



Damages awards in international commercial arbitration

A study of ICC awards

December 2020





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Executive summary

Tribunals are left to bridge the gap

There is a very significant gap in the outcome of the quantification of claims by claimants and respondents, with respondents quantifying damages on average at only 12% of the amount claimed by claimants. This finding is remarkably consistent with the gap found in the PwC Studies¹ of investment treaty awards, in which respondents were also noted as quantifying damages at 12% of the amount quantified by claimants.

Interestingly, this gap found in this study was virtually the same whether quantum experts were involved in the proceedings or not. Factors that may explain the gap include the legal position taken by the parties and differing interpretations on the facts, both of which often result in experts answering different exam questions in their assessments of loss.

In evaluating the gap, we are mindful that the sample under review, being those cases which proceed to a final award, is predisposed towards having the widest gap in the parties' positions. After all, a settlement is generally more likely in cases where parties are closer together in their assessment of loss.

The significant disparity in the amounts proposed by claimants and respondents, or experts on their behalf, highlights the difficult job that Tribunals are faced with to bridge the gap and determine an appropriate amount of damages to award.



Respondents quantify damages on average at only 12% of the amount claimed by claimants

12%

¹ See page 8

Claimants fare better...

Tribunals awarded on average 53% of the amount claimed in the awards in this study (by head of claim), significantly more than the 36% noted in the PwC Studies of investment treaty awards. However, these averages encompassed a broad range of awards with relatively little convergence on the middle ground and no evidence of Tribunals “splitting the baby”.

Considering possible explanations for the higher relative amount awarded in commercial arbitration compared to investor-state arbitration, we infer:

The higher prevalence of “backward looking” valuation methodologies may contribute to the higher proportion awarded

The most frequently adopted measure of damages in this study (63% of claims) was the sunk cost methodology, which looks backwards to sums already spent by a claimant. These claims generally result in a higher amount awarded by Tribunals, with the average in this study being 55% of the amount claimed.

...but “forward looking” methodologies are also awarded a higher proportion of the amount claimed compared to the PwC Studies

Claims assessed based on a variant of an income approach (lost profit or discounted cash flow methodologies) also resulted in a higher amount being awarded (44%) compared to the average for the PwC Studies (36%).

One hypothesis for this difference is that measuring loss by reference to a whole company valuation is more prevalent in investor-state cases than in commercial cases. This may result in Tribunals facing more complex issues and a greater number of judgement calls, with a corresponding reluctance to award the full amount claimed.

Greater agreement over methodology in commercial arbitration also results in higher relative awards

Tribunals in investor-state cases are more likely than those in commercial cases to adopt a different valuation method to that put forward by claimants. Our analysis suggests that a change in methodology (for example from lost profits to sunk costs) often leads to more sizeable differences between the amounts claimed and awarded.

...but many claims come in for criticism from Tribunals

Despite benefiting from a higher relative amount awarded by Tribunals, we also observed in this study that claimants very frequently come under criticism from Tribunals for their approach to quantifying loss. By far the most common criticism is a lack of evidence or an inadequate substantiation of damages claims, followed by wrong or unconvincing underlying assumptions or speculative claims.

The fact these criticisms are the top three is perhaps unsurprising. What is more interesting is just how often these criticisms are made, collectively in over half of the claims reviewed. This finding could be a useful point of reference when discussions inevitably arise between clients, counsel and/or experts when considering which potential heads of loss to put forwards and which heads it may be better to drop.

Other common criticisms by the Tribunals concerned perceived errors in the calculation of the claim and concerns that a party was attempting incorrectly to maximise its position and inflate its damages.



The most frequently-adopted measure of damages in this study was the sunk cost methodology

63%
of claims



Claims assessed based on a variant of an income approach also resulted in a higher amount being awarded

44%

compared to the average for the PwC Studies

36%

The arms race for use of experts

Our study shows that for claims in excess of \$10 million the use of experts is more common than not. The research suggests there is an “arms’ race” effect: if a claimant brings an expert on board, a respondent generally fares better when it responds in kind by appointing its own expert, and this is the case regardless of the size of the claim.

- Tribunals awarded on average 69% of the amount claimed when there was a claimant expert engaged, but no respondent expert.
- Tribunals award on average only 41% of the amount claimed when there are both claimant and respondent experts.

The diversity debate needs to include experts too

Various institutions and other groups have taken steps to try to improve gender diversity amongst arbitrators in recent years. The evidence suggests that these measures have improved diversity amongst arbitrators. For example, the use of women arbitrators in cases administered by the International Chamber of Commerce (‘ICC’) nearly doubled from 2015 to 2018.

However, rather less attention has been given to the diversity gap in respect of experts who, like arbitrators (and for many of the same reasons), tend to be from the demographic sometimes described as ‘pale, male and stale’. From the population of awards in this study, women represented only 11% of experts and 10% of arbitrators.

The solution to a lack of diversity amongst experts requires action from professional services firms, where women are still underrepresented as partners (or equivalent grade). The understandable desire amongst clients and counsel to hire a seasoned, heavyweight testifying expert inevitably tilts the scale towards long established experts, and this leaves not only women, but also ethnic minorities and more junior would-be experts, struggling to get the necessary experience on their CVs to break through.

A step that could help address this challenge would be greater use of joint expert reports, between an established expert and an appropriate member of his or her team. Many would argue that this would better reflect the reality of how expert reports are prepared. Such joint reports would also increase opportunities for a more diverse pool of experts to be instructed.

Other steps that could be taken to help improve diversity could include, for example:

- Commitments by those charged with proposing potential experts to ensure the diversity of candidate lists provided to clients.
- Mentoring schemes, in particular between law firms and experts.
- Participation of people from underrepresented demographics in the increasing number of networking groups focused on women and minority groups in arbitration.
- Gender pay gap reporting, which is now increasingly commonplace in professional services firms (and indeed mandatory in the UK for any organisation that has 250 or more employees) and which helps to drive senior accountability.

Figure 1: Extent of gender diversity within experts



Covering letters



Tim Allen



Ian Clemence

PwC is delighted once again to support research performed by Queen Mary University of London ('QMUL'), aiming to further debate and research in the field of international arbitration. This study is in an area of particular interest to PwC, examining trends in the award of damages in commercial arbitration.

The study is based on analysis of 180 awards from arbitration proceedings administered by the ICC. We are privileged that the ICC has provided such access, which we believe makes it the first of its kind in the field of commercial arbitration.

The research complements PwC's previous studies of damages in international arbitration published in 2015 and 2017 which covered over 100 awards related to investor-state arbitration. The focus of the present study on commercial arbitration awards allows us to identify issues specific to the award of damages in commercial arbitration, while also exploring differences in the approach taken to damages in investor-state arbitration.

Reflecting on some of our key takeaways from this study, we look forward to engaging with the arbitration community in debate around issues such as:

- The wide gap between claimant and respondent positions on damages — remarkably similar between commercial and investor-state arbitration, and whether experts are involved or not — and the tools available to Tribunals to bridge the gap.
- The common pitfalls that claimants, or counsel and experts on their behalf, should be mindful of when quantifying claims, and how they can best be avoided.
- Steps that can be taken to improve both gender and racial diversity amongst expert witnesses. Our view is that more should be done in both of these areas and now is the time to do it as we promote the next generation of expert witnesses.



This study aims to foster debate around:

1. the wide gap between claimant and respondent positions
2. the common pitfalls that draw tribunal criticism
3. steps that can be taken to improve diversity amongst expert witnesses



Loukas Mistelis

Queen Mary University of London

It is my great pleasure to introduce this 2020 study of damages in commercial arbitration. This is the first study on the subject conducted and released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and it is innovative and unique in so many ways. It has been prepared with the support of PwC and also the cooperation of the ICC International Court of Arbitration. C.J.W. Baaij, PhD, JSD, LL.M, MA was our lead researcher who developed the methodology for identifying, processing, and analysing the variables in contract disputes, and was part of writing this report. He led the in person collection of data at the ICC in both Paris and New York with the assistance of a number of our LL.M students: Ali Emir Bagis, Sinem Buyukkececi, Sophie Courville-Le Bouyonnec, Maline Fourmont, Lucy Gustav and Sonal Salwi.

For the purpose of this study, Queen Mary University of London has been given access to over 700 confidential award in arbitral proceedings administered by the ICC International Court of Arbitration in Paris and New York between 2014 and 2018. Out of these awards, 180 were identified for further analysis as falling within the scope of this project, representing 284 separate heads of claim, including counterclaims. It is the first time that any study has had the access and the opportunity to examine these commercial arbitration awards for the purpose of assessing trends in the award of damages.

We are grateful to the ICC, and, in particular Alexander Fessas and Ana Serra e Moura and Sylvie Picard Renault, for allowing us such access and enabling us to provide an unprecedented insight into how damages decisions are made, the impact of legal culture, the role of

experts, allocation of tasks between arbitrators, counsel and experts and also to look into questions of interest. This executive summary focuses only on some of our key findings.

We hope you will find the study and its findings useful and that this will be the first of several similar surveys in years to come.

