Assessment of economic loss and valuation of damages as a remedy for contract breach: A comparative law & economics analysis from empirical research on American common law, French civil law and International private law

Draft research paper1
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ABSTRACT

The assessment of economic harm and compensatory damages for contract breach has traditionally navigated between two practical difficulties: judicial uncertainty and technical complexity. Judicial uncertainty is particularly high when objective data are missing. And when data exist, financial and statistical methodologies are too complex and costly for the overwhelming majority of cases. This leads to inefficient bargaining, unnecessary litigations and/or unpredictable/arbitrary judicial decisions.

Hence there is a need for alternative methods that are both objective/predictable and simpler/cheaper than current quantitative methods. One of those methods would be to develop damages scales for certain types of economic loss as they exist for bodily injury. A good way to start is to study case law and to survey as many rulings as possible that can be used as precedents for different classes of economic damages.

We have selected three types of business situations where we think the use of simple quantitative methods is most relevant to assess economic loss due to contract breach. For each of those situations we successively designed hypothesis of the findings we were looking for, developed a template with fact specific criteria, searched and identified recent and relevant cases and built a database with those cases. We then used the database to validate or amend the initial hypothesis, to identify patterns or correlations and when relevant to suggest damage ranges or scales.

We show that reference ranges can be observed from relevant precedents of contract damages. We claim such ranges may benefit the academics debate and the parties’ attorneys contract drafting or pre-litigation settlement. We suggest continuous empirical research on certain types of contracts damages could eventually lead to shared and updated compensatory scales which courts and judges would use as tools to assist their rulings.

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1 This draft research paper is an ongoing work. Please do not cite, quote, or circulate without author’s permission.
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The research, dissertation and articles are supervised by Professors Mark Barenberg, Patrick Bolton, Richard Brooks, Victor Goldberg, Avery Katz and Pascal de Vareilles-Sommières. I am indebted to them for their early trust and continuous encouragement.

I am grateful to Professors Laurent Aynès, George Bermann, Suzanne Carval, Ronald Gilson, Jeffrey Gordon, Yves-Marie Laithier, Christina Ramberg, Ruth Sefton-Green, Robert Scott, Eric Talley, Christina Tvarno and audiences at the 09/27/2015 and 05/03/2017 Visiting Scholar Forums, 09/15/2017 Career in Law Workshop and 10/09/2017 Law & Economics Workshop at Columbia Law School for their generous advice and helpful comments.

I thank Dean Adam Kolker for his continuous support, Mickael Le Borloch for legal translation and editing assistance, Mohini Banerjee, Salomée Bohbot, Unique Cheon, Ismaïl El Hailouch, Tonbara Ekiyor, Joan Gondolo, Megan Ji, Jordan Johnson, Sophie Moskop, Swara Saraiya and Vasile Rotaru, for valuable research assistance.
BACKGROUND AND SCOPE OF RESEARCH

The assessment of economic harm and compensatory damages for contract breach has traditionally navigated between two practical difficulties: judicial uncertainty and technical complexity. Judicial uncertainty is particularly high when objective data are missing. And when data exist, financial and statistical methodologies are too complex and costly for the overwhelming majority of cases. This leads to inefficient bargaining, unnecessary litigations and/or unpredictable/arbitrary judicial decisions.

Hence there is a need for alternative methods that are both objective/predictable and simpler/cheaper than current quantitative methods. One of those methods would be to develop damages scales for certain types of economic loss as they exist for bodily injury. A good way to start is to study case law and to survey as many rulings as possible that can be used as precedents for different classes of economic damages.

We have selected three types of business situations where we think the use of simple quantitative methods is most relevant to assess economic loss due to contract breach. Those are situations where there is limited reliance (no/low investment) and where expectancy (general or consequential) exists but its quantum is speculative or difficult to prove objectively (no data available). In consequence those litigations have highly unpredictable outcomes and too sophisticated methods would require unreasonable investment compared to the economic stake. As they are also relatively frequent, those litigations are best fitted for normalized/objective but simpler/cheaper quantitative methods:

- Situation 1) breach of an agreement to negotiate or to agree, in M&A or commercial deals;
- Situation 2) damage to goodwill, business reputation or image;
- Situation 3) lost profits and lost chance for new businesses and start-ups.

Over the last three decades, the law has evolved towards “relaxed reasonable certainty rules” allowing more frequent and/or more generous expectancy damages.

For each of those situations we successively designed hypothesis of the findings we were looking for, developed a template (framework of analysis) with fact specific criteria, identified several hundreds of relevant cases and built a detailed database with 250 of them. We then used the database to validate or amend the initial hypothesis, to identify patterns and when relevant to suggest damage scales.

For comparison purposes, the project covered both commercial arbitration and higher State jurisdictions in French civil law, American common law and International private law.

We will start with a brief literature review and the summary of our previous research, mainly focused on Civil Law. Then the methodology of the current project will be developed and the key challenges will be anticipated. Finally, we will describe the key findings of our research. The appendixes show the size of the database, the graphs produced for the analysis and an abstract bibliography.

The expected outcome of the research is to gather a significant pool of data regarding damages awarded under a few situations presenting great unpredictability of awarded damages, which will help:

1) Build a guide to precedents with a range (if not a full scale) of appropriate damages awarded;
2) Compare between different jurisdictions the reactions to these unpredictable damages situations;
3) Determine the trends overtime in the likelihood, the proportion and the kind of damages awarded.

**SUMMARY OF PREVIOUS RESEARCH ON FRENCH CIVIL LAW**

(American Literature is mentioned later in this paper)

Legal literature is very abundant on the theory of contract law, also on the grounds for contractual liability, less so on the definition of damages for contract breach and even much less on the quantum of those damages. As the assessment and award of damages are only considered a matter of facts and not a matter of law in most laws, very few legal literatures have been found on the assessment of economic loss and the valuation of damages for contract breach. Most of the publications are from scholars in the fields of economics or statistics.

In French civil law, the general principle is that all prejudice is compensated as long as it is direct and certain. According to L. Aynès, a logic consequence is that « there is no relevance in law (...) to identify different categories of prejudice (...). Not any definition of economic loss exist in the law and even in the doctrine ».

On the contrary in American common law, where there is no such a general principle, « it is essential to define the notion (of economic loss) as it sets the boundaries of what loss is compensable: it is pure economic loss, that is the money loss independently of any bodily injury or material damages ». This originally English notion has inspired comparative analysis in France showing that « in spite of the general scope of full compensation principle, a hierarchy between bodily injury and economic loss (detrimental to the latter one) has appeared in recent laws and court rulings ».

« Economic loss is not precisely defined (...) and the method to value it is totally unforeseeable (...). Hence, trial judges are sovereign.» Even if the Cour de Cassation apply a growing control over the motives, it leaves trial judges free on the selection of the heads of damages and even more so on the valuation method. The Cour often uses the following phrase: “the trial judge justifies the existence of the prejudice by his own evaluation, having no obligation whatsoever to detail the elements he used to determine the quantum.” Academics have even shown that the least the trial judge says, the more chance her opinion has to be confirmed.

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4 Please refer to bibliography abstract in Appendix 3. We hold a full bibliography for your convenience.

5 References from Columbia professors of Economics include:


7 Ibidem

8 Ibidem

9 Ibidem

10 Cited by Laurent Aynès in his article.


*Frank S. Giaouï 2 October 2017*
L. Aynès\textsuperscript{12} concludes: “The legal rules governing the damages are so general that they hardly can be used as an adequate valuation method’. The principle of full compensation is constantly described by the Cour de cassation as follows: “civil liability aims at putting the victim back to the position where she would have been, had the damage not taken place”\textsuperscript{13}. The aim is clear but the higher court is silent on the method. This principle when strictly applied does not in practice - if not legally – allow to compensate the victims, including corporations, at the height of their real loss. It limits compensation for damages to the certain loss actually suffered by the creditor, solely and directly attributable to the breach of the contract and predictable from the debtor viewpoint.\textsuperscript{14}

Whereas the Anglo-Saxon common law also includes the loss of potential gains (shortfall) in its contract law, it adds to the burden of the creditor an obligation to mitigate damages. This obligation is still discreet in the French civil law. When she is hesitant on the certainty of the damage, a French trial judge would typically hide behind the loss of a chance. In that matter the only rule of law is that ‘compensation for the loss of a chance shall be measured to the chance lost and cannot equal the advantage the chance would have produced if it materialized.’\textsuperscript{15} Apart from that, trial judge is sovereign.

In summary, the French system is great to protect the contract and less so to protect the non-breaching party. Nevertheless the principle is, full compensation is rarely actually achieved when non-performance happens and parties are not willing to keep the contract going. Moreover, when it is achieved, one can hardly predict the calculation methods the judge will use to award damages. Based on a comparative analysis with the relevant American Common law, Private International law and the most recent trends observed in Civil law doctrine and practice, we have argued in a previous research\textsuperscript{16} that an extended and more liberal interpretation of the full compensation principle - associated with more objective and controlled valuation methods - is an adequate solution - both efficient and respectful of the fundamental principles of contract law – in order to completely compensate the victims of non-performance.

The conclusion calls for a discussion with American lawyers and explores various reforms in order to implement that solution. The legislative reform would consider the economic and financial loss, the assessment of compensatory damages and therefore the calculation of quantum not only as a matter of fact but also as a matter of law.

The current project aims at going a step forward. If the calculation of quantum were also a matter of law and more objective/controlled valuation methods were implemented, how can damages scales be used as an objective valuation method and how empirical observation can help develop those damages scales to start with?

\textsuperscript{12} Laurent Aynès, article cited.
\textsuperscript{13} Cass. civ. 3, 6 May 1998, B. III, n° 91.
\textsuperscript{14} Articles 1146 to 1153 of the old Code Civil and 1231 of the new Code Civil.
\textsuperscript{16} Frank Giaoui, working paper cited.
METHODOLOGY AND CHALLENGES OF EMPIRICAL RESEARCH

The methodology borrows from classical empirical research in social sciences with inductive reasoning i.e. extract the relevant data to validate or amend previously developed work hypothesis. We will particularly focus on detailed analysis of quantitative data and coded qualitative data. Some analysis will be common to all situations and jurisdictions and others will be specific.

