

Global Arbitration Review

The Guide to Damages in International Arbitration

Editor
John A Trenor

Third Edition

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Editor

John A Trenor

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Preface

This third edition of Global Arbitration Review's *The Guide to Damages in International Arbitration* builds upon the successful reception of the first two editions. As explained in the introduction, this book is designed to help all participants in the international arbitration community understand damages issues more clearly and communicate those issues more effectively to tribunals to further the common objective of assisting arbitrators in rendering more accurate and well-reasoned awards on damages.

The book is a work in progress, with new and updated material being added to each successive edition. In particular, this third edition incorporates updated chapters from various authors and features several new chapters addressing such issues as best practices and issues in discounted cash flow models, full compensation and total reparation, and estimation of harm in antitrust damages actions.

We hope that this revised edition advances the objective of the first two editions to make the subject of damages in international arbitration more understandable and less intimidating for arbitrators and other participants in the field, and to help participants present these issues more effectively to tribunals. We continue to welcome comments from readers on how the next edition might be further improved.

John A Trenor

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Part I

Legal Principles Applicable to the Award of Damages

1

Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits

Clare Connellan, Elizabeth Oger-Gross and Angélica André¹

Introduction

Compensatory damages, as the name indicates, are intended to compensate a claimant for losses suffered as a result of the other party's (wrongful) conduct. Those losses can be pecuniary (e.g., costs, loss of profit, related expenses) or non-pecuniary (e.g., for pain and suffering, loss of reputation).² The basic rule, in one common law formulation, is that a claimant is entitled to 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.³ This rule is formulated in similar terms in civil law jurisdictions – for example, French law recognises the principle of full compensation, the objective of which is to put the injured party in the position in which it would have been had the act that gave rise to the damage not occurred.⁴

This chapter will provide a comparative overview of the legal principles and elements of compensatory damages in civil law and common law jurisdictions, with a focus on contractual damages. There are several reasons why such a comparative analysis is important for international arbitration practitioners. It is common for disputes underlying international

1 Clare Connellan and Elizabeth Oger-Gross are partners at White & Case LLP. Angélica André is an associate at White & Case LLP. The authors thank Heather Clark for her contribution to the first edition of this chapter.

2 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Section 2-001. As discussed below, there are restrictions on a party's ability to recover non-pecuniary losses in common law jurisdictions. See, e.g., Common Law Series: *The Law of Damages*/Part I General Principles/Chapter 4 Damages for non-pecuniary loss/E Disappointment, distress, humiliation and loss of enjoyment/Contract.

3 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Section 2-002, citing *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas. 25 at 39.

4 Full compensation is the authors' translation of the French term 'réparation intégrale'. See A. Bénabent, *Droit des obligations* (16th ed. L.G.D.J. Précis Domat, 2017) 683. See also H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014) para. 2.03.

arbitrations to be governed by a range of applicable national laws, so it is important to be familiar with the broad principles of their substantive content – or, at least, of two of the main legal traditions,⁵ though the differences among national laws within those traditions should not be underestimated. While there is certainly a lot of common ground in relation to the legal principles and elements of compensatory damages claims in common and civil law jurisdictions, there are also differences, as described in more detail in the sections below. As advocates, it can be useful to be attuned to these differences when formulating written or oral pleadings, particularly where the arbitral tribunal is of mixed legal backgrounds.

While certainly less prevalent than national laws in international arbitration, transnational principles can also play a role in damages analyses in international arbitration, either where parties have agreed to apply them or where tribunals have cited them as a means of reinforcing or supplementing the applicable law.⁶ These principles may be influential even where not directly applicable and include, for example, those codified in instruments such as the 2010 UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles), which ‘reflect concepts to be found in many, if not all, legal systems’.⁷ Understanding the origin of these transnational principles is important preparation for their application.

As a final note, arbitration clauses sometimes contain broadly worded consents to arbitration that may be interpreted to include non-contractual (i.e., tortious or delictual) claims.⁸ However, the focus of this chapter will be on compensatory damages arising out of contractual claims. In addition, we do not consider non-compensatory damages, damages principles under the Convention on Contracts for the International Sale of Goods (CISG), contractual limitations on damages, damages in investment arbitration, interest and costs. These topics are addressed in other chapters of this publication.

The law applicable to damages

The law applicable to damages can have a significant impact on the assessment of damages, as it determines the conditions under which damages may be obtained and the categories of damages available, and provides guidance regarding the amount of damages to be awarded.

5 A discussion of compensatory damages principles under other legal traditions is beyond the scope of this chapter.

6 See E. F. Agnò, ‘The Impact of UNIDROIT Principles on International Dispute Resolution in Figures’, www.unidroit.org/english/publications/review/articles/2011-3-finazzi-e.pdf, 721. The UNIDROIT provisions on damages were among those most frequently invoked by arbitral tribunals and domestic courts. See also P. Gélinas, ‘General Characteristics of Recoverable Damages in International Arbitration’ in Y. Derains and R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 4* (Kluwer Law International; International Chamber of Commerce (ICC) 2006) 11, 20–29.

7 UNIDROIT Principles of International Commercial Contracts (UNIDROIT 1994), Introduction, xxiii (PDF 22).

8 See, e.g., ICC Case 9517, Interim Award, November 1998: ‘The Arbitrators find that the scope of the wording of the arbitration clause “any dispute arising in connection with this Agreement” is clear and does not lend itself to construction. It is very wide and covers any claim which arises, directly or indirectly, with any relationship to the Management Agreement, and whether the claim is contractual or delictual of nature. There is also no basis for construing the clause or the ICC Rules as applicable only to commercial disputes. The claims raised are, therefore, within the scope of the arbitration clause.’