Professor Loukas Mistelis FCI Arb

- Former Director of the School of International Arbitration (2002-2019) and
- Director, QMUL-UNIDROIT Institute of Transnational Commercial Law



It is the first time that any study has had the opportunity to examine these commercial arbitration awards assessing trends in the award of damages.

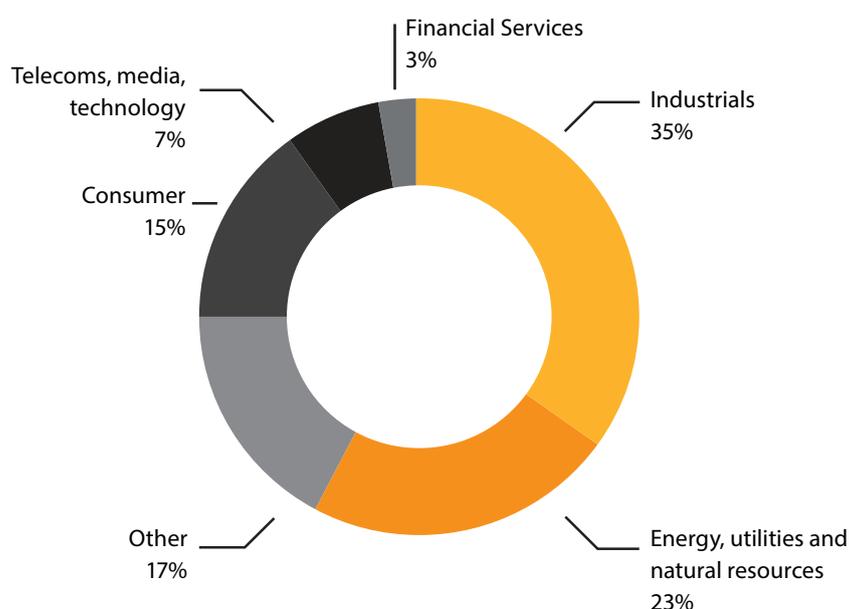
Scope of the study

For the purpose of this study, Queen Mary University of London was given access to over 700 confidential awards in arbitral proceedings administered by the ICC in Paris and New York, between 2014 and 2018. From the 180 awards that fell within the scope of this project, 284 separate heads of claim, including counterclaims, were analysed. The basis of analysis is the result of a consultation process with an international specialist focus group.

In 2015 and 2017, the PwC Studies examined trends in the award of damages based on arbitration awards available in the public domain. These studies involved the analysis of over 100 awards related to investor-state arbitration². Where relevant, the findings of this study have been compared to those of the PwC Studies, to enable comparison between trends in commercial and investor-state arbitration.

An overview of key statistics for the population of awards in this study is shown below, with further details provided in Appendix 1.

Figure 2: Industry sectors relevant to the subject matter of the dispute



Claims ranged in value from two thousand to four billion US Dollars (“USD”), with a median average of USD 3.7 million. Awards ranged in value from zero to USD 1.8 billion, with a median average of USD 1.2 million³. These are, on the whole, lower than the amounts noted from the awards in the PwC Studies.



Approximately half of all disputes related to the industrials sectors (35%) and the energy sector (23%).



The nationality of the parties involved was dominated by the USA and the UK, which may be explained by both the focus of the study on awards written in the English language and the inclusion of awards administered by SICANA, the ICC’s North American office.

² In this study we refer to previous PwC Studies, which can be found online www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf www.pwc.co.uk/services/forensic-services/disputes/insights/pwc-international-arbitration-damages-research-2017.html

³ Amounts are stated based on 284 individual heads of claim pleaded in 180 cases. For the counterclaims (being 55 of the 284 claims under review), the ‘claimant’ for our analysis was in fact the respondent in the case in question.

Figure 3: Nationalities of parties by case

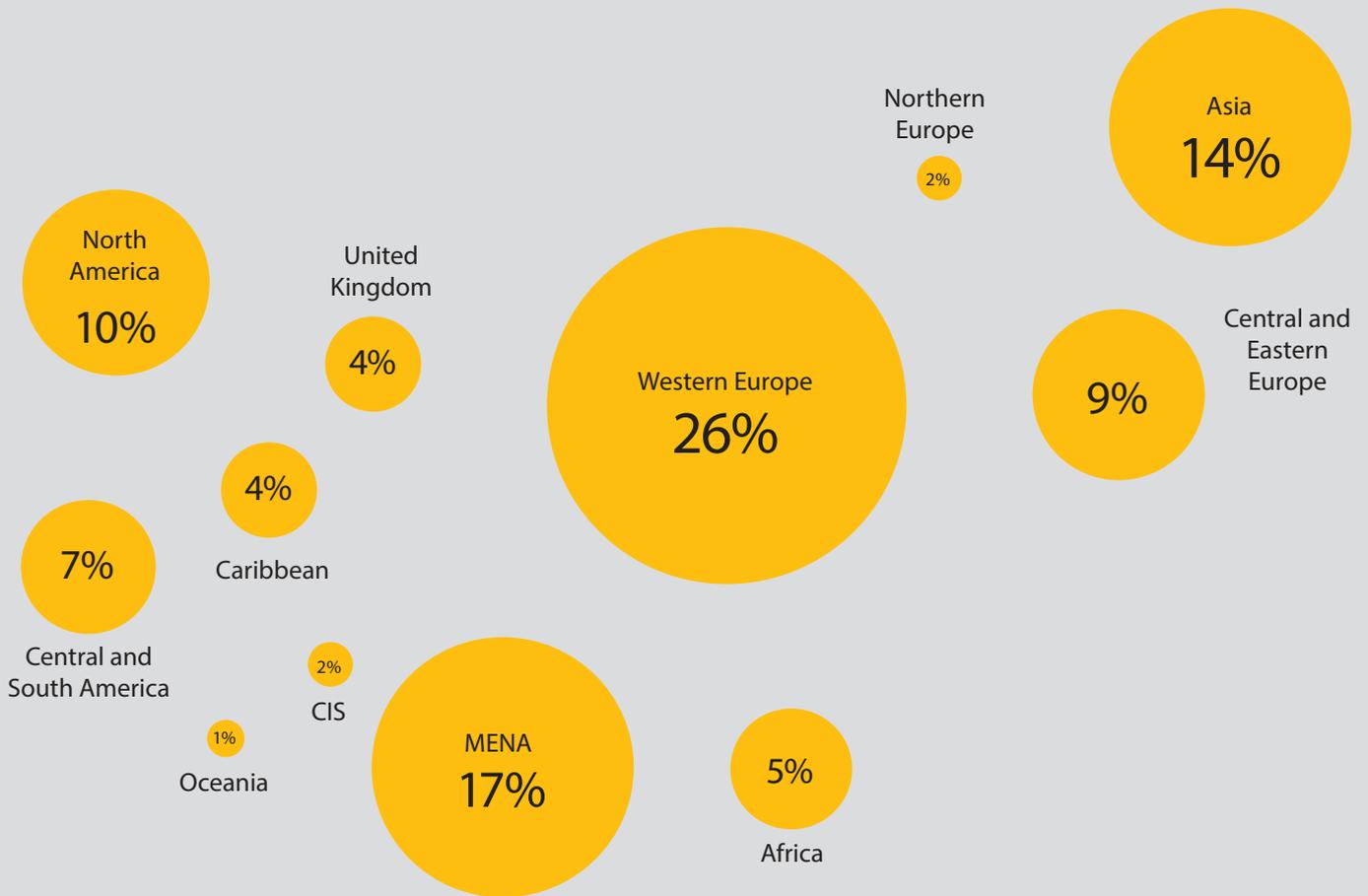
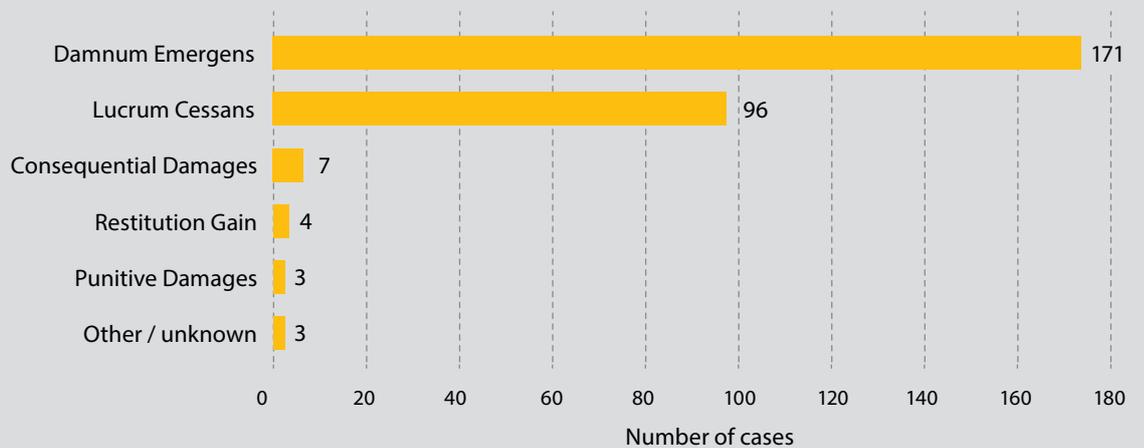


