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## Don't Delay! Addressing Damages Early in International Arbitration by A.M. Anderson and M. Vats-Fournier

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## **Don't Delay! Addressing Damages Early in International Arbitration**

by Alan M. Anderson, PhD, FCI Arb, and Mira Vats-Fournier, JD, MCI Arb\*

### **Abstract**

*Calculation and presentation of damages is an essential aspect of any international arbitration case. However, few counsel or arbitrators are familiar or comfortable with damages, their calculation, or presentation. Damages often are ignored early in an arbitration proceeding or simply left to the end. As a result, damages awards are often less than satisfactory – for the parties, counsel, and the arbitrators. This article argues that damages should be analyzed early in the arbitration process and that this can be done cost-effectively. It suggests a number of issues for early exploration. Early evaluation of damages by a qualified neutral also is presented as a means to promote timely resolution of a dispute.*

### **I. Introduction**

Variable costs, incremental profits, discounted cash flow, fair market value – few counsel or arbitrators understand, much less enjoy, these concepts. Yet these concepts, and many others, are critical to determining damages in international arbitration. The vast majority of counsel and arbitrators have, at best, a rudimentary understanding of principles of accounting, economics, and marketing. Many positively abhor issues regarding damages. As a result, matters involved with calculating and presenting damages often are left until the end of preparations, or deferred by agreeing to bifurcation of liability and damages issues – perhaps in the hope that a decision on liability will prompt settlement and thereby avoid the need to complete damages calculations entirely.

But this should not be how damages in international arbitration are managed. Damages are a critical – in some cases *the* critical – aspect of any dispute. The liability and damages parts of a dispute are interrelated. A solid liability case, without a correspondingly solid damages claim, normally is of little value. Spending hundreds of thousands (or even millions) of Euros in legal fees to establish liability is a poor investment if the maximum potential damages award is in the tens of thousands. In order to evaluate and prepare a matter properly, a party and its counsel have to know realistically what they are “playing for” or defending against early in the arbitration process.

This article argues that damages issues should be analyzed early in international arbitration. It first illustrates some problems that may arise through a failure to understand or present clearly a party's damages claim. It then presents the Pareto, or 80/20, Principle to support the argument that damages issues can, and should be, evaluated early in the dispute and that this can be performed cost-effectively. This article then identifies and suggests a number of damages-related issues that should be explored and analyzed early in any international arbitration. Finally, early evaluation of damages by a qualified neutral is presented as a means to promote timely resolution of a dispute.

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## II. The Problems Caused by Ignoring Damages Early

Despite the importance of quantification of damages in virtually every international arbitration, essential issues relating to damages analysis, calculation, and presentation have long been ignored. As one leading international arbitrator stated barely eight years ago:

It is surprising in comparative terms how little has been written to date about damages in international arbitration. Yet quantification of damages is usually integral to the whole process and is normally the issue of greatest relevance to the parties themselves. Damages represent in monetary form reimbursement for the loss suffered by the innocent party. In cases where the claim or counterclaim is for damages, an award favourable on liability alone is likely to be of no real value to a claimant or counter-claimant, unless possibly if it is a partial award in a bifurcated hearing and a trigger for settlement.<sup>1</sup>

While much more attention now is devoted to damages issues in arbitration and in the published literature, almost no attention is focused on the importance of assessing and considering damages issues *early* in the dispute resolution process.

This failure can and does result in a variety of pitfalls and problems for the parties, their counsel, and the arbitral tribunal. A dispute that should have been resolved early instead continues, with the claimant or respondent – or both – wasting resources and incurring far more in costs than may be appropriate in light of the quantum reasonably in issue. Because the particular damages theory that fits the evidence is not considered early, the wrong “type” of damages expert may be retained, such as a valuation specialist when an accountant is required. Necessary evidence may not be obtained or prepared. A claim that should be worth more, or less, is presented to the tribunal. Even worse, the damages claim may be presented in such a fashion that the members of the tribunal do not understand the merits of that party’s position.

While other than anecdotal evidence of the problems associated with a failure to consider damages issues early in international is difficult to obtain, data from investment treaty arbitral awards, which are often published, does provide some indication. One recent study found that the amount of damages awarded by tribunals over a fifteen-year period of investor-state arbitral awards examined, was only 37% of the amount claimed. Although that study found that the number of pages in the final award that tribunals devoted to damages issues had increased over the study period, the percentage of the total pages of the arbitral award focused on damages stayed constant at merely 15%.<sup>2</sup> Recently, an ad-hoc committee of the International Centre for Settlement of Investment Disputes (ICSID) granted the claimant’s request to partially annul an award because the ICSID tribunal’s liability findings could not be reconciled with the damages findings. The ad hoc committee further stated:

The Committee takes issue with the complete absence of any discussion of the Parties’ expert reports within the Tribunal’s analysis of the loss of value claim.