The parties' agreement is paramount in international arbitration. In the absence of a statement to the contrary, the right to damages, the categories and the amount of damages recoverable, and the nature of the proof required are first and foremost governed by the parties' agreement.⁹ Parties often choose to specify the conditions for the recovery of damages, as well as the categories and the amount of damages recoverable (e.g., with liquidated damages, penalty clauses or limitation clauses),¹⁰ broadening or limiting the rights available under national laws. However, the parties do not always agree on such arrangements, and, in any event, their agreement is unlikely to be exclusive of all provisions of the applicable rules of law. Further, some national law rules and principles, such as public policy rules and principles, are of mandatory application.

In the absence of, or to supplement, the parties' agreement relating to damages, arbitral tribunals have to determine the applicable rules of law. The tribunal first has to determine whether damages-related issues are substantive or procedural issues. Most damages-related questions are usually analysed as issues of substance. However, certain aspects, such as the standard of proof, are sometimes analysed as procedural matters, so that different laws or rules of law can apply to different aspects of damages.

The arbitral tribunal will again be guided by the parties' agreement and, without such agreement, by the relevant rules for determining the applicable rules of law. Some arbitration rules and laws favour a 'direct' approach to determining the applicable rules of law (i.e., without considering conflict of laws rules), referring to the rules of law that the arbitral tribunal considers appropriate¹¹ or those that have the closest connection to the dispute.¹² Others rely on a conflict of laws approach.¹³

The applicable rules of law can be a national law or a convention, principles or sets of rules – such as the CISG,¹⁴ the UNIDROIT Principles or the 2002 Principles of European Contract Law (PECL) that have been developed to reflect internationally accepted rules or principles or to achieve a compromise between various legal systems. These international instruments often have to be complemented by national rules of law to the extent that they do not cover specific issues and therefore do not necessarily exclude the application of national laws in those respects.

9 C.T. Salomon, P.D. Sharp, 'Chap 10: Damages in International Arbitration', in J. Fellas and J.H. Carter (eds), *International Commercial Arbitration in New York* (2nd ed., OUP New York 2016) para. 10.1; N. Blackaby, C. Partasides and others, *Redfern and Hunter on International Arbitration* (6th ed. OUP, 2015) para. 9.40.

10 See Chapter 4 on contractual limitations on damages.

11 See, e.g., French Code of Civil Procedure Article 1511; Austrian Code of Civil Procedure s. 603; Belgian Code of Civil Procedure Article 1710; 2010 UNCITRAL Arbitration Rules Article 35.1; SCC Arbitration Rules Article 27; DIAC Arbitration Rules Article 33.1; 2016 SIAC Arbitration Rules Article 31.1.

12 See, e.g., German Code of Civil Procedure Article 1051; Swiss Private International Law Article 187; 2012 Swiss Rules of Arbitration Article 33; 2011 CRCICA Arbitration Rules Article 35.1.

13 See, e.g., English Arbitration Act 1996 Section 46(3) ('the law determined by the conflict of laws rules which it considers applicable'); UNCITRAL Model Law Article 28(2); Danish Arbitration Act Article 28(2); EC Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) Article 12(1)(c) in combination with Article 4; 1961 European Convention on International Commercial Arbitration Article VII(1).

14 See Chapter 3 on damages principles under the convention on contracts for the international sale of goods (CISG).

In addition to national laws, arbitral tribunals at times take a transnational approach, referring to general principles applicable to damages in international arbitration, such as a generally recognised duty to mitigate.¹⁵ Such principles, however, are not uniformly identified or applied.

Assessing the proof relating to damages

The assessment of damages is driven by a factual determination and often involves complex data and economic issues, such that parties and arbitral tribunals rely on experts. The parties first have to establish their right to damages, before justifying the type and amount of damages requested. It is thus essential to determine which party bears the burden of proof and what standard should apply.

The burden of proof

In international arbitration, as under national laws, the burden of proof usually lies with the party making an assertion,¹⁶ in both common and civil law jurisdictions.¹⁷

This rule should not, however, be understood to mean that the burden of proof necessarily lies with the claimant. Rather, the burden lies with the party making a claim, a counterclaim or any assertion. The burden of proof thus moves from one party to another depending on which party is making assertions on specific aspects of a claim.¹⁸ Certain Latin American legal systems have developed a dynamic burden of proof whereby the judge can redistribute the burden of proof among the parties depending on which party is in a better position to provide evidence on a particular claim.¹⁹

The standard of proof

While the burden of proof determines which party should prove the relevant facts and law underlying an assertion, the standard of proof sets the level of proof required and thus goes to the heart of the case.

There is no unanimously recognised standard of proof in international arbitration – national laws vary. Yet, the standard of proof is often considered to be a ‘balance of probabilities’, ‘preponderance of the evidence’ or ‘more likely than not’ standard. The standard

¹⁵ See, e.g., ICC Case No. 2478, Award, Clunet 1975, 925 (‘we should not lose sight of the fact that, by virtue of the general principle of law which is reflected in Article 42(2) and 44(1) of the Swiss Federal Code of Obligations, it belongs to the aggrieved party to take all necessary measures in order not to increase the damage.’). See further, Chapter 5 on principles of reducing damages.

¹⁶ N. Blackaby, C. Partasides and others, *Redfern and Hunter on International Arbitration* (6th ed. OUP, Oxford, 2015), para. 6.84; G. Born, *International Commercial Arbitration* (2nd ed. Wolters Kluwer, 2014), 2313-2314.

¹⁷ See, e.g., Article 27(1) of the UNCITRAL Arbitration Rules; Article 1353 of the French Civil Code (formerly Article 1315); Article 8 of the Swiss Civil Code; Article 1315 of the Belgian Civil Code. This general rule is expressed by the Roman-law expression *actori incumbit probatio*; H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 2.14; G. Born, *International Commercial Arbitration* (2nd ed. Wolters Kluwer, 2014), 2314.