Figure 4: Legal bases for the amounts claimed

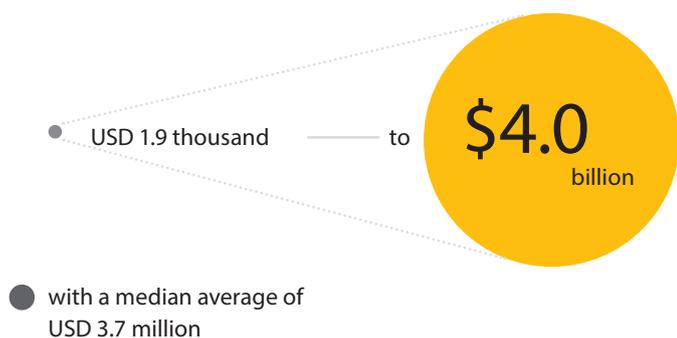


The amount of damages awarded by Tribunals and quantified by experts

The amount of damages awarded by Tribunals and quantified by experts

Range of damages claimed and awarded⁴

The amounts claimed in the study ranged from



The amounts awarded ranged from



The awards reviewed in the PwC Studies, which looked largely at investor-state cases, were on average of higher value, with a median average amount awarded of USD 21.4 million. Although claims and awards in this study are for lower amounts on average, it is worth noting that this does not necessarily mean that the issues at stake are any less complex from the point of view of calculating damages. Parties and Tribunals still need to assemble the evidence, select a methodology and arrive at a value for damages.

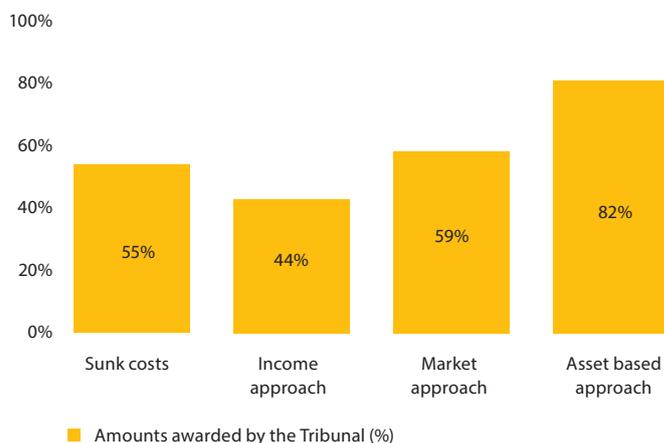
Amounts awarded by Tribunals as a percentage of the amount claimed

The amount awarded by Tribunals was on average 53% of the amount claimed by claimants (by head of claim), which is significantly higher than the average of 36% from the PwC Studies of investment treaty awards.

The reason for the relatively higher amount awarded as compared to the prior PwC Studies may be partly due to the prevalence of sunk costs as a valuation method in the cases studied (which is directly related to the measure of damages being *damnum emergens*).

⁴ Amounts are stated based on 284 individual heads of claim pleaded in 180 cases.

Figure 5: Amount awarded by the Tribunal as a percentage of the amount claimed



It is perhaps unsurprising that a higher percentage of sunk cost claims is awarded compared to income approach claims. In a sunk costs approach, there will often be less scope for disagreement about the actual cost of the items being claimed, which will often be a matter of record. Disagreements involving sunk—costs claims would typically arise in respect of whether specific costs are legitimately included in the claim, but less so in respect of the calculation of the amount claimed. By contrast, where a case involves estimation of an income stream, there is more room for uncertainty and disagreement, potentially leading Tribunals to award a lower percentage of the amount claimed. The higher percentage in respect of the market approach is therefore a surprising result but we note that this is based on a small population of awards (14 cases).

That said, the difference in amounts awarded for forward and backward looking methodologies isn't as stark as one might imagine, with sunk cost claims being awarded 55% of the claimant's claim on average and claims based on income and market approaches being awarded 44% and 59% on average respectively. This tells us that the higher amount awarded by Tribunals in this study is not solely down to the choice of methodology.

Valuation methodologies for the assessment of damages

For the purposes of performing this research, we have grouped the methodologies commonly adopted for the assessment of damages into four categories, which are explained below:

Income approach

Included in this category are claims for lost profits and claims for lost value assessed through use of the discounted cash flow methodology. Both of these approaches share the same need to estimate the income (i.e. profits or cash flows) that would have been generated “but for” the actions of the respondent. Depending on the circumstances, in each case the estimated profits or cash flows may or may not be discounted.

We classify these techniques as “forward looking” methodologies because they generally involve looking forward from a date of breach to estimate the profits/cash flows that would have been generated “but for” the breach.

Market approach

Included in this category are claims for loss in value assessed by comparing the business, asset, or a good or service being valued to similar businesses, assets, or goods or services in the market, so called ‘comparables.’ This approach again involves an assessment of future value and is referred to in this study as a “forward looking” methodology.

Asset approach

The asset approach included assess the current market or book value of assets, net of liabilities. We consider this approach is generally “backward looking”.

Sunk costs

Included in this category are claims assessed by reference to the historical cost of an investment (for example in joint ventures or purchase of company shares) or wasted expenditure relevant to the issues in dispute.

Wasted expenditure might include costs incurred either by honouring one’s obligations under a contract (e.g. payments or performances) in advance of a breach, or costs incurred as a consequence of a breach (e.g. mitigation of damages).

For the purpose of this study, this category also includes the valuation of the principal amount that is allegedly still due under the contract itself.

This approach generally involves quantification of expenditure actually incurred prior to the moment of quantification as damages, and is referred to in this study as a “backward looking” methodology.

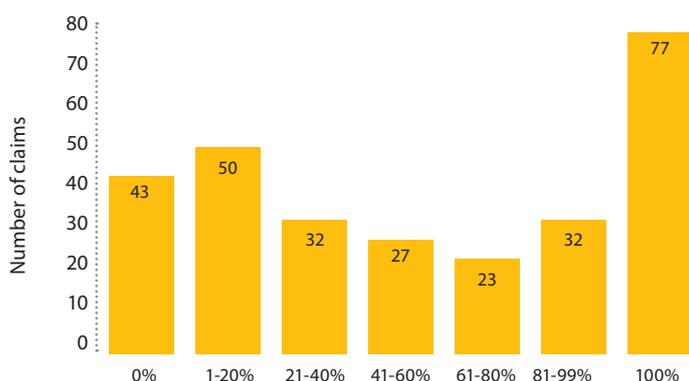


Are Tribunals splitting the baby?

A common refrain is that Tribunals follow a human instinct to “split the baby” and go for a middle ground between the parties’ positions. The awards in this study do not support that hypothesis and we note that this finding is consistent with the PwC Studies. Our analysis shows that it is much more common for Tribunals to favour more closely either the position of the claimant or the respondent, a trend which is particularly evident in this study.

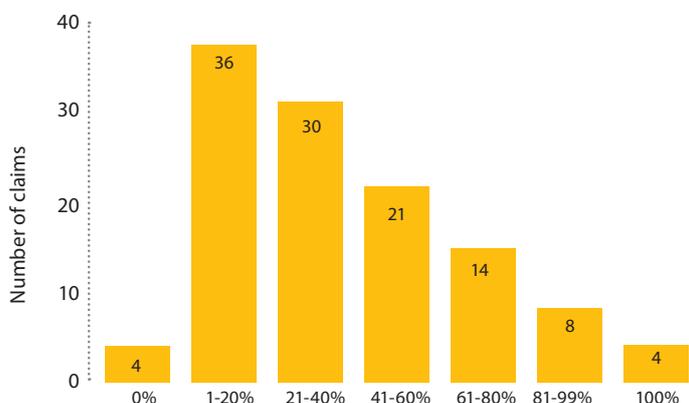
The graphs below show the distribution of the amounts awarded by Tribunals as a percentage of the amount claimed by claimants, including the result from this study and from the PwC Studies.

Figure 6: Amounts awarded by Tribunals as a percentage of the amount claimed in the QMUL Study of ICC awards



Percentage of claimant's claim awarded by Tribunal

Figure 7: Amounts awarded by Tribunals as a percentage of the amount claimed in the PwC Studies of investment treaty awards



Percentage of claimant's claim awarded by Tribunal

An interesting distinction between this study and the prior PwC Studies is that a significantly higher proportion of heads of claim resulted in 100% of the amount claimed being awarded (27% for this study, as compared to 3% for the PwC Studies).

The trend is partly explained by the greater prevalence of sunk cost awards in this study. 41% of the awards for sunk costs were for between 81% and 100% of the amount claimed. Conversely, only 27% of the awards for an income approach claim were awarded between 81% and 100% of the amount claimed.

As set out in the next section, we note that Tribunals in investor-state cases are more likely to adopt a different valuation method from that put forward by the claimants. This may lead to more sizeable differences between the amounts claimed and awarded (for example, where a claim based on lost profits meets an award based on sunk costs). By contrast, Tribunals in commercial arbitration generally agree with the proposed methodology.