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<sup>1</sup> Hilary Heilbron, “Assessing Damages in International Arbitration: Practical Considerations,” in Lawrence C. Newman/Richard D. Hill (eds.), *The Leading Arbitrators’ Guide to International Arbitration*, 2nd ed., Huntington, NY 2008, 445.

<sup>2</sup> PricewaterhouseCoopers, “2015 – International Arbitration damages research: Closing the gap between claimants and respondents,” (2015), 6-7, available at [www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf](http://www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf) (21 June 2016).

While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory.<sup>3</sup>

Extrapolating the findings of the aforementioned study and the recent ICSID annulment decision to international arbitration generally, and more specifically to the failure to consider and assess damages issues early in any dispute, is difficult. However, the extent of the divergence between the amount of damages requested and actual awards, and the apparent inability of at least one tribunal to consider and determine damages appropriately, suggests that problems exist in evaluating and presenting damages awards. Ignoring issues relating to damages in the early stages of any dispute, especially before a claim is filed, likely contributes to the disconnect that exists between damages claims and awards and the ability of a tribunal to understand clearly the contentions and presentations of the parties regarding damages. Assessing damages issues early can only benefit a party's case.

### III. The Pareto Principle

In all but the simplest and straightforward of commercial disputes, analyzing and assessing damages is expensive and time-consuming. The costs associated with the damages aspects of a case often increase almost exponentially the more complex the matter or the greater the amount of damages in issue.<sup>4</sup> For example, the magnitude of party costs, which include expert fees, in investment treaty arbitration, is staggering and often amounts to millions or tens of millions of dollars.<sup>5</sup> The cost for experts generally is considered to be similar, as a percentage of total costs, in non-investment treaty arbitration.<sup>6</sup> In an effort to control costs, the International Chamber of Commerce (ICC) has suggested that the starting presumption in commercial arbitrations should be that no expert witnesses will be required for the dispute.<sup>7</sup> Such a presumption is rarely, if ever, practical in all but the most simplistic of matters with very easy damage claims. Clearly, however, the costs associated with damages issues and

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<sup>3</sup> *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (Annulment Proceedings), Decision on Annulment (5 Apr. 2016), 36, ¶131.

<sup>4</sup> For a study establishing this fact in ICSID cases, see Tim Hart, "Study of Damages in International Center for the Settlement of Investment Disputes Cases," Credibility Consulting (2014), 14-15, available at [www.credibilityconsulting.com/ICSID\\_Damages\\_Study.pdf](http://www.credibilityconsulting.com/ICSID_Damages_Study.pdf) (21 June 2016).

<sup>5</sup> See, e.g., Matthew Hodgson, "Costs in Investment Treaty Arbitration: The Case for Reform," *Transnational Dispute Management Journal*, 11 (2014) 1, 1, available at [http://www.allenoverly.com/SiteCollectionDocuments/Costs in Investment Treaty Arbitration.pdf](http://www.allenoverly.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf) (8 July 2016); Matthew Hodgson, "Counting the costs of investment treaty arbitration," *Global Arbitration Review online news* (2014), 2-3, available at [http://www.allenoverly.com/SiteCollectionDocuments/Counting\\_the\\_costs\\_of\\_investment\\_treaty.pdf](http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf) (8 July 2016); Diana Rosert, "The Stakes Are High: A review of the financial costs of investment treaty arbitration," International Institute for Sustainable Development (2014), 8-10, available at <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> (8 July 2016).

<sup>6</sup> Rosert, "The Stakes Are High," 8; Matthias Scherer, "Arbitral Institutions under Scrutiny," *Kluwer Arbitration Blog* (2011), available at <http://www.kluwerarbitrationblog.com/2011/10/05/arbitral-institutions-under-scrutiny/> (8 July 2016).

<sup>7</sup> ICC Commission Report, "Controlling Time and Costs in Arbitration," International Chamber of Commerce (2012), 13, ¶62, available at [www.iccwbo.org](http://www.iccwbo.org) (8 July 2016).

damages experts often can be viewed as a barrier to early consideration and analysis of this critical part of any dispute.

