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**Title**

How comparative (empirical) analysis can help turn facts into legal guidelines and reduce judicial uncertainty: application to damages *quantum*

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**Abstract**

From the perspective of the aggrieved party as well as the one of the debtor who will need to compensate, the damages *quantum* is obviously key. Hence, it is surprising to let this valuation process to the sole sovereign power of judges as the *quantum* is traditionally considered as a matter of facts. Each litigation would then be a unique case with its idiosyncratic characteristics calling for a *sui generis* outcome.

This paper shows the limits of such a conception of positive law. It leads to inefficient bargaining and, more importantly, to structural judicial uncertainty that is detrimental to the legitimate expectations of both parties. In practice, it deeply corrupts a fundamental principle in contract law: full compensation. I argue there exist normative avenues to consider economic loss, compensatory damages and hence damages valuation as a matter of law that should follow methodological rules and guidelines. The application of such rules and guidelines would be controllable while leaving discretion to judges on the *quantum* itself. I open some of those avenues specifically on damages for breach of contract using two simultaneous methodologies: On one hand, a comparison between French civil law, American common law and international commercial law and, on the other hand, an empirical analysis mixing field interviews with expert practitioners and a systematic quantitative analysis of litigations in cases where damages are difficult to measure.

In order to clarify the background, the **Introduction** describes the fundamental principles of remedies for contract breach in the three considered bodies of law.

**The First Part** highlights the lack, in the law, of a precise definition of the « full compensation » principle, and *a fortiori* the lack of rules for assessing compensatory damages. The legal doctrine

tries to fill in the blank by describing the different types of damages awarded, notably in the United States. The problem persists when the loss is certain but its evaluation remains difficult or uncertain. Indeed, French and American legal systems and International harmonization tools all three impose two conditions for compensation: the loss must be certain and foreseeable, to which are added - only in French law – direct, - only in American law – economic, and – in American and International commercial law, still with the exception of French law - mitigated. Courts, potentially assisted by experts, will bear the final responsibility to assess the *quantum*.

**The Second Part** fails to identify in the legal doctrine or the case law any calculation methodology missing in the statutes and the codes. However, it explains the differences and resemblances between the three legal systems. The assessment of the economic loss and the calculation methodology for damages are considered to be matters of facts in all three legal and judicial systems: trial courts and judges thus retain a sovereign power over the *quantum* evaluation, resulting in great uncertainty for the parties. Reducing judicial uncertainty requires the choice and creation of a common framework.

It results in **the Third Part** that referenced compensatory damages guidelines or schedules can be practically developed from compiling relevant legal precedents. A similar approach was successfully used to develop sentencing guidelines and, personal injury schedules. The introduction of such guidelines or schedules would benefit academics in their debates, parties in the drafting of their contracts and counsels in their pre-trial exchanges. Eventually, judges could use them as tools to assist their rulings. The paper concludes with prescriptions on judicial practices and prospect of predictive justice thru shared compensatory damages schedules which could eventually lead to machine learning artificial intelligence models.

Wider research is deserved in other disciplines such as history and socio-psychology to identify potential shifts in judicial behaviors and explain the rationale behind converging trends in damages. Deeper computer aided empirical analysis would allow to reach statistically significant samples.

**Key Words**

Damages; full compensation; comparative law; empirical legal studies; predictive justice.

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