GAR Global Arbitration Review

The Guide to Damages in International Arbitration - Sixth Edition

Compensatory damages principles in civil and common law jurisdictions: requirements, underlying principles and limits

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This sixth edition of Global Arbitration Review's Guide to Damages in International Arbitration builds on the successful reception of the earlier 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 to 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 sixth edition incorporates updated chapters from various authors and contributions from new authors. This edition seeks to improve the presentation of the substance through the use of visuals such as charts, graphs, tables and diagrams; worked-out examples and case studies to explain how the principles discussed apply in practice; and flow charts and checklists setting out the steps in the analyses or the quantitative models. The authors have also been encouraged to make available online additional resources, such as spreadsheets, detailed calculations, additional worked examples or case studies, and other materials.

We hope this revised edition advances the objective of the earlier 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.

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Compensatory damages principles in civil and common law jurisdictions: requirements, underlying principles and limits

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Summary

INTRODUCTION: COMPENSATORY DAMAGES

Compensatory damages, sometimes also referred to as actual damages, are designed to repair the damage a claimant has suffered or is expected to suffer. By contrast, the aim of punitive damages is to punish and deter certain behaviour. Punitive damages do not exist in most civil law countries, such as Germany,[2] France,[3] Switzerland,[4] Poland,[5] Italy,[6] Japan, Korea and Taiwan.[7] Punitive damages are also generally unavailable for a breach of contract in common law jurisdictions such as England[8] and the United States, unless, for example, the conduct constituting the breach is also a tort.[9]

Given that the purpose of compensatory damages is to make the claimant 'whole', the principles of reparation articulated in the Factor At Chorzów case are particularly relevant. As explained in that decision, under international investment law, 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[10] Many times reaffirmed since its establishment,[11] this standard of full reparation is regarded as a 'principle of international law, and even a general conception of law'.[12] Notwithstanding this general agreement, the approaches to determining compensatory damages necessary to achieve full reparation differ significantly across jurisdictions.

In the context of international arbitration, the resolution of disputes traverses the boundaries of diverse legal systems. Arbitrators who assume the responsibility of impartially adjudicating multinational disputes should be aware of the differing principles and approaches to damages in different jurisdictions, such as understanding the differences between civil and common law traditions.[13] The same is true – maybe even more so – for counsel in international arbitrations. To effectively plead a case to arbitrators who may have different legal backgrounds, counsel must know what legal concepts are likely to inform the arbitrators' decision-making process. Indeed, even at the very outset of an arbitration, understanding how an arbitrator (based on the arbitrator's background) is likely to treat certain damages issues (e.g., moral damages) may be an important factor in nominating that arbitrator. Similarly, such knowledge is pivotal when engaging a damages expert from a different jurisdiction or when communicating with a client from another jurisdiction.[14]

The aim of this chapter is to provide an overview of the multifaceted considerations in popular civil law and common law jurisdictions relating to determining compensatory damages and of their requirements, underlying principles and limits.[15] This chapter also addresses international principles and codifications, such as the 2016 UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the United Nations Convention on Contracts for the International Sale of Goods (CISG), as they continue to have an important role in international arbitration proceedings. The Principles of European Contract Law (PECL) are also addressed as they were developed to codify common principles of European contract law and have been used in several countries as a reference point for law reform initiatives.[16]

DETERMINING THE APPLICABLE LAW

Unless specified otherwise, the law applicable to determining damages is the law applicable to the substance of the case. Typically, parties involved in a matter choose the applicable substantive law. The situation can become complex, however, if the parties have not agreed on the applicable law. Many arbitration rules, such as the 2021 Rules of Arbitration of the

International Court of Arbitration and the 2020 Arbitration Rules of the London Court of International Arbitration, authorise arbitral tribunals in these instances to choose the law that they deem most appropriate for the case.[17] Other arbitration institutions stipulate that the law is to be determined in accordance with the rules of private international law (voie indirecte).[18]

In addition to the applicable national law, lex mercatoria (which is a body of law consisting of commercial customs, general legal principles and transnational norms) may be relevant to the damages analysis.[19] The UNIDROIT Principles[20] are an example of standards codifying lex mercatoria.[21] These sources of law are often referenced by arbitrators in international disputes to interpret national law, and include provisions relating to damages.[22]

Finally, in addition to the applicable substantive law and lex mercatoria, arbitrators are sometimes authorised to award damages pursuant to their reasonable discretion (ex aequo et bono).[23]

TYPES OF COMPENSATORY DAMAGES

The various types of compensatory damages differ from jurisdiction to jurisdiction.[24]

ACTUAL LOSS SUFFERED AND LOST PROFITS

A distinction that originates from Roman law and that is still made in most civil law jurisdictions is that between damnum emergens and lucrum cessans.[25] Damnum emergens refers to actual suffered losses, and lucrum cessans means the loss of expected profits.[26] The distinction is regularly stipulated by law. Section 252 of the German Civil Code, for example, stipulates that the damage to be compensated includes lost profits. Article 1231-2 of the French Civil Code stipulates that damages generally include the damages actually incurred as well as lost profits.[27] Similar provisions exist in many civil law countries, such as the Netherlands, Spain, Italy, Finland and Austria,[28] as well as under international law.[29]

DIRECT AND CONSEQUENTIAL DAMAGES

Under common law, compensatory damages may be available for direct harm resulting from a wrong (for example, the value of goods not delivered in breach of contract) and for consequential harm flowing from the same wrong (for example, lost profits).[30]

Direct damages are often called 'general' damages[31] and are intended to compensate for the immediate consequences of a breach. Consequential damages, on the other hand, are often referred to as 'special' damages[32] and compensate for losses that may not be a direct consequence of a breach but instead flow indirectly from the breaching conduct. Indirect losses are only recoverable if it can be reasonably assumed that both parties contemplated them as a probable consequence of the breach of contract at the time the parties concluded the contract.[33]

What qualifies as direct damages in one contract may be classified as indirect or consequential damages in another,[34] for example, although lost profits due to delay may typically constitute consequential damages, in the context of a construction contract (where time is of the essence), this may well constitute direct damages.[35] In other words, whether damages are classified as direct or consequential depends on the contract at issue and the facts of the case.

EXPECTATION AND RELIANCE DAMAGES

In both civil and common law jurisdictions, compensatory damages are often also considered from the lens of a party's expectation and reliance.[36] Expectation damages compensate a party for the value of the benefit the party would have received had the contract been properly performed. Direct and consequential damages, which are intended to put the non-breaching party in the same position that it expected to be in had the contract been performed, are therefore types of expectation damages.[37] Reliance damages (also referred to as wasted expenditures), on the other hand, allow the non-breaching party to recover any costs or expenses incurred in reliance on the breaching party's promises.[38] In other words, expectation damages seek to place the non-breaching party in the same economic position as if the breaching party had properly performed the contract, whereas reliance damages are intended to return the non-breaching party to a position as if the contract had never been concluded. Under civil law, damnum emergens (actual suffered losses) covers both reliance and expectation damages.[39] By contrast, lucrum cessans (lost profits) includes only expectation damages.[40]

PECUNIARY AND NON-PECUNIARY DAMAGES

Expectation damages and reliance damages are intended to provide redress for the non-breaching party's pecuniary loss (i.e., losses that can be reducible to money).-[41] In addition to pecuniary damages, compensation may also be available to remedy non-material harm such as mental suffering, loss of social standing or damage to reputation.[42] Compensation for non-material harm is referred to as non-pecuniary damages (or often also as moral damages). There are different views on whether non-pecuniary damages are generally of a compensatory or non-compensatory nature.[43] Since the need to compensate non-material harm arises from the widely recognised obligation of full reparation (compensation) of an injury, there is certainly an argument that such damages should be considered as compensatory in nature.

