

# Moral Damages in Investment Arbitration

## Kluwer Arbitration Blog

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As has been chronicled in [previous postings](#), the 2008 decision of an ICSID arbitral tribunal to award \$1 Million (US) in “moral damages” to an injured company has been eyed covetously by other investor-claimants in investment treaty disputes.

Such sums may be “small change” compared to the more conventional forms of economic compensation claimed for treaty breaches. Still, it’s become *de rigeur* for claimants – and even some states – to tack on claims for a few million Dollars in moral damages.

Arbitrators have been slower to award moral damages. However, in a recently-concluded ICSID arbitration proceeding, a tribunal grappled at considerable length with the claimant’s \$3Million (US) moral damages request.

You can find a fuller accounting of the Joseph Charles Lemire v. Ukraine case [here](#), so I won’t rehearse all of its facts. It suffices to mention that Mr. Lemire is a U.S. investor in Ukraine’s radio broadcasting industry, and that he accused Ukrainian broadcasting authorities of unfairly rejecting a long string of applications for new radio frequencies that would have permitted him to expand his radio business.

Arbitrators ultimately held that Ukraine’s treatment of Mr. Lemire did not meet the standards of fairness set out in the U.S.-Ukraine bilateral investment treaty, and awarded him \$8.7 Million (US) for his financial losses.

Mr. Lemire made a further request for moral damages, complaining that he had suffered indignity, stress, humiliation and other forms of moral harm as a result of the state’s serial (and legally unfair) rejection of radio licensing applications. He also cited the stress and anxiety occasioned by state-harassment, including a series of (allegedly irregular) inspections, and license renewal delays.

### **What “exceptional circumstances” would justify moral damages?**

In its March 28, 2011 Award, the tribunal debated whether Mr. Lemire’s treatment constituted the type of “exceptional circumstances” that warrant an award of moral damages.

To elucidate the meaning of “exceptional circumstances” the arbitrators looked to certain arbitral awards plead by the parties. They identified three criteria:

- the State’s actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and

- both cause and effect are grave or substantial

### **Mr. Lemire's injuries don't meet the test**

The tribunal acknowledged that Ukraine's repeated and unfair rejection of Mr. Lemire's licensing applications had led to some "negative impact" to his reputation and entrepreneurial image. However, the gravity of this harm could not be likened to the hurt caused from armed threats, or by witnessing the deaths of others, or the other types of suffering endured by claimants in earlier cases where moral damages were warranted.

The tribunal also found that the allegedly harassing inspections carried out on Mr. Lemire's company were not undertaken in order to "intimidate" the foreign investor.

Thus, while the tribunal expressed sympathy for Mr. Lemire's stress and anxiety, it held that the economic compensation awarded was sufficient to compensate for the moral aspects of his injuries.

### **Ukraine urged that any moral damages be calculated in line with human rights law**

Because Mr. Lemire's suffering did not rise to the level where moral damages were warranted, arbitrators did not need to address an argument by Ukraine that such damages should be quantified in line with the practice under international human rights law.

Ukraine pointedly noted that Mr. Lemire had offered no explanation for his decision to claim \$3 Million (US). Moreover, the government observed that awards of moral damages before international human rights courts and tribunals "are much lower than that requested by Claimant."

I've made a similar argument in a [2009 article](#), in my *Investment Arbitration Reporter* newsletter. Frankly, it's unheard of for human rights tribunals to award 1 Million (US), much less 3 Million (US), even in cases of the gravest indignities such as torture or extra-judicial killing.

I happen to favour the award of moral damages in certain investment treaty cases. Such a remedy can be a crucial one where claimants have suffered grave indignities, particularly when calculable business losses may be minimal. However, I can't see a principled reason why the same manner of indignities visited upon claimants - be they in human rights or investment law contexts - should result in the award of wildly divergent sums by international tribunals

If arbitrators were to engage in a comparative analysis of the quantification of moral damages it might help, in its own small way, to alleviate the perception that investment treaty arbitration is a system of "conciierge-level" international justice that puts aliens (or at least foreign investors) on a privileged plane above all other claimants in international dispute resolution.