

# Lost Profits and the Crystal Ball

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# Lost Profits – A leap in the dark

## ▶ Damnum Emergens

- ▶ - actual damages
- ▶ - reality
- ▶ - hard evidence

## ▶ Lucrum Cessans

- ▶ - not realised profit
- ▶ - fiction – ‘but off’ test
- ▶ - unknown contingencies
- ▶ - ‘reasonable certainty’

# Assessment even if difficult ???



# Even if difficult

- ▶ No limits in time ?
- ▶ No 'positive-legal' but business approach
- ▶ In fact : historic data ; going concern  
business plan, contract not renewed  
3-10 years (5 years)
- ▶ If too foggy : perte d'une chance  
= low 'reasonable certainty'

# Pre - / Post – Award Profits

- ▶ Pre-Award Profits
  - ▶ Hindsight
  - ▶ Record of contingencies : known evolution – like industry
- ▶ Post- Award Profits
  - ▶ Most likely probability of contingencies
  - ▶ Time-limit by duty to mitigate ?

# Continuing Profit Losses

- ▶ [Partial Judgments for materialised losses]



- ▶ Arbitration :
  - ▶ Partial awards ? Inconvenience
  - ▶ Successive Awards ? [ NAFTA]