It is broadly accepted in civil law and common law countries, as well as in international law, that non-pecuniary damages may be recoverable, albeit with some restrictions.[44] Almost all European jurisdictions contain regulations on non-pecuniary losses. Section 253 of the German Civil Code provides compensation only in cases expressly provided for by law, such as the violation of body, health, freedom or sexual self-determination. Mere frustration about non-performance cannot be compensated.[45] The Netherlands, Austria and Italy are similarly restrictive. France and countries that have been influenced by the French Civil Code have adopted a more generous approach.[46] Compensation under the French Civil Code encompasses not only non-material damages in the strict sense of pain and suffering but also a broad range of personal injuries.[47] Examples of court judgments include compensation for a company's personal and moral damage resulting from acts of unfair competition by the sellers of the shares in that company,[48] and compensation for the personal damage of a shareholder who had been induced to invest in the securities issued by a company and to hold them as a result of false information disseminated by the directors.[49]

Under common law, although the general rule is that non-pecuniary damages are not available for the breach of commercial contracts, as an exception, such damages may be awarded in circumstances where either the purpose of the contract was to provide pleasure, peace of mind or relief from stress[50] or the contract is of a nature such that its breach is to produce emotional distress.[51] Similar to the examples of the civil law judgments described above, under common law, non-pecuniary damages may be awarded in connection with the

breach of contracts for personal services, contracts involving one's home, contracts for the burial of bodies or delivering news of a family emergency.[52]

Regarding international law, Article 7.4.2 paragraph 2 of the UNIDROIT Principles expressly provides that full compensation includes non-material harm (e.g., physical suffering or emotional distress). A similar provision can be found in Article 9:501, paragraph 2 of the PECL. The CISG, however, is an exception, as the prevailing opinion is that the CISG limits the compensation of damages to pecuniary losses.[53]

To summarise, the various types of compensatory damages available across different jurisdictions demonstrate that both civil and common law countries are mostly in agreement on the types of compensable losses, even if they are labelled differently. It is not always possible to clearly allocate a certain damage to one or other type. Nevertheless, the basic differences should be considered – this is crucial particularly when it comes to drafting or interpreting clauses that are intended to exclude certain types of damages.[54] Equally, any request for relief should be drafted in a manner that leaves no doubt in the arbitrators' minds as to what kind of damages are being sought.[55]

RELEVANT CONSIDERATIONS IN ESTABLISHING DAMAGES

REMEDIES FOR A BREACH OF CONTRACT

Under both common law and civil law, a fundamental requirement for a contractual claim for damages is a breach of contract; however, driven by the overarching principle of pacta sunt servanda, the preferred remedy for a breach of contract in civil law jurisdictions is not monetary compensation but rather specific performance. In Germany, France and many legal systems influenced by the French Civil Code, specific performance is only denied if performance is not possible.[56] By contrast, under common law, monetary compensation is the rule and specific performance is available only where monetary damages are either inadequate or not available.[57]

Most civil codes deal with breaches of contract in a general section and specify damages for specific contracts, such as the sale of goods, in another section.[58] Breaches of contract are often differentiated according to their nature, such as by their severity. In most civil law jurisdictions, a 'fundamental breach' or a similar material breach may be required for the termination of a contract but not for a claim for damages.[59] An exception may apply if the claim is for damages in lieu of performance (i.e., the party claims damages instead of insisting on performance),[60] as this is tantamount to a termination; for example, in Germany, a non-material breach of contract does not entitle the non-breaching party to claim damages in lieu of performance – only a material breach does.[61]

Under common law, compensatory damages are available for any breach of contract regardless of the cause or degree of materiality of the breach.[62] A similar approach is reflected in the international law principles codified in Article 74 of the CISG.[63]

NOTICE REQUIREMENTS

National laws, particularly laws on contracts relating to the sale of goods, vary significantly as to whether a claim for damages requires that the non-breaching party first send a notice to the breaching party. In civil law jurisdictions especially, it is a common requirement for the buyer to notify the seller of a breach of contract or to request performance to give the seller a last chance to avoid a dispute by fulfilling its contractual obligation.[64] In France, no claim for damages can be made until the other party is put in default by a formal protest (mise

en demeure), even if there was a fixed deadline for fulfilment.[65] Generally, in Germany, to claim damages for delay, the non-breaching party must have reminded the breaching party to comply with its contractual obligation.[66] To claim damages in lieu of performance, the non-breaching party must even set a grace period for performance (Nachfrist) and wait until it has expired.[67] The notice requirement exists in many other civil law jurisdictions, such as in Spain, Austria, Switzerland and Mexico.[68]

English law, on the other hand, does not require any notice – compensation is due from the date on which the breaching party should have rendered its performance.[69] In practice, however, contractual notice periods usually apply. Under US law, in the context of the Uniform Commercial Code, it is necessary for one party to inform the other on discovering a breach.-[70] Unlike civil law, this notification is not a prerequisite for establishing the right to claim damages. Instead, the notice serves to give the breaching party an opportunity to take measures to minimise loss and liability.[71] A similar provision has been adopted by the CISG for damages claims in respect of non-conforming goods, under which the buyer otherwise loses its right to claim damages.[72]

EXAMPLE 1[73]

> The breaching party, a producer of sensors used in applications in the automotive industry, and the non-breaching party, a producer of optical systems used by car manufacturers, entered into a sales contract for the procurement of sensors, which are crucial for the non-breaching party's manufacturing process. The agreement stipulated delivery of the sensors by 1 June. On 4 June, after the breaching party had failed to meet the delivery deadline, the non-breaching party sent a letter requesting delivery as soon as possible. When the breaching party still failed to deliver, the non-breaching party had to halt production and requested compensation for financial losses caused by this interruption to its production. The non-breaching party also sought to recover amounts that it had paid as compensation to downstream customers.
>
> Under French law, it is disputed whether such an ordinary letter is sufficient for the necessarymise en demeure. However, in transactions between merchants, as here, an agreement that a letter constitutes sufficient notice is assumed. Under German law, on the other hand, the non-breaching party can claim damages any time after 1 June without the need for further notice, given that this was the fixed delivery date. Similarly, under English law, the non-breaching party could have sought damages after 1 June without the need to provide any notice.