Fortunately, in 1896, Italian economist Vilfredo Pareto posited what has become known as the Pareto Principle, commonly referred to now as the 80/20 Principle.<sup>8</sup> “The 80/20 Principle asserts that a minority of causes, inputs, or effort usually lead to a majority of the results, outputs, or rewards.”<sup>9</sup> The Pareto Principle applies for the purpose of early evaluation and analysis of damages in international arbitration as well. Typically, 80% of the benefit from early damages assessment can be achieved for 20% of the costs.<sup>10</sup> Indeed, one arbitration organization has recommended that early identification of damages issues is “[o]ne of the most important and cost effective steps arbitrators can take”.<sup>11</sup>

Thus, fears of the costs usually associated with determination of damages should not deter parties and their counsel from assessing damages and related issues early. Ignoring damages issues until later in a dispute – even just until after the claim is filed – will only result in higher damages expert costs and higher legal fees. Parties and their counsel in international arbitration should not shy away from or avoid analyzing and assessing damages-related issues early. The Pareto, or 80/20 Principle, ensures that significant and usually cost-saving benefits can be obtained by early consideration of damages issues.

#### **IV. Suggested Issues for Early Consideration**

No party or counsel should want to present an unreasonable, excessive, or unfounded damages claim to an arbitral tribunal. However, this occurs far too frequently. The goal of every lawyer and his or her client should be to present a well-founded, well-articulated, and solidly-based damages claim or defense. A claimant that receives a decision from the arbitration panel that awards only a fraction of the damages requested when liability is found should be the exception and not the rule. Similarly, if a tribunal determines liability issues favorably to the respondent, the respondent’s damages assessment, if any, should be the result. An arbitral award that is subject to review or annulment because the panel has failed to understand the damages evidence is just as much, if not more, the fault of the lawyer and expert presenting the claim as it is the arbitrators. The ideal damages outcome is one in which every cent of damages proffered is awarded based on both the liability findings and the presentation and analysis of the expert, whether representing the claimant or the respondent. Bifurcation of liability and damages issues in arbitration, which often occurs in the (faint) hope that a decision on liability will obviate the need to decide damages, is not a reason to ignore damages issues early in a dispute. While the following suggestions may seem obvious, many continue to be ignored by even the most seasoned counsel.<sup>12</sup>

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<sup>8</sup> See generally Vilfredo Pareto, *Manual of Political Economy: A Critical and Variorum Edition*, Aldo Montesano, Alberto Zanni, Luigino Bruni, John S. Chipman, and Michael McLure (eds.), Oxford, UK 2014.

<sup>9</sup> Richard Koch, *The 80/20 Principle: The Secret to Achieving More with Less*, 2nd ed., New York 2008, 4.

<sup>10</sup> Carol Ludington, “Eat the Frog First: Address Damages Early,” *New York Dispute Resolution Lawyer*, 8 (2015) 2, 19, available at <http://www.nysba.org/CustomTemplates/SecondaryStandardPubs.aspx?id=32586> (8 July 2016).

<sup>11</sup> CPR International Committee on Arbitration, “CPR Protocol on Determination of Damages in Arbitration,” International Institute for Conflict Prevention & Resolution (2010), 3, available at [www.cpradr.org](http://www.cpradr.org) (8 July 2016).

<sup>12</sup> Some of the suggestions made hereafter are adapted from Alan M. Anderson, “Damages Management in IP Litigation,” *Intellectual Property Litigation*, 19 (2007) 1, 6-7.

A party and its counsel should start managing the damages aspects of its claim or claims as early as possible. Consider the damages theory as part of preparation of the overall theory of the case, including liability. The damages approach must “fit” the liability parts of an arbitral claim. A good liability case does not exist without a good damages case, and vice versa. Accordingly, before a claim is filed, or at worst shortly thereafter, select a damages expert, if reasonably necessary, and get him or her involved. Make sure the proper type of damages expert is selected with the appropriate qualifications or expertise. Do not select an economist when you need an accountant, for example. Determine if the case is one in which more than one damages-related expert is necessary, such as an expert in valuation matters.

Do not select an expert who has never given an opinion regarding damages in the particular type of claim at issue. Do not retain an expert who has never previously testified before a tribunal – either in court or at a final hearing. Make certain the expert who is retained is comfortable rendering an opinion in the area in question. An expert never should be asked to render an opinion with which he or she is not completely comfortable or which is outside their area of expertise. A well-qualified and experienced expert can dominate the other side’s expert if a joint report is requested by the tribunal or if “hot-tubbing” occurs. If the expert is not in agreement with the type of damages claim to be presented, rethink the strategy and theory. After all, they are the experts.

