



**Swedish Arbitration Days 16-17 September 2010
at Näringslivets Hus, Storgatan 19, Stockholm**

DAMAGES AND OTHER RELIEF IN INTERNATIONAL ARBITRATION

A company resorting to international arbitration is seeking in most cases not only a determination of its legal rights, but most typically an award to compensate for loss suffered due to some real or perceived breach and, as a consequence wishes to be made whole by way of monetary damages or other relief which it can enforce against the adverse party in a third country. This sets in motion a process of analysis and determination of complex issues of a legal, contractual, and evidentiary nature. Is arbitration better equipped than other procedures to meet the challenges of modern claimants/litigants? Does the process cater to a wider and more refined arsenal of proofs and evidence on topics such as damages? If so, why and to what extent?

- What should counsel think about and what are arbitrators to do?

The theory of damages and its variety of forms raise many complex issues of entitlement, measurement, reliability, predictability, foreseeability, causation, and the like. The interaction between the applicable law and other rules applicable to the merits and the procedural context as well as legal traditions, cultures and other factors will be analysed. On what principles are causation and foreseeability based? How are issues like proximity or remoteness evaluated? If and to what extent can loss be awarded for other than economic damages?

- Evaluation of compensation

The breach may have caused loss in sales or production, market position, technological supremacy, competitive edge or resulted in another adverse consequence. How is this to be evaluated? Do the economists' concepts of losses and damages or compensation fit the applicable legal doctrines and vice versa? Is the process of arbitration able to achieve its vital function in the commercial world to appropriately evaluate and compensate for contractual or other breaches?

What are the means available in different contexts for making an effective case for damages/compensation or alternative relief or for defending against such a claim? What are the pitfalls? What are the strategies and tactical choices? If the *quantum* of any monetary relief is not properly based on rational economic analysis, international arbitration will – all trenchant legal analysis aside – still fail in its fundamental objective.

- Burden and standard of proof

What is required to carry the burden of proof? What is the standard of proof? The role of the expert and his influence over the process and the award – dangers and advantages? Who owns the process? The interaction between the parties, counsel, arbitrators and the experts.

- Does the relief differ depending on the judicial context?

Is the nature of the relief that may be available and the required level of substantiation different in an arbitral than in a judicial context, in a commercial dispute as opposed to an investment treaty dispute, in one jurisdiction or legal culture rather than another?

- The conference

This conference presents a multi-professional and multinational/cultural perspective on these and other issues, bringing together the views of leading international arbitration practitioners, well-known arbitrators, scholars, forensic evaluation and accounting experts in the appraisal of damages, among others.

Organizing Committee:

Hans Bagner, Jeffrey Hertzfeld, John Kadelburger

**Johnny Herre, Toby Landau, Daniel Hochstrasser, Annette Magnusson
Fredrik Norburg, Kristoffer Löf**

Conference sponsors:



Conference Programme

Thursday 16 September

8.30 - 9.00 Registration

9.00 - 9.05 **Opening of Conference - SAA Chair**

9.05 - 9.20 **Key Note Address - Jan Paulsson, Freshfields, Paris**

Challenges, problems, solutions and improvements. Does the arbitral process provide the ideal context in which to play the game?

9.20 - 10.45 **Session 1 - The Toolkit - Means, burden, manner and level of proof**

Moderator: Hans Bagner, Frank, Stockholm

Panellists: Mark Baker, Fulbright & Jaworski, Houston; Teresa Cheng SC, Des Voeux Chambers, Hong Kong; Patrick Maher, Deloitte, London; Jean-Claude Najjar, GE Commercial Finance, Paris

What is it – if anything – that makes the arbitral process (as opposed to other forms of dispute resolution) different or better suited for the determination and analysis of complex legal and economic/financial theories? How are the issues influenced by legal traditions, cultures in the arbitral forum? The role of experts for the determination/structure of the case and the award by the arbitrators - welcome or confusing - right or wrong?

- **Which means are available?**
- **What level of proof is required to win your case? Can one make generalizations or is it case specific?**
- **The causality requirement**
- **Standard of certainty**
- **Influence of equitable factors and the limits of the mandate**
- **Approaches to calculating lost expectancy**
- **The use of expert reports as a manner of proof of loss**
 - **The economist's view**
 - **The lawyer's view**
 - **The arbitrator's view**
 - **The user's view**

10.45 - 11.15 Coffee break

11.15 - 13.00 **Session 2 - Loss of profit, goodwill or opportunities**

Moderators: Franco Ferrari, New York University and University of Verona and Charles Kaplan, Herbert Smith, London

Panellists: Gregory K. Bell, Charles River Associates; Brent Kaczmarek, Navigant Consulting; Washington, Wolfgang Kühn, Heuking Kühn Lüer Wojtek, Düsseldorf; Robin Oldenstam, Mannheimer Swartling, Stockholm

