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How Tribunals Deal with Damages in International Arbitration

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DAMAGES IN INTERNATIONAL ARBITRATION

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TABLE OF CONTENTS

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INTRODUCTION

Damages can be a fraught issue for arbitral tribunals, the members of which are often learned in the law but may not be as learned in things mathematical or economical. Regrettably, it is not uncommon for counsel or tribunal members to recount experiences during evidentiary hearings, shared with me by damages experts, in which the evidence of damages experts was 'shoe-horned' towards the end of the hearing. This creates the impression that the tribunal members were not as familiar with their reports as they would have liked and may well mean that, after the evidentiary hearing and during award preparation, further enquires have had to be made by the arbitral tribunal regarding the expert evidence when it could (and should) have been explored at or even before the evidentiary hearing.

The thesis of this paper is that proactive attempts should be made by tribunals to ensure that issues of damages are dealt with in an informed and appropriately detailed way. Two effective ways to do so are for the tribunal members to (i) educate themselves on the alternative approaches to the assessment of damages, and (ii) tactfully engage with experts, particularly party-appointed experts. A tribunal's proactive management of party-appointed experts, including those who are not versed in what may be considered best practice for international arbitration, will pay considerable dividends for the economy, precision and impartiality of the arbitral process.[2]

This paper is divided into two parts:

1) **Part I: Educating Arbitrators** discusses the various resources available to assist with familiarisation with the alternative approaches to the assessment of damages in international arbitration.

2) **Part II: Approaches to Engagement** highlights the differences between party-appointed experts and tribunal-appointed experts and suggests engagement processes with party-appointed experts. For there to be real value to both parties and the arbitral tribunal, the approach to expert evidence must be redefined for party-appointed experts.

[2] Professor Doug Jones AO, 'Jones Shares Procedural Approaches After GAR-LCIA Roundtable', *Global Arbitration Review* (Blog Post, 6 December 2024).

Proactive case management is central to this objective. The Paper raises the potential of facilitating an educational process midstream in the arbitration between the arbitral tribunal and the damages experts (and experts of other discipline) as to how they are each intending to approach the question of damages (or their expertise) from common data sets. Party-appointed experts can also add real value in providing their analysis in the event of the other expert's methods or assumptions being adopted by the tribunal.

PART I: EDUCATING ARBITRATORS

Parties, and their counsel and experts, express frustration with awards that offer little reasoning on damages, or worse still, errors in principle or calculation. Tribunal members struggle with counsel and experts who are unable to clearly communicate complex damages issues. It is therefore useful for tribunal members to be aware of the various authorities, texts and institutional guidance available in the international arbitration context. This knowledge is also pivotal when damages experts are appointed (irrespective by whom): the significance of the role of a damages expert should not be underestimated.[3]

A. Authorities

Legal Principles

Before damages can be assessed, tribunal members ought to thoroughly understand the different types of damages. Damages can be divided into compensatory and non-compensatory types. Compensatory damages, also termed as 'actual damages', are designed to repair the damage a claimant has suffered or is expected to suffer.[4] This includes direct and consequential damages, reliance and expectation damages and pecuniary/non-pecuniary damages.[5] In contrast, non-compensatory damages, including penalty clauses, liquidated damages, punitive damages, nominal damages and restitution damages, are not intended to compensate the claimant's loss/expected loss, but may correspond to *benefits* gained.

[3] Chief Justice Sundaresh Menon, 'Inadequate Handling of Damages in International Arbitration' (2023) 17 *Dispute Resolution International* 80.
[4] The various types of compensatory damages differ from jurisdiction.
[5] See, eg, John Y Gotanda, 'Damages in Lieu of Performance Because of Breach of Contract' (2006) *Villanova University Charles Widger School of Law* 14.

It is usual for tribunal members to familiarise themselves with the legal authorities in the applicable substantive national law. This is critical as some damages are only available in certain jurisdictions and have differing standards of proof.[6] Moreover, in most civil law jurisdictions, there is a distinction between *damnum emergens* (actual suffered losses) and *lucrum cessans* (losses of expected profits). This distinction is ordinarily statutory.[7] One must also be aware of any considerations in establishing the availability of damages, such as notice requirements and fault versus strict liability.