1. Analysis of damages to be performed consistently for all situations and jurisdictions
   - Number and percentage of cases granting damages, evolution overtime by type of damages.
     - Compensatory, punitive, aggravated
     - Among compensatory: expectation, reliance, restitution
     - We will most probably focus on expectation (general and consequential)
     - Graph mapping the amount awarded in absolute value and as a percent of amount claimed
     - Evolution of amounts claimed and awarded overtime
     - Valuation methodology
     - Asset value (liquidation, usage, replacement, acquisition or book value)
     - Multiple value (market comparable)
     - DCF value (NPV of future cash flows)
     - Conjoint analysis (price premium)
     - Ex ante and/or ex post surveys… and other quantitative marketing techniques
   - Identify simple patterns (or relations when they exist) to assess amount awarded
   - Identify specific factors explaining any significant deviations from patterns
   - Select most robust patterns and deviation factors to design damage scales

2. Examples of factors (patterns or deviation) to be considered in each type of situation

2.1. Breach of an agreement to negotiate or to agree, particularly in the case of M&A
Those agreements are often called Type II Laval contracts after the name of Judge Laval. Several factors are useful to consider when trying to identify a pattern:
   - The absolute size of the termination fee, as well as in % of equity value
   - The benefit to shareholders, including a premium (if any) that directors seek to protect
   - The absolute size of the transaction, as well as the relative size of the partners
   - The degree to which a counterparty found such protections to be crucial to the deal
   - The preclusive or coercive power of all deal protections included in a transaction

Some factors may explain an exceptionally high break up fee:
   - Waiver of the acquirer’s rights, which makes alternative transactions possible
   - The length of the process searching for strategic alternatives
   - Number of directors being independent and disinterested
   - Arguably most importantly, opportunism and in some cases bad faith

In a recent article17, Robert Scott “argues that opportunism is a primary explanation for why commercial parties deliberately breach their contracts.” We will check how this factor is taken into consideration by courts when granting damages.

2.2. Damage to goodwill, business reputation or image;

We will assume there are two types of such damages. 
**Lato sensu** type is when it can be demonstrated that such damage to image had an indirect economic impact (often consequential damages) to reduce sales of goods or services. Calculating money relief is equivalent to the general valuation of lost profit. Lato sensu damage to business reputation or image concerns all claimants as long as they have an economic purpose: see classification below.

**Stricto sensu** type is when it cannot be demonstrated that damage to image had an impact to reduce sales of goods or services. The issue becomes the following: We are certain damage exists but we don’t know how to repair it because we don’t know how to calculate it. Traditional valuation methods are not enough anymore. In order to overcome the issue, there are two possible avenues:

- New econometrics analysis tools allow quantify with a reasonable reliability some reputation damages (image, brand, honesty) that do not necessarily or not directly translate into lost profits.
- Since 1993, the *Cour de cassation* has decided in this subject matter, damage is a direct consequence of the fault. Higher court judges often include the following wording in their rulings: “denigration/dispraise is enough to infer damage; there is no need to demonstrate a decrease in turnover or an actual customer poaching.” For the time being contract law does not seem ready to import that tort law, but we will check it during our research.

Finding the data may be more or less challenging depending on the claimants.
For **non for-profit and small corporations**, stake is often limited and data is missing or not publicly available. Those claimants being close from individuals, a first cut would be to use the same techniques and scales as the one used for individuals’ case law.
For **large corporations**, data is often available.

When traditional economic criteria are impacted, damages can be measured by lost sales, price discounts, increased ad spend to counterbalance the effect of dispraise, tangible or intangible assets (brand) depreciation, etc.

When non-economic criteria are impacted, damages can be measured by other indicators such as ESG (*Environment, Social, Governance*). They measure the intangible assets and the image of the corporation. Such indicators can be client satisfaction, attractiveness among students, “Great place to work” ranking, inclusion in a Socially Responsible Investments (SRI) portfolio, etc. The deterioration of those indicators can then be translated into economic damage. For instance: a lower customer satisfaction will translate into additional promotional activities and hence lower sales prices; a lower attractiveness among students or a lower “Great place to work” ranking will make it necessary to increase wages and hence higher costs; the exclusion from SRI indexes or portfolios will deteriorate share price and hence raise financing costs.

<table>
<thead>
<tr>
<th>Type of damages</th>
<th>Type of claimants</th>
<th>Reputation damage</th>
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<tbody>
<tr>
<td>Large corporation</td>
<td>Stricto sensu</td>
<td>Reputation damage</td>
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<td></td>
<td>3 Alternative/non economic techniques to measure damage that do not easily translate into lost profits</td>
<td>Lato sensu</td>
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<tr>
<td></td>
<td>1 Traditional economic techniques to measure lost profits</td>
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<tr>
<td>Small corporation</td>
<td>Non for profit</td>
<td>Reputation damage</td>
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<td></td>
<td>4 Is there really an asset in terms of goodwill, reputation or image? New business rule?</td>
<td>Lato sensu</td>
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<tr>
<td></td>
<td>2 When there is an economic purpose</td>
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<td></td>
<td>Same techniques as for individuals</td>
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</table>
2.3. Lost profits and lost chance for new businesses and start-ups.

The New Business rule has significantly evolved in American law. Its traditional approach would practically exclude all new businesses from the scope of money reliefs and damages simply on the ground that they were not making any profit anyway. The conservative rule – with no equivalent in French doctrine and law – has progressively disappeared and given space to a more liberal case law. Upon the new business rule, the promisee is entitled to damages as soon as she has demonstrated the same reasonable certainty as required from any other type of promisee.

That legal evolution was initiated in the Uniform Commercial Code then formalized in the Restatement of Contracts (Second) in 1981, and it is consistent with the economics. No economics theory can justify ruling out damages for lost profits on the ground of a new business or un-established activity. If opportunity cost is the next best use of one’s investment, then a start-up has arguably a higher opportunity cost (hence a higher expectation) than a well established business because its weighted average cost of capital is also higher: both shareholders and lenders will expect higher returns on their investments to compensate higher risk.

We have listed several criteria that may define an un-established business.
- Start up or recently launched activity
- No previous profit or no prior successful experience (track record) demonstrated
- A new location in an existing business network or chain operation
- A new venture within an existing business group

Under the key word “New Business Rule”, 173 cases are identifiable on Westlaw for all US jurisdictions. There may be more under other similar key words such as start-ups, new venture, etc.

In a recent article\textsuperscript{18}, Victor Goldberg has broken case law into four stylized categories (detail the consequences):
- The plaintiff has done nothing in reliance and claims expectation; the opportunity cost of capital gives the expected return on a new investment
- The owner of some property or asset (for instance IP) licensed it to a party and the licensee failed to exploit it
- The promisor have delayed performance or provided a defective product
- The buyer has repudiated by anticipation a long-term contract in which the seller has partially performed

Jurisdictions may be split into three categories as how they apply (or not) the new business rule:
- Jurisdiction have a NBR per se
- Jurisdiction have no NBR per se but de facto applies a higher standard for new businesses
- Jurisdictions apply same standards for new and established businesses

3. Coding

Above, we have mainly explained the quantitative analysis. So we have a good view of the necessary quantitative data to document. In order to identify the relevant qualitative data to document and code for each case, we have listed them down here. This list is simply illustrative and the appendixes are more specific on the final coding values. We have selected consistent coding values for all the jurisdictions and all the situations whenever it was relevant.

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In addition to the information detailed in subsections 1 and 2 above, we will aim at coding the following qualitative data:

- Reasons - mentioned in ruling - to grant or not damages
  - Reasonable certainty. We will check the requirement is higher to demonstrate the quantum than to demonstrate existence. Also, we will check the requirement to demonstrate existence is higher for consequential damages than for general damages
  - Foreseeability
  - Timing of damages ex-ante or ex-post the breach

- Reasons - mentioned in ruling - to grant damages closer to claim (”winning cases”)
  - Claim and defense have very close quantum
  - Claimant’s expert report particularly convincing
  - Market is very thin, no alternative for claimant
  - Claimant business is not risky (mature v. emerging industry, stable v. volatile market, established v. new business, low cost of capital if available…)

NB: All those criteria (in reverse) may explain why damages granted are on the lower side, closer to defense.

- Compare judge ruling with trial view and explain difference
  - Judge follows or amend trial view
  - Judge rejects expertise
  - Judge rejects manifestly unreasonable damage claim
  - Judge does not rule on quantum
  - Others

- International Commercial Arbitration should be detailed by source of law
  - International private law
  - US law
  - French law

NB: That is the lex arbitri on the substance/merits not on the procedure

- International private law should be detailed
  - CISG
  - PICC/UNIDROIT
  - UNCITRAL

4. Data extraction, additional challenges and guidelines to read the results

For each situation we thought of (and searched for) keywords that would be found in specifically relevant cases and carried such inquiries to major legal databases (primarily Westlaw and Lexis Nexis, also Dalloz and Lamyline for France, also Pace and Unilex for International). We focused on cases dating from 1990 to 2016 as they would document both the historical and the recent trends. These cases are also those most easily found on online databases anyway. We tended to extract cases only from the top courts (supreme courts and appellate courts in the US, Cour de Cassation in France) in order to build a database with and draw conclusions from the most important authorities possible. In the case of France however the Cour de Cassation only rules on matters of law and does not take facts or quantum into account. This would not, theoretically, have been a problem as we could have referred to the facts and the quantum discussed by the Cour d’Appel when its decisions were confirmed by the Cour de Cassation. For all practical purposes however, the databases very rarely publish the Cour d’Appel case if the ruling from the Cour de...
Cassation is published. This may arguably denotes a lack of interest from the judicial community towards factual and statistical concerns, a lack that we found also in the US and International laws. Consequently, we had to focus on Cour d’Appel decisions that were not ultimately (or not yet) the subject of a ruling from the Cour de Cassation. This should not, however, diminish the value of such cases as (1) these decisions are the ones most relevant to our study, (2) the Cour d’Appel decides in the same way as the Cour de Cassation did in most recent similar cases, and even more (3) considering the very high number of cases addressed by the French top court each year, those litigants which do not go on cassation most likely know they have no chance of winning, making these cases just as relevant to our study.

Then, for each of the three laws and the three situations, we randomly extracted 30 cases to determine the proportion of them granting or not granting compensatory contract damages. We respected heavy methodological constraints to have the most representative database. For instance, from a first sample of 150 cases of each situation, we picked one out of 5 cases to respect the distribution of the results with regard to chronology and other descriptive criteria.

Then, we did a second extraction in which we purposely mostly selected cases granting damages to better analyze the quantum. Consequently, the two samples are different even though some cases can logically be found in both.

