



Contemporary methods of damages evaluation in international arbitration

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The case

Austrian employer

AUT

UKR

Contract for construction
of a power plant (5 years)

Power plant

DEFECT

How to calculate damages?

- i) contract performance interest
- ii) market value of the enterprise

Ukrainian contractor



General principles for quantification of damages

Sources

- National laws
- Arbitral awards
- Supranational instruments (CISG, UNIDROIT Principles, PECL etc.);
- Conflicts between the law of the seat, applicable material law and law of the place of enforcement
- Public policy

Is it possible to determine transnational general principles for quantification of damages?

Transnational general principles for quantification of damages

- Full compensation
- Wasted costs (*damnum emergens*) and lost profit (*lucrum cessans*)
- Restitution, reliance interest, performance interest
- The obligation to mitigate damages
- Certainty and foreseeability of damages
- Causation
- Mitigation of damages by courts / arbitrators

The goal of the damages

to protect performance interest of the injured party

Prescribed in:

- Common law
- Civil law
- CISG
- UNIDROID
- PECL



Valuation methods

Income Based Approach / Discounted Cash Flow (DCF)

Determines the value of the business by projecting the net cash flow for a certain time period into the future and then discounting it back to present value as of the date of the breach.

Usually the most appropriate method, but difficult to apply:

- Projecting company's earning based on a wide variety of factors
- Determination of a discount rate

Often require expertise

Market Based Approach

Compare the business or business interest to similar businesses or business interests.

Often is used in practice and is easier to apply

Criticisms of the method:

- There may be no comparable businesses or opportunities to which a tribunal may look to in calculating damages.

Asset Based Approach / Adjusted Book Value (ABV)

Current market value of assets net liabilities.

Appropriate for businesses which main value is its assets rather than earnings (e.g. holding companies).

Criticism of the method:

- is based on historic and not actual costs
- does not account for intangible assets
- does not take into account the future profitability of the business

Conclusions

- The goal of the damages – to protect performance interest of the injured party (provided by common law, civil law, CISG, UNIDROID, PECL);
- Thus wasted costs and lost profit usually should be awarded
- Problems in determining lost profit
- Limitations on damages, under applicable law (foreseeability, certainty, mitigation), must be taken into account;
- Application of valuation methods, when breach of contract seriously injured or stopped business

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