In the spirit of this being a GAR Keynote, a popular and helpful starting tool for tribunal members to 'rende[r] more accurate and well-reasoned awards on damages' is the GAR Guide to Damages in International Arbitration.[8] Now in its sixth edition, the Guide has punchily provided an overview of damages and has footnoted references to leading authorities for further review. Additionally, and specifically for the UK audience, LexisNexis has issued a Practice Note with relevant UK authorities.[9] *Damages in International Arbitration Under Complex Long-term Contracts* by Herfried Wöss et al published by Oxford University Press, provides detailed coverage of the types of damages and its legal, financial and economic implications.[10] To learn more on a specific type of damage, there is a plethora of high quality sources. For example, Markus A Petsche has published an excellent article on punitive damages.[11] Gary Born's treatise, *International Commercial Arbitration*, which is in its 3rd edition, also addresses punitive, exemplary or statutory damages.[12]

Approaches and Methods for the assessment and quantification of damages

The focus of this paper is, however, upon identifying relevant authorities to ease the burden on tribunal members who must evaluate whether the estimated damages presented by the parties

[6] Nathan O'Malley, *Rules of Evidence in International Arbitration: an Annotated Guide* (Routledge, 2012) [7.27].
[7] See, eg, Germany (*German Civil Code* s 252); France (*French Civil Code* art 1231-2); Netherlands (*Dutch Civil Code* art 6.69); Spain (*Spanish Civil Code* art 1106); Italy (*Italian Civil Code* art 1223). The effect of this distinction is still noticeable. By example, *damnum emergens* covers both reliance and expectation damages whilst *lucrum cessans* includes only expectation damages: Gotanda, 'Damages in Lieu of Performance Because of Breach of Contract' (n 5).
[8] John A Trenor (ed), *The Guide to Damages in International Arbitration* (6th edn, 2024).
[9] 'Damages in International Arbitration' *LexisNexisUK* (Web Page, 2024) <https://www.lexisnexis.co.uk/legal/guidance/damages-in-international-arbitration>.
[10] Herfried Wöss et al, *Damages in International Arbitration under Complex Long-term Contracts* (Oxford University Press, 2014).
[11] See, eg, Markus A Pesche, 'Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?' (2013) 29(1) *Arbitration International* 89.
[12] Gary Born, *International Commercial Arbitration* (Kluwer, 3rd edn, updated August 2022) §23.07[D].

are reasonably accurate reflections of economic damage suffered. There are a range of stellar sources to demystify this damages analysis.

It is perhaps apt to begin once again with of GAR's Guide to Damages in International Arbitration, specifically the chapter in the sixth edition titled 'Demystifying the Damages Assessment in International Arbitration'[13]. This chapter provides a helpful checklist for arbitrators when assessing damages by addressing various factors and concepts, such as causation, mitigation, the calculation of fair market value, and counterfactual analysis. This is only one of many chapters on assessment and quantification in GAR's Guide – indeed, the book dedicates an entire Part to this topic.

Additionally, I have found Herfried Wöss et al's *Damages in International Arbitration Under Complex Long-term Contracts* excellent. The book clarifies how different legal rules regarding damages and loss of income are applied to claims by virtue of breaches of complex long-term contracts, including privately-financed infrastructure projects and public-private partnerships. It provides a walkthrough of applying the but-for method and its relationship to loss, causation and the measure of damages. Moreover, it refers to best national and international practices for the reconstruction of hypothetical courses of events to solve the legal, financial and economic issues involved in the determination and quantification of damages claims and the proper reasoning of arbitral awards.[14] In a review written by Ruth Teitelbaum published in *Arbitration International*, *Damages in International Arbitration Under Complex Long-Term Contracts* is described as "much more than a book about damages in international arbitration": "It concerns the allocation of risk in international investment and commercial disputes and the legal theories involved in framing and assessing damages claims."[15]

For timely and relevant articles on complex issues that arise in assessing damages, the *Journal of Damages in International Arbitration* is quite helpful. The perspectives of experienced damages experts, practitioners and tribunal members are invaluable in assisting how to evaluate, analyse, quantify and ultimately determine the amount of compensation to award.[16]

[13]'Demystifying the Damages Assessment in International Arbitration', Julie M Carey, Christian Dippon and Ralph Meghames, in John A Trenor (ed), *The Guide to Damages in International Arbitration* (6th edn, 2024).
[14] Herfried Wöss et al, *Damages in International Arbitration under Complex Long-term Contracts* (n 10).
[15] Ruth Teitelbaum, 'Damages in International Arbitration under Complex Long-term Contracts, by Herfried Wöss, Adriana San Román Rivera, Pablo T. Spiller, Santiago Dellepiane, edited by Loukas Mistelis' (2015) 31(4) *Arbitration International* 693, 696.
[16] *Journal of Damages in International Arbitration* (*JDIA*).