For Private International Law we extracted both litigation and commercial arbitration. For the US, we focused the extraction (primarily but not exclusively) on 3 state jurisdictions: New York, California and Delaware. For France, most cases were decided in Paris or Versailles. That is first consistent with the geographical concentration of American and French litigations. This concentration is magnified here because cases in our situations need to be very well documented to evidence damages and thus require companies to have enough financial resources to back the necessary expertise, lawyers... However, we also found some cases decided in other French cities or other American jurisdictions; they often regards mid size companies, have smaller economic stake or are granted no damages.

Additional challenges should be answered now. One of the main methodological problems encountered is the selection bias as in most empirical studies. We should answer this problem both on a general theoretic viewpoint and on the practical objective pursued by our specific research.

We know since Priest and Klein published their seminal paper in 1984 that, due to the selection effect, the cases ending up in court do not constitute a random sample of all disputes. For three decades, many researchers have concluded one should not infer the character of law by observing litigated cases only. However Klerman and Lee have argued in 2014 and 2015 that, taking selection effects into account, one may be able to make valid inferences from the percentage of plaintiff victories, because selection effects are partial. Therefore, as Schweizer concluded in a research paper published in 2016 “empirical analysis confined to data from litigated cases seems possible and fruitful in spite of the selection effect.”

In the specific case of our research, selecting cases that are actually litigated is in itself a bias as most cases in the US or under International Law and a good portion in France are actually settled. Those litigated cases are the most speculative and/or those where the parties have very different expectations in terms of outcome. Well, those are precisely the cases we want to analyze here. So, that second practical answer combined with the previous theoretic demonstration give us enough confidence in the validity of inference from our empirical research.

19 Situation 3 (New Business Rule) was actually detailed only for US Law.
One other methodological challenge is specific to comparative analysis. Proceedings under the French law and the US law are very different, not to mention the Private International law. The existence of Jury trial only in US law will probably lead us to compare preferably rulings in appeal. The more basic but important challenge will probably be to find enough cases documenting the quantum both in claim and award. The data extracted and compiled shows this challenge clearly exists (particularly for US case law) but can still be overcome with larger samples.

Before describing the key findings of our research, we will provide a basic explanation to read the tables and slides here after. All the data we extracted and analyzed are laid out on excel spreadsheets, one for each situation (1,2 and 3) and for each law (French, American, International). However, in order to visualize the most important findings, we have produced summary tables and slides with graphs (storylines).

The summary tables are systematically based on comparative analysis. It is worth pointing out that while we have a great deal of data and most of it is consistent, we do not have complete data on every case and some of the data we have is not exactly comparable across jurisdictions or laws. As a result, the number of observations varies across our analyses according to the availability of the relevant information.

Slides tend to follow the same order for each situation and for each law.

The first slides, present the essential comparative findings. They describe each situation’s sample with regard to the Grant / No Grant distribution and to the main reasons for a case to be granted damages. The Grant / No Grant distribution is the first step of our work. It shows how likely the court (or the arbitral tribunal) is to find the defendant liable or not liable and hence, how likely she is to award damages to the plaintiff or to reject the claim. Such analysis can be found multiple times along the storyline and is always a pre requisite for analyzing the grants.

Then, we performed an analysis of the court’s decision in terms of quantifying the grants. We defined a Grant to Claim (G/C) Ratio as the percentage of the claim quantum actually granted by the court. Such analysis thus excludes every No Grant case, that is every case with a grant of 0 in the excel spreadsheet.

Then, we analyzed what types of compensatory damages (expectation, reliance, restitution) were detailed in the claims and the grants and how they evolved along time.

We then explored different possibilities to understand how both the Grant / No Grant distribution and the G/C Ratio along with other quantitative analysis, changed depending on various circumstances such as the length of negotiations, the size of each company, the risk of the claimant’s business, the sophistication of the methodology used to evidence the claim, the importance of the reputation for claimant’s business, etc.

Finally, each slide contains, at its top, a brief summary of the presented findings and, when necessary, of the methodology used.
COMPARATIVE ANALYSIS SUMMARY

Comparative analysis - Situation 1

For situation 1, top two reasons for granting compensatory damages include bad faith of the defendant, which is a way to hide punitive damages. The other reason is a clear agreement being recognized between the parties; this makes more sense and is true in all three laws.

No surprise also to notice that Expectation General Damages represents the bigger portion of the claims (76%) but Reliance Damages are two to three times better granted: G/C ratio of 46% for RD compared to 20% for E_GD.

One of the clearer conclusions of the empirical analysis is that the absolute value of the claim is a heavy driver over the G/C ratio. The largest is the quantum you claim the lowest recovery rate you should expect to get. This is true for all 3 laws (France, US and International). This may indicate that courts still hesitate to grant very large quantum in compensatory damages.

Trends of G/C ratios over the last three decades (from 1989 to 2016) vary depending on the law. It is generally increasing in France: from 26% to 40%. This is not due to an increasing absolute value of the quantum but to more liberal decisions taken by courts.

Whereas the quantum is sky rocketing in the US (from average claim of USD 2,5 millions in the 1990’s to close to USD 50 millions over the last decade), the G/C ratios tend to decrease: from 80% to 45% converging to a common value with France.

It is decreasing in International: from 93% to 60%; current values are still significantly higher than for France and the US.

In situation 1, it is generally demonstrated that longer negotiations lead to higher likelihood of granting damages and sometimes even with higher G/C ratio. That is also a very intuitive result. There is an observable exception to this rule in the US though; further research is needed to understand why.

However a counter intuitive result is that claimant operating in mature and stable industries (distribution and services) have much better chance to be granted damages (and twice as high G/C ratios between 42% to 88%) than those operating in more risky industries such as high tech or manufacturing (G/C ratio between 21% to 46%). This is very consistent across the three laws and somehow contradicts the economic theory saying that risk should be compensated. One explanation is probably that those claimants in high tech industries are probably smaller / younger than those in distribution and, as such, they command much less ability to evidence their lost profits (see new businesses in situation 3).

Sophistication of the methodology developed by the claimant in support of her claim has logically a positive impact on the likelihood to be granted damages. For instance, both in France and the US, those cases with no rationalized claim (sophistication index 1) are never granted damages whereas those with sophisticated claim (index 3) have 80% chances to be granted damages.

However this driver remains weaker than the absolute value of the claim: very sophisticated claims (index 4) have comparable or even lower G/C ratios than index 3 when their claims are larger. This is particularly true in France (with a G/C ratio of 31% vs. 57%) confirming a historical hypothesis of reluctance when claims are “too large” in the eyes of the court.

The comparison between 1st instance and appeal rulings was performed only for France. It shows that courts of Appeal tend to adopt more extreme positions than in the past: over the last decade
56% of appellate decisions cancelled or created a grant; the same figure was only 24% during the 1990’s.

The analysis of lawyers’ results was performed only for the US. No surprise here as the largest, most global firms focus on the larger claims (average quantum value in excess of USD 142 Millions compared to less than USD 5 Millions for other firms) and as such achieve relatively lower G/C ratio (45%) than the firms just one rank smaller which are absolute top performers (97%). It also pays to hire a firm significantly larger or more global than the other party’s: 76% G/C ratio compared to 46% when both firms are similar sizes.
Comparative analysis - Situation 2

For situation 2, top two reasons for granting compensatory damages almost always include bad faith of the defendant, which is a way to hide punitive damages. The other reason is a substandard performance from the defendant; this makes more sense and is true in all three laws.

No surprise also to notice that Expectation Consequential Damages represents the bigger portion of the claims (74% in the US) but a much smaller one of the grants (20% in the US) as there is a more stringent standard of evidence for consequential damages.

One of the clearer conclusions of the empirical study is that the absolute value of the claim is a heavy driver over the G/C ratio. The largest is the quantum you claim the lowest recovery rate you should expect to get. This is true for all 3 laws (France, US and International). This may indicate that courts still hesitate to grant very large quantum in compensatory damages.

Trends of G/C ratios over the last three decades (from 1989 to 2016) vary depending on the law. It is generally increasing in France: from 30% to 39%. This is due partly to an increasing absolute value of the quantum and more so to more liberal decisions taken by courts. Whereas the quantum is increasing in the US (from average claim of USD 293 K in the 1990’s to close to USD 1.5 million over the last decade), the G/C ratios tend to increase: from 0% to 73% this damage has started to be granted by the courts only over the last decade or so. It is decreasing in International: from 104% to 76%, current values are very consistent with the USA.

It is demonstrated for this damage that when reputation is an important success factor for the claimant’s business, then she is granted relatively more: For instance in France, 27% G/C ratio when reputation is a low to moderate criteria (index 1-2) compared to 44% G/C ratio when reputation is a high to very high criteria (index 3-4).

Sophistication of the methodology developed by the claimant in support of her claim has logically a positive impact on the likelihood to be granted damages. For instance in the US, those cases with not or low rationalized claim (sophistication index 1-2) are never granted damages whereas those with sophisticated claim (index 3-4) have 36% chance to be granted damages.

This is even more obvious in France (with respective G/C ratios of 22% vs. 71% for the same sophistication indexes).

The comparison between 1st instance and appeal rulings was performed only for France. It shows that courts of Appeal tend to adopt more conservative positions than in the past: over the last decade 44% of appellate decisions confirmed or reduced a grant; the same figure was 0% during the 1990’s.

