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After *The Golden Victory*: Still Lost at Sea

Victor Goldberg

Following an anticipatory breach there is a temporal gap between acceptance of that breach and final disposition of the case. The House of Lords confronted the question of whether post-breach facts should be taken into account when assessing damages in *The Golden Victory*.¹ Drawing on two strands of precedent, their Lordships concluded that they should be. First, it invoked the compensatory principle of *Robinson v Harman*² “that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.” Second, it cited a non-contract decision a century earlier, *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v. Pontypridd Waterworks Co.*: “Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?”³ I will argue that, properly understood, the compensation principle does not require recognition of the post-breach information and that the groping metaphor, while superficially attractive, is not really helpful.

Unfortunately, *The Golden Victory* was recently ratified by the Supreme Court in *Bunge SA v. Nidera BV*.⁴ Perhaps it is too late to do anything about it. Optimistically, I hope that “with the light before them” the Court will see fit to reverse course in a future decision.

Before developing that argument, I want to return to the Court’s invocation of *Bwllfa*. It could just as easily have invoked a case decided one year after *Bwllfa* and come to the opposite conclusion. Their Lordships were confronted with a contract dispute in which a party attempted to bring a post-breach fact to the court’s attention. Earl of Halsbury L.C., who had been on the *Bwllfa* panel but had not written an opinion, thought it astonishing that someone could argue that subsequent events should be taken into account. The contract was for the delivery of torpedo boats to Spain. Had they been delivered on time, they likely would have been destroyed with the rest of the Spanish fleet. Their Lordships unanimously held that contractually determined charges for delay were enforceable liquidated damages, not unenforceable penalties:

Then there comes another argument which, to my mind, is more startling still: the vessel was to be delivered at such and such a time; it was not delivered, but the fleet the Spanish Government had was sent out at such a time and the greater part of it was sunk, and, says the learned counsel, “If we had kept our contract and delivered these vessels they would have shared the fate of the other vessels belonging to the Spanish Government, and therefore in fact you have got your ships now, whereas if we had kept

¹ *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* 2005 WL 290997

² 1 Exch 850. (1848)

³ At 718 citing *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v. Pontypridd Waterworks Co.* [1903] AC 426, 431HL (E).

⁴ [2015] UKSC 43

our contract they would have been at the bottom of the Atlantic.” My Lords, I confess, after some experience, I do not think I ever heard an argument of that sort before, and I do not think I shall often hear it again. Nothing could be more absurd than such a contention, which, if it were reduced to a compendious form such as one has in a marginal note, would certainly be a striking example of jurisprudence. I think I need say no more to shew how utterly absurd such a contention is. I pass on to the other question.⁵

My thesis is that the contract is an asset and that compensation entails determining the decline in value of that asset at the time of the breach.⁶ To take a simple example, suppose that Sam Smith agrees to sell 1,000 shares of Widgetco stock to Betsy Brown for delivery on December 1 at \$10 per share. On June 1 the forward price for December delivery is \$16 and Smith reneges. On December 1, the actual price had fallen to \$9. Brown claims that she should recover \$6,000, the contract-market differential at the date of breach. Smith counters, claiming that he had done Brown a favor and that there should be no damages. Alternatively, suppose that on December 1 the price had risen to \$25 per share. Brown would now claim that her damage should be measured by the price differential on December 1, and therefore she should receive \$15,000. Smith would argue that damages should be measured by the differential at the date of breach, June 1. At the time the claim is being litigated it clearly would matter whether we chose the date of breach or the date of litigation as the appropriate date for assessing damages. But at the time the parties entered into the contract, would it matter?

Note that Widgetco’s value is not a function of the past; it depends on projecting earnings into the future. All sorts of things might happen that will affect Widgetco’s future earnings. Recessions, inflation, war, market shifts, currency fluctuations, pestilence, the health of key personnel, oil embargos, and expropriations all might affect the value of Widgetco. Its current market price reflects the collective best guess as to the likelihood and impact of all of these and any other contingencies. That is, all the uncertainty about the future has been incorporated into a single number—the price on the date of the breach.