¹⁸ H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 2.14; N. O’Malley, *Rules of Evidence in International Arbitration: an Annotated Guide* (2012), paras. 7.15, 7.32.

¹⁹ Argentinian Civil and Commercial Code, Article 1735; Colombian General Code of Procedure, Article 167.

does not rise to the ‘beyond all reasonable doubt’ standard that applies, for instance, in criminal matters in the United States or England.²⁰

When they discuss it, arbitral tribunals usually refer, cumulatively or exclusively, to the applicable substantive national law to determine the applicable standard of proof.²¹

Although the standard of proof varies from one legal system to another, the standard is often similar or leads to a similar analysis. In common law jurisdictions, the party making the claim for damages must meet the standard of proof for civil cases, the ‘balance of probabilities’ test.²²

Under Swiss law, the regular standard of proof refers to the judge’s or arbitrator’s inner conviction, whereby he or she should be convinced of a fact and have no serious doubts about its existence, although absolute certainty is not necessary.²³ Some civil jurisdictions, however, have no defined standard of proof and instead grant judges extensive leeway to determine damages-related facts. Under French law, for instance, the judge enjoys wide discretionary powers to assess the evidence before him or her.²⁴ Judges particularly make use of these discretionary powers in the allocation of damages.²⁵ Likewise, under German law, the German Code of Civil Procedure grants full discretion to judges. It refers to the judge’s free conviction to decide allegations of facts in general,²⁶ and with respect to the existence and scope of damages in particular.²⁷ The standard of proof that the aggrieved party must meet to demonstrate its damages requires establishing the existence of loss and causation regarding the extent of the loss. In this context, a finding of a preponderant probability of the existence of damages and their extent is sufficient.²⁸

20 N. Blackaby, C. Partasides and others, *Redfern and Hunter on International Arbitration* (6th ed. Oxford University Press, 2015), para. 6.85; G. Born, *International Commercial Arbitration* (2nd ed. Wolters Kluwer, 2014), 2314; G. M. von Mehren, C. Salomon, ‘Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide’, 20(3) *J. Int’l Arb.* 285 (2003), 291.

21 G. Born, *International Commercial Arbitration* (2nd ed. Wolters Kluwer, 2014), 2315; N. O’Malley, *Rules of Evidence in International Arbitration: an Annotated Guide* (2012), para. 7.27.

22 Defined in English law by Lord Denning as ‘more probable than not’ in *Miller v. Minister of Pensions* [1947] 2 All ER 372; and described in the US as the preponderance of the evidence (the standard is satisfied if there is a greater than 50 per cent chance that the proposition is true).

23 Swiss Federal Tribunal, BGE/ATF 130 III 321 dated 29 January 2004; R. Groner, *Beweisrecht*, 2011, 180; P. Guyan, in K. Spühler, L. Tenchio, D. Infanger, *Basler Kommentar, Schweizerische Zivilprozeßordnung* (3rd ed., 2017), Article 257, para. 7; H.P. Walter, in H. Hausheer, H.P. Walter (eds), *Berner Kommentar, ZGB*, Band I/1, *Einleitung* (2012), Articles 1–9, para. 134.

24 D. Guével, *JurisCl. Civil Code*, ‘Art. 1315 et 1315-1: Preuve, Charge de la preuve et règles générales’, 2016, para. 63, and, e.g., French Court of Cassation (1st Civil Chamber), 14 January 2010, No. 08-13160; French Court of Cassation (Commercial Chamber), 6 September 2011, No. 10-17963.

25 C. Boismain, ‘Etude sur l’évaluation des dommages-intérêts par les juges du fond’, *Petites affiches*, 2007, No. 39, p. 7; L. Gratton, ‘Le dommage déduit de la faute’, RTD Civ. 2013 [275]; P. Casson, ‘Dommages et intérêts’, *Rép. Droit civil Dalloz* 2017, para. 19.

26 Section 286 of the German Code of Civil Procedure.

27 Section 287 of the German Code of Civil Procedure. See also Korean Civil Procedure Code, Article 202-2.

28 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 4.330.

Entitlement to damages

This section outlines the conditions to be fulfilled in order to obtain damages and analyses, in particular, the foreseeability requirement and duty to mitigate.

Establishing entitlement to damages

Before assessing damages, the claimant first has to establish that it is entitled to damages. Under English law, for example, the requirements are as follows. First, one must prove the existence of a ‘wrong’²⁹ – that is, a breach of contract. Second, one must establish that the damage is not too remote and that the losses were reasonably foreseeable at the time the parties entered into the contract.³⁰ Third, any damages awarded are subject to deductions for any failure to mitigate (or contributory negligence in the case of breaches of duty of care).³¹ Fourth, any damages awarded are also subject to any breaks in the chain of causation.³² Irrespective of factual causation, English law can treat some losses as not having been legally caused by the breach, on the basis that it is not fair to hold the defendant responsible for them due to a ‘break in the chain’ or *novus actus interveniens*.³³ If the breach of contract was the ‘effective’ or ‘dominant’ cause of the loss, damages may be recoverable even if the breach was not the sole cause of the loss.³⁴ Where there are competing causes, a balance of probabilities test applies.³⁵

Civil law jurisdictions embrace similar conditions. The French Civil Code underwent a substantial revision and restructuring with respect to contract law, with Ordinance No. 2016-131 dated 10 February 2016, which entered into force on 1 October 2016.³⁶ The reform has made changes to the damages regime and reshuffled the relevant articles of the Civil Code, but has not significantly changed the applicable principles.

Where a party has not performed its contractual obligations, French law favours specific performance over damages, unless specific performance is not possible or if there is a manifest disproportion between the costs of the specific performance for the debtor and the creditor’s interest in the specific performance (Articles 1221 et seq. of the French Civil Code³⁷).³⁸ If the aggrieved party has requested specific performance from its debtor and

29 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Section 1-001.