Identify a realistic damages theory under the applicable law as early as possible, preferably before filing a claim. Being realistic does not preclude being creative, provided the expected evidence supports the approach. One should make certain that both the documentary and the testimonial evidence will support the theory. Do not hesitate to consider alternative theories if the path the evidence will take is not entirely clear at the outset. However, this does not mean that an “A; if not A, B; if not B, C; etc.” approach ultimately should be adopted. Determining damages is not a game of darts. Proper consideration early in the process should avoid the need and inclination to present multiple alternative damages calculations based on identical or similar sets of facts.

Next, make or obtain a realistic preliminary determination of the likely magnitude of the damages claim in light of the applicable law and underlying theory. This is where the 80/20 Principle is especially applicable. A realistic preliminary analysis can be obtained if the expert performs 20% of the necessary work. An initial damages assessment by a qualified and appropriate damages expert “involves few, if any, documents, a small number of interviews, and limited research.”<sup>13</sup> An initial damages assessment identifies viable damages measures, a rational range or magnitude of damages, and key issues and needed evidence. Fit the amount of effort and cost to be spent on damages to the size of the claim. It makes no sense to spend €400,000 in expert fees and costs to attempt to recover €500,000 in damages. Rational decisions cannot be made, either to file an arbitration claim or the amount of effort to be expended, unless counsel and the client understand the realistic size of the claim.

Based on the analysis and assessment thus far, consider how the damages claim might affect the selection of members of the arbitral tribunal. A tribunal comprised of members who likely will have a difficult time understanding a complex damages case will not benefit either the claimant or the respondent. Particularly if damages issues may predominate over liability

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<sup>13</sup> Ludington, “Eat the Frog First,” 19. See also Carol Ludington, “If We Ignore It, Maybe It Will Go Away,” *Just Resolutions e-News*, ABA Section of Dispute Resolution (2014), 1-2, available at [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/Ludington\\_%20If\\_We\\_Ignore\\_It.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/Ludington_%20If_We_Ignore_It.authcheckdam.pdf) (5 July 2016).

issues, consider whether to appoint an arbitrator who will more likely understand the damages issues, whether on behalf of the claimant or the respondent. Why appoint an arbitrator who may have a difficult time understanding the damages issues? If the party has the ability to appoint one arbitrator, should that person have special expertise or experience in damages? Should at least one of the arbitrators be a qualified accountant or economist? If liability is clear or an insignificant issue, consider asking for a qualified tribunal to address only damages issues.

Assign responsibility and accountability for preparation of the damages case early to a suitably senior member of the team. Make certain this person coordinates the work of the expert and the development of the damages case throughout the proceeding. Do not assign responsibility to someone who has no prior damages experience or some education or training relevant to damages. If an inexperienced or unqualified individual is assigned the task, too often important information is missed or excessive time and effort spent, resulting in increased costs.

After the damages theory or theories to be pursued have been identified and confirmed, the appropriate expert selected, and the damages-related tasks assigned, then focus on the gathering of information on the issues that are relevant and that must be established for the theory to prevail. Ask the expert as soon as possible what information and facts he or she needs to have to formulate the opinion that will be presented to the tribunal. It makes no sense to pursue a particular damages strategy if the necessary evidence is not obtainable or is obtainable only with excessive cost. Provide the expert with the right documents and information from the start.

If relevant and important damages information is likely in the possession of the respondent, enlist the help of the expert to frame an appropriately specific request for a Redfern Schedule. The expert should be able to provide a succinct statement of why a particular document or documents are necessary and relevant to the claim.

Do not ignore that relevant and important damages information may come from a variety of individuals, including third parties. Some of the best evidence may come from individuals who may not be an obvious source. Identify those sources early, and make sure the expert has, or will have, access to everyone he or she wishes to speak with in order to prepare their opinion. Once the expert has identified important sources, this information can guide preparation of witness statements for presentation to the tribunal.

Insist on the involvement of the testifying expert – not that individual’s staff – from the beginning and throughout the planning, preparation, and report drafting process. This does not mean that more “cost-effective” subordinates cannot be utilized. But too much delegation by the expert to his or her staff, especially at the beginning of an arbitral proceeding, often results in important issues being missed, excessive time and costs spent on insignificant or irrelevant points, and duplication of effort. The testifying expert may then have to spend a significant amount of time “getting up to speed” prior to the final hearing. A testifying expert who is ill-prepared and too unfamiliar with important details and information will be subjected to devastating examination before the arbitral tribunal, causing the damages claim or defense to be greatly reduced or rendered valueless.