Returning to the question of whether it would matter whether we chose the date of breach or decision, subject to a caveat to be developed below, the answer is “No.” The *expected* value at the time of litigation should be equal to the *actual* value at the time of the breach. Whether we invoke rational expectations, efficient markets, or arbitrage, the conclusion is robust. Courts will sometimes misleadingly refer to a breach taking place in a *rising* market; more precisely, the reference should be to a *risen* market. That is, the court learns after the fact that the market has risen, but at the time of the breach future

⁵ Clydebank Engineering and Shipbuilding Company, Limited and Others v. Don Jose Ramos Yzquierdo Y Castaneda and Others, House of Lords, [1905] A.C. 6, 13 (19 November 1904).

⁶ I am not concerned in this paper with the treatment of consequential damages; on that subject, see Goldberg, Rethinking Contract Law and Contract Design, ch. 8-10. Consequential damages are less likely to be an issue following an anticipatory breach since the promisee would be able to protect itself from consequential losses by not accepting the breach.

price movements of the asset would be random. The caveat has to do with the time value of money. If legal prejudgment interest rates were to differ from the market rate, the equality would no longer hold.⁷ In this paper I am going to assume that issues concerning the time value of money can be adequately dealt with. So, conceptually we should be indifferent between a rule that says always use the breach date or always use the litigation date—the measurement date should be chosen behind a “veil of ignorance.” The existence of a firm rule is more important than the content of the rule.

Having said that, I will proceed by choosing the breach date as the appropriate date. Why? The cases that have rejected that date have been exceptions to this rule. Deviating from this rule by recognizing ad hoc exceptions would allow the parties to shop, presenting new possible exceptions, invoking the rule more favorable to them at the time of the trial, and the court would have little guidance in choosing between the proffered measures. A second advantage is that the party contemplating nonperformance will find it easier to weigh the costs and benefits of going forward. I recognize that some courts and commentators object strongly to the notion that breach is an option. I have suggested elsewhere that it is useful in this context to think of the damage remedy as the price of the implicit termination option.⁸ Using the breach date makes the price more transparent, making the decision easier.

Does this mean rejection of the compensatory principle? No, it simply entails defining more precisely what is being compensated—the value of the contract at the moment it had been repudiated. The House of Lords missed that basic point in *The Golden Victory* and that misconception has carried over into subsequent decisions, notably *Flame v. Glory Wealth*⁹ and *Bunge SA v. Nidera BV*.¹⁰ I shall consider each of these decisions in turn.

A. *The Golden Victory*

In July 1998, the owner of the *Golden Victory* chartered the tanker to a Japanese company for seven years. The charter included a clause that was “invariable in time charters for tankers likely to visit the Gulf”:¹¹

If war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC, UK, Netherlands, Liberia, Japan,

⁷ Suppose that the real price of Widgetco stock remained constant between the breach date and the litigation date. And suppose further that there was substantial inflation so that the nominal price rose 20%. If the prejudgment interest rate reflected that inflation rate, awarding Brown her breach date damages (\$6,000) would be equivalent to awarding her the litigation date damages (\$7,200).

⁸ See Goldberg, *Protecting Reliance*, 114 *Columbia L. Rev.* 1033, 1049-1054 (2014) and Goldberg, *Rethinking Contract Law and Contract Design*, 16-21 (2015). See also Robert Scott and George Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 *Columbia L. Rev.* 1428 (2004). In both *The Golden Victory* and *The Glory Wealth*, the breacher, in effect, exercised the option to terminate.

⁹ [2013] EWHC 3153 (Comm).

¹⁰ [2015] UKSC 43

¹¹ At 719.

Iran, Kuwait, Saudi Arabia, Qatar, Iraq, both owners and charterers shall have the right to cancel this charter. Either party, however, shall not be entitled to terminate this charter on account of minor and/or local military operation or economic warfare anywhere which will not interfere with the vessel's trade.¹²

The language is not unique. A similar term is included in the New York Product Exchange (1993) form, with the names of the countries to be filled in at the time of chartering. (clause 32). The hire rate was initially set at \$31,500 per day, increasing by a formula that was not included in the decision. In addition, the owner would receive a share of the profits over the base rate. In December 2001, following a sharp decline in the market for ship charters, the charterer repudiated; three days later the owner accepted the breach. In a September 2002 interim declaratory award, the arbitrator found that there had been a breach and that the earliest contractual date for redelivery would have been in December 2005. The damage measurement issue was not decided until October 2004. That gap turned out to be significant since the second Gulf War began in March 2003. Had the contract still been in effect, the war clause would have been triggered and the charterer would have exercised its right to terminate.