Forms of, calculation and assessment of compensation of loss in different contexts, subjective or objective criteria and methods; pricing, direct-indirect costs, loss of efficiency and other factors. Are the tests used by the arbitral tribunals consistent with the criteria suggested by economic principles? Benefits and shortcomings of various approaches. Are there common and uniform trends? What are the differences and what are the influencing factors? The role and relevance of applicable law to the merits and the procedural rules as opposed to economic/financial theory. Forward-looking or historic values? Packaging the claim and successful presentation; Legitimacy and avoiding risk of double or over-compensation. Forms of awards and required reasoning – avoiding the risk of splitting the baby or is this acceptable? Uniform standards as to reasoning and proof for ensuring enforceability.

- **Compensation for lost profits and other expectation interest**
- **Compensation for lost value**
- **Compensation for lost volume/revenue**
- **Compensation for loss of goodwill or business reputation and loss of opportunity**
- **Incidental, indirect and consequential**
- **Contributory negligence**
- **Mitigation of damages - factors involved & their relationship**
- **Application of rules regarding reasonable compensation**
- **The foreseeability test and/or requirement of adequate causality**

13.00 - 14.00 Lunch

- 14.00 - 15.30 **Session 3 - Additional elements of compensation or relief**
- Moderator: Jeffrey Hertzfeld, International Arbitrator and retired senior partner of Salans, Paris**
- Panellists: Nayla Comair-Obeid, Obeid Law firm, Beirut/Paris; Vladimir Khvalei, Baker & McKenzie, Moscow; Richard Kreindler, Shearman & Sterling, Frankfurt; José Rosell, Hughes, Hubbard & Reed, Paris**
- Is the sky the limit? Theories and trends.
- **Reliance interest damages**
 - **Restitution based damages**
 - **Unjust enrichment or gain-based damages**
 - **Compensation for changes in monetary values - currencies**
 - **Arbitration costs as relief and/or damages**
- 15.30 – 16.00 Coffee break
- 16.00 – 17.30 **Session 4 - Contractual and/or statutory provisions and circumstances influencing damage calculations**
- Moderators: Daniel Hochstrasser, Bär & Karrer, Zurich and Michael Davison, Hogan Lovells International, London**
- Panellists: Gisela Knuts, Roschier, Stockholm/Helsinki; Matthew Weiniger, Herbert Smith, Paris**
- The scope and interplay between special contractual and statutory forms of relief available and the choices to be made. Ancillary or separate/independent? Approaches and concepts to and elements of calculations. Relevance and equity. Over-compensation.
- **Penalty clauses**
 - **Limitation of liability clauses**
 - **Liquidated damages clauses**
 - **Consequential damages clauses**
 - **Force majeure**
 - **Punitive damages – tort vs. contractual**
- 18.00 - Buffet Reception

Friday 17 September

09.00 - 10.30 **Session 5 - Alternative forms of relief**

Moderator: Johnny Herre, Swedish Supreme Court Justice, Stockholm

Panellists: Jan Ramberg, Stockholm; Ewan McKendrick, Oxford University; Christoph Liebscher, Wolff Theiss , Vienna

What are the forms to be applied and do the criteria differ from those applied for other relief? When are they appropriate to be applied and when are they not? What are the difficulties for arbitrators in granting and for counsel in devising appropriate measures? Different approaches under various legal regimes and contexts. Liabilities and exposures. Appropriateness, effectiveness and enforceability; Timing of such relieve before/during/after the proceedings. Temporary or permanent relief – the monetary value of such alternative forms.

- **Specific performance**
- **Injunction**
- **Declaratory relief**
- **Interim relief**
- **Compensatory interest**
- **applicable criteria**
 - **simple/compound**
 - **rates/dates**
- **Interest on price in case of termination**

10.30 - 11.00 Coffee break

11.00 - 13.30 **Session 6 - Compensation in investment treaty arbitration**

Moderator: Donald F. Donovan, Debevoise & Plimpton, New York

Panellists: Stephen Jagusch, Allen & Overy, London; Mark Kantor, Washington; Sabine Konrad, K&L Gates, Paris; Christer Söderlund, Vinge, Stockholm

The difference in approach, analysis and methodology, if any, as opposed to the commercial context; the influence of public international law. Other concepts, doctrines and approaches for determining compensation.

- **Compensation and expropriation and breaches of other treaty obligations – difference to commercial arbitration – trends and developments [claimants/defendants/awards]; calculations and appropriateness of the DCF and /or other methods**
- **Indirect investment: The “flow- through” damage.**

- **Other remedies - restitution**
- **Moral damages**
- **Priority of remedies - two/multi- stage remedies**
- **Public and private law perspectives on the remedies available**

13.30 (approx.) **Closing of Conference**