30 *Wagon Mound* (No. 1) [1961] AC 388; J. Chitty, H. Beale, *Chitty on Contracts* (32nd ed., 2015), paras. 26-109 to 26-111 and 26-116. The notion of foreseeability will be further analysed below.

31 The notion of mitigation will be further analysed below.

32 See, e.g., *Corr v IBC Vehicles Ltd* [2008] 1 AC 884, per Lord Bingham: ‘The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness.’

33 *Ibid.*

34 *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374-1375; J. Chitty, H. Beale, *Chitty on Contracts* (32nd ed., 2015), paras. 26-58, 26-68.

35 *Nulty and others v Milton Keynes Borough Council* [2013] EWCA Civ 15 ([T]he court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing.)

36 Where relevant, this chapter refers to both the new and the former versions of the provisions of the French Civil Code.

37 Replacing Articles 1142-1144 and 1184 of the French Civil Code.

38 D. Mainguy (ed), *Le nouveau droit français des contrats, du régime général et de la preuve des obligations (après l’ordonnance du 10 février 2016)* (UMR-CNRS 5815, 2016), para. 229; O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par*

if the debtor does not comply, the debtor can be liable for damages, pursuant to Article 1231 of the French Civil Code. A claimant then has to show that the three conditions for the recovery of damages for breach of contract, drawn from Articles 1231 to 1231-2 of the French Civil Code, are satisfied.³⁹ First, the claimant must establish that there has been a breach of contract. Second, the claimant must have suffered a loss. Third, there must be a causal link between the breach and the claimant's loss.⁴⁰ Article 1231-1 provides for one exception to the recovery of compensatory damages, in case of force majeure,⁴¹ which is defined in this context as an event that is outside of the debtor's control, that could not have been reasonably foreseen at the time of conclusion of the contract, the effects of which cannot be avoided by appropriate measures, and that now prevents the debtor from performing its obligation (new Article 1218).⁴²

As under French law, specific performance is the rule under German law (Section 241(1) of the German Civil Code). However, a party cannot request specific performance if performance is impossible for the debtor or anyone else (Section 275 of the German Civil Code).⁴³ Regarding the entitlement to damages, German law has adopted similar conditions to French law. The claimant has to establish three objective conditions: first, a breach of an obligation; second, the existence of a loss; and third, a causal link between the two. German law also includes a subjective element, in the form of a fault on the part of the debtor.⁴⁴

Similar conditions to those found in these civil law jurisdictions are found in international instruments or transnational principles. Article 74 of the CISG requires the proof of a breach of contract by one party and a loss suffered by the other party as a consequence of the breach. Article 7.4.2 of the UNIDROIT Principles entitles an aggrieved party to full compensation for harm sustained as a result of non-performance.

Where some civil law jurisdictions do depart from common law jurisdictions is on the requirement of notice. There is no notice requirement under English common law, so notice is not required unless imposed by the contract. By contrast, under French law, for example, the claimant must give notice to the respondent that it is in delay or in breach of the agreement and request performance of its obligation within a reasonable time, unless

article (LexisNexis, 2016), 485–488. Requests for specific performance require only the showing of a breach of contract (C. Larroumet, S. Bros, *Traité de droit civil, Tome 3: Les obligations, Le contrat* (8th ed. Economica, 2016), para. 645).

39 Formerly Articles 1146–1147 of the French Civil Code.

40 P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017), 533, 535, paras. 961–966.

41 Rather than an external cause, *cause étrangère*, as was previously required under the former Article 1147.

42 D. Mainguy (ed), *Le nouveau droit français des contrats, du régime général et de la preuve des obligations (après l'ordonnance du 10 février 2016)* (UMR–CNRS 5815, 2016), para. 242; O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (LexisNexis, 2016), 477.

43 This is also the case under Japanese law. See Taniguchi, 'The obligation to mitigate damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006), 79, 83.

44 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014) para. 4.263. The requirement for a fault arguably also exists under French law (H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), paras. 4.198–4.201).

the non-performance is permanent; if the respondent does not perform upon receiving the notice, the claimant will be entitled to damages.⁴⁵ This requirement is consistent with the emphasis that French law puts on specific performance.

The foreseeability requirement

Foreseeability refers to the notion used in common law jurisdictions. Civil law jurisdictions do not necessarily refer expressly to foreseeability in the texts relating to damages, although courts and commentators often rely on this requirement. The notion of foreseeability acts as a limitation on the amount of damages that have to be paid in both common and civil law systems.

Under English law, as set out above, damages for breach of contract are recoverable only to the extent the loss that has occurred was reasonably foreseeable by the parties at the time they entered into the agreement. This test was first expressed in England in the 1854 case of *Hadley v. Baxendale* as follows:

*Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.*⁴⁶

Thus, loss is recoverable only if the type of loss⁴⁷ that occurs is 'in the contemplation of the parties' (i.e., foreseeable)⁴⁸ and 'not unlikely'⁴⁹ at the date of contracting (rather than the date of breach).⁵⁰ What is in the contemplation of the parties is assessed objectively on the basis of the 'ordinary course of things' and subjectively on the basis of special circumstances or knowledge attributed to the parties.⁵¹ If this test is satisfied, the respondent is considered to have assumed the responsibility for the loss.⁵²

In civil law systems, damages are generally recoverable only if they were foreseen or ought to have been foreseen at the time the contract was made. Under French law, the

45 Article 1231 of the French Civil Code (formerly Article 1146). See D. Mainguy (ed), *Le nouveau droit français des contrats, du régime général et de la preuve des obligations (après l'ordonnance du 10 février 2016)* (UMR-CNRS 5815, 2016), para. 242; O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (LexisNexis, 2016), 517-518.