We further note that whole company valuation is more prevalent in investor-state arbitration than in commercial arbitration, where claims are more often focussed on valuing wasted costs or lost profits rather than an entire company. After all, in contrast to investment cases, commercial disputes arise from contracts that can involve the procurement of various types of good or service other than the purchase or transfer of a company or business. A whole-company valuation would often involve more variables and require assumptions to be made over longer periods and therefore be subject to more judgement calls. Increased uncertainty might account for a lower percentage of claims being awarded in investor-state arbitration.

How far apart is the gap between claimants and respondents?

A statistic that caused a significant amount of debate in the PwC Studies was the significant gap in the quantification of claims between experts acting for claimants and respondents.

A similar gap is evident from the claims in this study, where the respondent position was on average 12% of the amount claimed. This is consistent with the PwC Studies which also had an average of 12%.

Any hypothesis that experts might adopt a more partisan approach if they know the final award will not be made public, as is more often the case for commercial arbitration compared to investor-state arbitration, therefore appears to be unsupported.

Our analysis tells us that the gap is not solely, or even primarily, down to the experts, since the gap is equally wide whether experts are involved or not. Other factors at stake include the legal position of the parties and differing interpretations on the facts.

The respondent's position as a percentage of the claimant's position is, on average:

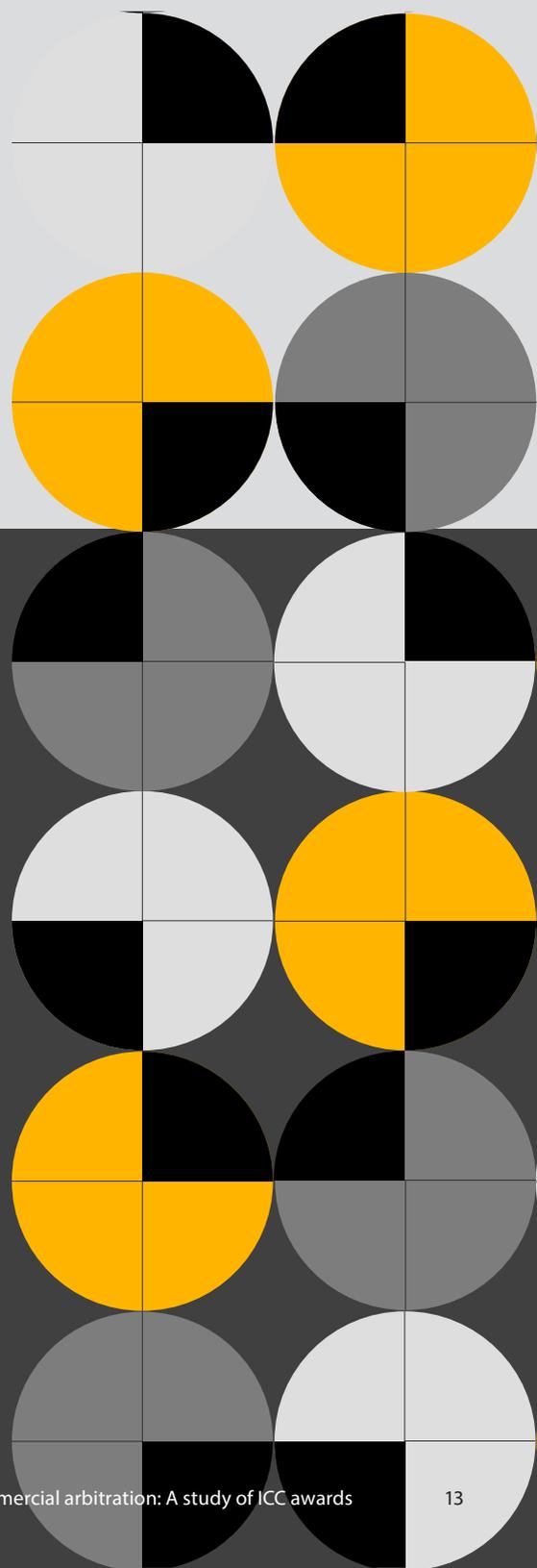
11.8%

When experts are involved

11.7%

When experts are not involved

The size of the gap should also be considered in light of the fact that our population includes only cases that result in a final award being issued and so, by nature, are likely to include cases in which the parties are further apart in their assessment of the legal and factual position.



Methodologies proposed by the parties and adopted by Tribunals

Frequency of different valuation methodologies

There is a clear difference in the relative frequency of approaches noted in this study, as compared to the PwC Studies of investment treaty awards. In this study, the claimants were far more likely to propose the sunk cost methodology than the income or market approaches. This is in contrast to the PwC Studies, which focused on investor-state cases, where claimants would most frequently propose a forward looking income or market approach.

It appears that in the ICC cases, which involve commercial arbitration, claimants claim outstanding payments or costs incurred due to a breach of contract more often than lost income or loss of profit or indeed, loss of an entire company. The high number of cases where the focus is on damages that have already occurred may be caused by the fact that in many ICC cases the disputes arise out of short-term contracts or single delivery or supply agreements, or the lost profit is already provided for by the applicable national law. Typical examples would include contracts for the sale of goods or supply of services or construction contracts, where the issues appear to be breach of contract, non performance or lack of agreed qualities in supplied goods or services.

Acceptance of proposed methodology by the respondent

Figure 9 shows the relative frequency with which the claimant's proposed methodology is accepted by the respondent.

The data indicates that in many cases the respondent either agrees with, or does not challenge, the claimant's methodology. A respondent actively disagreeing with the claimant's proposed approach in favour of an alternative was rare, occurring in only 4% of sunk cost claims, 7% of income approach claims and 7% of market approach claims.

Figure 8: Comparison of methodologies proposed by claimants in this study to those cases examined in the PwC Studies

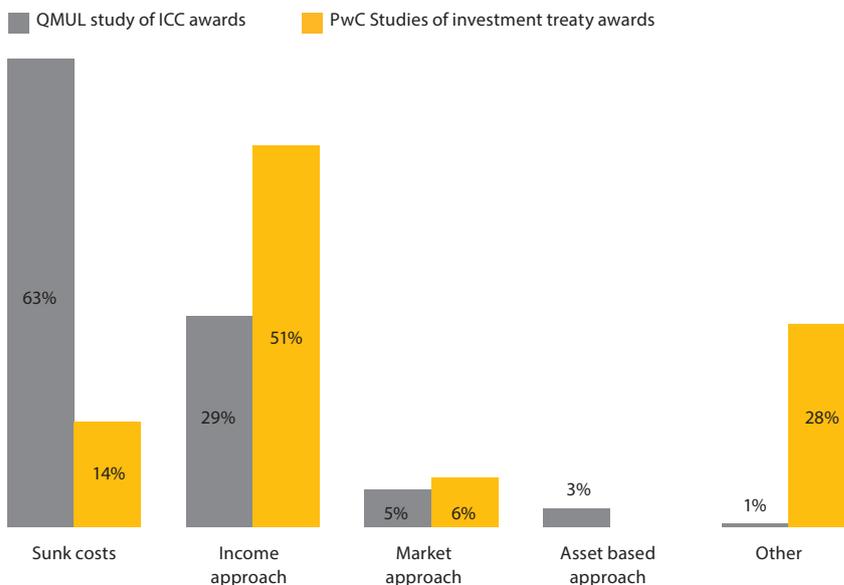
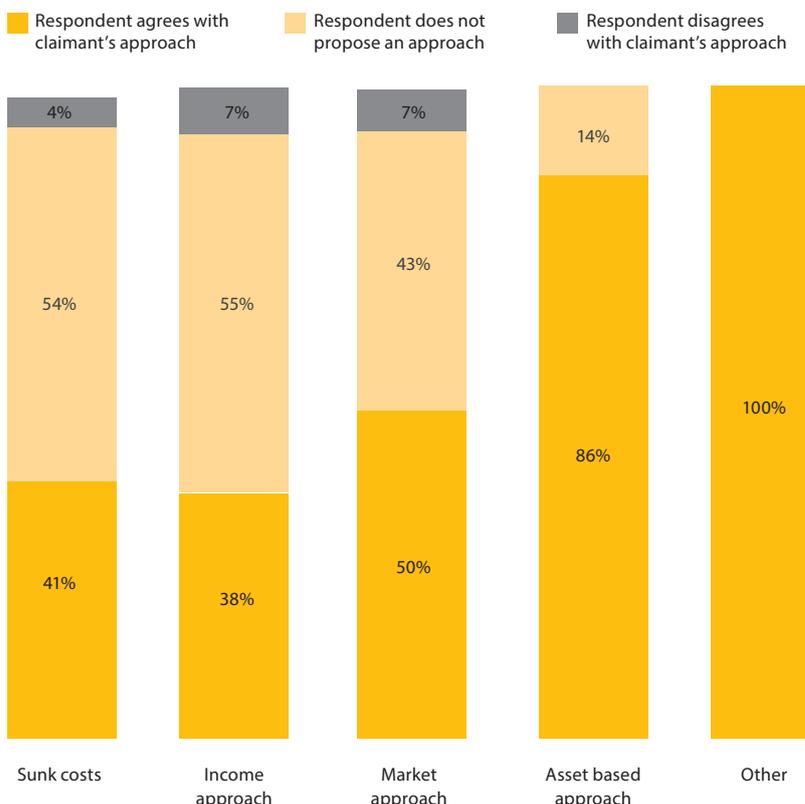