B. Institutional Guidance and Materials

An excellent ICC Dossier titled 'Evaluation of Damages in International Arbitration', published in 2006, comprises ten chapters from leading arbitration practitioners. [17] The Dossier explores various sub-topics, including the general characteristics of recoverable damages, the duty of mitigation, and more specifically, delay and disruption damages in international construction arbitration. Elements of the Dossier also reveal that something as apparently clinical as damages calculations can still have a kind of humanness to it, a personal touch. As Serge Lazareff notes in the foreword: 'Even though, from a strictly legal point of view, damages should be calculated in a cold and abstract way, the judge, [whether] state or arbitrator, will take human and behavioural aspects into consideration. How to measure good and bad faith? In the majority of situations, the assessment is based on a personal approach'. [18]

Additionally, the CPR Committee on Arbitration produced a Protocol on Determination of Damages in Arbitration, which seeks to guide arbitrators, counsel, and clients themselves, in the preparation and presentation of damages evidence. [19] The Protocol emphasises that the issue of damages should be addressed sooner rather than later in arbitration proceedings – a sentiment I would also echo – and moreover, sets out guidelines as to how experts can present their damages calculations. This includes a description of not only how they reached their conclusions, but also underlying assumptions, and whether a different assumption affects their quantification. I too would emphasise the importance of identifying assumptions in expert evidence. In my experience, this often becomes the subject of cross-examination: cognisance of the various assumptions at play and their effect on analysis means that the evidence can be tested in a more effective way. Ultimately, this assists tribunal members in assessing *which* assumptions are preferred over the other(s), and *how* this is best applied in the circumstances.

C. International Valuation Standards 2025

[17] *Evaluation of Damages in International Arbitration* (ICC Institute of World Business Law, Dossier IV, 2006) 5.
[18] Ibid.
[19] CPR International Committee on Arbitration, *Protocol on Determination of Damages in Arbitration* <https://drs.cpradr.org/rules/protocols-guidelines/protocol-on-determination-of-damages-in-arbitration#:~:text=The%20Protocol%20on%20Determination%20of,damages%20evidence%20in%20arbitration%20proceedings.>.

Special mention ought to be made about the International Valuation Standards (IVS), published by the International Valuation Standards Council (IVSC), and its usefulness to tribunal members.[20] The IVSC is an independent, not-for-profit organisation committed to building confidence and public trust in valuation by producing the IVS and securing their universal adoption and implementation.[21] Importantly, from this month, the latest edition (effective from 31 January 2025) of the IVS will become freely accessible to the public.[22]

Since its establishment in 1981, IVSC is now truly collaborative and international, with over 130 leading experts on its Boards and Committees. There are currently 200 member organisations operating in 137 countries worldwide which have joined the IVSC.

IVS

IVS are globally recognized, principles-based standards that form the foundation of valuation of all assets and liabilities. They outline an internationally agreed 'best practice' process that can be used in conjunction with other standards, laws, and regulations requiring a value. The 2025 Edition is significant because it enhances process rigour and risk mitigation.[23] Relevantly for tribunal members, the 2025 Edition has also improved clarity on mandatory and situational valuation requirements, as well as provides new guidance on model selection.[24]

The IVS is comprised of seven 'General Standards' and eight 'Asset-specific Standards'. Compliance with the IVS requires compliance with applicable legal, statutory and regulatory requirements appropriate to the purpose and jurisdiction of the valuation. If in conflict with the IVS, the requirements should be prioritized and explained. Any other deviations would render the valuation not compliant with IVS. The valuer is ultimately responsible for the assertion of compliance with IVS.

The General Standards[25] set requirements for the conduct of all valuation assignments, including articulating the applicable basis of value, the selection of valuation approaches and

[20] IVSC, 'International Valuation Standards (IVS) & The Law' (Web Page, 2025).
[21] IVSC, *International Valuation Standards (effective 31 January 2025)* 5.
[22] IVSC, 'IVS to Become Freely Available From January 2025' (Web Page, 29 August 2024) <https://www.ivsc.org/ivs-to-become-freely-available-from-january-2025/>.
[23] IVSC, 'New Edition of the International Valuation Standards (IVS) Published' (Web Page, 24 January 2024) <https://www.ivsc.org/new-edition-of-the-international-valuation-standards-ivs-published/>.
[24] Ibid.
[25] IVS 100 - Valuation Framework; IVS 101 - Scope of Work; IVS 102 - Bases of Value; IVS 103 - Valuation Approaches; IVS 104 - Data & Inputs; IVS 105 - Valuation Models; IVS 106 - Documentation and Reporting.

methods, and reporting. A basis of value is the 'fundamental premises on which the reported values are or will be based'.[26] These include Marked Value, as defined by the IVSC, or other bases such as Fair Value and Fair Market Value. In addition to the requirements of the General Standards, the Asset Standards apply to specific types of assets and liabilities.[27] This includes background information on the characteristics of each asset type and additional asset-specific requirements regarding common valuation approaches and methods used.[28]

The IVS is implemented in several ways: through legislation or delegated authority,[29] compulsory accreditation from a legal authority,[30] optional accreditation[31] and references in case law which utilise IVS as 'best practice'.[32]

The IVS is poised to become an increasingly influential tool in international arbitration, particularly as the complexity and scale of cross-border disputes grow. Their emphasis on standardized and transparent valuation practices is likely to enhance the consistency and credibility of valuation evidence presented in arbitral proceedings. As tribunal members rely on expert valuations, adherence to IVS prevents semantic misunderstandings and minimises contention over methodologies while improving the efficiency of the process. I expect the universal framework to gain prominence and shape the future of dispute resolution in the global arena.