46 *Hadley v. Baxendale* (1854) 9 Exch. 341. This rule applies in India as well. The Kerala High Court has observed that 'the party guilty of breach of contract is liable only for reasonably foreseeable losses – those that a normally prudent person, standing in his place possessing his information when contracting, would have had reason to foresee as probable consequences of future breach.' (*State of Kerala v. K Bhaskaran* AIR 1985 Ker 49 (para. 12).)

47 *H. Parsons (Livestock) Ltd v. Uttley Ingham & Co Ltd* [1977] EWCA Civ 13.

48 *Hadley v. Baxendale* (1854) 9 Exch. 341.

49 *Koufos v. C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

50 *Hadley v. Baxendale* (1854) 9 Exch. 341.

51 *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528.

52 *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; *Supershield Ltd v. Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; *Rubenstein v. HSBC Bank plc* [2012] EWCA Civ 1184.

defaulting party is liable only for damages that were foreseen or foreseeable at the time of conclusion of the contract, pursuant to Article 1231-3 of the French Civil Code.⁵³ The idea is that the parties should be in a position to understand the extent of their potential liability for breach of contract when entering the contract.⁵⁴ Foreseeability is applied in abstracto – meaning what is ‘normally’ foreseeable – but this notion is flexible.⁵⁵ This condition does not have to be examined if the parties have not put this argument forward.⁵⁶

However, the defaulting party cannot reduce its liability for damages on an argument that the loss was not foreseeable if it has been grossly negligent (*faute lourde*) or has committed an intentional breach (*faute dolosive*).⁵⁷ In case of gross negligence or intentional breach, the defaulting party is liable only for damages that are the immediate and direct consequence of its breach, pursuant to Article 1231-4 of the French Civil Code.⁵⁸ The notions of foreseeability in Article 1231-3 and direct consequence of a breach in Article 1231-4 – which refers to causation as opposed to foreseeability – are two different concepts under French law,⁵⁹ although they are not well distinguished in practice.⁶⁰

Some other jurisdictions do not refer to foreseeability per se. German law provides, for example, for compensation of losses that are within the scope of protection of the contractual obligation breached, to the exclusion of damages that were not contemplated by the parties in their contract.⁶¹ Certain provisions expressly require a loss to have been foreseeable, such as Section 252 of the German Civil Code, which refers to lost profits that ‘could probably have been expected’ in the ‘normal course of events’ or in ‘special circumstances’, resulting from particular measures or precautions taken.

Mitigation

In common law jurisdictions, it is accepted that the aggrieved party is under a duty to take steps to minimise and not increase its loss. Damages may be reduced if that party has not taken steps to mitigate its loss. While mitigation and other means of reducing damages will be discussed in detail in Chapter 5, a brief discussion of certain comparative law aspects will be presented here.

53 Formerly Article 1150 of the French Civil Code.

54 B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018), para. 330.

55 P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017), para. 965.

56 French Court of Cassation (1st Civil Chamber), 15 July 1999, No. 97-10268.

57 Before the 2016 reform, Article 1150 of the French Civil Code referred only to intentional breach (*dol*).

However, the French courts were already analysing gross negligence as an intentional breach; therefore, the reference to gross negligence in the 2016 reform only codifies applicable case law.

58 Formerly Article 1151 of the French Civil Code.

59 C. Larroumet, S. Bros, *Traité de droit civil, Tome 3: Les obligations, Le contrat* (8th ed. Economica, 2016), paras. 656-660; P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017), paras.

962-966; O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (LexisNexis, 2016), 520.

60 P. Gélinas, ‘General Characteristics of Recoverable Damages in International Arbitration’ in Y. Derains and R.H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 4* (Kluwer Law International; International Chamber of Commerce (ICC) 2006), p. 11, sp. p. 15.

61 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 4.261.

Under English law, for example, the claimant must first take all reasonable steps to minimise its loss as a result of the respondent's breach of its obligation. The claimant cannot recover losses that it could have avoided through reasonable action or inaction. Second, as a consequence of the first rule, the claimant can recover the costs that it has incurred in taking reasonable steps to minimise its loss. This is true even if the steps taken have in fact increased the loss. Reasonable attempts to mitigate will not reduce damages payable, if they are unsuccessful.⁶² Third, where the claimant has minimised its loss, the damages owed by the respondent are reduced by the amount of the reduction achieved by the claimant.⁶³ The burden of proof in this context is on the defendant.⁶⁴ This duty is present in other common law jurisdictions as well. Further, any profit accrued as a consequence of the claimant's mitigating steps must be credited to the defendant if causation is established. The onus is on the defendant to prove both the existence and amount of profit.⁶⁵

Contributory negligence is the contribution to the loss by the aggrieved party through its action or inaction and is a separate doctrine in common law jurisdictions. In a contractual context, contributory negligence can apply if there is a contractual duty of care and the contractual duty of care is concurrent with a tortious duty of care.⁶⁶ Contributory negligence reduces the damages payable in accordance with the court's assessment of the parties' respective responsibilities for the loss.

Civil law jurisdictions have not necessarily developed or embraced a doctrine of mitigation. As mentioned above, civil law jurisdictions favour, contrary to common law jurisdictions, specific performance over the compensation of damages, at least in theory. Nonetheless, civil law jurisdictions have over time evolved to include mechanisms similar to mitigation. Under German law, for instance, there is no duty to mitigate *per se*, but a similar result is achieved through the regime on contributory negligence. Section 254 of the German Civil Code makes the entitlement and scope of damages dependent on the circumstances, in particular on the extent to which one or the other party caused the damages in full or in part. A fault will even be found where the aggrieved party has failed to avert or reduce the damage pursuant to Section 254(2). The Japanese Civil Code similarly provides that courts can take account of the claimant's own negligence in determining

⁶² *Lagden v. O'Connor* [2004] 1 AC 1067, Lord Scott, para. 78.