Figure 9: Degree of acceptance of the claimant's methodology by the respondent

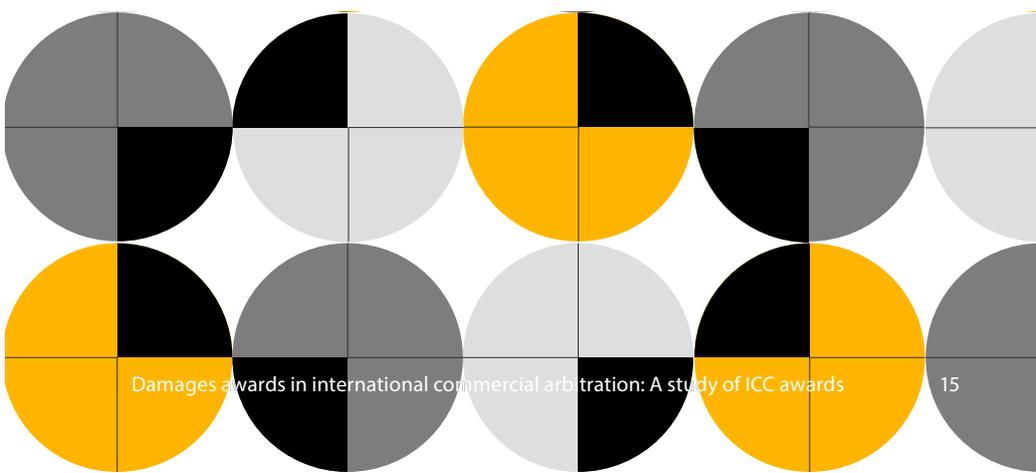
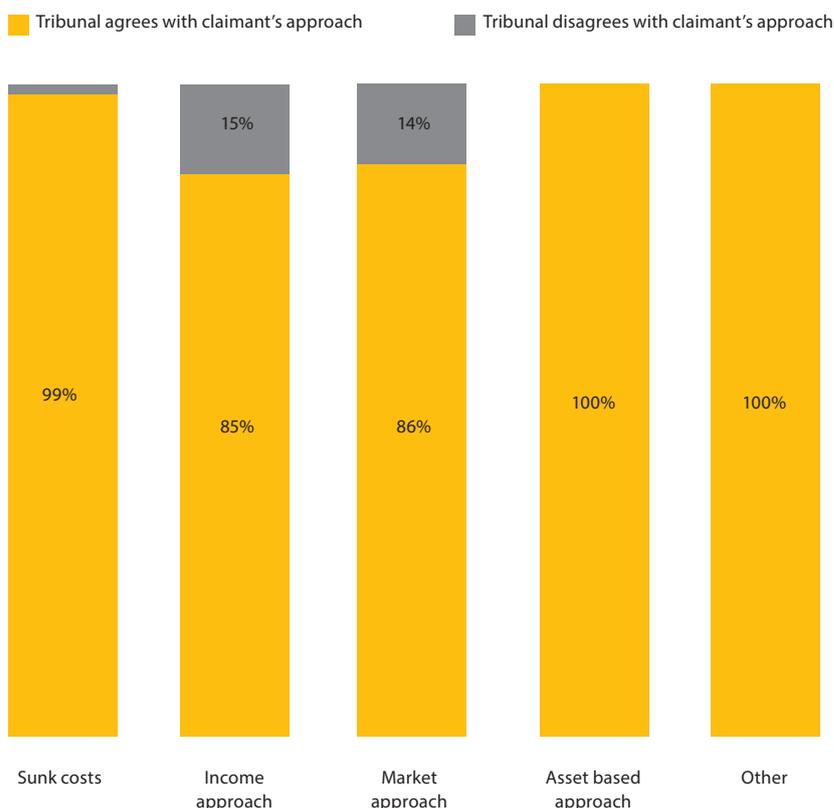


Tribunals almost invariably accept the sunk costs approach when it is proposed by claimants. In this study the sunk costs approach was accepted by Tribunals in 99% of the claims it was proposed by claimants, which is consistent with the PwC Studies, where it was accepted in 100% of the claims.

Tribunals are less likely to accept the forward looking approaches, with the income approach accepted in 85% of the cases in which it was proposed and the market approach 86%. These percentages are higher than was noted in the PwC Studies, in which the income approach was accepted in 66% of the cases in which it was proposed, and the market approach 60%. This may help to explain the smaller gap between amounts claimed and amounts awarded in commercial arbitration cases, as changes in methodology (for example from lost profits to sunk costs) can have a significant impact on the sums awarded.

For the 16 claims where the Tribunal adopted a different methodology to that proposed by the claimant, the Tribunal either used an alternative method to calculate damages (9 claims) or rejected the claim altogether and awarded no damages, despite finding in favour of the claimant on liability (7 claims). We note that the rejection of an approach did not always lead to a low award – in three cases, more than 40% of the claim amount was awarded, despite the Tribunal using a different methodology to that proposed by the claimant. It is clear that rejection of a particular valuation approach does not inevitably result in a total rejection of a claim for damages.

Figure 10: Degree of acceptance of the claimant’s methodology by the Tribunal



Criticisms levelled by Tribunals

We have examined the criticisms levelled by Tribunals against claimants, and their experts, in relation to the quantification of claims. The most frequent criticisms are that the claimant's case is not adequately substantiated, is speculative or contains the wrong underlying assumptions (Figure 12).

In awards where the top three criticisms appeared, the claimants overall outcome, across all of its claims, is on average lower than the broader population of awards reviewed in this study. Figure 11 demonstrates this trend, showing, for example, that claimants subject to criticism by Tribunals related to a lack of evidence get, on average, 39% of the total amount claimed, which is significantly lower than the average across all 180 awards of 55%.

Figure 11: Graph showing the amount awarded to a claimant, across all claims, where one of the claims was subject to criticism by the Tribunal

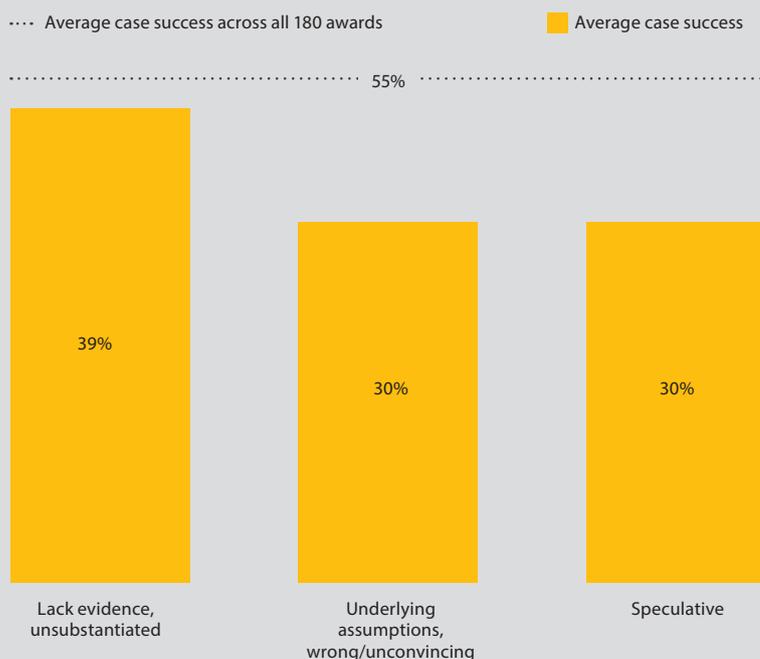
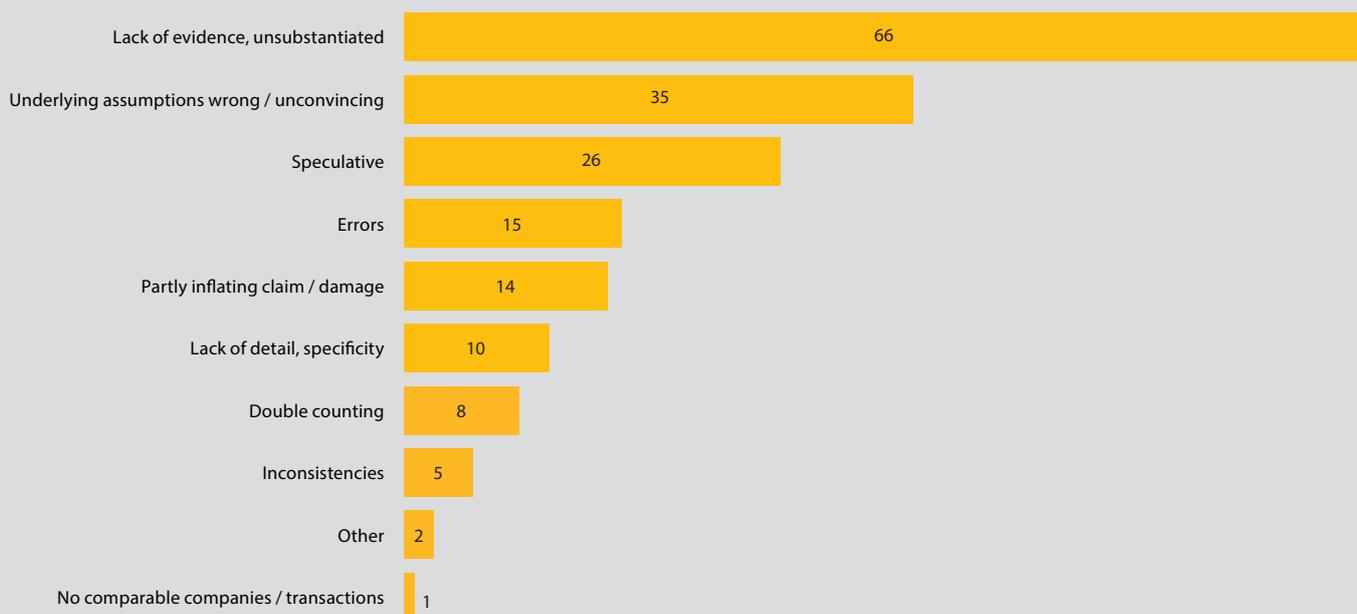