PART II: AN APPROACH TO ENGAGEMENT

Expert evidence is now a widespread and important feature in international arbitration. Many arbitrations are highly technical and complicated in nature, where factual findings may be

[26] IVS 102 - Bases of Value, section 10.
[27] IVS 200 - Business & Business Interests; IVS 210 - Intangible Assets; IVS 220 - Non-Financial Liabilities; IVS 230 - Inventory; IVS 300 - Plant, Equipment & Infrastructure; IVS 400 - Real Property Interests; IVS 410 - Development Property; IVS 500 - Financial Instruments.
[28] IVS, 'Standards' (Web Page, 2025).
[29] See, eg, Slovenia (Audit Law).
[30] See, eg, Indonesia (Masyarakat Profesi Penilai Indonesia); India (Insolvency and Bankruptcy Board of India).
[31] See, eg, Singapore (ACRA-IVAS Singapore).
[32] See, eg, the Australian case *PepsiCo Inv & Anor v Federal Commissioner of Taxation* [2023] FCA 1490 [329]; the Singapore case *WPQ v WQQ* [2023] SGHCF 49.

decisive in determining the case. The involvement of experts in providing specialised evidence in areas the arbitral tribunal may often be unfamiliar with is therefore necessary.[33] Evidence is given in the form of written reports and testimony at an evidentiary hearing. Experts can be broadly divided into three distinct categories:

1. Technical/industry-specific experts, who are deployed to assist the arbitral tribunal on issues requiring specialised technical knowledge.
2. Analysis experts are primarily delay, disruption and damages experts. Their expertise derives not so much from technical ability in a specialist field (although certain complex mathematical models and analytical methodologies may demand such ability), but from the ability to survey and interpret vast quantities of data that the tribunal simply does not have the opportunity or resources to analyse itself.[34]
3. Legal experts who give evidence where the law of a particular legal system is material to the dispute.[35]

Relevantly for this keynote, damages experts are indeed the most deployed form of expert evidence.[36] The importance of damages experts in assisting the arbitral tribunal cannot be overstated: tribunal members often indicate that they find quantifying damages to be more challenging than determining liability.[37] The calculation of damages can even be seen to have developed into a sophisticated discipline in its own right. It is therefore especially critical for tribunal members to be provided with realistic and objective expert evidence.

There is an ever-increasing reliance by counsel from both civil and common law traditions on party-appointed experts,[38] a development traced to early iterations of the IBA Rules on the

[33] Brooks W Daly and Fiona Poon, 'Technical and Legal Experts in International Investment Disputes' in Chiara Giorgetti (ed), *Litigating International Investment Disputes* (Brill, 2014) 323, 323.
[34] Edna Sussman, 'Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them' (2013) 24(3) *American Review of International Arbitration* 487, 497.
[35] Donald Francis Donovan, 'Re-Examining the Legal Expert in International Arbitration' in Hong Kong International Arbitration Centre (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Walters Kluwer, 2018) 247, 253−55.
[36] Daniel Greineder, 'Expert Evidence', *Global Arbitration Review* (Blog Post, 11 April 2019).
[37] Sussman, 'Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them' (n 34).
[38] See, eg, Paul Friedland & Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process', *White & Case* (Report, 2012) 29.

Taking of Evidence in International Arbitration.[39] Especially in the last decade, while reliance on party-appointed expert testimony has steadily increased, lamentably, the efficient use of these experts is far less common.[40] Perhaps the most serious consequence is when party-appointed experts act as 'hired guns', that is, tailoring their evidence to support the party by whom they were appointed. This situation is exacerbated when parties *and* arbitral tribunals operate on the seemingly implicit and misguided understanding that this is indeed the role of the party-appointed expert. More broadly, without effective case management techniques, experts of like discipline may be like 'ships in the night' providing evidence on different questions posed by their respective appointing parties, based on different witness and documentary material.