⁶³ H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Sections 9-002 to 9-006.

⁶⁴ *Lombard North Central plc v. Automobile World (UK) Ltd* [2010] EWCA Civ 20. A claimant should nevertheless consider whether to take steps to show how it has mitigated its loss, as failure to do so can be risky. *Bulkhaul Ltd v. Rhodia Organique Fine Ltd* [2008] EWCA Civ 1452.

⁶⁵ *Thai Airways International Public Co Ltd v. KI Holdings Co Ltd (formerly Koito Industries Ltd)* [2015] EWHC 1250 (Comm). See also *Globalia Business Travel SAU (formerly TravelPlan S.A.U) of Spain v. Fulton Shipping Inc of Panama* [2017] UKSC 43, in which the Supreme Court confirmed that the issue turns on causation: where the claimant has obtained a benefit following a breach of contract and this benefit was caused either by the breach or by the claimant's act of mitigation, the recoverable loss will be reduced by the benefit.

⁶⁶ *Forsikringsaktieselskapet Vesta v. Butcher and others* [1989] AC 852; *Barclays Bank plc v. Fairclough Ltd* [1995] QB 214.

the entitlement and scope of damages.⁶⁷ Other civil law countries, such as Italy, Austria, Portugal and Finland, have similar provisions.⁶⁸

There are, however, exceptions where an approach similar to common law jurisdictions has been adopted. For example, the Quebec Civil Code includes an express obligation to mitigate under Article 1479, which provides that '[a] person who is bound to make reparation for an injury is not liable for any aggravation of the injury that the victim could have avoided.' Similarly, Article 404 of the Russian Federation Civil Code allows a judge to reduce the scope of damages if the aggrieved party, intentionally or not, increased the amount of damages or failed to take reasonable measures to reduce it.⁶⁹

French law, on the other hand, is generally presented as a legal system that does not embrace the duty to mitigate, and it is true that the French Civil Code does not include an obligation or duty to mitigate.⁷⁰ The French Court of Cassation has confirmed that there is no obligation to minimise the damages the aggrieved party has suffered in the context of non-contractual liability.⁷¹ This solution is generally understood to apply to contractual liability too.⁷² Indeed, the duty of mitigation has been viewed by some as being in contradiction with the French principle of full compensation. If the aggrieved party is entitled to recovery of its damages, it should not have to minimise its loss.⁷³

However, the duty to mitigate finds its way in through the back door in French law, and several commentators have welcomed this idea.⁷⁴ Various avenues have been considered to integrate the idea of mitigation in French law. Some judges have taken into account the

⁶⁷ Japanese Civil Code, Article 418. See also Y. Taniguchi, 'The obligation to mitigate damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006) p. 79, sp. p. 83.

⁶⁸ Italian Civil Code Article 1227; Austrian Civil Code Section 1304; Portuguese Civil Code Article 570; Finnish Sales of Goods Act Section 70(1).

⁶⁹ A. Komarov, 'Mitigation of Damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006), p. 37, sp. p. 39.

⁷⁰ B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018) para. 331; A. Komarov, 'Mitigation of Damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006), p. 37, sp. p. 39; Y. Taniguchi, 'The obligation to mitigate damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006), p. 79, sp. p. 81.

⁷¹ French Court of Cassation (2nd Civil Chamber), 19 June 2003, No. 01-13289, JCP G 2003.II.10170, note C. Castets-Renard; with respect to contract law, French Court of Cassation (1st Civil Chamber), 3 May 2006, No. 05-10411, D. 2006, p. 1403, obs. I. Gallmeister.

⁷² French Court of Cassation (3rd Civil Chamber), 10 July 2013, No. 12-13851; B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018), para. 331; P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017) para. 963.

⁷³ C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5, sp. para. 2.

⁷⁴ P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017) para. 963; B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018) para. 331; C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5. The latest reform of the French Civil Code envisages the reduction of damages if the aggrieved party does not take safe and reasonable measures to avoid the increase of damages (see, e.g., B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018), para. 331).

aggrieved party's behaviour, in particular his or her inertia, in assessing damages, relying on the judge's discretion in doing so.⁷⁵ Commentators have also referred to the obligation of good faith in this context.⁷⁶ The better legal justification appears, however, to be the requirement for a causal link to establish the damages. If the amount of damages would have been lower had the aggrieved party taken some action or, on the contrary, refrained from taking any, then the aggrieved party should not be entitled to the amount of damages that it requests. This reasoning can be easily applied in connection with the judge's full discretion to assess damages.⁷⁷ Further, parties can provide in their contracts that a duty of mitigation applies, without contravening French law or public policy.⁷⁸

In any event, arbitral tribunals applying French law in international arbitration (as opposed to French domestic arbitration) could rely on the duty of mitigation being a transnational principle or a principle of the *lex mercatoria* to apply this duty in any event.⁷⁹ The duty of mitigation is indeed widely recognised as a transnational rule, part of the general principles of law, in particular, in the context of international arbitration, so much so that several international and transnational instruments refer to it (see Article 77 CISG and Article 7.4.8 of the UNIDROIT Principles).⁸⁰ French courts would not annul or refuse to enforce an award on the ground of a violation of international public policy for referring to a duty to mitigate whether the arbitral tribunal applied French law or another law.⁸¹

Assessment of the amount of damages

General approach to damages in common and civil law traditions

In common law jurisdictions, damages are seen as the primary remedy for non-performance of contract, with specific performance seen as an exception. For example, the Restatement (Second) of the Law of Contracts, a United States treatise that seeks to restate common law principles that is frequently cited in US courts, states that '[s]pecific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party'.⁸²

75 French Court of Cassation (1st Civil Chamber), 2 October 2013, No. 12-19887; P. Malaurie, L. Aynès,

P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017), para. 963.