The owner claimed that the termination date for measuring damages should be December 2005. The charterer argued that, since it would have terminated in March 2003, it should only be liable for damages through March 2003. The arbitrator agreed, as did the judges in the commercial court, the appeals court, and, finally, in the House of Lords (in a 3-2 split). The arbitrator took evidence from experts on whether in December 2001 the war was merely a possibility or was probable or inevitable. There was considerable discussion of *The Mihalis Angelos*¹³ in which the charterers had cancelled three days early because there was no way that the vessel could be available at the time and place specified. In that case the court held that although the charterers had breached, there were no damages because the failure to meet the deadline was “predestined.” The majority in *The Golden Victory* took this as an indication that they could consider events subsequent to the breach in assessing damages. The owner argued that the “loss is crystallised at the date of breach and an arbitrator or court should not look at post-breach events in making the assessment. The only exception to this rule was where the subsequent event could be seen at the crystallisation date to be inevitable or ‘predestined.’”¹⁴

Lord Bingham, in his dissent, noted that if the damages had been calculated at the time the liability decision had been made, the Gulf War would not yet have occurred and, presumably, the arbitrator would have had no difficulty awarding damages for the last two-plus years of the charter. Could the charterer then have come back to the arbitrator and asked for a refund for the last two years? Presumably the arbitrator and the majority would have rejected such a claim, perhaps invoking “finality.” But why make the remedy depend on the length of the damages phase of the proceedings? War was only one of the

¹² ¶50.

¹³ *Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH (The Mihalis Angelos)*, 1970 W1 29513

¹⁴ ¶58.

many risks that might have impacted the value of the charter. If the market price for charters collapsed, should the charterer's damages be increased to take into account the latest conditions? If not, which post-breach, pre-decision factors should a court take into account when reckoning damages?

The charter was an asset of the owner and the problem was to determine the market-contract differential, assessing the value of the asset at the time of the breach with and without the breach. The complicated pricing formula—indexing and profit sharing—made that more complicated, but the complications were independent of the timing question. Lord Mance (Court of Appeals) recognized that the contract was an asset, but failed to understand the implications: “But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period. They never had an asset which they could bank or sell on that basis.”¹⁵ That’s half right; the value of all assets is entirely determined by the future and the future is, by definition uncertain. That does not mean that the assets can’t be valued. We do it all the time—think Widgetco. The majority wrongly suggested that the war clause made the duration of the charter (and therefore its value) uncertain: “Where there is a suspensive condition such as a war clause, however, the duration of the charter was always uncertain, depending on a contingency of the occurrence of an event which was by definition within the contemplation of the parties.”¹⁶ By that reasoning, every contract with a force majeure clause would be at risk.

Valuing the asset would, by necessity, take into account the possibility that the war clause would come into play and that one of the parties would exercise its cancellation option. If at the time of the breach, war was a low probability event, the discount would have been minor. Conversely, if the breach occurred at the beginning of March 2003, the value of the asset would have been close to zero. A simple analogy might be helpful. Suppose a company is litigating a patent claim. If it were to win, the share value would be \$100 and if it were to lose, the share value would be zero. If the chance of winning is 50:50, the value of the stock on the eve of decision is \$50. Post-decision it would be \$0 or \$100. Varying the probabilities would alter the stock price; if winning were “predestined,” the stock price would approach \$100 and if it were exceedingly unlikely, it would approach \$0. The likelihood of an event at the time of the breach, whether remote, predestined, or something in between, is one of the determinants of the value of the asset.

The Lords’ failure to comprehend this point is illustrated in Lord Brown’s opinion:

Shift the facts here and assume that the arbitrator had found, as at December 2001, a probability (or even merely a significant possibility) of (perhaps imminent) war breaking out in the Gulf, but that in fact, by the time damages finally came to be assessed, not only had war not broken out but all risk of it had disappeared—or, indeed, the assessment might not

¹⁵ [2005] EWCA Civ 1190, ¶24.

