The above study confirms that there is an almost universal consensus among tribunals that the goal of damages for breach of contract is to place the injured party in the position that it would have been in had the contract been performed. Consequently, tribunals recognize that the injured party is typically entitled to recover both losses incurred as well as gains of which it was deprived because of the breach. This is not surprising. As the survey in section III discloses, the laws in a vast majority of countries recognize these principles.

VI. Conclusion

Today, there is a universal consensus that a party who has been injured by a wrongful breach of contract is entitled to be placed in the position the party would have been in had the contract been performed. Therefore an injured party is entitled to recover both losses incurred as well as gains of which it was deprived because of the breach. While national laws impose different requirements and limitations on the recovery of lost profits, the differences, in general, have not been problematic for tribunals deciding transnational contract disputes. Rather, it is the calculation of lost profits that has proved troublesome and has resulted in different treatment for similarly situated parties. Of particular note has been conflicting tribunal awards resulting from the application of the new business rule and the abuse of rights doctrine as an international legal principle. Neither should limit a legitimate claim for lost profits. To do so would leave the injured party less than whole, fail to achieve the goal of full compensation, and provide a windfall to the wrongdoer. The current problems associated with the calculation of lost profits also could be reduced if parties set forth in their agreement the method that the tribunal is to use to calculate lost profits in the event of a breach of contract and if tribunals more actively employ their own experts to help understand the complex process of calculating damages.

Referring Principles:

VII.3.2 - Calculation of damages