FAULT VERSUS STRICT LIABILITY

A damages claim in civil law jurisdictions typically hinges on the requirement of fault.[74] According to Section 276 of the German Civil Code, for example, the breaching party is only responsible for intent and negligence. The concept of fault can be found in many other civil law jurisdictions, such as the Netherlands, Spain, Iran and Italy.[75] However, rules that shift the burden of proof for fault or rather for the lack thereof to the non-breaching party (such as Section 280 paragraph 1 of the German Civil Code) mean that a fault-based system may in

reality be very similar to a system of strict liability (i.e., does not require fault as a prerequisite for a damages claim).[76] Austria and Switzerland have similar provisions.[77]

In France, there is no pure fault principle but rather a combination of a fault-based and a strict liability regime.[78] In principle, French law distinguishes between obligations that are based on results and those based on best efforts. Results-based obligations are subject to strict liability whereas a damages claim for the violation of an obligation based on best efforts requires a showing of fault.[79] If the breaching party fails to fulfil a results-based obligation, where fault is not required, the party can nevertheless avoid liability by demonstrating that the non-performance resulted from an unforeseeable external cause (force majeure).[80]

In contrast to civil law, common law generally prescribes strict liability for breach of contract.[81] This means that a party that fails to fulfil a contract is generally held accountable, regardless of the underlying cause. In the United States, for example, the fault principle is entirely rejected in contract law.[82] Contract law in China, although a civil law jurisdiction, is closer to the strict liability regime of common law.[83]

This strict liability approach is also reflected in Article 79 of the CISG.[84] Notably, this Article stipulates an exemption from liability if a party can prove that its failure of performance is due to an impediment beyond its control. The UNIDROIT Principles also provide for a strict liability regime with exemptions for force majeure.[85] A similar regulation is found in Article 8:101 of the PECL.

EXAMPLE 2

> In the case explained in Example 1, the non-breaching party contends that the breaching party's inability to deliver the sensors on time resulted from a lack of proper contingency planning and failure to meet industry standards. The breaching party, on the other hand, asserts that the production delays occurred because it was unexpectedly let down by one of its own suppliers. It could have acquired the sensors from another supplier but this would have been at a significantly higher price.
>
> Under French law, the breaching party's obligation to deliver the sensors constitutes a results-based obligation; the breaching party is to be held to a strict liability standard and is likely to be held liable. Under German law, the breaching party is likely to have acted negligently if it did not take sufficient precautionary measures and explored alternative sources. Likewise, under common law, the breaching party would also be held liable for the delayed delivery since strict liability applies in any case.

CONTRACTUAL LIMITATIONS OF LIABILITY

In almost all jurisdictions, parties may agree on certain limitations of liability. Under French law, limiting liability with regard to simple negligence is admissible, whereas limiting liability for gross negligence and intent is inadmissible. This is derived from Article 1170 of the French Civil Code, which provides that any clause that voids a material contractual obligation of its meaning is deemed as if it were not written.[86] In Spain, solely limiting the liability in cases of intent is inadmissible.[87] In Austria, neither intent nor extreme gross negligence can be excluded from a party's liability, whereas liability for general gross negligence may be

excluded.[88] Under German law, only liability for intentional conduct cannot be excluded in individually negotiated contracts.[89]

Under English law, limitations of liability are generally admissible but there are certain exceptions, such as in cases involving fraudulent behaviour.[90]

In the United States, limitations of liability are also enforceable, with some limitations.[91] A clause limiting liability will not be enforceable if 'circumstances cause [the] remedy to fail of its essential purposes',[92] and the limitation must not be unconscionable.[93] In the United States, liability cannot be excluded for acts of fraud, gross negligence or intentional wrongdoing, which is similar to English law.[94]

The UNIDROIT Principles also stipulate that contractually limiting one's liability is generally permissible and is inadmissible only in grossly unfair situations.[95]

CAUSATION, ATTRIBUTION AND REMOTENESS

In most legal systems, although often not explicitly stipulated, a claim for damages requires that the damage should be caused by illegal conduct.[96]

To determine whether a causal link between the conduct and the harm can be established, common law jurisdictions tend to apply a 'but-for' test, whereas civil law jurisdictions tend to apply a conditio sine qua non test.[97] Even though the terminology differs, both tests achieve the same results; however, as a matter of fairness, when attributing harm to a certain act or omission, all legal systems apply further normative requirements in addition to causality.

German case law has developed a three-step test to ascertain whether a specific type of harm or damage was caused by, and is therefore attributable to, a certain type of conduct. First, as already mentioned, the conduct must have caused the damage in the sense of a conditio sine qua non.[98] Second, under the test of adequacy (Adäquanztheorie), the damage must have been reasonably foreseeable, meaning that the party that breached the contract cannot be held liable for types of damage that were entirely improbable. Remote damages are therefore not compensable.[99] Third, the damage must fall under the intended scope of protection of the infringed obligation. The aim of this last step is to exclude those types of damage that are merely a result of the ordinary risks of life or are predominantly attributable to someone else.[100] In this respect, for example, the German Federal Court of Justice held that if an accident blocks the road and some impatient drivers – of their own volition and in violation of traffic rules – cross and damage a pavement to drive past the accident, this can no longer be attributed to the person responsible for the accident.[101] On the other hand, the theft of goods that were spilled on the road as a result of an accident will still be attributed to the person who caused the accident.[102] This case law shows how nuanced an attribution analysis can be.

French law equally requires a causal link between the conduct and the damage (lien de causalité)[103] as well as a test of adequacy, which is based on an evaluation of probability.-[104] This includes considering the chronology of the events, the simultaneity of the alleged facts and the suffered harm, as well as an economic analysis to demonstrate the connection between the conduct and the damage. Those two steps are frequently applied throughout European civil law jurisdictions,[105] whereas the third prong of the German test (the consideration of the protective scope of the infringed provision) is not commonly applied in other European jurisdictions.[106]

Common law requires, in addition to the 'but-for' test, an assessment of reasonable foreseeability, which is comparable to the German test of adequacy. As established in the landmark English decision Hadley & Anor v. Baxendale & Ors, the damage must not be too remote, which means that the damage is compensable only if it was reasonably contemplated by the parties at the time of the conclusion of the contract.[107] This goes hand in hand with the rules laid down in other cases, namely that the question of whether specific damage is compensable depends on the intended scope of protection of the infringed provision.[108]

This far-reaching international consensus, despite minor national differences, is reflected in Articles 7.4.2 and 7.4.4 of the UNIDROIT Principles, which stipulate very similar requirements of both causation and foreseeability.[109]

EXAMPLE 3

> This time, the breaching party delivered defective parts, which not only damaged the non-breaching party's production facilities but also injured a worker who tried to restart the malfunctioning system. In the hospital, the worker caught a serious illness and was on sick leave for six weeks. The non-breaching party paid €150,000 to repair the damaged production facility. In addition, it suffered a loss of profit of €75,000 due to the worker's absence.
>
> The non-breaching party demands compensation for this damage. Under any jurisdiction, the non-breaching party has a good argument that the breaching party's conduct is the causal link for the damage. The breaching party argues, however, that the claimed damage is far too remote. Under all legal systems, the damage to the production facilities caused by defective parts is likely to be attributed to the breaching party. This also applies to the injury to the worker. However, the non-breaching party's claim for lost profits caused by the worker's subsequent illness may be deemed too remote and is likely to be denied.