¹⁶ ¶59.

have taken place until the whole nominal term of the charterparty had expired. On the view taken by the minority of your Lordships, the damages award would have had to reflect a risk which never in fact eventuated, a conclusion in the circumstances, greatly to the owner's disadvantage. Yet that inescapably is the logic of the minority's approach.¹⁷

And that is how it should be. Markets take future risk into account, incorporating the best information at the time of the breach. If the likelihood of the particular event changes over time or, as in this instance, the event comes to pass, the market will reflect those changes. If the news turns out to be better than had been anticipated (Brown's no war scenario), the measured damages at the time of the breach would have been below the measurement at the time of the decision. And if the news turns out to be worse, as in the actual case, the measured damages at the time of breach would exceed those at the time of the decision. Whether the losses were probable or predestined would be determined by the market, not by after-the-fact expert testimony.

B. *Flame v. Glory Wealth*

In *The Golden Victory* the post-breach fact recognized by their Lordships was the occurrence of the Gulf War, an event beyond the control of both parties. In *Flame v. Glory Wealth*,¹⁸ the claim concerned a "fact" that was in plaintiff's control, namely whether it would have had the ability to perform. That case involved a charterer's breach of a contract of affreightment (COA).

After the collapse of Lehman Brothers the market for freight collapsed, falling 75% in three months. The charterer repudiated the COA for future shipments and the arbitrators found it liable. In the damage phase, the charterer argued that the owner's financial position had so deteriorated that, had the charterer not breached, the owner would not have been able to provide the required vessels. Therefore, following *The Golden Victory* logic, if the owner could not finance the voyages, then the charterer should not be liable for losses on those voyages that would not have occurred. Since compensation should put the owner in the position it would have been in had the charterer performed, an award that failed to take into account the owner's inability to provide the vessel in the future would, argued the charterer, give the owner a windfall.

The court weighed the conflicting views of English contracts scholars. On the one hand, it cited Gunther Treitel: "[O]nce the shipowner had accepted the charterer's earlier breach and so terminated the contract for that anticipatory breach, the shipowner would be relieved of any further obligation to perform, so that his failure to perform on the due day could no longer be a breach."¹⁹

¹⁷ ¶84.

¹⁸ [2013] EWHC 3153 (Comm).

¹⁹ ¶11. In an article published shortly after *The Golden Victory* decision, Treitel asserted that the victim's inability to perform should not matter: "The victim's inability to perform after acceptance of the breach therefore cannot amount to a breach by the victim and so cannot, even if it would have been a repudiatory

On the other hand, it quoted Michael Bridge:

It has now been established by the decision of the House of Lords in *The Golden Victory* that considerations of certainty and finality have to yield to the overriding principle that the claimant's loss has to be assessed accurately or else a seller would be entitled to windfall damages in respect of a loss which, in fact, he would never have sustained. This will necessarily involve the court in an assessment of what would have happened if the contract had not been repudiated.²⁰

The court adopted the latter position:

If, let it be assumed, it is clear that the disponent owner would not have had the resources to provide a carrying vessel and the court or tribunal did not take that matter into account, then, if the disponent owner were awarded substantial damages on the prima facie measure, such an award would put the disponent owners in a better position than if the charterparty had been performed by the charterer. For if the charterer had declared the required laycans the disponent owner would still not have earned the agreed freight. In those circumstances an award of substantial damages would be a windfall and would breach the compensatory principle.²¹

There is no conflict with the compensation principle. Nor is there a windfall. The owner would be fully compensated at the time of breach with the difference between the value of the remainder of the charter under the contract terms and the market, or current, value, which would reflect the 75% reduction in the freight market. Judge Teare did not claim that the owner could not perform; he did, however, put the burden of proof on the plaintiff to prove that it would have been able to perform. That should not have been difficult. Even if the plaintiff were in financial distress it should not have had a problem arranging financing since it had at least one valuable asset—a \$5 million claim—in its possession. Moreover, the plaintiff had taken a short position in the vessel market and the same factors that led to the collapse of the freight market impacted the market for vessels. That made its position even more attractive.

But the plaintiff should not have had to make that argument. The possibility that the counterparty might not be able to perform is something that parties can contract over. The charterer could have insisted on the right to demand adequate assurance and to withhold

breach, had it occurred before the acceptance, provide an ex post facto justification for the breach." G.H. Treitel, *Assessment of damages for wrongful breach*, 123 L.Q.R. 9, 12 (2007).

²⁰ ¶14.