The analysis of lawyers’ results was performed only for the US. Results are very surprising as they show the claimant gets higher G/C ratio (100%) when her law firm is smaller than when her law firm is of similar size (60%). We are not sure how to interpret those results: may be this new type of “moral” damages being with lower economic stake is not yet well served by larger firms and only smaller specialized firms have found a profitable business model with it.
<table>
<thead>
<tr>
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<tr>
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<td>Risk 2</td>
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<td>% Grant / Claim</td>
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<tr>
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<td>1st Grant</td>
<td>Ap. Grant reduced</td>
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<tr>
<td>% Sample T1</td>
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<td>% Sample T1</td>
<td>Ap. Created grant</td>
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</tr>
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<td>% Sample T2</td>
<td>Ap. Cancelled grant</td>
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<tr>
<td>% Sample T2</td>
<td>Ap. Created grant</td>
<td>25%</td>
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| % Grant/NoGrant | Sophistication 1 | 0% | 0% |
| % Grant/NoGrant | Sophistication 2 | 40% | 20% |
| % Grant/NoGrant | Sophistication 3 | 80% | 80% |
| % Grant/NoGrant | Sophistication 4 | 50% larger claim | 100% |
| % Grant / Claim | Sophistication 1 | 0% | 0% | 75% |
| % Grant / Claim | Sophistication 2 | 23% | 54% | 85% |
| % Grant / Claim | Sophistication 3 | 57% | 59% | 75% |
| % Grant / Claim | Sophistication 4 | 31% larger claim | 65% | 65% larger claim |

| % Grant/NoGrant | Law firm size 1-3 | 6% |
| % Grant/NoGrant | Law firm size 4-5 | 52% |
| % Grant / Claim | Similar law firm | 46% |
| % Grant / Claim | D law firm size 2+ | 76% |
| Avg claim | Law firm size 1-3 | 294 |
| Avg claim | Law firm size 4 | 4735 |
| Avg claim | Law firm size 5 | 142372 |
| % Grant / Claim | Law firm size 1-3 | 50% |
| % Grant / Claim | Law firm size 4 | 97% |
| % Grant / Claim | Law firm size 5 | 45% |

**Improve format of tables**
### Situation 2 (DRAFT)

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<tr>
<th>Criteria 1</th>
<th>Criteria 2</th>
<th>France</th>
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<th>International</th>
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<td>73%</td>
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<td>9%</td>
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<thead>
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<td>% Grant/NoGrant</td>
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<td>75%</td>
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</tr>
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<tr>
<td>% Grant / Claim</td>
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<td>100%</td>
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</tr>
<tr>
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</tr>
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<td>% Grant / Claim</td>
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<tr>
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<td>66%</td>
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<td>36%</td>
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* In Situation 2, sophistication is intended with different meanings in International compared to France and the USA. In International we analyze the sophistication of the decision maker’s legal rationale whereas in France and the USA we analyze the sophistication of the claim’s rationale.

**Improve format of tables**
## Situation 3 (DRAFT)

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**Improve format of tables**
RESULTS FOR FRENCH CIVIL LAW

French Law - Situation 1: breach of an agreement to agree or an agreement to negotiate

Situation 1 features cases in which parties entered negotiations (on an existing or a new contract) that eventually broke down. In order to extract relevant cases from the databases, we used several combinations of the following keywords (not exhaustive list translated from French): ‘agreement to agree’; ‘agreement to negotiate’; ‘merger & acquisition’; ‘share sale’; ‘preemptive right’; ‘right of first refusal’; ‘exclusivity clause’; ‘substandard performance from the contractor’; ‘contractual liability’; ‘bad faith’; ‘insufficient notice’; ‘compensatory damages’; ‘termination of negotiations’.

First, we have randomly selected one out of five relevant cases from the 150 results; out of the resulting sample of 30, we have found 12 cases granting damages (40%) and 18 not granting damages. Then we extracted another sample of 30 cases (a few can be found in both samples) where we purposely mostly selected cases granting damages in order to analyze the quantum more thoroughly. We however kept a few cases not granting damages in order to assess the reasons for not granting damages. Out of 30 cases, 27 had quantified claim and grant and 21 (70%) were actually granting damages.

We first analyzed why the courts were granting damages, particularly expectancy damages. In general, courts are reluctant to grant compensation on the sole claim of negotiation termination. It often re-qualifies the issue as a contractual breach considering that negotiation had advanced to such an extent that the parties actually reached a rather clear agreement.

Bad faith on the part of the defendant is the single most important factor found to grant damages to the plaintiff: 1 case out of 3 granting damages explicitly mention this reason in the ruling. This seems to confirm that some compensatory damages are actually hidden punitive damages. Inversely, an unreasonable claim on the part of the plaintiff most likely disqualifies the claim.

These two factors explain most cases with the largest deviation compared to the average Grant/Claim (G/C) ratio. We have defined this ratio as the % of a given claim actually granted by the court.

This situation 1 was the most complex sample to extract precise quantitative data from, but it gave very interesting results. Indeed, the cases featured various types of compensatory damages: Expectancy General Damages (EGD), Expectancy Consequential Damages (ECD), Reliance Damages and Restitution Damages. Almost all cases claimed EGD. Among them, 10 also claimed Reliance Damages, 4 also claimed ECD and 4 claimed all three damages. Restitution Damages were claimed only once in the sample. The numbers are nearly the same for the grants except that no case granted all three types of compensatory damages and two cases granted Reliance Damages only.

However, the study of the quantum gave an entirely different perspective. While EGD represent 76% of the claims’ quantum and Reliance Damages represent 24% of the claims’ quantum, the percentages are almost reversed for the grants’ quantum (26% for EGD v. 74% for Reliance Damages). This confirms the theory/common sense that, once the defendant is found liable, Reliance Damages are almost always fully granted as plaintiffs easily provide the Court with evidences of the money spent, whereas it is much more challenging to evidence and hence to be granted EGD, and even more so ECD.

The quantum was analyzed for each type of claim (constant 2016 dollars):
- Reliance damages were claimed for an average of $1,8 M and a median of $160 K
- EGD were claimed for an average of $9,0 M and a median of $730 K
- ECD were claimed for an average of $7,0 M and a median of $995 K
The G/C ratio was analyzed for each type of compensatory damages:
- Reliance damages were granted with an average G/C ratio of 93%; all cases granting 100% except one featuring a 50% ratio.
- EGD were granted in half of the cases with an average G/C ratio of 29%.
- Most ECD claims failed. Only one significantly succeeded with a G/C of 40%. That is case Pavie v. Mazars-Pavie et Associés23, in which the defendant was of very bad faith leading to particularly high G/C ratios in every type of damages.

In the sample, we also purposely selected cases ranging from 1990 to 2016 in order to analyze the evolution of the quantum overtime. The G/C ratio for EGD has continuously climbed over time. We split the cases in 3 similar sized samples of successive time periods, the result was extremely eloquent giving average values respectively of 27%, 33% and 41%.

We have observed that the length of the relationship / negotiations between the parties had a key influence on the court’s decision to grant and on the G/C Ratio. Indeed, when the relationship lasts less than 12 months, only 20% of cases do grant damages. However, when the relationship exceeds 12 months, the percentage climbs at 56%. Moreover, this ratio continuously raises as the relationship extends.

Additionally, it appears as if the courts are reluctant to grant damages in cases in which the claimant is a bigger company than the defendant: 20% of the cases compared to 70% in our overall sample.

We also extracted data based on qualitative elements. For instance, we classified each case depending of the claimant’s industry type (Distribution, Service, High Tech, Manufacturing). We have attributed a claimant’s business risk index to each case with regard to multiple factors (industry, market price volatility, tenure of operation, size of the business). This index ranges from 1 (very low risk) to 4 (very high risk). The findings were very surprising as High Tech and Manufacturing claimants were not granted any damages. Distribution cases have the highest G/C ratio (28%) and Service cases had a ratio of 11.5%. Moreover, contrarily to our initial intuition, the lower is the claimant’s business risk, the higher is the compensation granted by the courts. In our sample cases with index 1 or 2 have been granted an average 42% G/C ratio, compared to 21% for cases with index 3 or 4. We can only imagine that evidences are more easily put together by long standing businesses with low volatile prices such as distribution for instance and less so for start up businesses in high tech for instance. This remark has interesting connection with the analysis of new business rule in US Law.

Additionally, we compared the grants in all cases between first instance and appeal decisions. We could find full data for 18 out of the 30 cases of our sample. 13 of those 23 cases ultimately granted damages in appeal, 6 of which overturned a No Grant decision, 2 raised the quantum and 5 reduced it.

The repartition of such cases over time is extremely eloquent. We separated the cases in two periods of time (1990 - 2004 and 2005 - 2015) and noticed a clear change in the court’s attitude. Indeed, before 2005, the Court of Appeal reduced the quantum of two decisions out of three (64%). However such decisions have entirely disappeared in recent times. The court now more often rules on the Grant / No Grant principle (overturning the decision in 56% of cases and confirming a No Grant in 25% of cases). The court of appeal surprisingly seems to decide on law more than on facts. That being said, it has also started raising the quantum of first instance decisions (19% of cases).

The following two cases are illustrative of the wide range of claims detailed and valuation methodologies used in this situation.

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23 Our ref. 1F01, Dalloz, 89/13910, CA Paris, 10/01/1990.

Frank S. Giaoui 2 October 2017
In Pavie v. Mazars-Pavie et Associés\(^\text{24}\), court was convinced by basic evidence from the claimant, considering the obvious bad faith of defendant.

**Factual background**

On July 28, 1987 Albert Pavie sent a letter to the CEO of MPA to detail the terms and conditions of the sale of the securities he owned into the company and to request a firm response back. MPA sent a letter back agreeing with those T&Cs. Albert Pavie argued the response did not meet his expectations.

MPA made it clear they:
- hold Albert Pavie liable for breach of agreement,
- launch a law suit to seek damages,
- still benefit a ROFR on the sale of Albert Pavie’s securities.

On the contrary, Albert Pavie considered he was free to sell at anytime and he did so to ACL Audit despite the ROFR.

**Contract Breach Damages Claim: 2,26 M€ (2015 value)**

MPA initiated the case contending the sales agreement between them and Albert Pavie was perfect, claiming the resolution of the agreement under breach by Albert Pavie, seeking damages at 5 millions Francs for general expectation and secondarily 5 millions Francs for moral and economic consequential damages for bad faith break up of the agreement to agree.

Total damages sought: 10 millions Francs in 1987 value.

**Defense**

Albert Pavie contended the agreement to agree was null and void because of previous breach alleged against MPA. The agreement was to be executed before a certain date; after then each party had a right to walk away at anytime. Hence MPA is not entitled to damages.

**Damages granted and valuation methodology 1,58 M€ (2015 value)**

At first instance: 10 millions Francs. Final sentence on appeal: 7 millions Francs.

Damages caused to MPA result from:
- the profit loss from the acquisition of a large portion of the equity of a very profitable company with revenues of 51 millions Francs in 1987;
- the time loss and the failure to implement strategy at a time where major consolidation happened in the business.

Court considers reasonable certainty and evidence to fix at 7 millions Francs the damages to make MPA whole.

**Summary metrics**

70% average final G/C ratio. 100% on Expectation General Damages. 40% on Consequential Damages.

Appeal reduced by 30% first instance damages.

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\(^{24}\) Our ref. 1F01, Dalloz, 89/13910, CA Paris, 10/01/1990.

*Frank S. Giaoui* 2 October 2017
The more recent UCA v. MC and GAC\textsuperscript{25} case involves much more diverse claims categories and hence more detailed evidence from the claimant.

**Factual background**

UCA wants to control MC and GAC. MCA sets up a scheme for MC to buy GAC and UCA to buy MC through another company. Negotiations advanced but ultimately UCA's board did not approve of the deal claiming it was illegal (1). The parties then signed another agreement. A 3 years agreement slightly in favor of MC which permitted UCA to retain good commercial relationships for the next 3 years (2).

