shares similarities with the English concept of contributory negligence. Under this doctrine, any fault on the side of the claimant (including his or her family members, friends, colleagues, employees, etc.), which caused damages or increased the amount of damages may be an element to be taken into consideration by the courts in reducing the amount of damages claimed. The rule is similar to English rule of contributory negligence, although in Japan the rule applies to damages for breach of contract and for negligence in the same way.[30] The rule is also applicable to reduce liquidated damages.[31]

2. Duty of mitigation

[30] Civil Code, arts 418 and 722(2).
[31] Judgment of Supreme Court of 21 April 1994 Saiji 1121-73.

The basis of this duty is a rule of law under the principle of good faith. Generally, the claimant's failure to comply with such duty is taken into consideration in determining the amount of the "ordinary damages" claimed in accordance with Article 416, paragraph 1 of the Civil Code as referred to in II.1 above.[32]

A typical example of its application is the judgement of the Supreme Court of 19 January 2009.[33] In this case, the claimant was a tenant of a commercial premise in an old building where it carried out the business of karaoke store. In February 1997, due to a failure of the drainage facility of the building, the demised premise was flooded and became unusable. The claimant requested the defendant, the owner of the building, to repair the demised premise so as to recommence its karaoke store. However, the defendant refused and gave notice to terminate the contract of lease. Under Japanese law, it was evident that such notice was invalid and the defendant breached its obligation as lessor to repair the premise. In September 1998 (i.e., nineteen months after the above incident), the claimant brought an action against the defendant for compensation of damages incurred by the defendant's failure to repair the demised premise in breach of the contract. An issue in the case was the amount of damages. The lower court granted the claimant recovery of the full amount of damages claimed, including its lost profit for the period of four and a half years (from March 1997 to August 2001), during which the claimant could not carry out karaoke business in the premise. However, on appeal, the Supreme Court did not agree to such amount. The Court said that, before commencement of this action, the claimant should have known that its karaoke business could not be restarted in the same premise, which was quite ruined at that time. Taking account of it and other relevant circumstances, the claimant was under the duty to take some steps, such as restarting the karaoke business in another place, to mitigate the amount of damages. The court held that it was against rule of law to claim compensation of all damages without taking any steps. The damage amount was therefore limited to the claimant's lost profit until the point of time when the claimant could have restarted another karaoke store somewhere else.

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[32] Another situation where such duty is taken into account is the decision of the claimant's contributory negligence (Civil Code art 418).
[33] Judgment of Supreme Court of 19 January 2009, Hanta 1289 -85.

This does seem to be close to calling this a duty, which we have noted above is not the case under English law although for practical purposes there does not seem to be very much difference. The above rule adopted by the court seems to be identical to the first rule of mitigation under English law[34], as provided in McGregor on Damages referred to in III.1 above. However, the rule is different from the second and third English rules set out in the same book.

Under Japanese law, the courts apply the above rule in order to reduce the amount of damages claimed, taking account of the amount, which should have been mitigated had the claimant took reasonable steps by action or inaction. The actual benefit received by the claimant may not be reduced by operation of this rule.

3. Deduction of benefit accrued

Benefit may be deducted from the damages claimed by application of this rule. Under the doctrine of benefit accrued, if the claimant receives benefit as a result of the same cause as the cause of damages at the time they/it suffers damages, the amount of such benefit shall be deducted from the amount of damages claimed, provided that, the damage claimed and the benefit shall have the same nature and shall be exchangeable.[35] This rule is recognized by the court under the principle of fairness and used in determining the amount of damages for both breach of contract and negligence.

Benefits deductible under this rule may be accrued from the claimant's action. For example, in the case where a contract of property lease is terminated by the lessor on the ground of the lessee's anticipatory breach in the middle of the term, in principle the lessor is entitled to claim damages in the amount representing their/its net loss of income for the remaining period of the lease. However, if,

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[34] One notable difference is that the Japanese rule may be operated to reduce the amount of liquidated damages (Judgment of Supreme Court of 21 April 1994 (n 31) – Although the case relates to application of the comparative negligence to liquidated damages, under Japanese law, breach of duty of mitigation is of the same nature as negligence, i.e. breach of duty of care.).
[35] Judgment of Supreme Court of 24 March 1993, Minshu 47-4-3039 (The case relates to damages caused by negligence, however, under the Japanese law, the same rule applies to damages for breach of contract.).

during such period, the lessor leased the same property to another person, benefits received from the new lessee shall be deducted from the amount of damages claimed. The example is illustrated in a case of Yokohama District Court concerning a property lease contract between two neighbouring cities in Kanagawa prefecture (Yokohama-City and Hiratsuka-City).[36] In this case, Yokohama-City took a bicycle racetrack and related facilities on lease from Hiratsuka-City and carried out the bicycle racing business for over 50 years. In 2000, Yokohama-City decided to withdraw from this business which was unprofitable and notified Hiratsuka-City to terminate the lease. Hiratsuka-City claimed against Yokohama-City for damages of lost profit amounting to the expected rent income in the next three years. The court admitted Hiratsuka-City's claim, however, the court noticed that Hiratsuka-City operated bicycle racing at the same racetrack during such three-year period. Based on such fact, the amount of net profit received through its own operation of racings was held to be deducted.