AMOUNT OF DAMAGES

CONTRIBUTORY NEGLIGENCE, MITIGATION AND EQUALISATION OF BENEFITS

Whether the injured party is entitled to (full) compensation may also depend on its own conduct; whether it is responsible for a cause for the damage, failed to mitigate the damage or even gained any benefits from the other party's illegal conduct.[110]

Contributory negligence refers to the conduct of the injured party before or at the time the damage occurred. Mitigation of damages refers to conduct after a party has become aware of the damage. This distinction, however, is merely theoretical in nature, as in both cases the damage caused by the respective contribution – or lack of mitigatory measures – is deducted from the claim for damages.

Similarly, Section 254 paragraph 1 of the German Civil Code stipulates that contributory causation of the damage must be deducted from the injured party's claim for damages. Also, if the injured party subsequently fails to reduce the amount of the damage, the amount of the damage that would not have been incurred had the injured party taken reasonable measures to mitigate the damage is deducted in accordance with Section 254 paragraph 2

of the German Civil Code.[111] This duty to mitigate damages is also codified in various other civil law frameworks.[112]

The UNIDROIT Principles also provide for contributory negligence and mitigation of damages in Article 7.4.7 and Article 7.4.8, respectively.[113]

The situation is different under French law, as a duty to mitigate has not been codified nor is it widely accepted as an implied obligation; instead, mitigation is frequently perceived to violate the French principle of full compensation. Although French courts reject a general duty to mitigate damages in tort law, French courts have assumed that such a duty exists in contract law in exceptional cases.[114] Some decisions have considered the creditor's fault as having contributed to the worsening of their harm, thereby limiting their compensation.[115]

The calculation of damages becomes particular complex when the breaching party's actions or omissions have not only led to damage but have also – potentially indirectly – led to a benefit for the non-breaching party. The question then arises as to whether this benefit should offset the breaching party's liability (compensatio lucri cum damno).

Under German law, the test is similar to the three-step test for causation: the benefits must be causally based on the damage; the benefits must be adequate (i.e., foreseeable); and the offset of benefits must not contradict the spirit and purpose of why liability to pay damages exists in the first place.[116] If, for example, a party has an insurance policy and the insurance pays, this insurance is generally not intended to benefit the breaching party and hence no offset to the breaching party's liability is warranted. Similar considerations apply under Swiss law.[117] Under Article 7.4.2 of the UNIDROIT Principles, causal benefits are also taken into account.[118]

The concept of contributory negligence also exists under common law.[119] Moreover, the duty to mitigate the damage is enshrined in the mitigation of damages doctrine,[120] according to which the injured party must take reasonable steps to reduce the damages. If the non-breaching party avoids the potential loss resulting from the breach, then there is no recovery, because the claimant is entitled to damages only for the actual loss, which is assessed by taking into account all the items in the notional profit and loss calculation for the whole transaction.[121] The injured party, however, may claim reimbursement of the costs incurred to mitigate the damage even if its efforts to mitigate turn out to be unsuccessful.[122]

In the United States, failure to mitigate damages is an affirmative defence. The defendant who wishes to bring this defence bears the burden of showing (1) what reasonable actions the plaintiff should have taken, (2) that those actions would have reduced the damages, and (3) the amount by which the damages would have been reduced.[123] If the defendant establishes that the plaintiff failed to mitigate damages, then the defendant is entitled to offset the damages award by whatever amount the plaintiff failed to mitigate.[124] There is also a general prohibition on damages providing a windfall or double recovery,[125] which is comparable to compensatio lucri cum damno. This is in line with the principle that compensatory damages are intended to make the non-breaching party whole – nothing less but also nothing more.

EXAMPLE 4

> In the above example, the non-breaching party asserts that it has suffered damage valued at €500,000 due to loss of profit because its production had to

be stopped. The breaching party argues that the non-breaching party still had spare parts that could have been used instead. Had the non-breaching party used those spare parts, production would only have had to be stopped for a shorter amount of time, which would have reduced the damages by half.
Under most jurisdictions, according to the doctrine of contributory negligence or principles of mitigation, the damage that the claimant could have reasonably avoided (i.e., €250,000) would have to be deducted from its claim. Under French law, however, the prevailing view is that the availability of additional spare parts would not affect the amount of damages. However, a duty of consideration could have been breached, resulting in the respondent being able to offset this violation.

BURDEN OF PROOF AND STANDARD OF PROOF

Regarding the amount of compensation, most jurisdictions apply the principle of full compensation[126] and achieve similar results. According to this principle, the non-breaching party has to be put in the same economic position it would have been in had the contract not been breached.[127]

Generally, in various jurisdictions as well as in arbitral proceedings, the burden of proof for the amount of damages lies with the injured party.[128] The standard of proof, however, varies.

French law does not contain an express provision that requires certainty that a profit had occurred; nonetheless, it is necessary to prove that damage was suffered. French judges have a wide discretion in determining the amount of damages.[129] They may rely on presumptions at their discretion, in accordance with Article 1382 of the French Civil Code. To determine the amount of compensation, judges will evaluate the damage based on a hypothetical or counter-factual scenario using various economic, accounting and financial methods. The goal is to determine what the situation would have been in the absence of the liability-triggering event, allowing for a comparison with the actual situation.

The German Code of Civil Procedure in its Section 287 also grants the courts discretion with regard to the amount of damages (i.e., the courts may estimate the damage). Case law demonstrates, however, that German courts tend to apply strict standards of proof for the facts that form the basis of the estimate.[130] In any event, in arbitration proceedings, Section 287 of the German Code of Civil Procedure generally does not apply (unless the parties have agreed to apply the German Code of Civil Procedure beyond the 10th book) but it may nonetheless influence the approach of German arbitrators.

In the case of compensation for lost profits, German substantive law eases the standard of proof. The injured party must solely prove what normally would have occurred. It must therefore only establish the ordinary course of events and prove that the profit was likely, not whether there is no reasonable doubt that the injured party would have gained the profit without the breach of contract.[131]

Under English law, the claiming party has to prove the loss based on a ‘balance of probabilities’ test.[132]

In the United States, the party alleging the breach must prove the breach by a preponderance of evidence.[133] This means that the injured party must show the breach to be more probable than not.