²¹ ¶18. Jargon alert: the plaintiff was the "*disponent owner*." A disponent owner would operate the vessel, but would not in fact own it. When the parties entered into the COA the owner did not have a vessel under control. In effect, it had taken a short position. A *laycan* is an abbreviation of "layday cancelling date" or "laydays cancelling". A term used in a voyage charterparty, referring to the period of time between the commencement of laytime (being the beginning of the "lay days" when the charterer must commence loading the cargo), and the cancelling date (being the date after which the charterer may repudiate the charterparty if the ship has not then arrived at the specified port or place of loading).

<http://juridicaldictionary.com/Laycan.htm>

performance if the other party failed to do so.²² Even if it had not included an assurance clause in the charter, it could have incorporated the possibility of the owner's future breach into its calculus. If it expected the owner to breach soon, then it could suffer a few more months of losses anticipating the owner's breach.²³ If it perceived the owner's breach as unlikely, as apparently was the case, then the termination price (damage remedy) it faced would reflect its expectation that the owner would be capable of performing for the duration of the agreement. The charterer's decision to breach rather than wait for the owner to breach is evidence of its contemporaneous belief in the owner's ability to perform.

C. Bunge SA v. Nidera BV

The Supreme Court reaffirmed *The Golden Victory* in *Bunge SA v. Nidera BV*.²⁴ Both cases involved an excuse clause. In *The Golden Victory* the probability of the excusing event at the time of the breach was low, while in *Bunge* it was very high. Bunge (the seller) agreed to sell 25,000 metric tons of Russian milling wheat crop 2010, FOB Novorossiysk. The contract was entered into on June 10, 2010 with delivery to be made between August 23 and August 30. The contract price was \$160 per metric ton but by August 11 the price had risen to between \$280 and \$285. On August 5 Russia introduced a legislative embargo on exports of wheat from its territory, which was to run from August 15 to December 31, 2010. The contract included a prohibition clause: "In case of . . . any executive or legislative act done by or on behalf of the government of the country of origin . . . restricting export, . . . any such restriction shall be deemed by both parties to apply to this contract . . . and to that extent this contract or any unfulfilled portion thereof shall be cancelled."²⁵ On August 9 the seller jumped the gun, notifying the buyer that because of the embargo the contract was cancelled; the buyer rejected this on August 11, claiming that the seller had repudiated the contract, and it then accepted the breach. The seller then offered to reinstate the contract, but the buyer claimed that it was too late. It claimed damages for the difference between the contract price and the market price on August 11, US\$3,062,500.

The arbitration panel found that the premature invocation of the prohibition clause amounted to a breach which the buyer had accepted. It was possible that Mr. Putin might have changed his mind before August 30, it held, so it would have been possible that Bunge could have performed. In the subsequent stages of litigation that finding was upheld and I will not pursue that issue. The remaining issue concerned damages—had the buyer suffered any damages and, if so, how would they be measured? Should the fact that the embargo remained in place be taken into account?

The initial arbitration panel refused to award damages, holding that the buyer had suffered none. The decision took into account post-breach information, a la *The Golden*

²² In the United States, the right to demand adequate assurance for the sale of goods is included in a statute, UCC §2-609. It is also recognized in the Restatement (Second) Contracts §251. For more on the right to demand assurance, see Goldberg, *Rethinking Contract Law and Contract Design*, ch.13.

²³ Professor Peel makes a similar argument. Edwin Peel, *Desideratum Or Principle: The "Compensatory Principle" Revisited*, 131 *Law Quarterly Review*, 29, 34 (2015).

²⁴ [2015] UKSC 43

²⁵ ¶2.

Victory, namely that the embargo remained in effect in August 23-30, so the contract would have been excused. The arbitration Appeal Board reversed, measuring damages on the date of breach (\$US\$3,062,500) and ignoring the subsequent information. On appeal the Judge was Nicholas Hamblen who had been losing counsel in *The Golden Victory*.²⁶ He distinguished *The Golden Victory* by noting that it involved an installment contract whereas the Bunge-Nidera contract was a one-off.²⁷ His decision was affirmed by a unanimous Court of Appeals.²⁸ However, in a unanimous opinion, the Supreme Court reversed, awarding the buyer nominal damages of \$5.²⁹

None of the decisions say what happened to the wheat. Did Bunge manage to sell it on the world market prior to August 15? Could it? Or did it have to sell in Russia at whatever price prevailed in that market? Russian prices were below the world price at the time of the initial contract and at the time of the breach. As it happened, the Russian price differential remained roughly the same while the embargo was in effect. The post-embargo Russian price, while lower than the world price, was substantially higher than the contract price. So Bunge made a substantial profit regardless of whether it sold in Russia or in the world market.³⁰ Doctrinally that might not matter, but there is at least a strong hint in the Supreme Court decision that it was influenced by concern for unfairness to Bunge if it were to have to pay damages. In fact, Bunge had received a handsome windfall.