Deduction of benefit is allowed under the rule also in the case where benefit is accrued by a cause unrelated to the claimant's action or inaction so long as such benefit has the same nature as, and exchangeable for, the damages.

In the case of Supreme Court, where the claimant awarded damages as a result of death of her husband due to medical negligence of the defendant (doctor), it was held that the amount of survivor's pension payable to the claimant shall be deducted from the amount of her damages.[37] The survivor's pension was granted to the claimant without her action to mitigate damages, but it was granted to her in place of her deceased husband's retirement pension that he had been entitle. Based on this, the Supreme Court decided that the survivor's pension had the same nature as the claimant's damages because it was a replacement of the retirement pension, which should be considered as part of the lost profit.

On first examination, this ruling seems out of line with the English decision of *Parry v. Cleaver* (at n 29) above where Lord Reid says:

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[36] Judgment of Yokohama District Court of 14 May 2010, Hanji 2083-105.
[37] n 35.

"A pension is intrinsically of a different kind from wages. …. wages are a reward for contemporaneous work but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind." But as we will see the Japanese court has also considered this point and decided that the amount of life insurance proceeds shall not be deductible under this rule. The Supreme Court so held in the case where the claimants claimed damages for the defendant's negligent accident that caused loss of their son's life.[38] The Court said that life insurance proceeds which were paid were of the nature of consideration for the premium that the deceased son had paid, and it was to be paid on his death in any event and without regard to the defendant's negligence.

In another case where a drug chain brought an action against the Tokyo Electric Power Company on the basis that the accident of the Fukushima Power Station following the Great Earthquake ("the Accident") was caused by its negligence, the claimant claimed damages in the sum of its lost profit as a result of closure of five stores within the region of the Accident.[39] However, evidence proved that profits of the claimant's other stores in Fukushima prefecture increased rapidly after the Accident. The court found that such increase of profit was caused by the Accident because people in the region of the Accident moved to other areas in Fukushima. Taking it into account, the court deducted the amount equivalent to 37.5% of the claimant's increased profit in the other area of Fukushima from the amount of the lost profit claimed.

4. Analysis

In view of these cases, there are some similarities between the above rule of benefit accrued and English rule of mitigation. As with part of the principles listed by Popplewell J in the *New Flamenco* case,[40] under the Japanese rule (i) the cause of benefit claimed must be the same as the cause of damages, i.e., the breach or negligence, (ii) if benefit accrued from a transaction that the non-

[38] Judgment of Supreme Court of 25 September 1964, Hanji 385-51.
[39] Judgment of Sapporo District Court of 18 March 2014, Hanji 2320-103.
[40] n 27. Where eleven principles were set out.

breaching party could have made irrespective of the breach, the breach is not sufficiently causative of the benefit,[41] and (iii) there must also be consideration of justice, fairness and public policy.[42]

However, the Japanese rule is different from English principles in several points. First, under Japanese rule the benefit must be of the same nature as, and must be exchangeable for, the loss claimed,[43] while under English law difference in the nature is merely a factor to negate a causal link between the loss and the benefit. Second, in the case where befit comes from the claimant's action for mitigation, English rule requires a direct link between the breach and the benefit, however, in Japan it does not seem to be essential so long as the benefit and the loss has the same nature.[44] Above all, under the Japanese rule of benefit accrued, benefit does not have to be accrued from any steps of mitigation (by action or inaction) taken by the claimant.[45]

Nonetheless, in a case like that of the *New Flamenco,* we are of the view that the Japanese courts would reach the same conclusion as the decision of the English Court if the same action under the same facts were brought in Japan. This is because the cause of the owners' benefit (or avoidance of loss) in that case was merely an incidental change of the economic and market condition. Such cause was unrelated to the charterers' breach, which caused the owners' loss of profit. Moreover, the nature of the benefit (i.e. the gain from the timing of sale owing to the change in market price) is different in nature from damages claimed (the loss of rent income).

V. CONCLUSION

It seems that both legal regimes, Japan and England and Wales have a rich history of commercial cases in which the level of damages to be awarded was in disputes and that both systems allow sufficient flexibility to the courts for the

[41] n 38.
[42] n 35.
[43] n 35, n 36 and n 38.
[44] n 35.
[45] n 35 and n 39.

development of rules to provide sophisticated and nuanced decisions. It is true that in Japan there are codes which proscribe the ability of the courts to deviate and depart too much from the statutory provision but nonetheless both systems of law have arrived at very similar conclusions. Given the lack of firm statement in the English Supreme Court's decision in the New Flamenco there is a possibility for deviation between Japan and England and Wales and we wonder if in ten years' time the two systems will maintain this close proximity of outcome.