Figure 12: Types of criticism levelled by Tribunals against claimants





The impact of experts

The larger the claim, the higher the chance that an expert will be appointed

As one might expect, the use of experts becomes more frequent as the size of claims increase, as shown in Figure 13.

For claimants, only 21% of cases with an amount claimed in the range of \$0-1m involved an expert, increasing to 85% of cases with an amount claimed in excess of \$25m that were quantified by an expert.

Respondents were less likely than claimants to make use of an expert, with only 66% of cases with an amount claimed in excess of \$25m being quantified by an expert on behalf of respondents.

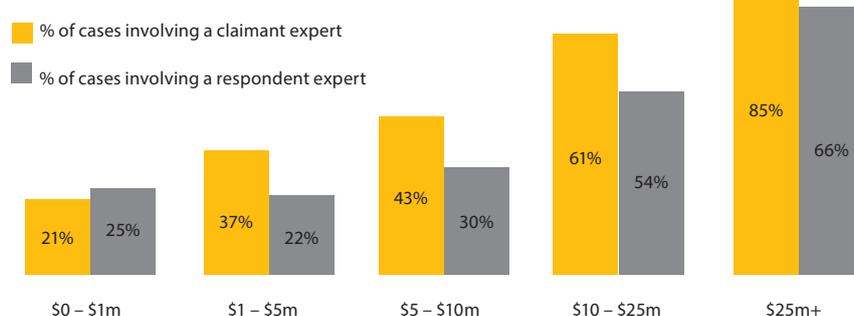
There is an “arms race” effect once a claimant appoints an expert

In those cases where the claimant appointed an expert, the analysis shows that the respondent fared significantly better when also appointing an expert:

- Tribunals awarded on average 69% of the amount claimed when there was a claimant expert engaged, but no respondent expert (29 cases in the population).
- Tribunals award on average only 41% of the amount claimed when there are both claimant and respondent experts (64 cases in the population).

This difference may in part be explained by respondents being less willing to put forward an expert when defending a weak position. Even so, the difference when

Figure 13: Frequency of the use of experts by claimants and respondents, split by claim size



respondents appoint an expert to respond is significant.

The P&ID vs Nigeria case⁵, where the claimant was awarded USD 9.6 billion (being USD 6.6 billion plus interest), substantially all of the amount claimed, highlights the importance of respondents engaging with experts and ensuring that the expert evidence they put forward fully and adequately responds to all aspects of the claim as quantified by the claimant’s expert(s).

Although the respondent in this case did employ an expert, the Tribunal’s comments suggest that the expert in question did not address the calculations and evidence provided by the claimant’s experts in a number of important areas, leaving the Tribunal little option but to accept the figures put forward by the claimant.

The Tribunal referred to respondents’ experts’ reliance on “altogether false assumptions about the underlying figures”⁶, failure to respond to the claimant’s experts in a number of important areas⁷ and failure to support the respondent’s own assertions⁸ which leave

the Tribunal no satisfactory basis to accept alternatives⁹.

The Tribunal felt that the respondent’s expert’s report was “based on a misapprehension, evident throughout the report and the submissions on behalf of the Government, about the nature of the calculation which the Tribunal has to make. It fails to appreciate that the calculation must be made on the assumption that the Government will perform its obligations under the Contract.”¹⁰

This highlights the importance of an expert working closely with the client and their legal team to ensure that they understand the claim and deal fully with all aspects of the evidence that is relevant to the quantification of loss.

⁵ For the avoidance of doubt, this was not an ICC arbitration and is not part of our dataset for this study. The final award, dated 31 January 2017, is available in the public domain.

⁶ P&ID vs Nigeria award dated 31 January 2017, paragraph 65

⁷ See for example P&ID vs Nigeria paragraphs 66, 71, 103

⁸ P&ID vs Nigeria paragraph 85, 96, 100, 102, 105

⁹ P&ID vs Nigeria paragraph 75, 103

¹⁰ P&ID vs Nigeria paragraph 89

Is gender diversity any greater for experts than for arbitrators?

Recent debate in the arbitration community has focused on the limited degree of gender diversity amongst arbitrators, leading to such initiatives as Equal Representation in Arbitration (“ERA”).

It appears that this lack of diversity extends to experts, with women representing only 11% of experts and 10% of arbitrators in the cases reviewed in this study.

ERA’s launch of “The Pledge” in May 2016 has encouraged organisations to actively devise a set of concrete actions to ensure fair representation of women in arbitration. Some of the proposed actions include participation in mentorship programmes to guide women colleagues and the implementation of an equal representation policy. A key element of the pledge aims to ensure “fair representation” of women on lists of potential arbitrators. In June 2019, the ICC reported that the number of women appointed and confirmed as arbitrators in ICC cases improved from 136 in 2015

to 273 in 2018¹¹, which indicates some success. However, it is clear that there is still a way to go before ERA’s ultimate goal of full parity is achieved, and perhaps similar positive action would be beneficial in the field of expert witnesses.

Many of the reasons often suggested for the lack of diversity amongst Tribunals are also likely to apply to the lack of diversity in experts including, for example, the relative lack of women in senior positions, cognitive bias and a lack of female mentors. Positive steps to address the lack of diversity can be taken by the various stakeholders for experts in the arbitration community.

Firstly, with regard to the professional services firms that provide the pool of experts, it is a reality that most damages experts are partners (or partner equivalents), a grade at which women are still underrepresented.

An important step taken in recent years by many professional services firms is to publish the gender pay gap (a legal requirement in the UK for companies with over 250 employees), with associated targets which drive accountability amongst the leadership of the firms to close the gap.

Secondly, with regard to the law firms and clients who hire experts, the desire to appoint heavyweight names inevitably tilts the scale towards established (mostly male) experts. This leaves women, minorities and more junior would-be experts struggling to get the necessary experience on their CVs to break through. A possible solution is the appointment of “joint witnesses” comprising a pair of experts, including an established expert and an appropriate member of his or her team. Firms can be reluctant to countenance this, however, citing cost and/or a perceived tendency of counsel to try to identify and target the less experienced of the two in cross-examination.

Other steps that could be taken to help improve diversity could include, for example, an effort by those charged with selecting experts to ensure diversity in their list of potential experts to be shared with clients, mentoring schemes, in particular between law firms and experts, and participation in the increasing number of networking groups focused on women in arbitration.

Figure 14: Extent of gender diversity within arbitrators



Figure 15: Extent of gender diversity within experts



¹¹ICC Arbitration figures

Interest

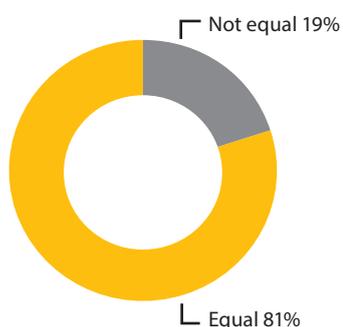
Lastly, we turn to the award of interest, including consideration of the basis for the rate applied, the use of simple or compound interest rates and the distinction (if any) between pre and post award interest.

Award of interest and rate applied

For the 180 cases reviewed, the absolute rate of interest (where stated) ranged from 1% to 18% although the rate of interest was frequently expressed as a mark up over a benchmark such as LIBOR or by reference to a national legal interest rate.

The majority (145 cases, 81%) of awards applied the same interest rate in the pre and post award periods. Where there was a different rate applied, there was no consistency of approach: some post award rates were higher than the pre award rate and some post award rates were lower than the pre award rate.