It is therefore instructive to first consider, albeit briefly, the role of expert witnesses and the distinctive approaches to expert evidence between common and civil law jurisdictions. Only then can one ascertain the challenges of expert evidence from both party-appointed and tribunal-appointed experts, before being able to meaningfully offer tools so that tribunals can devise innovative methods for experts of like discipline.

A. Party-Appointed Experts and Tribunal-Appointed Experts

I. Common Law and Civil Law Approaches

Perhaps the most important distinction at hand is between party-appointed and tribunal-appointed experts. The current practice in the evidentiary process of international arbitration is

[39] See, eg, the first edition of the IBA Rules: International Bar Association, 'Rules on Evidence in International Arbitration' (1999, 1st ed) arts 5–6; revised 2010 version: International Bar Association, 'Rules on Evidence in International Arbitration' (2010, 2nd ed) arts 5–6; 2020 version: International Bar Association, 'Rules on Evidence in International Arbitration' (2020, revised ed) arts 5–6.

[40] See, eg, Professor Doug Jones AO, 'Experts & Arbitration: "Hired Guns": Modern Solutions to Ancient Problems' [2024] (3) *Supreme Court Cases* J-6; Professor Doug Jones AO, 'Redefining the Role and Value of Expert Evidence in International Arbitration' (2023) 17(2) *Journal of the American College of Construction Lawyers* 1; Professor Doug Jones AO, 'Discussing Expert Evidence in International Arbitration with Professor Doug Jones AO' (Podcast, K&L Gates Hub, 24 March 2022); Professor Doug Jones AO, 'Party Appointed Experts in International Arbitration - Cost v Benefit' (Keynote Address, AMINZ Breakfast Webinar, 3 November 2021); Professor Doug Jones AO, 'Witness and Expert Evidence: An Arbitrator's Perspective' in Amy C Klaäsener, Martin Magál & Joseph E Neuhaus (eds), *The Guide to Evidence in International Arbitration* (Global Arbitration Review, 2021) 154; Professor Doug Jones AO, 'The Ineffective Use of Expert Evidence in Construction Arbitration', (Paper presented at Dubai Arbitration Week 2020, 16 November 2020); Professor Doug Jones AO, 'Party Appointed Experts in International Arbitration: Asset or Liability?' (2020) 86(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 1.

a product of hybridisation, where elements of common law and civil law procedure are drawn upon to guide how international arbitration should be conducted.

In the adversarial tradition of the common law, in which parties bear the principal responsibility for shaping and presenting their cases to the court or tribunal, parties will engage and brief their own experts. You may be familiar with Lord Mansfield's seminal statement, which paved the way for party-appointed expert opinions to be accepted as evidence:[41]

> 'In matters of science, the reasonings of men of science can only be answered by men of science.'

By contrast, the inquisitorial tradition of civil law systems means that courts or tribunals have traditionally appointed their own experts to assist with their inquiry into the relevant issues.

II. The Expert's Role

The general role of expert witnesses, whether they be appointed by the parties or the tribunal, is to assist the *tribunal* in its decision making by providing relevant and independent evidence in their area of expertise.[42]

It would be remiss not to mention a further distinction in how party-appointed experts are used by parties. Whilst the expert has a fundamental duty to the arbitral tribunal to whom they present their expert evidence, there is the notion of the 'shadow expert' or expert adviser,[43] who assists and consults the party in the preparation of its case from the outset.[44] When the same expert occupies both roles, this can bear significantly on issues of bias which is further explored below.[45]

III. Challenges

[41] *Folkes v Chadd* (1782) 99 ER 589, 590 (Lord Mansfield).
[42] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 931.
[43] Or, more dysphemistically, the 'dirty' expert: 'Experts in International Arbitration', LCIA (Web Page, 17 January 2018) [9] <https://www.lcia.org/News/experts-in-international-arbitration.aspx>.
[44] See Julian Haslam-Jones, 'Are Shadow Experts Having a Positive Impact on Disputes?' (2022) (October) *Driver Trett Digest* 22, 22−3.
[45] See also International Chamber of Commerce Commission on Arbitration and ADR, *Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management* (Report, 2019 update) 22 [18.3].

Party-appointed Experts

The most fundamental (and obvious) issue with party-appointed experts is the fact of their appointment by one party. Although experts are enjoined to be 'independent and impartial' and to assist the tribunal, they are inherently partisan and therefore often perceived as 'hired guns'.[46] 'Hired' in the very literal sense that they were appointed by a party, and 'guns' insofar as their findings are invariably weaponised against the other party and its experts of like discipline. The underlying problem, is that experts have tended to provide their evidence in response to questions generated by their appointed party, based on the factual evidence held by that party at that time. As a consequence, there is a lack of meaningful engagement with the opposing party's expert to opine of the key issues.

