KILPATRICK TOWNSEND

## 6 KEY TAKEAWAYS

# Presenting Damages in International Arbitration

On September 13, 2022, Kilpatrick Townsend Partner and Global Lead for International Disputes, Thomas G. Allen, participated as a debater in the "GAR Live: Atlanta" debate on presenting damages in international arbitration.

Here are some key takeaways from Mr. Allen's debate presentation:

**1** There is broad agreement that the traditional approach to a damages valuation is often too costly and over complicated. Direct, easily quantifiable reliance damages are usually not the source of expert battles or protracted briefing and witness examination. The problem comes when experts are attempting to value something more amorphous, such as future costs and income streams, lost profits, as well as intangible categories of loss such as good will, or diminution in value and lost opportunity costs.

**2** The motion being debated is for an expert lead process where the tribunal would essentially hire its own damages expert to act as a referee to help streamline and simplify the quantum aspect of an arbitration case.

**3** As an arbitration user, I support improvement of the process for presenting damages evidence. However, when I approach an individual case, first and foremost, I want to achieve the client's objectives. The client's objectives may or may not be aligned with an expert lead approach.

**4** My preference is for the lawyers in an adversarial system to continue to control how their damages case is presented on behalf of their clients. Improvements to efficiency are important but can be achieved through means that do not confer too much influence upon a Tribunal appointed referee or expert.

**5** Bifurcation of liability and quantum should be implemented more often. In many cases, the complicated damages phase could be avoided or simplified if some of the threshold liability issues are disposed of first. The applicability of consequential damage waivers and liability caps are good examples of where bifurcation could significantly streamline a proceeding. If a party is trying to recover consequential damages or recover above a liability cap, much of the damages case could be avoided completely, or the prospects for settlement greatly enhanced, if threshold issues such as the validity of these limitations provisions are determined before the presentation of damages evidence.

**6** There are other ways to search for efficiency in the process too. In addition to exploring the ways that bifurcation can add efficiency, Tribunals should also liberally award fees and costs in the event that a party presents an outsized damages case that lengthens and complicates the proceedings unnecessarily. Awarding fees and costs liberally to a party that decisively defeats a costly damages claim could act as a deterrent to an

and complicates the proceedings unnecessarily. Awarding fees and costs liberally to a party that decisively defeats a costly damages claim could act as a deterrent to an overreach by claimants.



There is broad agreement that the process of presenting damages can be improved but further dialogue is needed to determine an approach that will not compromise the client's ability to direct the presentation of evidence.

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