INTRODUCTION

The alliterative summary of the forensic art of advocacy, “preparation, presentation and persuasion,” applies equally to the issue of damages as it does to the issue of liability. However, there is often one fundamental difference between damages issues and liability issues. Liability questions usually look backwards. The determination of who is liable involves an assessment of past facts and law, albeit based on probabilities. Damages issues, although they often involve retrospective determination and frequently also involve legal issues, equally involve looking at issues prospectively, where the realm of facts give way to judgmental determinations such as discounts. This gives an added dimension to quantum.

Tribunals must, of course, assess damages on the basis of the applicable legal principles, which generally include the principle that the burden of proof in civil cases is the balance of probabilities. Thus, tribunals must be satisfied, with the burden on the claiming party, that the loss and its quantification is more likely to be true than not.

The process of proving damages is explored under these three headings: preparation, presentation, and persuasion. The article shall concentrate on international commercial arbitration, although the considerations are similar for investment treaty arbitration.

PREPARATION

To think of the assessment of damages as being a number-crunching exercise is a big mistake. While charts, prospects, discounts, calculations, and
expert evidence are all part of the exercise—the building blocks to success—they have to be built on foundations. Those foundations are evidence, and without evidence a claim for damages will founder in the same way as a claim for liability. An expert’s opinion is only as good as the information he or she is given. Similarly, for example, the discount used in a discounted cash flow calculation can make a huge difference to the result, yet somehow the tribunal has to choose a discount, and which discount it chooses will reflect the evidence available. It is easy to lose sight of the fact that a claimant has to prove its loss. Proof requires evidence, both factual and expert.

An immensely valuable exercise is an early evaluation in detail of the issues that arise in an arbitration. This provides a helpful way of assessing what evidence is needed on each point, although the nature of arbitration is such that the exercise will have to be considered at the outset and at regular intervals thereafter as the issues narrow or develop.

The sorts of issues that such an exercise can throw up are set out below.

Defining the Factual Issues

The factual issues can be summarized quite briefly, as they will vary from case to case, but the following are some general questions.

(1) Is the loss claimed a past loss or a future one or an amalgamation of both?
(2) Is the business a start-up or does it have an established trading history?
(3) Is the contract in question or the business profitable? Does the company have financial difficulties? How dependent was the company concerned on the contract in question? How easily can it raise capital or other money to operate its business? What rates would apply?
(4) What are the economic and business prospects for the particular business, and what is the subject matter of the contract? What are the prospects for the business of the company generally, or, looking even more widely, what is the market sector in the country (or globally as the case may be) involved?
(5) What currency is relevant to claim the loss in? This can have huge implications, particularly with a volatile exchange rate.