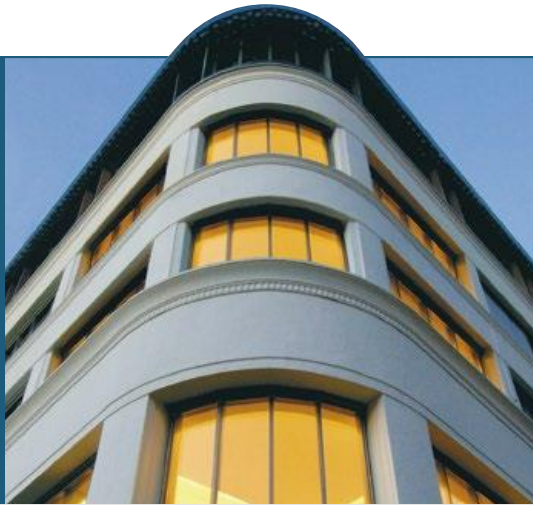


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Quantification of damages in international arbitration – selection of issues from a civil law perspective

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Introduction

- Focus of presentation:
 - Commercial arbitration
 - Contractual liability
- Importance of applicable law
- Importance of arbitrators' legal background
- Range of legal systems in civil law world
- Civil law vs. common law:
 1. Differences with limited impact on damages
 2. Differences with potentially more impact on damages

1. Differences of limited impact

1.1 Specific performance v damages

- Different starting point in case of breach: civil law (specific performance) vs. common law (damages)

However,

- Damages available and same underlying principles applicable:
 - Common law: position the injured party would have been in if it had not sustained the wrong
 - Civil law (France): *réparation intégrale*, full compensation, actual loss and lost profits
 - Civil law (Switzerland): full compensation, *intérêts positifs* or *intérêts négatifs*

1. Differences of limited impact

1.2 Foreseeability (certainty/remoteness) vs. causation

- Common law (England): foreseeable loss, *Hadley v Baxendale*
- France: foreseen or foreseeable loss, Art. 1232-2 CC
- Switzerland: natural causation and adequate causation

However,

- Different terminology and reasoning, result likely to be the same
- The issue of loss of chance (Swiss restrictive approach)

1. Differences of limited impact

1.3 Duty to mitigate

- Common law (England): clear duty to mitigate
- France: no stand alone duty
 - However, duty of good faith, discretion of adjudicator, *lex mercatoria*
- Switzerland: power of adjudicator to reduce damages if the injured party is responsible for the increase or aggravation of the loss (Art. 44.1 CO)
 - Practically, similar to a positive duty to mitigate

2. Differences with potentially more impact

What impact?

- Availability of certain categories of damages
 - Ultimately dictated by applicable law
- Quantification: interpretation of limitation of liability clauses, assessment of evidence on quantum
 - Room for interpretation and impact of arbitrators' legal background
- Challenge of award for breach of public policy?

2. Differences with potentially more impact

2.1 Notice requirements

- Law requires notice to perform within a period of time prior to exercising right to claim damages (with exceptions, e.g. non-performance is final)
- France: Art.1231 CC
- Switzerland: Art.102, 107-109 CO: notice and obligation to elect early between *positive* (expectation) or *negative* (reliance) loss
- Failure to notify/elect remedy can be fatal

2. Differences with potentially more impact

2.2 Possible award of damages for moral damage in contractual claims

- England: generally damages for non-pecuniary loss in tort only
- France: damages for non-pecuniary loss, including moral damage, available in purely contractual claims, provided it is compensatory, discretion of the judge
- Switzerland: more restrictive, applies to contractual cases but only awarded to natural persons

2. Differences with potentially more impact

2.3 Enforceability of penalty clauses

➤ England:

Liquidated damages clause (enforceable) vs. penalty clause (not enforceable)

➤ Civil law (France and Switzerland):

- Standard *clause pénale* may also serve a punitive function
- Enforceable provided it is not manifestly excessive

➤ Room for interpretation by arbitrators

➤ Enforceability of award applying “penalty clauses”

2. Differences with potentially more impact

2.4 Restrictions by law on exclusion / limitation of liability clauses

- Parties can decide on the allocation of risk
- But limitations imposed by law: no exclusion or limitation of liability in case of gross negligence or wrongful intent
- France: Art. 1231-3 CC / Switzerland: Art. 100.1 CO
- Lower threshold than fraud
- Room for interpretation by arbitrators

2. Differences with potentially more impact

2.5 Judge's discretion in quantifying damages?

- Common general approach: discretion of the judge, but:
 - English judgements more detailed and use of precedents
 - France: no requirement to explain elements, lack of reasoning
 - Swiss approach: in between?
- Impossibility to evaluate the loss
 - France: clear duty to do so even if difficult based on evidence available
 - Switzerland: more restrictive approach in case of impossibility to prove loss (Art. 42.2 CO)
- Room for interpretation by the arbitrator

THANK YOU
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