Never allow a damages expert to present a theory that is inconsistent with the liability expert’s opinion, or vice versa. Ensure cooperation between any liability experts and the

damages expert to the extent necessary from the beginning. Although damages and liability issues usually are distinct, there may be overlap. Problems may arise if there is no communication between individuals responsible for the different areas.

Finally, think about how the damages claim will be presented to the tribunal in an informative, interesting, and straight forward manner from the very beginning of a case. Consider instructive demonstratives that may be used to explain the damages case to the arbitrators, how it fits the evidence, and why the amount of damages sought is reasonable. Damages does not need to be, and should not be, a boring and stultifying part of the case. If damages are considered and addressed early in the life of a dispute, a better and more cost-effective outcome or resolution, should be the result.

## **V. Damages and Early Neutral Evaluation**

“Early Neutral Evaluation” is “a process in which a third party neutral examines the evidence and listens to the disputants’ positions, and then gives the parties his or her evaluation of the case.”<sup>14</sup> Early Neutral Evaluation does not result in any form of award or final determination. Rather, it results in a reasoned evaluation of the parties’ positions by a qualified neutral evaluator. The evaluator listens to the parties’ evidence and arguments, normally presented in summary fashion or via short written submissions or both, and then provides his or her evaluation. Thus, Early Neutral Evaluation is distinct from the initial damages assessment suggested previously. Indeed, an early evaluation by a neutral can be obtained before an arbitration is commenced or a damages expert is retained to confirm the viability and magnitude of the anticipated damages claim. As applied to damages issues in international arbitration, Early Neutral Evaluation can be an effective means to promote the resolution of the dispute, especially in situations where damages issues dominate or where one side is viewed as having unreasonable expectations regarding damages.

Often there is a significant disparity between the claimant’s position on damages and that of the respondent.<sup>15</sup> While this difference may be the result of differing views on liability issues, frequently the damages experts assume similar or identical sets of facts yet opine to drastically different damage numbers. Reducing this gap – and thereby the expectations held by the claimant or the respondent – may facilitate settlement or resolution of a dispute. A party who has heard a qualified damages neutral provide an evaluation of the damages in a dispute should gain a better understanding of the likelihood of achieving their preferred damages outcome, and thereby become more reasonable toward a negotiated settlement.<sup>16</sup> A neutral evaluation of damages – early or even later in the dispute – or as an alternative or adjunct to a formal mediation, should influence the parties’ positions. Moreover, presenting a party’s damages case in a succinct and well-articulated manner to a qualified neutral and receiving their evaluation may assist counsel in refining and preparing the presentation before the arbitral tribunal if the dispute is not resolved.

In some disputes, the amount of damages to be awarded is the only real issue. For example, if a long-term distribution arrangement has been terminated, the amount of compensation owed

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<sup>14</sup> John Somers Blackman, “Neutral Evaluation: An ADR Technique Whose Time Has Come,” (1997), 1, available at <http://library.findlaw.com/1999/Sep/1/128447.html> (9 July 2016).

<sup>15</sup> One recent study found that in a sample of investor-state arbitrations, the respondent’s position on damages averaged only 13% of the claimant’s. PricewaterhouseCoopers, “2015 – International Arbitration damages research,” 5.

<sup>16</sup> Ludington, “If We Ignore It, Maybe It Will Go Away,” 1-2.

to the terminated distributor may be the stumbling block to an amicable resolution. If a qualified damages expert evaluates the parties' respective positions and arguments, even before an arbitral proceeding is commenced and before positions harden, a conciliated resolution in a cost-effective manner, which will benefit both parties, is more likely. An Early Neutral Evaluation, focused on damages issues, should be considered by parties and their counsel in any international arbitration.

## VI. Conclusion

Calculation and presentation of damages is an essential aspect of any international arbitration case. Damages should not be left to: "Well, that is just a matter of quantum." Because few counsel or arbitrators are familiar or comfortable with damages, their calculation, or presentation, damages issues often are ignored early in an arbitration proceeding or simply left to the end. The potential adverse consequences of not properly addressing damages issues early in the process – even before a request for arbitration is filed – are clear. Damages awards that are less than satisfactory – for the parties, counsel, and the arbitrators – is the likely result. Instead, damages should be analyzed early in the arbitral proceedings. Such an assessment can be performed and obtained cost-effectively. By addressing damages early in international arbitration, parties and their counsel can ensure a better understanding of an important aspect of their case, present their claim more clearly to the arbitrators, and perhaps lead to a faster, more efficient resolution of the dispute. Parties and their counsel should not delay; they should address damages issues early in international arbitration.

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