Article 7.4.3 of the UNIDROIT Principles requires a reasonable certainty of the damages being claimed according to a balance of probabilities.[134]

Generally, despite its legal relevance, the applicable standard of proof in arbitration is a rarely discussed topic.[135] Standards of proof that have been propagated include a 'balance of probabilities' and 'more likely than not'.[136] Standards may also differ depending on whether factual causation or the amount of damages needs to be assessed; the latter often requires a certain degree of estimation.[137]

CONCLUSION

Despite some variations in prerequisites, approaches and standards of damages, different laws often yield similar outcomes. Arbitrators also tend to enjoy a certain leeway when it comes to the application of principles for the assessment of compensatory damages – there are awards that were set aside for arithmetical errors or a violation of the right to be heard regarding quantum but the authors are not aware of awards that were set aside as a result of the approach taken for the assessment of damages.[138]

Regardless, given that international arbitration necessarily involves different traditions of law, it behoves arbitration practitioners to be aware of the conceptual differences (and similarities) across jurisdictions to effectively advocate for their clients.

ENDNOTES

[1] Anke Sessler is a partner and Sharmistha Chakrabarti and Max Stein are counsel at Skadden, Arps, Slate, Meagher & Flom LLP. The authors thank Valentin Autret, Sonia Qin, Daria Wohler, Paul Thiessen and Eya Ben Yaghlan for their contributions to this chapter.

[2] See M Klode, 'Punitive Damages – Ein aktueller Beitrag zum US-amerikanischen Strafschadensersatz', NJOZ 2009, 172.

[3] See J-S Borghetti, 'Punitive Damages in France' in Helmut Koziol and Vanessa Wilcox (editors), Punitive Damages: Common Law and Civil Law Perspectives (2009), p. 55.

[4] Swiss Supreme Court, 17 July 1998, cited in J Werner, 'Punitive and Exemplary Damages in International Arbitration' in Y Derains and R Kreindler (editors), Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law, Vol. 4, 2006, p. 102.

[5] Polish Supreme Court, 11 October 2013 – I CSK 697/12.

[6] See F Giglio, 'Restitution for Wrongs: a Comparative Analysis', Oxford U Comparative L Forum 6, 2001 (https://ouclf.law.ox.ac.uk/restitution-for-wrongs-a-comparative-analysis (accessed 12 March 2024)).

[7] Werner, op. cit. note 4, p. 103.

[8] G Thüsing, 'Schadensersatz für Nichtvermögensschäden bei Vertragsbruch', VersR 2001, 285.

[9] See Restatement (Second) of Contracts, § 355 (Am. L. Inst. 1981).

[10] Factory at Chorzów, Permanent Court of International Justice, 13 September 1928.

[11] See, for example, ACF v. Bulgaria, Award in ICSID Case No. ARB/18/1, 5 January 2024; Infinito Gold v. Costa Rica, Award in ICSID Case No. ARB/14/5, 3 June 2021; I Marboe, Calculation of Compensation and Damages in International Investment Law (2nd edition, Oxford International Arbitration Series, 2017), p. 31; T G Nelson, 'A Factory in Chorzów: The Silesian Dispute that Continues to Influence International Law and Expropriation Damages Almost A Century Later', JDIA 2014 (Vol. 1).

[12] C Breton, 'Damages: General Concept' in D Müller, et al. (editors) Jus Mundi, Wiki Notes, 30 January 2024 (-https://jusmundi.com/en/document/publication/en-damages-general-concept (accessed 12 March 2024)).

[13] Noting that there are major differences within these systems: C M de Westgaver and S Krier, 'How Legal Traditions (Still) Matter in International Arbitration', Kluwer Arbitration Blog, 20 March 2017 (https://arbitrationblog.kluwerarbitration.com/2017/03/20/bryan-cave (accessed 12 March 2024)).

[14] C S Miles, 'Advocacy Regarding Damages in International Arbitration', JDIA 2014 (Vol. 1), p. 39. At the same time, the significance of damages experts' role should not be underestimated: S Menon, 'Inadequate Handling of Damages in International Arbitration', DRI 2023 (Vol. 17), p. 80.

[15] Since most disputes in arbitration proceedings about damages arise from contractual relationships, this chapter focuses on compensatory damages in contract law; however, some principles originate from tort law, which is why it is also listed here where appropriate.

[16] For more on this, see R Zimmermann, 'The Significance of the Principles of European Contract Law', European Review of Private Law, 2020 (Vol. 28), p. 487.

[17] International Chamber of Commerce (ICC), Rules of Arbitration, Art. 21 para. 1; London Court of International Arbitration, Arbitration Rules, Art. 22.3. See also German Arbitration Institute (DIS), Arbitration Rules, Art. 24.2.

[18] United Nations Commission for International Trade Law, Model Law on International Commercial Arbitration (UNCITRAL Model Law), Art. 28, para. 2 provides, for example, that in the absence of a parties agreement, the arbitral tribunal shall apply the law resulting from the conflict of laws rules that it considers applicable.

[19] K Schmidt in Münchener Kommentar zum Handelsgesetzbuch: HGB (5th edition, 2021), prior to § 1, para. 36.

[20] The UNIDROIT Principles are standards issued by the International Institute for the Unification of Private Law with the aim of standardising private law. They have no directly binding effect but can be referred to for the purpose of dispute resolution: M Wendland in beck-onlineOGK, 'Freie Rechtswahl', 2022, ROM I-VO Art. 3, para. 82.

[21] K Ritlewski, 'Die Lex Mercatoria in der schiedsgerichtlichen Praxis', SchiedsVZ 2007, 130 (132); S Hölker, Die Rolle der lex mercatoria im Anwendungsbereich des UN-Kaufrechts-, 2006, p. 144.

[22] Wendland, op. cit. note 20, para. 85.3.

[23] B Piltz in U Blaurock and F Maultzsch (editors), Einheitliches Kaufrecht und Vereinheitlichung der Rechtsanwendung, 2017, p. 99. See also UNCITRAL Model Law, Art. 28, para. 3.

[24] It should be noted that there is not even a consistent differentiation between the terms 'compensation' and 'damages' across various jurisdictions: Marboe, op. cit. note 11, p. 12.

[25] M Djordjevic in S Kröll, et al. (editors), CISG (2nd edition, 2018), Art. 74, para. 40; Marboe, op. cit. note 11, p. 101; T Schackel, 'Der Anspruch auf Ersatz des negativen Interesses bei Nichterfüllung von Verträgen', ZEuP 2001, 248 (266).

[26] M Senn, et al., 'Damages in International Arbitration: Understanding the Theories and Methods of Damages Valuation and Compensation' in L Shore, et al. (editors), International Arbitration in the United States, 2017, p. 418.

[27] The debtor is only bound to damages that were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault (French Civil Code, Art. 1231-3).

[28] See Dutch Civil Code, Art. 6:69, para. 2; Spanish Civil Code, Art. 1106; Italian Civil Code, Art. 1223; Finnish Sales of Goods Act, Section 67; Austrian Civil Code, Section 1293.

[29] See CISG, Art. 74 and UNIDROIT Principles, Art. 7.4.2.

[30] Halsbury's Laws of England (5th edition, 2019, Vol. 29), para. 313.

[31] Restatement (Second) of Contracts, § 351.

[32] id., § 351.

[33] The distinction originates from the two rules established in the leading case Hadley & Anor v. Baxendale & Ors, English Court of Exchequer (9 Exch 341), 23 February 1854.

