Evaluation of Damages in International Arbitration

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Once again, welcome to a new Dossier of the Institute.

In most cases, before state courts or arbitral tribunals, the bottom line is damages.

How to assess them? Practice shows that often, too often, damages are globally assessed simply because, in most cases, it is quite difficult to arrive at a fully justified estimate. This is not only true in very complex construction cases, but also in the simplest procedures. Whether or not their origin is contractual, damages are supposed to compensate the victim. What a delicate task!

Even though, from a strictly legal point of view, damages should be calculated in a cold and abstract way, the judge, be he state or arbitrator, will take human and behavioural aspects into consideration. How to measure good and bad faith? In the majority of situations, the assessment is based on a personal approach. This is good, because the true purpose of arbitration is to introduce into the law, not only the stipulations of the contract and the trade usages, as required by Article 17.2 of the ICC Rules, but also the expectations of the parties.

In addition to the recurring topics, it is interesting to see the importance that arbitrators give to the mitigation of damages, which shows that the burden not only rests on the author of the damage, but also on the victim.

In recent times, the notion of direct damage has been extended and, as discussed in this Dossier, now includes punitive damages and the delicate question of the recovery of the costs involved in arbitral proceedings. But which costs? What should they include? Should the winner take all? Should the winner not lose on the costs?
EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION

In fact, modern arbitration evolves. It is the duty of the ICC Institute to stay ahead of this evolution, every year, to focus on the combination of classical problems and new questions, and to give the unique answers that arbitration provides.

All questions linked to this very topical issue are discussed by eminent specialists in this Dossier.

Welcome to this fascinating issue. Now, you have to wait for next year’s Dossier!

My kind regards to each of you.
Introduction

By Richard H. Kreindler
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It is often said that an arbitral award is worth only as much as the ability to secure its enforceability. To the extent the vast majority of prayers for relief in arbitration are for money damages, an arbitral award granting damages is worth only as much as the ability to obtain payment, voluntary or compulsory, of such damages.

In international commercial, construction and investment arbitration, the prospect of cross-border enforcement of damage awards makes this test of “worth” all the more important, and often precarious. It also serves to focus the arbitrator, the counsel and the merchant alike on the practical need for certainty and clarity in achieving monetary satisfaction, and in properly pleading claims for damages in the first place.

Of all of the practical, legal and scientific issues which befall the arbitrator or the counsel, that of pleading, proving and calculating money damages is perhaps the most elemental and most commercially significant. Notwithstanding all other highly significant and thorny issues of procedure, choice of law, taking of evidence, compatibility with public policy under the lex arbitri and lex causae, etc. – it is the bottom-line quest for damages that informs the entire arbitration and the assessment of victory and failure by the parties. Agreements and disagreements on the procedural framework, the applicable substantive law, the means of presenting and proving allegations and enforceability of any award at the seat or elsewhere are all, ultimately, sideshows in comparison with the end result – did the claim for damages prevail and if so, in what amount? Of course, the fact that the end result is so unforgivingly transparent does not make these procedural, substantive and tactical stepping stones along the way any less significant, but it does show them to be means to an end.
The following papers are based upon presentations given at the 25th annual meeting of the ICC Institute of World Business Law in Paris on 28 November 2005. The presenters are well-known and highly experienced practitioners, counsel, arbitrators and academicians from various corners of the world, various legal cultures and thus various overlapping international perspectives. The common mission of the presenters and of these papers was to focus, more than has been the case in perhaps any other comparable symposium in the recent past, on damages per se. Presented here are analyses of the nature of damages, their legal, factual and forensic underpinnings, the problems of contractual and de lege constraints on damages recovery, the differing means of proving money damage claims, and newly developing areas such as damages in investment arbitration.

The range of analysis in the papers which follow is impressive and comprehensive, both from a legal and a commercial perspective. As an appropriate introduction to the subject, the general characteristics of recoverable damages in international arbitration are addressed, including foreseeability as treated in recent awards, treaties, model laws and such supranational instruments as the UNIDROIT Principles and the Vienna Sales Convention/CISG. Following hard upon the question of foreseeability is that of mitigation and the sources in national law and jurisprudence for a duty to seek to limit one’s own damages as a precondition to a right to full compensation.

Perhaps no issue of damages has caused such challenges and controversy as that of loss of profit and loss of opportunity, lucrum cessans. Both commercial and investment arbitrations in recent years have had to contend with complex issues of lost profit recovery. Is a party entitled to them? Can they be excluded or limited? How are they to be reliably calculated? Which substantive law or laws should apply to the question of their recoverability and calculation? In particular, the issue of the discounted cash flow method has proven to be a special challenge for arbitrators and practitioners alike, in addition to the ever-present question of just how foreseeable lost profits must be in order to be recoverable. In turn, party attempts to contractually limit or exclude certain kinds of indirect or consequential damages are examined, as well as public policy constraints on such damages and other kinds of indirect damages, including punitive and exemplary damages.
INTRODUCTION

When discussing damage claims, questions of burden of presentation and burden of proof are also never far removed. The following papers include expert approaches, from various perspectives, of burden of proof as a procedural versus a substantive law issue, and possible conflicts in assigning the appropriate burden depending on which substantive law is applied. In this connection, perceived tensions in the requirements for substantiation of damages are also addressed in the comparison between civil law and common law approaches and the stereotypes associated with these approaches.

The final areas of analysis in the papers include interest as a sub-species of damages and acceptable kinds of damages recovery in international investment arbitration. Moratory and compensatory interest continue to be inevitable questions in most international commercial arbitrations, but alas they attract vastly different and not always reconcilable approaches. With regard to investment, the last three to four years have seen unique legal challenges to damages claims in investment disputes related to claims for wasted costs as opposed to those for loss of profit. In addition, the approach to damages for unlawful expropriation has evolved in recent years, complicated by the fact that certain damage claims may be characterized as contract claims, others as treaty claims and still others as mixed. Finally, the papers approach the perenially thorny issues of delay and disruption damages in construction arbitration and costs of arbitration as damages.

With this compendium of intellectually and culturally stimulating legal analysis, a gap in the recent treatment of commercial, construction and investment arbitration proceedings and awards has been addressed and filled. Damages remain not only the most elemental aspect of arbitration, both for the parties and the tribunal, but also, in many respects, the most problematic. They are rooted in fact as well as in specific legal concepts. At the same time, they are also open to variable and shifting trends in forensic accounting, in transnational public policy and in the art of advocacy. Against this background, the papers in this volume provide a welcome and insightful roadmap to the challenges awaiting international arbitration in the area of damages for several years to come.