**Contract breach damages claim: 2 959 824 € (or 3,11 m€ in 2015 value)**

(1) 625 000 = acquisition cost of company E. & B. and subsequent depreciation in book value; 45 000 = acquisition costs of GAC, 105 000 = to reimburse the professional fees of GAC paid by UCA in reliance to the contract, 505 872 = profit loss from 3 years contract signed and not executed (expectation); 69 475 = interest paid for need of cash, 150 000 = damages to brand image, 150 000 = as an opportunity cost to compensate men-time invested without return, 51 130 = reliance investment in unused equipment, 29 000 = stock of goods bought by UCA in reliance to the contract and eventually lost, TOTAL = 1 730 477 euro.

(2) 505 872 = profit loss from non executed contract, 625 000 = acquisition cost of company E. & B. to serve as logistics platform for MC on Rungis site, including the operating losses covered by MC, 69 475 = interest paid for need of cash, 29 000 euro = stock of goods bought by UCA in reliance to the contract and eventually lost, TOTAL = 1 229 347 euro.

**Defense**

(1) UCA claims the board did not approve the deal mostly because it was illegal. Hence the vote and the reason why the vote was negative should not be reasons for UCA's liability. (2) The agreement was not valid for a lack of consideration. Indeed, it only favored MC.

**Damages granted and valuation methodology 372 K€ (or 398 K€ in 2015 value)**

(1) 625 000 = 0; 45 000 = 0; 105 000 = 105 000 (100% R); 506 000 = 169 000 (33% EGD); 69 000 = 69 000 (100 % R, interest paid); 150 000 = 0 (0% damages to brand image, CGD); 150 000 = 0 (0% R opportunity cost on men-time invested and without return ); 51 000 = 0 (0% R, investment in non used equipment) ; 29 000 = 29 000 (100% R, stocks).

(2) Nothing?

**Summary metrics:** G/C ratios are 33% on EGD, 50% on Reliance and 0% on ECD.

\textsuperscript{25} Our ref. 1F15, Lexis-Nexis, 303, 02/01704, CA Angers, 22/09/2009.

*Frank S. Giaoui*  
*2 October 2017*
French Law - Situation 2: Damages to goodwill, reputation or image

Situation 2 features cases in which the plaintiff has allegedly undergone damage to goodwill, reputation or image. In order to extract relevant cases from the databases, we used several combinations of the following keywords for the extraction from the databases (not exhaustive list translated from French): ‘damage to reputation’; ‘damage to goodwill’; ‘damage to image’; ‘loss of clients’; ‘lost profits’; ‘counterfeit’; ‘commercial reputation’; ‘corporate identity’; ‘brand image’; ‘loss of confidence from clients’. Randomly, selecting one case out of five among 150 results extracted, left us with 30 relevant cases, among which 8 cases granting damages (27%) and 22 not granting damages. This leads us to the first conclusion that it is more difficult to evidence damages on goodwill, reputation or image than those damages in situation 1 where grant likelihood was 40%.

We then extracted another 30 cases (a few are common to both extractions) dating from 1996 to May 2015 (29 with a quantified grant, 29 with a quantified claim, the missing case is however not the same, meaning that one case had a grant without a claim and vice-versa). Indeed, we, purposely, mostly selected cases granting damages so we could analyze the quantum. We, however, kept a few cases not granting damages to assess the reasons for not granting damages. Out of these 30 cases, 22 cases (73%) have granted damages to the plaintiff.

We must first notice that very few cases treat reputation claims thoroughly. Indeed, thousands of cases claimed reputational damages but very few claims were answered thoroughly by the courts; even less were deemed worthy of compensation. Some cases feature a situation in which the court recognizes a breach and damages to reputation but cannot calculate the harm suffered by the claimant. Most of the time, the claimant does not offer a satisfactory methodology to justify the existence of the harm or the quantum. Logically, in those cases, the claimant should end up being awarded no damages. Nonetheless the court sometimes grants reputational damages without detailed methodology leading to very rounded - and sometimes random - quantum (eg. 1 M€).

Regarding the locations, one might have assumed that cases would be mostly located in Paris (big cases, with large firms and costly expertise...); however we also found such cases before other French courts, in smaller cities.

The main reasons why courts grant damages are substandard performance from a sub-contractor (one case out of three) and bad faith again as in situation 1.

When cases are granting damages, the average grant to claim ratio (G/C Ratio) is 34%, with a median 19 points lower at 15%. Indeed, we found a few cases with very high ratios (where reasonable parties only asked for the appeal decision to confirm the first instance one) that made the average G/C ratio rise. Admittedly, this average was a little higher that what we expected when starting this research. Indeed, we thought that French courts would be extremely conservative with regard to damages to reputation but this ratio is actually pretty high (and higher than that of situation 1 on terminations of agreement to agree and agreement to negotiate). However, such statement is only relative because of the very few cases granting damages in this situation. It is therefore only logical that cases granting damages, are those worth the effort of being well documented to evidence most damages and hence those featuring a high G/C ratio.

The evolution of such ratio is also interesting. Predictably the ratio climbed as time went by and it is only recently (around 2008) that cases with G/C ratios over the average value (34%) started to be more numerous.

Moreover, it has been staggering to see that when we divide the cases in groups of similar sizes (11 cases, 10 cases and 9 cases) for three successive time periods, the average G/C ratio raises regularly from 30% in 1996-2007, to 33% in 2008-2011, to 40% in 2012-2015 confirming the recent acceleration in the rising of the average G/C ratio, and converging to similar results than situation 1 (41% in the last period).
We also attributed a Claimant Reputation importance index to each case. We constructed this index with regard to which does the claimant’s reputation influence their business. This index allowed us to attribute a rating to each case (from 1 being of very low importance to 4 being of very high importance). We noticed an eloquent correlation between the importance of the claimant’s reputation and the court’s decision. Indeed, when the reputation is of high or very high importance to the claimant, the court granted damages in nine out of twelve cases with an average G/C ratio of 44%. However, when reputation was of low or very low importance to the claimant, the court granted damages in 13 out of 18 cases with an average G/C ratio of 27%.

Additionally, we compared the grants in all cases between first instance and appeal decisions. We could find such data for 19 out of the 30 cases. 14 of those 19 cases ultimately granted damages in appeal, 5 of which overturned a No Grant decision, 2 raised the quantum and 2 reduced it. The repartition of such cases over time is extremely eloquent. We separated the cases in two periods of time (1990 - 2004; 2005 - 2015) and noticed a clear change in the court’s attitude. Indeed, before 2005, the Court of Appeal redressed very few claims on reputation damages (only 3 cases: one case maintaining a No Grant, one overturning a No Grant and one raising the quantum). More recently, the courts have ruled more diversely but never overturned a Grant decision, confirming our previous finding/intuition that if reputation damages are granted, the claim has been very well proven and detailed. Such evolution in the number of cases addressed and in the variety of decisions shows an increased understanding, by the courts, of damages to reputation.

The following two cases are illustrative of the wide range of economic stake covered and valuation methodologies used in this situation.

**Mogul v. Grillex**\(^2^6\) is representative of the earlier cases where economic stake was limited and methodology rather unsophisticated.

### Factual background
A contractor works poorly and performs below the standards of French construction norms. The client company claims damages to reputation and image.

### Contract breach and claim
15 K€ (or 16,5 K€ in 2015 value) for damages to image and reputation.

### Defense
No detail

### Damages granted and valuation methodology
Nothing in the first instance. Then 12 K€ (or 13,2 K€ in 2015 value) in appeal as reputation of the client company is clearly damaged and its liability potentially exposed in future years because of the poor quality of the construction.

### Summary metrics
G/C ratio = 80% in ECD damages on reputation.

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\(^2^6\) Our ref. 2F09, Lexis-Nexis, 06/01863, CA Douai, 21/11/07.

*Frank S. Giaouci*    
2 October 2017
The more recent SAS Les Variétés v. SARL Beauvais Cinéma Communication\textsuperscript{27} covers a significantly higher economic stake and develops more sophisticated methodologies.

**Factual background**
This is a leasing management contract for a cinema between an independent owner (Les Variétés) and a larger management company (Beauvais Cinéma). The company suggests the creation of a multiplex but wants to do it alone. The owner asks for a merger or an acquisition and the company rejects both. However the company holds on to the lease by refusing to prematurely end it and damages the goodwill.

**Contract breach and claim 1 244 K€ + 300 K€**
1 244 000 euro for damages to goodwill.
13 878 euro for lost rents on 2002; 71 443 euro for net loss on 2003, 144 432 euro for costs associated to anticipated termination of the lease contract due to end on July 2004; 71 337 euro non recoverable investments.

**Defense 300 K€**
Court should say expert report is void. Damages of the owner Les Variétés is only 297 847 euro as assessed in June 2000. Deny Les Variétés on all other claims as they are liable for 80% of their own damages.

**Damages granted for goodwill 734 K€ and valuation methodology**
The expert used 4 methods to assess the value of the goodwill: 1. Net profit adjusted for rent loss and tax savings. 2. Discounted cash flows. 3. Capitalization of rents (the least relevant method). 4. Multiple of (average weekly taxable) revenues. He chose the scale established by CPA firm Francis Lefebvre. That leads to an average number of 1 244 K€ (with methods 1, 2 and 4 which are really close). However this value, should be reduced by 40% which is the likelihood at which the construction of a multiplex would happen anyway; this leads to a value of 734 K€.

**Summary metrics**
G/C ratio = 60% (damages to goodwill).

\textsuperscript{27} Our Ref. 2F25, Lexis-Nexis, 11-02321, CA Douai, 18/04/13.
French Law Situation 3 – Damage to a New Business

We started addressing situation 3 in the same way that we did the two other situations. That is, searching for approximately 30 cases in which a new business claimed damages for a breach of contract. To do so, we tried using keywords such as: ‘new business’; ‘innovative company’; ‘recent business’; ‘growth company’; ‘start-up’ or search through the age of creation of the business. Such extraction of cases led to very few relevant results most of which did not grant damages. Our database thus includes the few cases we found to be relevant but also includes cases from situations 1 & 2 that were relevant for situation 3. Although the methodology has been rather limited, the findings seem to be fairly eloquent and faithful to the intuitions that we derived from our doctrinal research. Indeed, the court proves itself to be extremely demanding with regard to the standard of evidence it requires in order to compensate the losses of a new business. It is therefore not a surprise that 50% of cases do not grant damages (4 out of 8). With regard to the Grant to Claim ratio, the results were not surprising either as the ratio was very low in every case (from 2,5% to 15%) even in an extremely well document case (150 pages of expertise in Expanscience).