The contract, a standard form,³¹ included a “default clause” that set out how damages should be measured in the event of a default. To avoid confusion, I will call this a “damage clause,” reserving the term default to mean the rule that would apply in the absence of contract language that would govern the situation. Damages would be the contract-market differential at the time of the breach. This appeared to conflict with the Justices’ view that the compensation principle, as promulgated in *The Golden Victory*, would result in no damages since the embargo remained in force during the delivery period. Lord Sumption resolved this by claiming that the damage clause somehow did not cover this situation:³²

²⁶ [2013] 1 C.L.C. 325.

²⁷ ¶54. He also rejected the notion that Nidera should have mitigated by accepting Bunge’s retraction of the breach. (¶44)

²⁸ 2013] EWCA Civ 1628, Court of Appeal (Civil Division)

²⁹ ¶36. Earlier, a lower court reached a similar result in *Novasen SA v Alimenta SA* [2013] 1 C.L.C. 405,415; the product was groundnut oil and the contract was a standard form of FOSFA (Federation of Oils, Seeds and Fats Association).

³⁰ George Welton, *The Impact of Russia’s 2010 Grain Export Ban*, GeoWel Research, June 28, 2011 <https://www.oxfam.org/sites/www.oxfam.org/files/rr-impact-russias-grain-export-ban-280611-en.pdf>

³¹ The GAFTA 49 contract form is a standard set of f.o.b. contract terms designed for contracts for the delivery of goods from central and Eastern Europe in bulk or bags. GAFTA is the Grain and Feed Trade Association.

³² Lord Toulson also concluded that the language was unclear (¶¶58-63). In his discussion of *The Golden Victory*, he made a truly bizarre argument, claiming that the owner could have re-chartered on identical terms, so the owner suffered no loss. (The “value would have been undiminished if the owners had re-chartered the vessel on identical terms, and there was no suggestion that the owners could not have done so.”) (¶73) But the charterer, of course, had repudiated because the market had collapsed, so the statement is obviously false. It does make one wonder about their Lordships understanding of what was going on.

A damages clause may be assumed, in the absence of clear words, not to have been intended to operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss. (§26)

To treat a damages clause as a complete code in this all-embracing sense is to tax the foresight of the draftsman in a way which is rarely appropriate unless the alternative is to undermine the coherence or utility of the clause. (§27)

* * *

[I]n my opinion, clause 20 neither addresses nor excludes the consideration of supervening events (other than price movements) which operate to reduce or extinguish the loss. (§32)

The damage clause read: “The damages payable shall be based on, but not limited to the difference between the contract price and either the [cover price] or upon the actual or estimated value of the goods on the date of default.” The arbitration panel (and, presumably, the court) interpreted that to mean the price of the goods on the date of the breach, but there is ambiguity as to what that is. It should be the forward price of wheat on August 11, the day of the breach, for wheat to be delivered between August 23 and August 30. But which wheat? It could be the forward price on August 11 of wheat in the *world* market. Alternatively, it could be the price of *Russian* wheat in the *world* market. The latter would reflect the likelihood that the embargo might not be lifted before August 30. Under this latter interpretation the “estimated value of the goods on the date of default” would have taken into account the likelihood on August 11 that the embargo would be lifted and Russian wheat would have been deliverable outside Russia.