Figure 16: Comparison of pre and post award interest rates



Compounding of interest

The prior PwC Studies of investment treaty awards found that, over time, the compounding of interest had become more common practice than the award of simple interest. In the period between 2011 and 2015 compounding was adopted in 86% of cases in the PwC Studies. (Figure 17)

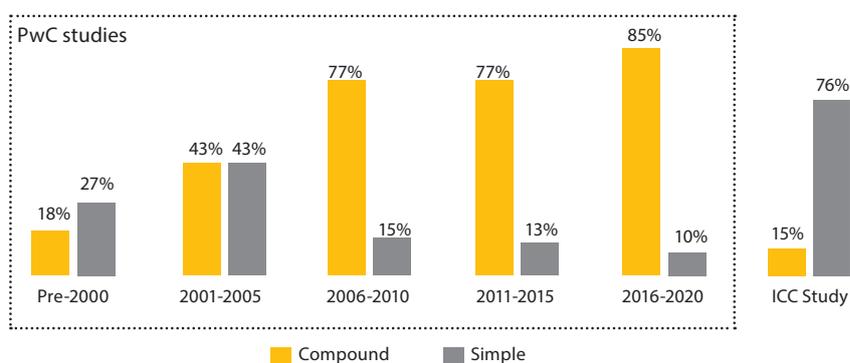
The same shift has clearly not happened in the ICC cases reviewed as part of this study, with simple interest adopted in 79% (pre award interest) and 74% (post award interest) of the awards reviewed (excluding cases where no interest was claimed). (Figure 18)

One reason for this significant difference in approach is that most investment treaties include a clause that allows for a commercial rate of interest, and Tribunals appear to have converged on a

consensus that commercial rates are calculated on a compound basis.

Conversely, the bases for the award of interest in this study were most commonly a legal/statutory rate (45% of cases) or a contractual rate (17%) (excluding cases where no interest was claimed) (Figure 19). In these cases, the applicable national law (particularly in civil law jurisdictions) or contractual term often require interest to be calculated on a simple basis. However, even where the type of interest was at the discretion of the arbitrators, the arbitrators' default position is often to assume that simple interest should be applied unless the parties had clearly agreed otherwise. This is in contrast to the position of Tribunals in investment treaty cases, which tend to assume that compound interest is the generally accepted approach.

Figure 17: Growing prevalence of compound interest (pre and post award) in previous PwC Studies compared to prevalence of compound interest in this study



Graph includes only cases where it is clear from the award whether interest is simple or compound.

Figure 18: Type of interest applied (pre and post award)

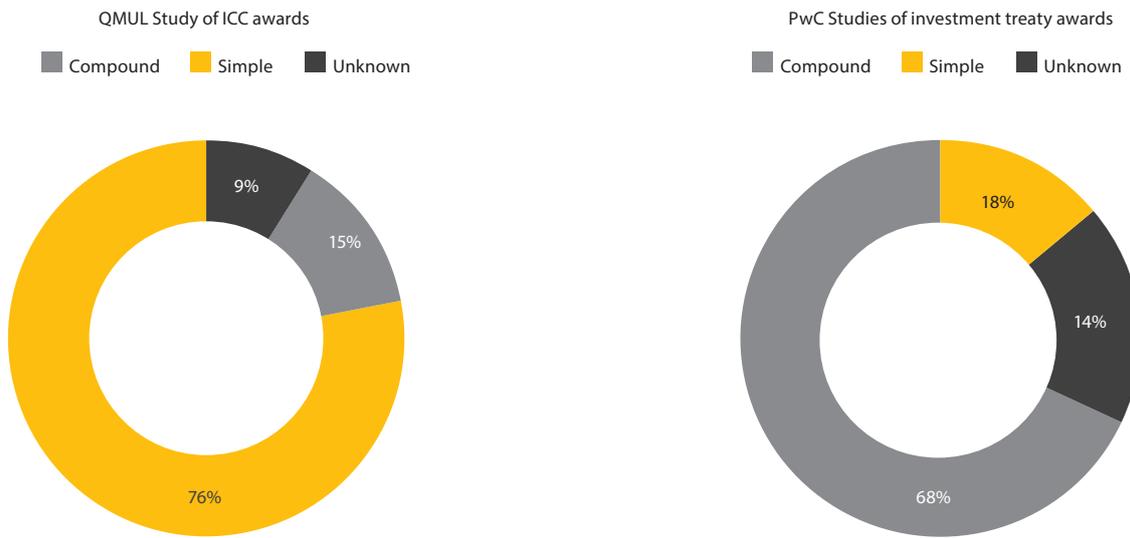
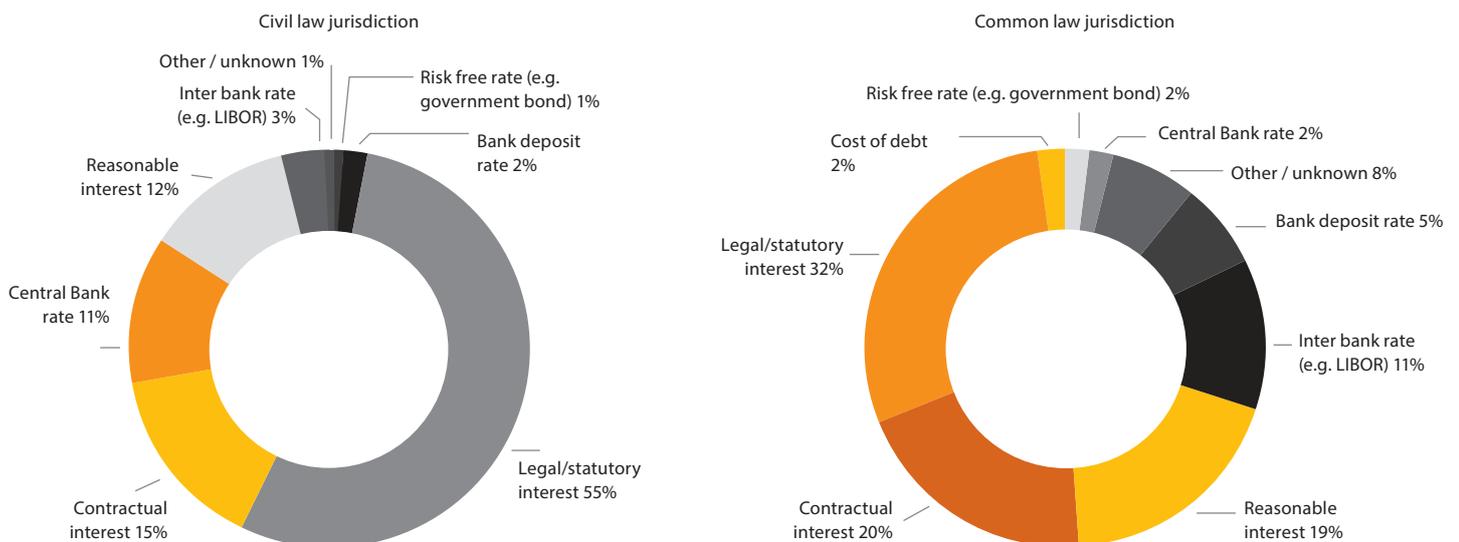


Figure 19: Basis of interest applied, separated between cases where the governing law is from civil and common law jurisdictions (pre and post award)



Appendix

Scope and key metrics of the sample population

Scope of awards in the study

The study examines 180 confidential awards in arbitral proceedings administered by the ICC in Paris and New York between 2014 and 2018. QMUL examined the most recent awards that were drafted in English, in which damages were awarded and which were not dismissed due to jurisdiction or liability determination. Excluded from the study were awards that have a heightened level of confidentiality such that the ICC was unable to provide access. The scope did not include any awards rendered before 2014. The most recent awards rendered by the ICC in Paris are from 2017, while the most recent ones from New York run up to late 2018.

In a given case, arbitrators might assess the damages for more than a single head of claim. The 180 cases that fall within the scope of this study are made up of valuations for 284 separate heads of claims, from both claimants and respondents. The study excludes heads of claims where the arbitrators established damages on merely legal grounds, for example, the interpretation of the contract, a simple liquidation clause, or the legal determination of liability, or quantified the damages merely based on simple invoices or the agreed contract price. However, if the contract price or a liquidation clause included a formula or was depended on a factor that required a valuation, the head of claim was included. Each valuation for these heads of claim are analysed in this study.

Award values

Awards ranged in value from

\$nil to \$1,763,657,466

with a median average of

\$1,213,118

Figure 20: Industry sectors

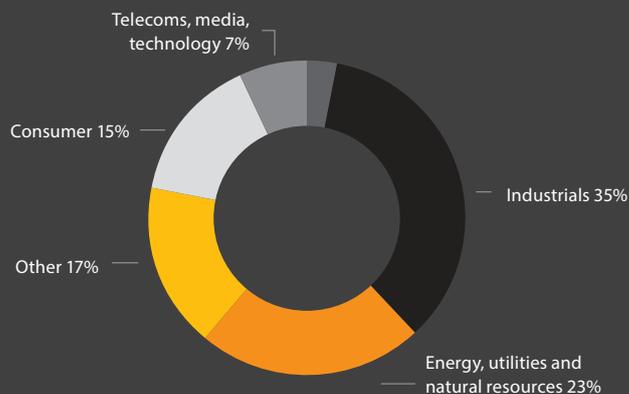


Figure 21: Nationality of parties



Figure 22: Nationality of Tribunal members



Appendix

Figure 23:
Lex Arbitri
(top 10 countries
in the sample)
of which 80 cases
are from common
law jurisdictions
and 68 cases are
from civil law
jurisdictions.