In the 6 cases in which the claimant was smaller than the defendant the result was particularly surprising as we found, from situations 1 & 2, that the court was rather generous. This is indeed a surprise compared to what we found in the cases of termination of negotiations or damages to reputation but is highly consistent with the court’s behavior towards new businesses. One case featured a situation in which the claimant was bigger than the respondent, giving a perfectly expected response rejecting the claim.
A more detailed analysis of the cases shows that three cases (out of four) granting damages feature a defendant whose behavior can be qualified of particular bad faith. Then again, it shows that the court will only compensate new business if it has particular incentives to do so. In this type of situation, bad faith should neither impact the business itself nor the calculation of compensatory damages.
RESULTS FOR AMERICAN COMMON LAW

American Law – General methodology

Samples description
Our initial database consisted of approximately 150 cases for each situation. After selection of approximately 1 out of 5 cases - over weighting those cases where quantification was provided for damages claims and/or grants - our final database consists of 35 cases for situation 1, 28 cases for situation 2 and 25 for situation 3. Situation 1 features 11 cases in which the court has granted damages and 24 in which the court has not granted any damages. Situation 2 features 6 cases granting damages and 22 without a grant. Situation 3 features 12 cases granting damages and 13 not granting.

Main reasons for granting compensatory damages
The cases featured in our databases sometimes show reasons as to why the court decided to award damages. We analyze the occurrence of such factors when they are clearly mentioned or they can be clearly identified in the court’s decision.

Bad faith or bad moral behavior of defendant appears to be mentioned in all three situations in American Law. This is not surprising from a common sense point of view. However it is not consistent with the theory of contract law because the court is supposed to grant full compensation based only on the damages evidenced as a direct consequence of a contract breach. No moral consideration or punitive damages are supposed to be in the picture. Empirical analysis suggests they actually are very present.

Main reasons to grant expectation damages are:
In situation 1 (mainly general damages)
- Binding contract recognized (4)
- **Bad faith of defendant (2)**
- Enforcement of an arbitral award
In situation 2 (mainly consequential damages)
- Contract breach (3)
- **Bad moral behavior**
- Negligence
In situation 3 (mainly general damages)
- **Bad faith (3)**
- Contract breach
- Restitution
American Law - Situation 1: Breach of an agreement to agree or an agreement to negotiate

We have identified and analyzed separately three outliers in G/C ratio
1U11: Very high ratio because plaintiff was seeking the enforcement of an arbitration award.
1U16: Very high ratio because the court found the agreement to be binding and plaintiff offered the court with a highly sophisticated claim.
1U17: Very low ratio because Plaintiff’s claim seemed unreasonable and not very sophisticated

A decrease of G/C ratios overcompensated by a sharp increase in quantum over time
The average G / C Ratio fell down from 80% in 1989-2002 to 54% in 2003-2006 to 45% in 2007-2015. Such evolution was however accompanied by a high rise in the amounts claimed (from 2,5 millions to 63 millions and to 197 millions respectively) and awarded (from 2,3 to 6,7 and to 50 respectively) – All figures in 2016 USD millions.

The absolute value of claim impacts negatively grant likelihood and G/C ratio
We have built two sub-samples separating cases below and over $ 10 millions claims. Grant / No Grant proportion falls from 57% (8 cases out of 14) to 33% (2 cases out of 6) and G/C Ratio from 74% to 16% respectively in those two sub-samples.

Evolution of grant likelihood and G/C ratio depending on length of negotiations
This analysis produces counter results to same situation in France or International and the theory. It does not show the intuitive increase of damages when negotiations are longer.

Grant likelihood and G/C Ratio depending on industry type
Grant likelihood is similar for all industries (one third of all cases is granted damages) except construction (no grant). However, when they are granted damages, Services and Manufacturing industries get higher G/C ratios (80% and 58% respectively) than High Tech or Construction industries (11% and 0% respectively).

A possible explanation: Companies in manufacturing and services are larger and better established than those in high tech and construction. And larger companies can show more evidence and easier than smaller companies.

This is confirmed by the distribution of cases and average G/C Ratio depending on claimant's risk/uncertainty index (1 = very low risk, 2 = low risk, 3 = high risk, 4 = very high risk) if we assume that the larger the company, the lower the risk/uncertainty – everything else being equal.

8 out of 17 claimants (47%) with business risks 1 or 2 are granted damages compared to only 2 out of 18 (11%) in risks 3 or 4. When they are granted damages, claimants operating in lower risk businesses (1-2 index) also earn higher G/C ratios than higher risk businesses (3-4 index) respectively 72% and 31%.

Those results are intuitive but they contradict the law and economic theory in many ways. First, a contract is supposed to reduce the risk level or even compensate a higher risk level. Second, claimants with higher risk index arguably operates in thinner market; if that is the case they should be granted larger damages to compensate the fact that they probably could not find alternatives when a contractor breaches. This seems to indicate courts are not as sensitive to law and economics theory as they are of evidentiary facts and figures to support the damages: “Information trumps the rules”.

There is a clear correlation between the sophistication of the methodology used by the claimant and the successful outcome of the case for that claimant.
We coded each claim with a rating ranging from 1 to 4.
1: Claimant gives a global number without ANY detail or justification.
2: Claimant details the claim between several categories of damages or says it takes factors into
account but does not detail how those factors influenced the claim.
3: Claimant takes factors into account and explains how they influence the claim using SIMPLE calculation methodologies.
4: Claimant takes factors into account and explains how they influence the claim using SEVERAL and/or SOPHISTICATED calculation methodologies.
Likelihood of Grant increases from 0% (none of 3 cases) to 20% (2 out of 10 cases), 80% (4 out of 5 cases) and 100% (all of 3 cases) and G/C ratio grows from 0% to 54%, 59% and 65% when sophistication is respectively 1, 2, 3 and 4.

**Larger/international law firms are relatively more successful on this claim**
We have defined 5 categories of law firms:
1- Very Small: local law office with less than 5 lawyers
2- Small: national law office with less than 30 lawyers
3- Medium: national firm with less than 100 lawyers
4- Big: major national law firm with over 100 firms
5- Very Big: major international law firm with over 300 lawyers
In our sample, size of lawyer clearly matters for claimants’ outcome. Out of 16 claimants with smaller law firms (sizes 1-3) only 1 (6%) is granted damages; whereas out of 15 claimants with larger/international law firms (sizes 4-5) 8 (53%) are granted.
Those claimants using law firms of similar size than defendants have on average 46% G/C ratio, whereas claimants using much larger/more international law firms achieve a higher 76% G/C ratio.
Average values of claims and grants are also very different: We know larger law firms tend to pick and choose the larger claims for obvious economic reasons. And the result is striking as claimants gets an average 31,5 millions, 4,6 millions and 146 K when using lawyers of category 5, 4 and 3 respectively.
While relatively recent, this claim has already reached a significant economic stake and is compensated before courts in such a way that larger firms could find a profitable economic model for their practice

**Expectation general damages are always less compensated than reliance damages RD.**
Methodology: We added all grants for both damages and divided each of them by the added claims of their respective type of damages. It should be noted that we excluded one outlier case (1U13) with huge reliance claim.
One out of 3 cases claiming expectancy are granted some damages with an overall G/C ratio of 20%. Almost all cases claiming reliance are granted some damages with an overall G/C ratio of 46%.
These findings are consistent with cases from similar situations in other laws, particularly France. Some G/C ratios can reach highs well over 50% of claims. That means if the required standard of evidence is reached plaintiff can get most of its claim not only in reliance but also in expectation damages: “When terms are precisely defined in agreement, expectancy can be granted”.
In absolute values, constant 2016 dollars and excluding extreme outliers however:
- The average claim on expectation general damages is $ 62 millions, and the average grant is $ 21 millions.
- The average claim on reliance is $ 0,6 million, and the average grant is $ 0,5 million.
American Law - Situation 2: Damages to goodwill, reputation or image

Sample description

In our sample of 28 cases, the first who were granted damages are dated 2002. So this claim is relatively new in American Law; it is also difficult to evidence. Hence this claim is not generously compensated, explaining probably why 1) it is often brought before the court together with other claims and 2) it has been difficult to find relevant cases, even recent ones.

There are three reasons for this higher standard of evidentiary requirement:
1) First and foremost, most goodwill / reputation damages are considered by the court as consequential damages. They are not considered general expectation damages where the required standard of causation and loss evidence is lower.
2) The second reason is that those goodwill / reputation damages are sometimes considered duplicative with expectation general damages and hence dismissed.
3) Lastly, there is also an evolution on the doctrine where those damages were entertained as tort / defamation cases in the 1970’s. Today those tort cases have been put into doubt and courts require evidence or foreseeability. As a consequence we did not find many cases after 2009: the reputation / goodwill claim is not common anymore in contract cases as a separate claim from economic loss.

As this situation concerns loss of reputation, goodwill and image, primarily intangible assets, we would have expected some evidence based on qualitative indicators such as client satisfaction, employee satisfaction, image for recruiting (“great place to work” index) and more generally speaking ESG (environmental, social and governance) indicators. Such was not the case, probably because those indicators are still too recent. This is probably a route for improved judicial expertise in the future.

The various analysis were performed on the 28 cases; however not all of them were fully quantified as far as reputation damages are concerned.

Ranges of claims and grants are wide but quantum remains modest in absolute value
(All figures in this sub section in constant 2016 US dollars).
Excluding one extreme outlier case claiming $182 millions (2U11), the average claim for reputation damages is close to a modest $1100 K with a median at $169 K.
Most cases do not reach the evidentiary or foreseeability standard to be granted damages: 12 out of 18 fully quantified cases (66%) grant nothing, so the overall average grant is a low $56 K or 5% of average normalized claim. New York is particularly challenging in evidentiary requirement. Virginia is more liberal.
Focusing on the 6 cases granting final reputation/goodwill damages, the grant ranges from $16 K to $600 K with an average at $155 K. Those represent a very high G/C ratio of 74% on average. 4 out of 6 appellate courts even grant 100% of claims or trial grants. That means if the required standard of evidence is reached, the claimant can recover all her claim.

Grant rates have increased over time
The proportion of cases granting damages has risen from 0 in1989 – 2001 to 30% in 2002 – 2015. The average claim rose from $ 293 K to $ 1461 K and the average grant rose from 0 to $ 155 K (without outlier and in constant 2014 $).