The decisions do not say why Bunge jumped the gun. Perhaps it was just careless talk and Bunge had no expectation of benefitting from an early termination. That is at least plausible, given its attempt to retract. If, however, a proper inquiry concluded that as of August 11 it was not feasible to sell the wheat to the world market by August 15, and the probability that Mr. Putin would change his mind before August 30 was very close to zero, then the contract value at the time of the breach would have taken this into account. (To be clear, the value of Russian wheat on the world market on August 30 was zero.) This measure would be akin to the damages in *The Golden Victory* context had the charterer repudiated in early March 1993. The probability of war would have been high in the one case, as was the continuation of the embargo in the other, and the contract in either case would have been discounted to close to zero. The result would be virtually the same as the Supreme Court found in *Bunge*, but the court could have gotten there while still honoring the damage clause. It also would have allowed the court to decline to endorse *The Golden Victory*.

Bunge’s decision to jump the gun might not have been mere carelessness. How could it benefit?³³ Suppose that it would have been possible to resell in the world market

³³ The fact that there was at least one other gun-jumping case (*Novasen*), but for a different commodity, suggests that there might have been some advantage to the premature invocation of the prohibition clause.

prior to August 15. The opinions are silent as to whether this would have been possible. But if it were the contract still would have had significant value. If Bunge could unilaterally terminate the contract, Bunge could keep all the gains for itself. None of the decisions even hinted at whether the wheat could have been delivered outside Russia prior to August 15, or, indeed, whether it had actually been delivered. If Bunge had managed to sell the wheat prior to August 15, it would have received 100% of the world-Russian differential. The contract did not say what share of the benefit would go to the buyer if Bunge had managed to dispose of the wheat in this manner; it did not even give the buyer the ability to force the early sale. Nonetheless, if Nidera could prove that Bunge could have made that sale prior to August 15, then it would have had a plausible claim to a share of the gain—the possibility would have been reflected in the value of the contract. So, it is possible that the contract did have a positive value—greater than the nominal \$5, but less than the contract versus world market differential.

I am not insisting that the Russian wheat interpretation is the correct one. A decent case can be made for that proposition. Why, after all, have a prohibition clause at all if the seller were free to deliver wheat from anywhere? But resolving this question is a routine matter of interpretation. It has nothing to do with whether post-breach evidence should be taken into account when determining damages.

D. Concluding Remarks

In *Bunge*, Lord Sumption rejected the notion of the contract-as-asset:

The minority [in *The Golden Victory*]. . . considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. . . . [T]he common law [principles] are concerned with the price of the goods or services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself.” (¶21)

However, to the extent that common law principles are involved, the price of goods and services are relevant only for determining the promisee’s loss—the change in value of the contract. The contract is an asset and assessing damages upon breach amounts to measuring the change in value of that asset at the moment of breach. In expectation, that value is the same as the measured damages at the time of decision when uncertainty has been resolved. In *The Golden Victory* and the subsequent cases, the court has focused on the virtues of resolving the uncertainty. The downside of this is that it increases uncertainty in a different dimension. If some subsequent events would result in reckoning damages at the moment of decision, but not others, then each party will have an incentive to argue for the rule favoring it when it is no longer behind the veil of

ignorance, and courts will have to determine on an ad hoc basis which cases warrant taking subsequent events into account. As Andrew Dyson and Adam Kramer note:

The formulae put forward for departing from the breach date rule are hopelessly vague. According to three leading House of Lords decisions, the breach date rule may be departed from “if to follow it would give rise to injustice”, “where it is necessary in order adequately to compensate the plaintiff”, or where it is “necessary or just to do so in order to give effect to the compensatory principle.” And so, on the conventional approach, judges are presented with an apparently unguided discretion which rests on unspecified concepts of justice and compensation.³⁴

The problem with *The Golden Victory* and its spawn is, as Dyson and Kramer say, the unguided discretion and the ad hoc exceptions it allows.

In his insightful critique of *The Glory Wealth*, Professor Peel refers to the “unwelcome consequences of too slavish a pursuit of the application of the compensatory principle.”³⁵ I would modify that slightly by objecting to “too slavish a pursuit of the *mis-application* of the compensatory principle.” Properly understood, the compensatory principle would compensate the promisee for the change in value of the contract at the time of the breach. The compensatory principle works just fine, as long as it is applied correctly.

³⁴ Dyson and Kramer, “There is no ‘breach date rule’: mitigation, difference in value and date of assessment,” L.Q.R. 259, 261 (2014).

³⁵ Edwin Peel, “Desideratum or Principle: The ‘Compensatory Principle’ Revisited,” 131 L.Q.R. 29, 34 (2015).