There are many potential sources for bias in a party-appointed expert. An expert may have familiarity with counsel of the appointing party, and using their case theory, such counsel may be able to sway the experts towards pursuing certain avenues of inquiry in their evidence. Money and the chances of future appointments may also be motivating factors, especially when experts consciously or subconsciously regard their livelihood as linked to the success of that party, such that they subtly tailor their findings to favour that party.

Party-appointed experts may also have a misguided sense of loyalty to their own party and may therefore refuse to consider or adopt methodologies proposed by the other party's expert. To do so may be seen, it is thought, as a concession to the legitimacy of the other party's expert evidence. Bred by an excessively adversarial approach to the expert evidence, in a sense, all possible points of disagreement could become a battlefield. Whereas it is, of course, valid for an expert to argue the merits of their preferred methodology as opposed to the other expert's, it is essential that an expert be able to opine on alternative factual and methodological scenarios to give the tribunal a complete picture of what its decision entails.[47]

Another critical challenge is that the list of questions, facts and data upon which a party-appointed expert bases their evidence may be different as between opposing parties. To some

[46] Including in judicial publications: see, eg, Federal Court of Australia, *Expert Evidence Practice Note*, 25 October 2016 [3.1].

[47] ICC Commission on Arbitration and ADR, *Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management* (Report, 2019) 23 [18.7].

extent, this is a natural product of party appointments. However, an arbitral tribunal may struggle to find any meaningful differences in opinion where the factual assumptions diverge significantly – hence why, the identification of the assumptions themselves can become critical. This issue is exacerbated by the widespread use of expert evidence in memorials in international arbitration, in which parties often collate legal arguments, factual evidence *and expert evidence* all in the a round of submissions. This worsens the psychological factors that link experts to their appointing parties and prevent them from acting or being seen as truly independent.

Tribunal-Appointed Experts

One may naturally think that a solution to the concerns in using party-appointed experts may be to deploy tribunal-appointed experts.[48] Indeed, common law courts have had some success in using court-appointed advisers in the capacity as admiralty assessors or as *amici curiae*, with the view of assisting the judge in interpreting the otherwise 'impenetrable' submissions of each party's experts.[49]

However, tribunal-appointed experts have their own associated challenges. First, and especially in the early stages of the arbitration, the parties may be better placed than the arbitral tribunal to choose experts appropriate to the issues in dispute.[50] Second, there is the awkward and sometimes problematic question of who is to pay for the expert.[51] Third, there is the concern that a tribunal-appointed expert essentially amounts to a 'fourth arbitrator'.[52] Fourth, an expert may bring a particular perspective of the relevant expertise, ignoring other perspectives. All of these challenges have a clear nexus to party autonomy, which lies at the heart of international arbitration. Indeed, access to party-appointed experts was considered a

[48] Julian DM Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ch 22, 553–83.
[49] See further Professor Doug Jones AO, ''Redefining the Role and Value of Expert Evidence' in Bernardo M Cremades & Patricia Peterson (eds), *Rethinking the Paradigms of International Arbitration* (ICC Institute of World Business Law, Dossier XX, 2023) 142, 151−53; Justice Steven Rares, Using the "Hot Tub": How Concurrent Expert Evidence Aids Understanding Issues (Speech, Judicial Conference of Australia Colloquium, 12 October 2013) [11] See also *Re Al M Fact-finding* [2021] EWHC 1162 (Fam).
[50] Roman Khodykin & Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, ed Nicholas Fletcher (Oxford University Press, 2019) 332.
[51] Lisa Richman, 'Hearings, Witnesses and Experts' in Lisa M Richman, Maxi Scherer & Rémy Gerbay (eds) *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Wolters Kluwer, 2021) 257, 275.
[52] Sven Timmerbeil, 'The Role of the Expert Witness in German and US Civil Litigation' (2003) 9(1) *Annual Survey of International & Comparative Law* 163, 175−6.

fundamental corollary of 'party autonomy' by 84% of respondents in 2021.[53] Relatedly, parties often opt not to cross-examine the tribunal-appointed expert, for fear of giving the impression that they are 'criticizing the judge's authority'.[54]

While there have been some recent attempts at revitalising the use of tribunal-appointed experts in arbitration, such as the Sachs Protocol[55] and the Prague Rules,[56] it is unrealistic to think that parties and arbitrators will apostatise on their demonstrated preference for party-appointed experts,[57] or put another way, that tribunal-appointed experts will become the status quo.