The absolute value of claim impacts negatively grant likelihood and G/C ratio
Grant / No Grant proportion reduces from 43% to 33% and 0% for absolute value of claims in range of $ 0 - 100 K, $ 100 - 1000 K and $ 1000 K + respectively.
Similarly Average G/C Ratio (on cases granting damages), also decreases from 100% to 47% and 0% respectively.

**Damages are more likely granted when reputation is important to the claimant’s business**

Distribution of cases and average G/C Ratio (in cases granting damages) depending on the importance of reputation for the claimant’s business: 1 = very low importance, 2 = low importance, 3 = high importance, 4 = very high importance.

2 cases out of 16 (12.5%) are granted damages when reputation is not an important criterion (Index 1-2) and 3 cases out 8 (38%) when reputation is an important criterion (Index 3-4). However the G/C ratios are similar between the two groups for those cases granting: 63% and 70% respectively.

**Using more sophisticated methodology increases claimant’s chances of success.**

Distribution of cases and average G/C Ratio (in cases granting damages) depending on the sophistication of the methodology used by the claimant. We attributed each claim with a rating ranging from 1 to 4.

1: Claimant gives a global number without ANY detail or justification.
2: Claimant details the claim between several “chefs de préjudice” or says it takes factors into account but does not detail how those factors influenced the claim.
3: Claimant takes factors into account and explains how they influence the claim using SIMPLEx calculation methodologies.
4: Claimant takes factors into account and explains how they influence the claim using SEVERAL and/or SOPHISTICATED calculation methodologies.

As per the rationale used by plaintiff as well as courts and judges, we find very inconsistent and basic methodologies to entertain those damages. However when claimants use more sophisticated methodologies, they increase significantly their rate of success.

0 cases out of 9 (0%) are granted damages when methodology is not detailed (index 1-2) and 4 cases out 11 (36%) when methodology is detailed and/or sophisticated (Index 3-4). The G/C ratios for those cases granting increase from 0% to 61% respectively.

**Smaller/specialized law firms are relatively more successful on this claim**

We have defined 5 categories of law firms:

1.-Very Small: local law office with less than 5 lawyers
2.-Small: national law office with less than 30 lawyers
3.-Medium: national firm with less than 100 lawyers
4.-Big: major national law firm with over 100 firms
5.-Very Big: major international law firm with over 300 lawyers

In our sample, size of lawyers has a negative effect on claimants’ outcome. Out of 12 claimants with smaller law firms (sizes 1-2) 4 (33%) are granted damages; whereas out of 7 claimants with larger/international law firms (sizes 3-5) only 1 (14%) is granted.

Those claimants using law firms of similar size than defendants have on average 100% G/C ratio, whereas claimants using much larger/more international law firms achieve a lower 62% G/C ratio. However, with nor surprise, absolute values of claims remain at the advantage of larger firms who tend to pick and choose the larger claims for obvious economic reasons. There are very few large firms (category 5) in our sample for this claim. Large firms (category 4) actually represent claims on average 10 times larger than the claims represented by smaller firms (categories 1 and 2): $ 657 K and $ 64 K respectively. It is important to notice the average value of those claims represents only a small fraction of the average value of the claims analyze in other situations: 100 times smaller than in situation 1 and even 10 times smaller than in situation 3.

One interpretation could be that this type of damages is still recent and not well compensated before courts. So while some smaller firms could specialize and find a profitable economic model, larger firms with higher overhead costs and more/bigger business opportunities could not and probably decided not to develop this practice.
Consequential damages claims are much larger and less compensated than general damages  
This situation gave very interesting results. Indeed, the cases featured various types of compensatory damages: Expectation General Damages (EGD), Expectation Consequential Damages (ECD) where reputation/goodwill damages often fall, Reliance Damages (RD) and Restitution Damages. Almost all cases claimed EGD. Among them, 10 also claimed Reliance Damages, 4 also claimed ECD and 4 claimed all three damages. Restitution Damages were claimed only once in the sample. The numbers are nearly the same for the grants except that no case granted all three types of compensatory damages and two cases granted Reliance Damages only. However, the analysis of the quantum gave an entirely different perspective. While ECD, EGD and RD represent respectively 74%, 12% and 8% of the claims’ quantum, the percentages for the grants’ quantum are much more balanced (29% for ECD, 20% for EGD and 34% for RD). This confirms the theory/common sense that, once the defendant is found liable, Reliance Damages are almost always fully granted. As a matter of fact, plaintiffs easily provide the Court with evidence of their investments, whereas it is more challenging to evidence and hence to be granted EGD, and even more so ECD such as reputation damages.

The quantum was analyzed for each type of claim (in constant 2016 dollars):
- Reliance damages were claimed for an average of $253 K and a median of $64 K
- EGD were claimed for an average of $324 K and a median of $68 K
- ECD were claimed for an average of $1100 K and a median of $169 K€

Two main recommendations to parties who want to improve their chances of success in recovering reputation / goodwill damages:
1- Prepare higher standards of evidence to demonstrate your consequential damages… It is clearly a higher standard than expectation general damages.
2- Draft the contract so that, in case of breach, it would be clear to the parties (and the courts) there would be foreseeable damages to reputation / goodwill in addition to expectation general damages such as direct lost profits.
American Law - Situation 3: Damages to a New Business

Methodology

On Lexis Nexis and Westlaw databases, we used broad search terms that would turn up many results and then read the cases to see if they fit the criteria. We used search terms such as "new business rule," "start-up," "new venture," "franchise," combined with terms like "contract breach," "lost profits," "damages". Lexis has an option of filtering by types of cases, so for every set of search terms, we tried to filter by contract breach cases and check what comes up there.

As previously said, the most challenging part was to find enough quantified cases in the random sample extraction. As quantum was the focus of our analysis, we included all relevant cases that we could find either of the claim or the award quantified for and that we could find the final judgment for. So, for example, we did not include new business cases discussing whether an expert testimony should be allowed in if the final decision was not on the database or if we couldn't find a quantified claim.

To check if the case had a quantified claim, in addition to checking the opinions of the prior/subsequent history, we would check if there was a complaint on either Lexis or Westlaw. The quantified claim criterion was even more difficult to meet because many of the complaints would have vague phrasing for their request for relief (i.e. "relief as the court deems proper"). In cases where a plaintiff had an expert witness that gave very specific figures about market size/pricing, we estimated a figure for the claim based on the figures the expert witness put out.

Initially, we only wanted to include cases that we could find both the quantified claim and the damage award figures for, but because it was so difficult to locate a set of 30 cases or so from the limited jurisdictions we were looking at, in the end we included an additional jurisdiction (TX) and some cases that did not have a quantified claim as long as there was a final decision. Of course some cases included did not award any damage either.

The reason some relevant cases weren't included in the sample is that they were about discovery or the court decided to remand. In those situations, the final judgment often wouldn't be in Westlaw or Lexis. But since we don't know the end result for those cases, we don't know how they would play into the figure we are looking at.

It's difficult to know if and how the findings of our analysis would be the same for a random sample of all new business cases. A lot of it would depend on how Lexis Nexis and Westlaw choose cases to report and if any of those factors would bias our sample. We also had thought about how the search terms we used ("new business," "new venture") could be biasing the sample because court opinions might be more likely to emphasize a business's "newness" when they aren't granting damages. Overall we expect those bias would not affect our general conclusions which governs trends and patterns much more than they do on absolute values.

Main findings

In American common law, courts have historically chosen to not award expectation damages when one of the parties is a new business, or the parties are contracting for a new venture because the damages are too speculative and cannot be supported by evidence. Since the 1990’s however, courts have moved away from applying the “New Business rule” as a per se bar from recovering damages in such cases, and instead appear to review and weigh evidence and testimony to decide damages in a holistic manner.
Analyzing all damages included: expectation, reliance and restitution
Our empirical analysis consists of 25 cases, 12 of which granted damages. Our data shows that courts are progressively less likely to grant any damages. The courts granted around 60% of all cases between 1993-2003. This grant/no grant ratio dropped to about 46% between 2004-2010 and seemed to stabilize at 43% between 2011-2016. This compares to an overall average Grant / No Grant ratio of 48%.
Over time, the grant to claim ratio has generally decreased. In our dataset, we identified two outliers out of this pattern: One in which the plaintiff received substantial damages from measurable fixed fees she would have received from subsequent franchise contracts with third parties; another in which the plaintiff received all of the restitution she requested in her claim but no other damages. Without those outliers, the average grant to claim ratio decreased from 33% in 1996-2003 to 21% in 2004-2010 and 1% in 2011-2016. Within our data set, plaintiffs have generally decreased their claims overtime from 201 millions (2016 USD) to 27 millions and 69 millions respectively.
Case TVT Records v. Island Def Jam Music Group\textsuperscript{28} features a very detailed breakdown of damages awarded, however there is little information on claim breakdown. This is also a nice case to use for damages award because every type of damages (ECD, EGC, Reliance and Restitution) were awarded.

Background
Artist Ja Rule's original band (CMC) was originally signed with TVT. Ja Rule left TVT for IDJ. IDJ originally allowed Ja Rule to release a CMC reunion on TVT in exchange for payment, but relations went sour. TVT sued IDJ.

Claims
Claims are diversified: Breach of contract, tortious interference w/ contractual relations, fraudulent concealment, and willful copyright infringement. $ 400 million in combined damages.

Grant
Jury granted approximately $132 million in damages on all claims: $108 million in punitive damages and $24 million in compensatory damages. $10,389,003 of the compensatory award was in lost profits.
Court affirms Jury findings: “This court finds that these figures were adequately supported by the evidentiary record and aren't overly speculative”.

Comments on new business rule
Court generally applies a heightened evidentiary standard to new businesses. On July 12, 1996, the United States Court of Appeals noted: "Furthermore, the Second Circuit observed as regards a new business that a stricter standard is imposed, but … whether the claim involves an established business or a new business…the test remains the same, ie whether future profits can be calculated with reasonable certainty … The new business rule is not a per se rule forbidding the award of lost profits damages to new business, but rather an evidentiary rule that creates a higher level of proof needed to achieve reasonable certainty as to the amount of damages."\textsuperscript{29}
On this point, the New York Court of Appeals similarly declared on March 25, 2010: "A stricter standard is imposed because there is not experience from which lost profits may be estimated with reasonable certainty and other methods of evaluation may be too speculative…Whether the claim

\textsuperscript{28} TVT Records v. Island Def Jam Music Group, our Ref. 3U5, 279 F. Supp. 2d 366, United States District Court for the Southern District of New York, 02/09/2003.

