



International Chamber of Commerce
The world business organization

Institute of World Business Law

25th Annual Meeting of the ICC Institute
Evaluation of damages in international arbitration

This brochure is available in French
on our website at www.iccconferences.com

Date **Monday 28 November 2005**

Venue **International Chamber of Commerce**
38, Cours Albert 1er
75008 Paris, France

Objectives

The evaluation of damages in arbitration goes to the heart of the parties' prayers for relief and defences, and particularly in the international sphere, it gives rise to a multitude of difficult and complex issues, some of which are by no means settled. The ICC Institute aims to analyze in depth the most fundamental of these issues, frequently encountered in commercial transactions, in particular investment and construction arbitrations. These issues include the requirements of certainty and foreseeability for the recovery of money damages, the nature and extent of the obligation to mitigate damages, how to calculate loss of profit and loss of opportunity damages, as well as the thorny problems associated with indirect, consequential, punitive and exemplary damages. Among other issues will be discussed the breach of payment obligations, recovery of wasted costs versus loss of profit particularly in the context of investment disputes, delay and disruption damages in construction arbitrations. Finally, questions of recoverability of damages for the often-considerable costs of the arbitration arise. Rather than offering a purely theoretical discussion and solution, this programme aims to analyze current developments, trends and challenges with respect to the evaluation of damages in international arbitration, and to reconcile the differing approaches where possible.

The proceedings will be published, and a copy of the publication will be sent to all those who register to the conference

Participants

All professionals involved in international trade and dispute resolution:

- Lawyers, arbitrators, experts
- Corporate counsel
- Business leaders involved in negotiating international contracts and dispute resolution

International Chamber of Commerce

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Chaired by

SERGE LAZAREFF

Avocat à la Cour; Chairman, ICC Institute of World Business Law, Paris

Co-chaired by

YVES DERAIS and RICHARD H. KREINDLER

MORNING

09:00 – 09:30

Registration

09.45 – 12.15

Welcome addresses by the ICC Secretary General and Serge Lazareff

Introduction by the Co-Chairmen

General characteristics of recoverable damages in international arbitration

- Certainty and foreseeability of damages and the limits of these concepts
- What has been the influence of recent arbitral awards, treaties and model laws, as well as of supranational instruments (UNIDROIT Principles, CISG, etc.)?
- Can a set of transnational general principles of damages recovery be identified?

The obligation to mitigate damages

- Sources of the obligation: national laws, arbitral awards
- Content and sanction of the obligation in practice
- Has the treatment of the obligation evolved in recent years?
- What conflicts exist between national law and public international law in this context?

Recourse to experts

Questions and discussion

Recent challenges and trends in calculation of damages: loss of profit and loss of opportunity

- What are the advantages and limitations of the discounted cash flow method?
- What about other acceptable methods for calculation of loss of profit and loss of opportunity?
- What is the relevance of the applicable substantive law to lost profit claims?
- How foreseeable and how certain must the lost profit be?

Break

Problems of indirect, consequential and other excludable damages in arbitration

- What issues arise in interpretation of contractual exclusions of consequential damages?
- What exceptions may be created or construed to contractual exclusions of indirect damages?
- What are the public policy constraints on consequential damages claims?

Punitive and exemplary damages in international arbitration

- How should a tribunal contend with public policy constraints on punitive damages at the seat?
- What are the issues respecting punitive damages and public policy constraints at the place of enforcement?
- What conflicts arise between the law of the contract, law at the seat and law at the place of enforcement?

Standards of burden of proof and damage claims

- Burden of proof as a substantive or procedural law issue
- What conflicts arise between the law of the contract, law at the seat and law of the place of enforcement?
- Are there civil law versus common law tensions in the substantiation of damages claims?
- What are the challenges respecting burden of proof and causality?