76 P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017), para. 963. This justification has, however, been criticised (see J. Ortscheidt, *La réparation du dommage dans l'arbitrage commercial international* (2001), paras. 233 et seq.; C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5, para. 10).

77 C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5, para. 11.

78 *Ibid.*, p. 5, sp. para. 8.

79 *Ibid.*, p. 5, sp. paras. 6–9.

80 A. Komarov, 'Mitigation of Damages' (2006), in Y. Derains, R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC, 2006), p. 37, sp. pp. 40–41; C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5, paras. 5–9; G. Born, *International Commercial Arbitration* (2nd ed. Wolters Kluwer, 2014), p. 3825; E. Gaillard, J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), para. 1491.

81 C. Larroumet, 'Obligation de modérer le dommage et arbitrage du point de vue du droit français', *Gaz. Pal.* 2008, No. 290, p. 5, paras. 6–8.

82 Restatement (2d) of the Law of Contracts, Section 359.

This area is one in which civil and common law jurisdictions differ in a more significant manner, as the primary remedy in most civil law jurisdictions has traditionally been to have the contract performed as agreed, with damages in lieu of performance as only a secondary remedy.⁸³ This remains the case in Germany, which has a strong position on the principle of *pacta sunt servanda*.⁸⁴ The revised French Civil Code favours specific performance as explained above (Article 1221 of the French Civil Code).⁸⁵

Categories of recoverable loss

In common law jurisdictions, there are three basic categories of recoverable damages.⁸⁶ The main category is expectation damages, according to which damages are awarded on the basis of putting the claimant in the position it would have been in, but for the breach. A claimant's ability to recover lost profits will depend on the subject of the breach of contract. For example, it is more likely that a claimant will be able to recover lost profits in a contract for the sale of goods than in a contract for the carriage of goods, as lost profits in the latter situation are generally held to be too remote.⁸⁷ The second is performance damages – i.e., the cost of curing the defective performance. The third is reliance or 'wasted expenditures' damages – i.e., expenditures or other losses that have been incurred by the claimant in reliance on the contract.⁸⁸ The purpose of reliance damages is to put the claimant in as good a position as it was in before the promise.

Within the category of expectation damages in common law jurisdictions, there are two subcategories – normal or direct damages (also known as general damages) and consequential damages (also known as special damages). Normal damages are those damages that are the natural and probable consequence of the breach.⁸⁹ Consequential damages are those that do not flow directly from the breach; they are recoverable only in limited circumstances, they are particular to the injured party, and they may be more difficult to calculate in financial terms.⁹⁰

83 See, e.g., in relation to French law, P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J. 2017), paras. 975–976.

84 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), paras. 4.256–258.

85 O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (LexisNexis, 2016) 485–486. See also discussion in D. Mainguy (ed), *Le nouveau droit français des contrats, du régime général et de la preuve des obligations (après l'ordonnance du 10 février 2016)* (UMR-CNRS 5815, 2016) paras. 230–232.

86 There are also various other categories of loss that may be recoverable, such as moral damages, punitive or exemplary damages, non-monetary damages (i.e., specific performance), and these topics are addressed in depth in other chapters of this publication.

87 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Sections 4-0018–19.

88 *Halsbury's Laws of England*, Section 503.

89 For the position under English law, see *Halsbury's Laws of England*, Section 317, citing *Ratcliff v. Evans* [1892] 2 QB 524 at 528, per Bowen LJ; for the position under New York law, see C. T. Salomon, P. D. Sharp, 'Chap 10: Damages in International Arbitration', in J. Fellas and J. H. Carter (eds), *International Commercial Arbitration in New York* (2nd ed., OUP New York 2016), paras. 10.11–10.14.

90 For the position under English law, see *Halsbury's Laws of England*, Section 317 and H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Section 3-008; for the position under New York Law, see

In most civil law jurisdictions, there are two categories of loss – *damnum emergens* (actual losses or damage already suffered) and *lucrum cessans* (loss of profits or wasted costs) – which have their origins in Roman law. In France, for example, these two categories of loss are codified at Article 1231-2 of the Civil Code, which states that '[d]amages due to a creditor are, as a rule, for the loss that he has suffered and the profit of which he has been deprived.'⁹¹ These categories of damages roughly correspond to the common law categories of expectation and reliance damages.⁹² French law also allows the allocation of damages for a non-pecuniary loss, such as for bodily harm, lasting inconvenience after an injury and emotional distress.⁹³

Assessment of the amount of damages⁹⁴

Under the common law, the normal measure of damages is the difference in value between the performance that should have occurred, had the contract been performed, and the actual performance.⁹⁵ This standard follows from the principle that compensation should put the injured party in the position it would have been in but for the wrong.⁹⁶

Under the civil law, the assessment of the amount of damages is also based on the principle of full compensation, the objective of which is to put the injured party in the position it would have been in if the act that gave rise to the damage had not occurred.⁹⁷ Full compensation may be achieved through calculation of the difference in value (i.e., the normal measure of expectation damages under English law) or through the calculation of the cost of cure (i.e., as for performance damages under English law).⁹⁸ However, French courts have a significant amount of discretion on how damages are calculated and often do not provide details in their justification of the amount of damages awarded.⁹⁹ For example, French courts are not required to set out detailed reasoning in relation to their assessment

C. T. Salomon, P. D. Sharp, 'Chap 10: Damages in International Arbitration', in J. Fellas and J. H. Carter (eds), *International Commercial Arbitration in New York* (2nd ed., OUP New York 2016), paras. 10.15-10.20.

91 D. Mainguy (ed), *Le nouveau droit français des contrats, du régime général et de la preuve des obligations (après l'ordonnance du 10 février 2016)* (UMR-CNRS 5815, 2016), para. 243; B. Fages, *Droit des obligations* (8th ed. L.G.D.J., 2018), para. 331.