[34] S P Gilbert, 'Dealing with Damages in Commercial Arbitration', DRJ 2018, 67 (78).

[35] C R Seppälä, The FIDIC Red Book Contract: An International Clause-by-Clause Commentary, 2023, p. 98.

[36] J Y Gotanda, 'Damages in Lieu of Performance because of Breach of Contract', Villanova University Charles Widger School of Law, 2006, p. 14; C Monaghan and N Monaghan, Beginning Contract Law, 2013, p. 158. In Germany, for example, expectation damages are referred to as positive interest and reliance damages referred to as negative interest: Djordjevic, op. cit. note 25, Art. 74, para. 40.

[37] See C T Salomon and P D Sharp, 'Damages in International Arbitration' in J Fellas and J H Carter (editors), International Commercial Arbitration in New York (2nd edition, 2016), para. 10.10; Halsbury's Laws of England, op. cit. note 30, para. 502.

[38] See Salomon and Sharp, op. cit. note 37, para. 10.29; Halsbury's Laws of England, op. cit. note 30, para. 503.

[39] Gotanda, op. cit. note 36, p. 14.

[40] Gotanda, op. cit. note 36, p. 13 et seq.

[41] Halsbury's Laws of England, op. cit. note 30, para. 312.

[42] S Litvinoff, 'Moral Damages', LaLRev 1977 (Vol. 38), p. 1.

[43] See J Murphy, 'The Nature and Domain of Aggravated Damages', CambLJ 2010 (Vol. 69), p. 353.

[44] cf. R Mohtashami, et al., 'Non-Compensatory Damages in Civil and Common Law Jurisdictions' in J A Trenor (editor), Guide to Damages in International Arbitration (5th edition, Global Arbitration Review, 2022), p. 39 et seq.; Litvinoff, op. cit. note 42, p. 3 et seq.; V V Palmer, 'An Investigation Into Moral Damage and Pecuniary Reparations in Transnational and International Law', JICL 2015, 305 (316 et seq.); R C Stendel, 'Moral Damages as an "Exceptional" Remedy in International Investment Law – Re-Connecting Practise with General International Law', ZaöRV 2021, 937 (946). Consideration of the much-discussed role of moral damages in investment arbitration is beyond the scope of this chapter.

[45] C Höpfner in Staudinger, BGB (2021), § 253, para. 6.

[46] W Wurmnest, 'Non-Pecuniary Loss', Max-EuP 2012 (-https://max-eup2012.mpipriv.de/index.php/Non-Pecuniary_Loss (accessed 12 March 2024)).

[47] Overall, many assessments from tort law are incorporated into the realm of contracts in French law: Thüsing, op. cit. note 8.

[48] Court of Cassation, Com. 15, May 2012, F-P+B No. 11-10.278.

[49] Court of Cassation, Com. 9, March 2010, No. 08-21.547.

[50] Halsbury's Laws of England, op. cit. note 30, para. 510.

[51] 38 Am Jur 2d, 'Fright, Shock, and Mental Disturbance', § 25.

[52] Halsbury's Laws of England, op. cit. note 30, para. 510; 38 Am Jur 2d, 'Fright, Shock, and Mental Disturbance', § 25; Chelini v. Nieri, 196 P.2d 915 (1948) (upholding a damages award where the plaintiff suffered an emotional shock and resultant physical illness due to the defendant mortician's breach of a contract to preserve the body of the plaintiff's deceased mother); Watts v. Morrow [1991] 1 W.L.R. 1421 (awarding damages for mental distress resulting from a building surveyor's negligence in concluding that the plaintiffs' home had no major defects, when in fact major repairs were required).

[53] P Schlechtriem, 'Non-Material Damages–Recovery under the CISG?' in The Pace International Law Review 2007 (Vol. 19), p. 90. However, the loss to business reputation can often be expressed in monetary terms: Djordjevic, op. cit. note 25, Art. 74, para. 22.

[54] Seppälä, op. cit. note 35, p. 100. Regarding contractual limitations, see section titled 'Contractual limitations of liability', below.

[55] Gilbert, op. cit. note 34, p. 68.

[56] A Björklund in S Kröll, et al. (editors), CISG (2nd edition, 2018), Art. 28, para. 5 et seq.

[57] See US Uniform Commercial Code (UCC), Section 2-716(1) and UK Sales of Goods Act 1979, Section 52. For the historical evolution of this difference, see E Calzolaio, Comparative Contract Law: An Introduction, 2022, p. 142; Gotanda, op. cit. note 36, p. 5 et seq.; see also Salomon and Sharp, op. cit. note 37, para. 10.06; Halsbury's Laws of England, op. cit. note 30, para. 502.

[58] Gotanda, op. cit. note 36, p. 16; L A DiMatteo, et al., 'Once More Unto the Breach: A Comparative Analysis of the Meaning of Breach in Contract Law', TLCP, 2021, 35, p. 86.

[59] See J Leng and W Shen, 'The Evolution of Contract Law in China: Convergence in Law but Divergence in Enforcement?', in Y C Chung, et al. (editors), Private Law in China and Taiwan–Legal and Economic Analyses, 2017, p. 5 (China); Court of Cassation, Commercial Chamber, 25 September 2007, No. 06-15.517 (France); DiMatteo, et al., op. cit. note 58, p. 89 (US common law); Djordjevic, op. cit. note 25, Art. 74, para. 9.

[60] If the injured party demands damages in lieu of performance, that party loses the right to demand performance: German Civil Code, Section 281, para. 4. See R Schulze in R Schulze, et al. (editors), Bürgerliches Gesetzbuch (11th edition, 2021), BGB, § 281, para. 14.

[61] German Civil Code, Section 281, para. 1, sentence 3.

[62] G H Treitel, 'Remedies for Breach of Contract: A Comparative Account' (1988, online edition, Oxford Academic, 22 March 2012), p. 130 et seq.; Restatement (Second) of Contracts, § 346.

[63] Treitel, op. cit. note 62, p. 131.

[64] cf. S Kröll in S Kröll, et al. (editors), CISG (2nd edition, 2018), Art. 39, para. 7 regarding the CISG.

[65] E A Farnsworth, 'Comparative Contract Law' in M Reimann and R Zimmermann (editors), The Oxford Handbook of Comparative Law (2006), p. 12. As per Art. 1344, the debtor is put on notice to perform by formal demand or, where this is provided for by the contract, by the mere fact that the obligation is enforceable.

[66] German Civil Code, Section 286, para. 1. In contrast to French law, however, this is not necessary if there has been a fixed deadline for fulfilment: id., Section 286, para. 2.

[67] id., Section 281, para. 1. Differences may arise if it is a commercial purchase and a fixed delivery date has been agreed: German Commercial Code, Section 376, para. 1; or, for example, if the breaching party seriously and definitively refuses performance: German Civil Code, Section 281, para. 2.

[68] Spanish Civil Code, Art. 1100; Austria Civil Code, Section 1334; Federal Act on the Amendment of the Swiss Civil Code (Code of Obligations), Art. 102 para. 1; Mexican Federal District Civil Code, Art. 2080.