B. Suggested Innovations

Attempts to address such issues by government law reform bodies and arbitral institutions have had varying degrees of success. Perhaps the most notable step forward in England was Lord Woolf's seminal 1996 report on 'access to justice', in which expert evidence was cited as an area where a lack of robust procedure was leading to considerable costs to efficiency in judicial procedure.[58] The report led to practice directions for experts in litigation and inspired a host of comparable reforms in other common law jurisdictions.[59]

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[53] George Burn, Claire Morel de Westgaver & Victoria Clark, 'Annual Arbitration Survey 2021: Expert Evidence in International Arbitration: Saving the Party-Appointed Expert' (Bryan Cave Leighton Paisner, 2021) 17.

[54] Sven Timmerbeil, 'The Role of the Expert Witness in German and US Civil Litigation' (2003) 9(1) *Annual Survey of International & Comparative Law* 163, 175.

[55] See Klaus Sachs & Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence' in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times* (ICCA Congress Series, Volume 15, 2011) 135, noting that reform to the system of tribunal appointment has otherwise been relatively non-existent: at 144.

[56] *Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)* (adopted 14 December 2018). For a recent discussion of the Prague Rules, see Professor Janet Walker CM, 'The Prague Rules: Fresh Prospects for Designing a Bespoke Process' in Amy C Kläsener, Martin Magál & Joseph E Neuhaus (eds), *The Guide to Evidence in International Arbitration* (Global Arbitration Review, 2nd ed, 2023) 4.

[57] Mark Kantor, 'A Code of Conduct for Party Appointed Experts in International Arbitration: Can One be Found?' (2010) 26(3) Arbitration International 323, 338−39.

[58] Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* (Final Report, 1996) [13.6].

[59] See, eg, *Civil Procedure Rules 1998* (UK) r 35.2; *Practice Direction 35* (UK) [3.3]; *Guidance for the Instruction of Experts in Civil Claims 2014* (UK) [2]. See further Professor Doug Jones AO, 'Redefining the Role and Value of Expert Evidence' in Bernardo M Cremades & Patricia Peterson (eds), Rethinking the Paradigms of International Arbitration (ICC Institute of World Business Law, Dossier XX, 2023) discussing the English reforms: at 156−7; and comparable reforms in Australia, the United States and Singapore: at 157−60.

A practical tool that the author has developed, which has increasing currency in the context of damages/quantum experts, [60] is now discussed. This tool, when combined with proactive case management (through midstream CMCs, which will be discussed shortly), has added significant value to the contributions made by party-appointed experts in arbitral proceedings. Mention is also useful of the value of a Post-Hearing Expert Access Protocol.

Party-Appointed Experts Case Management Protocol

This protocol can be given effect through CMCs and procedural orders in six steps, as outlined below. The protocol has proved particularly useful in managing complex analysis issues posed not only by damages experts, but also other experts.

1. The tribunal and parties should first determine the matters on which experts of like discipline will opine, and the identity of the experts. This should be done at an early stage of the proceedings. It may be that on some issues, there is no need for expert evidence at all. Conflict and competency challenges can also be dealt with. This first step ensures that expert evidence is only produced where necessary, and that there will be fewer bases for later challenge of individual experts.
2. The tribunal should confer as early as possible with the parties and the experts to formulate a draft common list of questions on which each discipline's experts are to opine. This list of questions should not be regarded as closed. The tribunal should pay particular attention to the experts' thoughts, as ultimately, they will be asked to provide their answers to those questions. This common list of questions is *essential* to ensuring that both parties' experts are on the same page, and that their disagreements reflect genuine differences in opinion rather than disagreements arising from different and incompatible lines of inquiry.
3. The production of expert reports should not commence until common factual evidence (both documentary and witness) is made available to allow the experts beginning to opine on a common data set. This will prevent an asymmetry in opinion that will need

[60] Professor Doug Jones AO and Professor Janet Walker CM, 'Procedural Innovations on the Horizon' (Conference Paper, SCA Conference, 12 May 2024); see also Professor Doug Jones AO, 'Flexibility in International Commercial Dispute Resolution' (CIArb Singapore Annual Thought Leadership Lecture, 9 November 2023).

to be remedied with difficulty through subsequent disclosure stages of the proceedings. Expert reports should not be produced with initial party memorials.

4. A joint expert report should then be produced within each discipline identifying areas of agreement and disagreement which have become apparent through discussion with the opposing experts and the exchange of 'without prejudice' drafts. This less adversarial approach allows the experts to be more candid and receptive to one another's views. Where there is agreement, there will be no further need to ventilate the issue. Where there is disagreement, the experts will be able to further expand on their view. Material exchanged by them in this work is protected from later production to the tribunal.
5. Individual expert reports need only be produced on these areas of disagreement. Beyond these areas, the joint expert report should provide a clear, singular source for areas of agreement and the substance of that agreement, thus reducing the volume of material generated.
6. Experts should produce 'reply' reports containing views in the alternative showing what their conclusions would be if the other expert's assumptions and methodologies were accepted by the tribunal. The experts should also have an opportunity to respond to the opposing expert's individual expert reports on areas where there is a divergence. However, these 'reply' expert reports should be strictly limited:
    a. to existing issues already raised by the other party's expert (rather than novel points entirely); and
    b. to differences of opinion, rather than differences in factual or methodological assumptions (which the tribunal will ultimately need to decide).