92 Practical Law Company UK, Damages in International Arbitration, online resource ID 0-519-4371. See also J. Paulsson, 'The Expectation Model' in Y. Derains and R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International, International Chamber of Commerce ICC 2006), 64.

93 C. Larroumet, S. Bros, *Traité de droit civil, Tome 3: Les obligations, Le contrat* (8th ed. Economica, 2016), para. 655.

94 In this chapter, we will not discuss contractual limitations, the metric of compensation or the treatment of expert evidence as these topics are being addressed in other chapters of this publication.

95 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014) para. 4.38. See, e.g., *Durham Tees Valley Airport Ltd v. Bmibaby Ltd* [2010] EWCA Civ 485.

96 H. McGregor, *McGregor on Damages* (20th ed Sweet & Maxwell, London 2017), Section 2-002, citing *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas. 25 at 39.

97 See, e.g., for French law, A. Bénabent, *Droit des obligations* (16th ed. L.G.D.J. Précis Domat, 2017), 683-693.

98 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 4.207.

99 C. Boismain, 'Etude sur l'évaluation des dommages-intérêts par les juges du fond', Petites affiches, 2007, No. 39, p 7; H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014), para. 4.206.

of the amount of damages.¹⁰⁰ In practice, French courts tend to use this discretion to take account of the degree of fault of the breaching party; i.e., where there is a high degree, they will take a 'heavy hand' in relation to the assessment of damages.¹⁰¹

Certainty of damages

Under English law, for example, one has to be able to prove the fact of loss and the amount of the loss on the basis of the balance of probabilities. Where it is difficult to prove the amount of loss with certainty, the wrongdoer should not be relieved of his or her responsibility to pay.¹⁰² Damages can also be recovered for loss of a chance, which is an inherently uncertain head of loss, and raises difficult issues of causation and quantification.¹⁰³

While a certainty requirement is not codified in the French Civil Code, French law requires that parties establish with certainty the fact of loss, rather than presenting the mere possibility of a loss.¹⁰⁴ As to the amount of damages awarded, French judges have a significant amount of discretion when making an assessment of damages, in particular with respect to breaches other than of an obligation to pay.¹⁰⁵

In relation to international arbitration, it has been observed that, even when faced with uncertainty, 'arbitral tribunals will find juridical ways and means to arrive at a figure which, given all the circumstances of the case, will lead to an equitable finding'.¹⁰⁶

Conclusion

While there are differences in the approach to compensatory damages in common and civil law jurisdictions, or among those jurisdictions, they often lead to similar results, albeit through different paths, so much so that arbitrators, but also national judges and commentators, have identified and applied international principles applicable to damages, such as the duty to mitigate, particularly in international arbitration.

However, the analysis of damages is first and foremost driven by the facts of a case. While the often subtle differences from one legal system to another might not lead to different results in most cases, they might have a significant impact in specific circumstances. It is, therefore, as important to ensure a proper analysis of the facts and of the assessment of

100 H. Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP, Oxford 2014) para. 4.208.

101 A. Bénabent, *Droit des obligations* (16th ed. L.G.D.J. *Précis Domat* 2017), para. 683.

102 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Sections 10-001 – 10-002.

103 H. McGregor, *McGregor on Damages* (20th ed. Sweet & Maxwell, London 2017), Sections 10-005 – 10-006.

104 A future loss can, however, be certain if there is no doubt that the loss will occur. What this notion of certainty excludes is a potential loss, which may or may not occur. See on these points, e.g., C. Larroumet, S. Bros, *Traité de droit civil, Tome 3: Les obligations, Le contrat* (8th ed. Economica, 2016), paras. 656–658; P. Malaurie, L. Aynès, P. Stoffel-Munck, *Droit des obligations* (9th ed. L.G.D.J., 2017) para. 962.

105 C. Boismain, 'Etude sur l'évaluation des dommages-intérêts par les juges du fond', *Petites affiches*, 2007, No. 39, p. 7; C. Larroumet, S. Bros, *Traité de droit civil, Tome 3: Les obligations, Le contrat* (8th ed. Economica, 2016), paras. 684–685.

106 P. Gélinas, 'General Characteristics of Recoverable Damages in International Arbitration' in Y. Derains and R. H. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; International Chamber of Commerce ICC 2006), p. 11, sp. p. 12.

the damages, often with the help of experts, as it is to determine the applicable rules of law to which the arbitrators will refer.

All jurisdictions give substantial leeway to judges and arbitrators in the determination of damages. It is, therefore, also important to take into account the legal background of the arbitrators, which might, whether consciously or not, impact their decisions.

Appendix 1

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Clare Connellan is a partner based in White & Case's London office and works with the international arbitration and construction and engineering groups. Clare advises companies, state entities, contractors, owners and operators on the resolution of complex disputes, with a particular focus on disputes within the construction and engineering industry. She has been involved in arbitrations under ICC, LCIA, LMAA and CRCICA rules, as well as *ad hoc* arbitrations, including under the UNCITRAL rules. Clare also advises on alternative dispute resolution, including mediation, and is a CEDR-accredited mediator. She has spent time on secondment to the LCIA as counsel. Clare holds degrees in English law and French law, an LLM in dispute resolution and is qualified as an English solicitor advocate.

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Angélica André is an associate in White & Case's Paris international arbitration practice group. She focuses on commercial arbitration conducted under the rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the United Nations Commission on International Trade Law (UNCITRAL), with respect to disputes relating to construction, energy, infrastructure and M&A. She also deals with annulment proceedings with respect to commercial and investment arbitral awards in France, and enforcement proceedings in France and various other jurisdictions worldwide. A French and German national, admitted to the Paris Bar, and with degrees in French law and German law and an LLM in dispute resolution, Angélica regularly engages in English- and French-language proceedings.

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