[69] Unless, of course, the parties contractually agreed on it: Calzolaio, op. cit. note 57, p. 153; H Beale, Chitty on Contracts, Vol. I, Section 1, para. 30-016.

[70] UCC, Section 2–607(3); Clemmons v. Upfield US Inc., 667 F. Supp. 3d 5, 19–21 (S.D.N.Y. 2023) (holding that the plaintiff did not provide notice of the breach in a timely manner); Lumbra v. Suja Life, LLC, 674 F. Supp. 3d 7, 19 (N.D.N.Y. 2023) (holding that the plaintiff failed to provide the defendant with timely notice of the breach prior to commencing suit).

[71] Lumbra v. Suja Life, LLC, op. cit. note 70, at 18.

[72] CISG, Art. 39. Apart from the non-conformity of goods, there is no notice requirement under the CISG: Treitel, op. cit. note 62, p. 137.

[73] The case design regarding the parties is inspired by the Problem of the 31st Willem C Vis International Commercial Arbitration Moot.

[74] L Chen, 'Damages and Specific Performance in Chinese Contract Law' in L A DiMatteo and L Chen (editors), Chinese Contract Law: Civil and Common Law Perspectives, 2018, p. 381; Treitel, op. cit. note 62, p. 8.

[75] Dutch Civil Code, Art. 6:75; Spanish Civil Code, Art. 1101; Civil Code of the Islamic Republic of Iran, Art. 227; Italian Civil Code, Art. 1218. See also Gotanda, op. cit. note 36, p. 18 regarding the different regulations on the burden of proof.

[76] S Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', MLR 2009 (Vol. 107), p. 1587; Treitel, op. cit. note 62, p. 8.

[77] E J Brödermann, 'UNIDROIT Principles of International Commercial Contracts' (2nd edition, 2023), Introduction Chapter 7; Gotanda, op. cit. note 36, p. 18; Treitel, op. cit. note 62, p. 10.

[78] DiMatteo, et al., op. cit. note 58, p. 85 et seq.

[79] Farnsworth, op. cit. note 65, p. 12; Grundmann, op. cit. note 76, p. 1589. Regarding the burden of proof of the French rule, see Treitel, op. cit. note 62, p. 9.

[80] Mere lack of fault, however, is not sufficient for a defence: Treitel, op. cit. note 62, p. 9. On that point, see French Civil Code, Art. 1231-1.

[81] J M Lookofsky, Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, p. 149. On the question of whether the common law in fact requires no fault, see Treitel, op. cit. note 62, p. 8 et seq.

[82] DiMatteo et al., op. cit. note 58, p. 86; Restatement (Second) of Contracts, 11 Intro. Note.

[83] Although the general rule is strict liability, a certain extent of fault is required for specific types of contract: Chen, op. cit. note 74, p. 382.

[84] Art. 79 of the CISG derives from Anglo-American contract law; Grundmann, op. cit. note 76, p. 1584.

[85] Brödermann, op. cit. note 77, Introduction Chapter 7.

[86] In a landmark decision on the limiting liability clauses, the Chronopost case, the judge restricted the validity of limiting liability clauses when they relate to an essential obligation of the contract (Com. 22 October 1996, No. 93-18.632).

[87] R Hernández, Elementos de Derecho Civil–Tomo II, Vol. 1 (9th edition, 1999), p. 175.

[88] H Krejci in P Rummel, et al. (editors), ABGB (2nd edition, 1990), § 879, para. 115.

[89] cf. German Civil Code, Section 276 para. 3. For an overview of the holdings of the German Federal Court of Justice on general terms and conditions, see F Graf von Westphalen and G Thüsing, VertrR/AGB-Klauselwerke, Freizeichnungs- und Haftungsbegrenzungsklauseln (45th edition, 2020), para. 1 et seq.

[90] Chitty, The Law of Contracts – General Principles, Vol. I, p. 624 et seq., para. 1030 et seq.

[91] UCC, Section 2-719(1).

[92] id., Section 2-719(2); Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 706–09 (9th Cir. 1990) (finding that contractual repair remedy failed of its essential purpose, thereby lifting the contractual cap on consequential damages).

[93] id., Section 2-719(3); Golden Reward Min. Co. v. Jervis B. Webb Co., 772 F. Supp. 1118, 1122–25 (D.S.D. 1991) (finding that a clause prohibiting recovery of consequential damages is not unconscionable).

[94] Under New York law, for example, 'a party may not insulate itself from damages caused by grossly negligent conduct'. Goldstein v. Carnell Assoc., Inc., 74 AD3d 745, 746 (2nd Dept. 2010). To constitute gross negligence, a party's conduct must 'smack of intentional wrongdoing' or evince 'a reckless indifference to the rights of others'. Sommer v. Federal Signal Corp., 79 NY2d 540, 554 (NY Ct. of Appeals 1992).

[95] Brödermann, op. cit. note 77; UNIDROIT Principles, Art. 7.1.6, para. 4.

[96] Treitel, op. cit. note 62, p. 150 et seq. and p. 162 et seq.; cf. B Mauro, et al., 'Causation' in Common Law and Civil Law Perspectives on Tort Law, 2022; p. 177 et seq. for an overview.

[97] On French law, esp. Civil Code, Art. 1231-4; see also E Steiner, French Law: A Comparative Approach, 2018, p. 254; on English law, cf. Corr v. IBC Vehicles Ltd [2008] 1 AC 884; 'Causation', Practical Law UK Glossary (resource ID: 4-107-5865).

[98] H Oetker in Münchener Kommentar: BGB (9th edition, 2022), BGB, § 249, para. 103; J W Flume in beck-onlineOGK (68th edition, 2023), BGB, § 249, para. 283; BGH NJW 2013, 2345, para. 20; 2017, 263, para. 14; 2018, 541, para. 18.

[99] The relevant point in time is the breach of contract. The Federal Court of Justice follows this approach consistently: see BGHZ 3, 261 (266 et seq.).

[100] Oetker, op. cit. note 98, § 249, para. 120; Flume, op. cit. note 98, § 249, para. 288; pioneering in this respect, E Rabel, Das Recht des Warenkaufs I, 1936, p. 495 et seq.

[101] BGH NJW 1972, 904; Oetker, op. cit. note 98, § 249, para. 159.

[102] ibid.

[103] Esp. French Civil Code, Art. 1231-4. See also Steiner, op. cit. note 97, p. 254.

[104] cf. French Civil Code, Art. 1231-3; see also Steiner, op. cit. note 97, p. 254; Civ. 1re, 28 April 2011, No. 10-15.056, in which the judge applied the test of adequacy on contractual claims; Mauro et al., op. cit. note 96, p. 188; also quoting A M Honoré, Causation and Remoteness of Damage, 1973, p. 41.

[105] B Mauro et al., op. cit. note 96, p. 188 with further references.