It is usual for the tribunal to actively engage with the experts after review of their material in CMCs attended by counsel, which leads to refinement of the experts' work, and a clear understanding of the expert issues by the tribunal well before the evidentiary hearing.

When the experts are explicitly directed to prepare the final report by adopting the opposing expert's assumptions and methodologies, the arbitral tribunal ensures that when it ultimately decides to opt for one expert's methodology over the other, it would have the benefit of both parties' experts as to how to proceed upon the choice of the appropriate one..

Proactive management of party-appointed experts provides an exceptionally useful educational process for the tribunal, and sorts the "wheat from the chaff" well before the evidentiary hearing.

Midstream CMCs

Another innovative tool proposed is the use of midstream CMCs. Midstream CMCs can (and have, in the author's experience) added considerable value by bringing counsel, experts and the tribunal together to explore the real issues in the case. The dual benefits are that it facilitates the tribunal's proactive management of the arbitral procedure early on to ensure ballast is shed, whilst also giving the tribunal the opportunity to engage with and begin to understand the key issues in dispute, and the expert evidence, well before the evidentiary hearings. Specifically to the question of damages which as aforementioned is often a complex matter, the possibility of an educational process midstream between the tribunal and the damages experts as to how they each intend to approach the question of damages, could prove to be invaluable.

There are three notable advantages of midstream CMCs:

1. **Disclosure**. This is the most costly part of arbitration, and disclosure for experts is no exception. Conferencing means the tribunal is kept à jour of the proposed approaches, issues, and concerns of the experts. Tribunals accordingly accrue a deeper understanding as to the materiality and proportionality of documents being disclosed. This supplements the often meagre information that can be gleaned from Redfern Schedules.
2. **Expert reports.** Holding midstream CMCs with the experts during the expert report process is very helpful. The objective is to settle the issues which they will opine on, and also to discuss and understand their joint and individual reports. Experts tend to require ongoing reminders from the tribunal as to what is required, especially pertaining to the process of filtering out areas of agreement in a joint expert report from areas of disagreement to be dealt with in individual expert reports. A CMC can also serve the purpose of educating the tribunal on complex technical issue the subject of the experts' reports.
3. **Contested Issues.** Another innovative way of using CMCs to great effect is to convene 'Issue CMCs' (often combined with document and expert CMCs) well before the evidentiary hearing, in which the real issues in dispute are identified and distilled. The

distilled synthesis of the issues can be presented in a tabular format in which the issues are listed alongside the corresponding factual and witness evidence relied upon for each contention. The tribunal should share the onus of preparing this material with the parties. While this demands the tribunal to read and analyze the parties' cases, the benefit is that the tribunal is provided the opportunity to engage with and understand the issues in dispute well in advance of the hearing, ultimately leading to a more focussed hearing, and a higher quality award.

Post-Hearing Expert Access Protocol

The role of the expert witness can extend beyond the hearing into the final stages of the award. In complex arbitrations, there remains complex calculations which must be completed to finalise an award, often which demand greater technical expertise than the tribunal safely commends. It is undesirable to provide a draft version of the award to the parties and their experts for assistance in completing these calculations, for reasons such as asset preservation, and continuing disclosure obligations of public companies. A Post-Hearing Expert Access Protocol, is established which is a tripartite agreement between the parties and the experts, permitting the tribunal to communicate directly with the experts (and not the parties) for assistance in completing calculations.[61] It is important to note that tribunals should communicate through *written* instructions only and the experts should be directed only to provide the requisite mathematical calculations. These communications are later shared with the Parties after the Award is delivered.

CONCLUSION

Damages are of course an integral part of many arbitrations. Yet, the area is often one of the most challenging for arbitrators, given the complexity of calculations and the cases themselves. Accordingly, This paper identifies various sources and strategies to assist tribunals in rendering an accurate and reasoned decision on damages – one that remains meaningful to the parties. Amongst the strategies are those that improve the efficacy of expert evidence, given that this is the most common channel through which damages submissions are developed. As mentioned at the outset of this paper, proactivity is key: it is this quality, imbued across the procedural suggestions in this paper, that will ensure tribunal members do indeed rise to the challenge.

[61] Jones and Walker, 'Procedural Innovations on the Horizon' (n 60) 6.