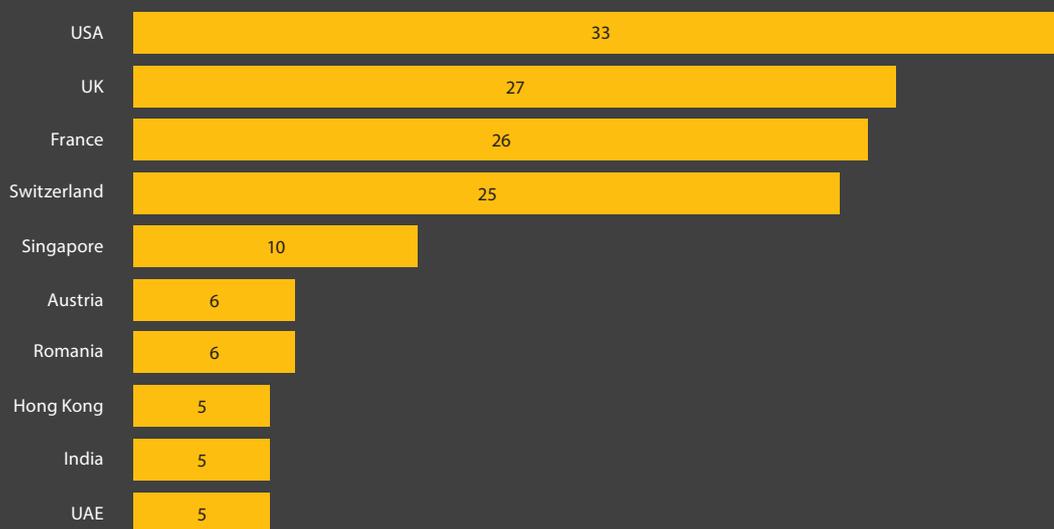


Figure 24:
Governing law
(top 10 countries
in the sample)
of which 66 cases
are from common
law jurisdictions
and 48 cases are
from civil law
jurisdictions.

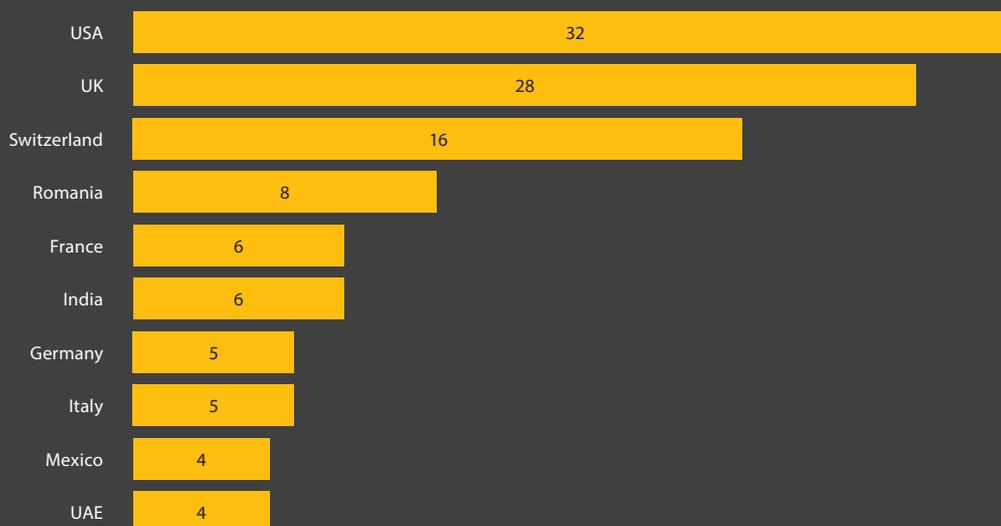


Figure 25:
Types of breach

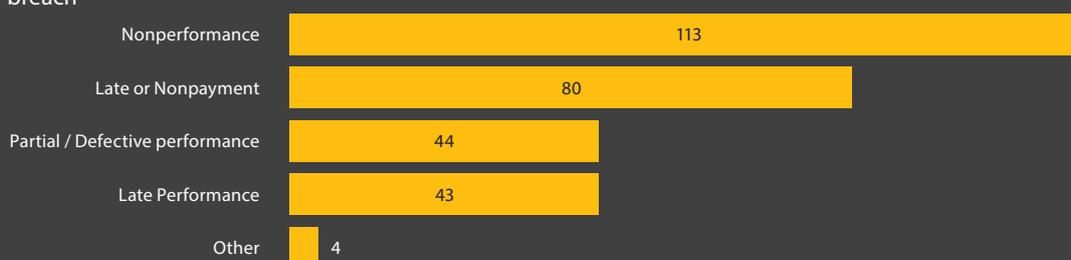


Figure 26: Measure of damages

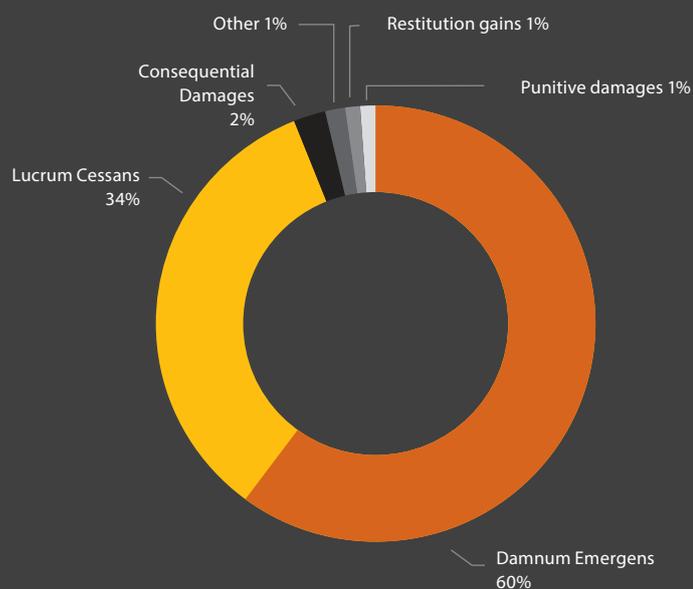
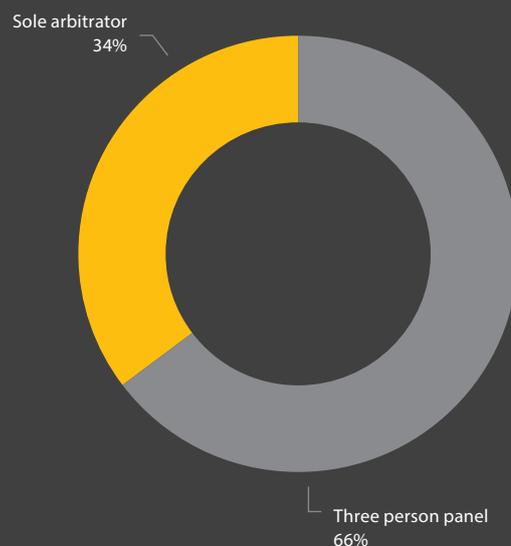
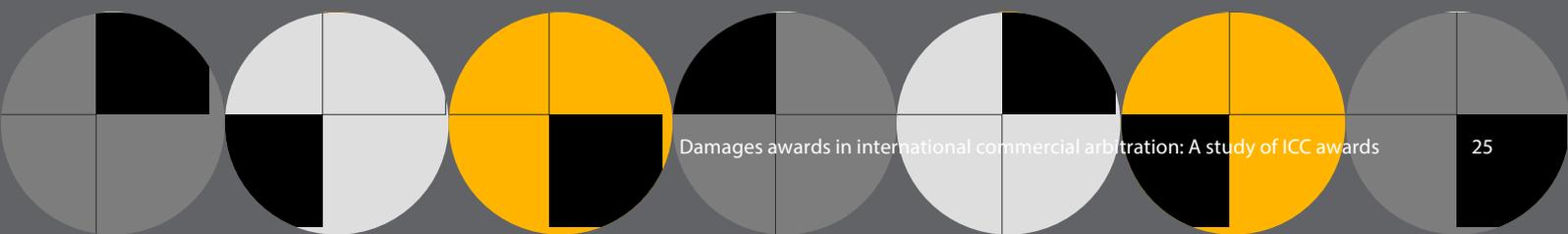


Figure 27: Number of arbitrators



Focus Group / individuals consulted:

- Professor Victor Goldberg, Columbia Law School
- Alice Fremuth-Wolf, Vienna International Arbitral Centre
- Matthew Weiniger QC, Linklaters
- Professor Mark Feldman, Peking University, School of Transnational Law
- Dr Remy Gerbay, Queen Mary University of London
- Sophie Nappert, International Arbitrator in independent practice
- Herfried Wöss, Wöss & Partners SC
- Annette Magnusson, The Arbitration Institute of the Stockholm Chamber of Commerce
- Mark Kantor, Arbitrator and mediator
- Jacomijn van Haersolte-van Hof, London Court of International Arbitration
- Laurence Shore, BonelliErede
- Professor Ioannis Kokkoris, Queen Mary University of London
- Javier Rubinstein, King & Spalding





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