[106] C Quézel-Ambrunaz, 'Essai sur la causalité en droit de la responsabilité civil', 2010, p. 141 et seq.; cf. albeit concerning tort law, Mauro et al., op. cit. note 96, p. 188. An example of a country in which the protective scope of the infringed provision also forms a limit is Austria: see K Wörle, 'Verursachung und Haftungsbegrenzung in der Vertragshaftung in Österreich und Frankreich', ZfRV 2014, 275.

[107] Hadley & Anor v. Baxendale & Ors, op. cit. note 33; M A Eisenberg, 'The Principle of Hadley v. Baxendale' in M A Eisenberg (editor), Foundational Principles of Contract Law, 2018, p. 239 et seq.; J Edelman, et al. (editors), McGregor on Damages (21st edition, 2022), Section 8-167.

[108] South Australia Asset Management Corp v. York Montague Ltd [1996] UKHL 10; Caparo Industries Plc v. Dickman [1990] UKHL 2.

[109] Respectively, Brödermann, op. cit. note 77, UNIDROIT Principles, Art. 7.4.2, para. 1, Art. 7.4.4, para. 1; UNIDROIT, UNIDROIT Principles on International Commercial Contracts – Official Commentary, p. 276 et seq.

[110] For an overview, see Treitel, op. cit. note 62, p. 179 et seq.

[111] J Knöfler in B Dauner-Lieb, et al. (editors), BGB Schuldrecht (4th edition, 2021), BGB § 254, para. 1.

[112] cf. Italian Civil Code, Art. 1227; Austrian Civil Code, Section 1304; Portuguese Civil Code, Art. 570; Finnish Sales of Goods Act, Section 70(1).

[113] Brödermann, op. cit. note 77; UNIDROIT Principles, Art. 7.4.7, para. 1. Regarding the duty to mitigate in the CISG and the Principles of European Contract Law (PECL), see CISG, Art. 77 and PECL, Art. 9:505.

[114] Academics welcome the principle regarding contract law: cf. for an overview on the current state of opinion, S L Pautremat, 'Mitigation of Damage: A French Perspective' in International and Comparative Law Quarterly, 2006, Vol. 55, No. 1, p. 205 et seq.

[115] Civ. 2e, 24 November 2011, No. 10.25.635.

[116] Oetker, op. cit. note 98, § 249, para. 233 et seq.; A Röthel, 'Vorteilsanrechnung auf Ersatzansprüche wegen manipulierter Abgaswerte (sogenannter VW-Dieselskandal)', JURA 2021, 218.

[117] B Chappuis, 'La détermination du dommage dans la responsabilité du gérant de fortune', Journée 2008 de droit bancaire et financier, 2009, p. 103 et seq.

[118] cf. P Mankowski, Commercial Law; UNIDROIT Principles, Art. 7.4.2, para. 3.

[119] cf. for instance Forsikringsaktieselskapet Vesta v. Butcher and others [1989] AC 852; Barclays Bank plc v. Fairclough Ltd [1995] QB 214.

[120] Beale, op. cit. note 69, Vol. I, Section 6.

[121] id., Vol. I, Section 6, para. 30-114.

[122] id., Vol. I, Section 6, para. 30-123.

[123] Restatement (Second) of Contracts, § 350; § 55:24. 'Failure to mitigate as affirmative defence', 5 Bus. & Com. Litig. Fed. Cts. § 55:24 (5th edition).

[124] Restatement (Second) of Contracts, § 350 cmt. b.

[125] id., § 55:25. 'Windfalls, double recoveries, and the collateral source rule', 5 Bus. & Com. Litig. Fed. Cts. § 55:25 (5th edition).

[126] See Factory At Chorzów, op. cit. note 10.

[127] On common law, see Paul-A Gélinas, 'General Characteristics of Recoverable Damages in International Arbitration', in Y Derains and R Kreindler (editors), Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law, Vol. 4, p. 11 et seq.; Robinson v. Harman (1848) 1 Ex 850; 'Measure of damages in contract', Practical Law UK Glossary (resource ID: 7-107-6335); on civil law, cf. Flume, op. cit. note 98, § 249, para. 80; R David, 'Measure of Damages in the French Law of Contract', Journal of Comparative Legislation and International Law 1935 (Vol. 17), p. 61.

[128] See, e.g., G Born, International Commercial Arbitration (3rd edition, 2020), p. 2487 et seq.

[129] The standard of proof is, nonetheless, considered as fairly high in comparison to common law jurisdictions: see K M Clermont and E Sherwin, 'A Comparative View of Standards of Proof', American Journal of Comparative Law 2002 (Vol. 50), p. 243 (248 et seq.).

[130] K Bacher in beck-onlineOGK (51st edition, 1 December 2023), ZPO, § 286, para. 2.

[131] According to the German Civil Code, Section 252, cf. C Kern in O Jauernig (editor), Bürgerliches Gesetzbuch (19th edition, 2023), BGB, § 252, para. 2; Schulze, op. cit. note 60, § 252, para. 3.

[132] Edelman, et al., op. cit. note 107, Section 10-016 et seq.; Bank St Petersburg PJSC and another v. Arkhangelsky and another [2020] EWCA Civ 408; Miller v. Minister of Pensions [1947] 2 All ER 372; this happens most frequently according to PwC and Queen Mary University of London, 'Damages awards in international commercial arbitration – A study of ICC awards', p. 3 (-https://www.pwc.co.uk/forensic-services/assets/documents/trends-in-international-arbitration-damages-awards.pdf (accessed 12 March 2024)).

[133] Restatement (Second) of Contracts, § 55:31. 'What the plaintiff must prove', 5 Bus. & Com. Litig. Fed. Cts. § 55:31 (5th edition).

[134] Brödermann, op. cit. note 77; UNIDROIT 2016 Art. 7.4.3, para. 1.

[135] G Born, op. cit. note 128, p. 2488.

[136] G Born, 'On Burden and Standard of Proof', in M Kinnear et al. (editors), Building International Investment Law: The First 50 Years of ICSID, 2016, p. 43 (50); see also G Born, op. cit. note 128, p. 2488; Kardassopoulos v. Georgia, Award in ICSID Cases No. ARB/05/18 and No. ARB/07/15, 3 March 2010, para. 229. See, for further references on investment arbitration, V Subhiksh, 'Standard of proof', in Jus Mundi Wiki Notes, 20 November 2023 (-https://jusmundi.com/en/document/publication/en-standard-of-proof (accessed 12 March 2024)); R B von Mehren, 'Burden of Proof in International Arbitration', in A J van den Berg (editor), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, Vol. 7, 1996, pp. 126 et seq., who infers a preponderance of evidence.

[137] Subhiksh, op. cit. note 136, para. 16 et seq.; cf. also, inter alia, Strabag v. Libya, Award in ICSID Case No. ARB(AF)/15/1, 29 June 2020, para. 296 et seq.

[138] For example, in France, an award was upheld in which exclusively the UNIDROIT Principles were applied, although there was no explicit agreement between the parties to this effect: see Court of Appeal of Paris, 25 February 2020, No. 17/18001.

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