Questions and discussion

12.15 – 14.00

Lunch

14.00 – 17.15

AFTERNOON

Recovery of damages for breach of an obligation of payment

- Moratory and compensatory interest: how should a tribunal deal with these issues?
- What choice of law challenges arise with these damages claims?
- Other methods of indemnification and compensation

Acceptable kinds of damages recovery in international investment arbitration

- What are the unique challenges for damages claims and recovery in investment disputes?
- Claims for wasted costs (*damnum emergens*) versus loss of profit (*lucrum cessans*) – Risks of double recovery?
- How has the approach to damages for unlawful expropriation evolved in recent years?
e.g., Aminoil, Sapphire, SPP, SOABI, Himpurna, Metalclad
- Characterizing damages claims as contract versus treaty claims – what difference does it make?
- What conflicts exist between national law and public international law in this context?

Questions and discussion

Problems of delay and disruption damages in international construction arbitration

- Has the presentation and treatment of damages claims evolved in recent years?
- Challenges in the use of expert opinions on damages in construction disputes
- What lessons can be drawn for commercial and state-to-state damages claims?

Questions and discussion

Break

Costs of arbitration and damages

- Foreseeability and reasonability respecting attorney's fees
- Compensability of extraordinary internal managerial time: when and why?
- A trend in the awarding of attorney's fees as part of the damages?

Questions and discussion

Conclusions by Yves Derains

Closing speech by Serge Lazareff

Speakers

MORNING SESSION

Paul-A. Gélinas, Member of the Montreal and Paris Bars, France; Council Member of the ICC Institute

Alexander Komarov, President, International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry; Council Member of the ICC Institute

Jan Paulsson, Partner, Freshfields Bruckhaus Deringer, France; Council Member of the ICC Institute

Hugo Perezcano Diaz, General Counsel for Trade Negotiations, Ministry of the Economy, Mexico

Yasuhei Taniguchi, Professor, Faculty of Contemporary Law, Tokyo Keizai University, Japan; Chairman of the Appellate Body of the WTO; Council Member of the ICC Institute

Jacques Werner, Partner, Werner & Associés, Switzerland

Moderator: **Richard H. Kreindler**, Partner, Shearman & Sterling LLP, Germany; Council Member of the ICC Institute

AFTERNOON SESSION

Nayla Comair-Obeid, Professor, Faculty of Law, Lebanese University; Partner, Obeid Law Firm, Lebanon; Council Member of the ICC Institute

Bernard Hanotiau, Partner, Hanotiau & Van Den Berg; Professor, University of Louvain, Belgium

Vivian Ramsey QC, Head of Chambers, Keating Chambers, United Kingdom

Henry Weisburg, Partner, Shearman & Sterling LLP, United States

Moderator: **Yves Derains**, Partner, Derains & Associés, France; Council Member of the ICC Institute

Registration form

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Register online
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Fax: +33 1 49 53 30 30

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Subject

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Participant information

Title (Mr/Dr/Mrs/etc.)
Family name First/given name
Position
Company
Address
City/state Zip/postal code
Country E-mail
Tel. (.....) Fax (.....)

(Please tick the appropriate box)

Contribution to costs

Before 12 September 2005

720 Euros "early-bird" special – applies to all participants

After 12 September 2005

780 Euros for ICC and Institute members

840 Euros for non-members

Method of payment

By credit card: American Express Euro/MasterCard Visa
Card number Expiry date
Name of cardholder

By cheque:
payable to "International Chamber of Commerce" bearing the reference "ICC S0525" and indicating clearly the participant's name

Registration will be confirmed upon receipt of this completed registration form and contribution to costs

Date Signature

The information you provide on this form will be used to compile the participants list for this event. By providing this information, you consent to ICC storing it in its data base for the sole use of the ICC International Secretariat. You may have access to this information and request to have it deleted or corrected at any time by contacting ICC Conferences.

If you know of someone who would be interested in participating, please let us know:

Family name First/given name
Company Country
Tel. (.....) Fax (.....)
E-mail