\textsuperscript{29} International Telepassport Corp. v. USFI,Inc., 89 F.3d 82, 85 (2d Cir.).
involves an established business or a new business, however, the test remain the same, ie whether future profits can be calculated with reasonable certainty.\textsuperscript{30}

**Analyzing expectation damages only**

The vast majority of the damages requested in our dataset were expectation damages, however they are less likely to be granted than reliance damages. 16 out of 25 cases were granted no expectation general damages mostly because they are considered too speculative. 9 cases out of 25 do grant GD (36%). Reliance, Restitution or even consequential damages are granted on 11 cases out of 25 (44%). Among those cases, 3 do not grant General Damages totaling to 12 out of 25 cases granting some damages no matter how much and which type.

Like the overall damages trend, our data showed that courts are less likely to grant expectation damages over time. The percentage of cases granting expectation damages decreased from 45% in 1996-2005 to 29% in 2006-2016.

However, although courts are overall less likely to grant expectation damages, they are also likely to grant more expectation damages in situations when they choose to. Of cases in which expectation damages were granted, our data shows that the grant to claim ratio has steadily increased from 5% in 1996-2005 to 21% in 2006-2016. This may be explained by the trend that more recent cases in which expectation damages were granted had smaller absolute claims than before: 130 millions and 18 millions respectively.

Case *Humetrix, Inc. v. Gemplus S.C.A.*\textsuperscript{31} is the best case to use for grants of expectation damages because the court defends the plaintiff's expert methodology and finds it reliable even when the opposing counsel tries to challenge it.

**Background**

Plaintiff (a consulting company) sues defendant (a manufacturer) for breaching an agreement to provide data storage technology. P planned to market the technology to the healthcare industry; they raised funds, increased sales staff, and developed a client base in the US to prepare for the opportunity. D acquired a separate subsidiary that performed many of the functions P was supposed to and, as a result, P and D's cooperation came to a halt.

**Claims**

Claims are diversified: Breach of contract and breach of its fiduciary duty, intentional tortious interference with contractual relations, declaration that Humetrix was entitled to a certain trademark. $51.36 million claimed in lost profits.

**Defense**

D argues that district court shouldn't have admitted expert testimony on lost profits because the testimony was speculative and unsupported by evidence.

**Grants**

Jury granted $ 15 million in damages for breach of contract and breach of fiduciary duty ($5 million for Sales Agreement; $10 million for Partnership Agreement)

Other grants are not considered in this study: $1.2 million for interfering with contractual relations and $1.3 million in punitive damages.

Reviewing on an abuse of discretion standard, Court affirms Jury finding.

**Comments on New Business Rule**

\textsuperscript{30} Ashland Management. Inc. v Altair Investments. NA, LLC, 2010,14 NY3d 774.


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The new business rule is more empirical than normative, however. As an empirical matter, new businesses often cannot offer reliable evidence of prospective profits. As a normative matter, if a business can offer reliable evidence of profits, there is no reason to deprive it from the profits it would have gained had the contract been performed, merely because it is "new."

As one California court put it: "The [new business] rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof."\footnote{Gerwin v. Southeastern California Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111, 119 (Cal. Ct. App. 1971).}

Our data also shows that there is a **negative correlation between the absolute value of the plaintiff's claim and the percentage of that claim actually granted** (G/C ratio). There is a clear cut in the average G/C ratio between cases claiming less and those claiming more than 10 millions (in 2016 USD): when damages are granted, the ratio decreases from 64% (30% excluding outliers) to 14% respectively. That indicates there may be a ceiling for damages the court will grant; asking for too much may be repugnant to the court, and hinder the plaintiff’s ability to recover damages. Thus, this finding is consistent with our findings in other situations in the United States, in France and in International private law.

Our data also shows a **positive correlation between the sophistication of the methodology used by the plaintiff and the likelihood of granting.** In our analysis, we attributed each claim an index ranging from 1 to 4.

1: Claimant gives a number without any detail or justification, or very obviously flawed reasoning
2: Claimant gives a number with very weak reasoning or justification
3: Claimant takes factors into account and calculates claim using simple calculation methodologies; nothing evidently problematic about methodology
4: Claimant takes factors into account and explains how they influence the claim using several and or sophisticated calculation methodologies; nothing evidently problematic or flawed about methodologies

We also noticed a stark increase from a sophistication level of 1 (36%) to 2 (63%), indicating that some level of justification is needed. Surprisingly, there was a moderate difference between a sophistication level of 2 (63%) and the much more sophisticated methodologies of 3 and 4 (75%).

Like the increasing likelihood of claims grant, there is a positive correlation between the sophistication of the methodology and the grant to claim ratio. When damages are granted, we also noticed the stark difference between a sophistication level of 1 and 2 or more, from an average of 19% to an average of 40% or so respectively.

**Our data shows courts of appeal affirm only one out of three trial courts opinions and they are less likely to grant damages (50% compared to 67%).**

Out of 25 documented cases in our database, 2 are undocumented on this matter and 13 did not reach jury trial either by choice of the claimant or by Summary Judgment Motion. Only 10 cases (40%) reached jury. Out of those 10, court overturned 5 giving virtually no damages and affirmed 5. Out of those last 5 cases, 2 were significantly reduced. In summary only 3 out of 10 (30%) jury grants were totally affirmed.

Out of our 25 documented cases, 12 (48%) had some appellate review, 6 of which gave some damages. Among those 6, 5 cases were modified, 3 of which had damages overturned to 0, 1 of which had damages greatly reduced and the final of which had substantial damages granted. Here again a relative minority (33%) of cases were affirmed or increased; the latter being clearly an outlier.

**Differences by jurisdictions**

\footnote{Frank S. Giaoui}
Our initial hypothesis was that there would be discrepancies in how jurisdictions applied a strict reading of the new business rule. Of the jurisdictions in our study, NY was the least likely to grant damages (30%), while CA was the most likely (75%). We grouped cases from other jurisdictions (DE, TX) in the last category for comparative purposes (50%). In terms of Grant to Claim ratio, New York was also the jurisdiction with the lowest ratio of all three groups (4%). Although CA was most likely to grant damages, it was on average slightly more generous (10%) than NY and clearly less generous than other jurisdictions (58%). We think one reason might be that Delaware has gone away with the New Business rule and courts there may consider the evidence and experts presented more leniently.

The doctrine gives two reasons for the higher standard of evidentiary requirement to recover lost profit damages for new businesses:

1) The main reason is that most new businesses are considered risky and hence they should expect volatility of their results including contractual commitments. So there are two consequences:

1.1) The failure is almost always foreseeable, hence the defendants have an easy job on this ground. Courts often consider there is no reasonable certainty in the evidence of expected profit. As far as the rationale used by plaintiff as well as courts and judges, we find very inconsistent and basic methodologies to entertain those damages...

1.2) When Courts really want to grant damages, they say it’s not really speculative, especially for consequential damages of business which are not pure start-ups.

2) The second reason is historic: New Business Rule might not be formally considered anymore in most jurisdictions (except Georgia) but it is de facto still into the mind of the judges. So clearly in NY law, also in Delaware and Illinois, the mindset is actually still against awarding lost profit damages. Main exception we found is California. Half of the cases granting lost profit damages are in California.

We conclude on two main recommendations to new business parties who want to improve their chances of success in recovering lost profit damages:

1) Prepare higher standards of evidence and calculation methodology to demonstrate your lost profit general damages and possibly your consequential damages too … Daubert\(^33\) standard

\(33\) In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 584-587, seven members of the Court agreed on the following guidelines for admitting scientific expert testimony:

- Judge is gatekeeper: Under Rule 702, the task of "gatekeeping", or assuring that scientific expert testimony truly proceeds from "scientific knowledge", rests on the trial judge.

- Relevance and reliability: This requires the trial judge to ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable foundation". Concerns about expert testimony cannot be simply referred to the jury as a question of weight.

- Scientific knowledge = scientific method/methodology: A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound "scientific methodology" derived from the scientific method.

Latest amendment of Rule 702 in 2011 made the language clearer. The rule now reads:

RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

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is clearly a higher evidentiary standard for new business than for any other well-established business. It requires that the expert sets forth a reliable methodology that is based on objective market forces.

2) Draft their contracts so that it would be clear to the parties (and the courts) there would be foreseeable lost profit in case of breach. The safest way is probably to insert a liquidated damages clause into their contracts. In a way, it should be stated that the parties have contracted because it is their intent to reduce the inherent risk of new business.

(c) The testimony is the product of reliable principles and methods; and
(d) The expert has reliably applied the principles and methods to the facts of the case.
While some federal courts still rely on pre-2000 opinions in determining the scope of Daubert, as a technical legal matter any earlier judicial rulings that conflict with the language of amended Rule 702 are no longer good precedent.
RESULTS FOR INTERNATIONAL PRIVATE LAW AND INTERNATIONAL COMMERCIAL ARBITRATION

International – General methodology

General Information
The body of law was generally the CISG, from which cases were found through the UNCITRAL Case Law Database or Pace University Law Database on CISG cases. In the companion Excel document there is a full data sheet and quantification sheet for each situation. The first, outlines the basic information of the cases with language excerpted to indicate salient points about the damage awards and claims. The quantification sheets are a distillation of the important information from the cases with a breakdown of the claims and awards by type of damages. Situation 3 is limited since there were not many cases available.

Main databases used to extract cases

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Search terms and keywords
We began with the type of law. For example, the UNCITRAL database allowed a function to choose CISG or International Arbitration.
For all searches we used ubiquitous keywords such as contract, damages and claim.
For situation 1, we added any combination of the following keywords: merger; acquisition; breakup fee; agreement; agreement to agree; agreement to negotiate; profits, lost profits; economic loss, loss in value.
For situation 2, we added any combination of the following keywords: goodwill; loss of goodwill; (business/commercial) reputation; loss of (business/commercial) reputation; (brand) image; loss of (brand) image; moral damages.
Last, for situation 3, we added any combination of the following: new business; new company; franchise; start up; new business in an existing chain/group; un-established business. However the sample we ended up with after several trials was too small to give any relevant analysis.

Selecting Cases
For international contract damages we did not select cases based on whether damages were awarded or not. We did not discriminate between damage awards of $0 or more.
We went through all cases we extracted to see whether they were, first, relevant to the research and, second, if we could use the metrics inside those cases. We have thus been able to narrow down our research most of the time by choosing the cases with quantified claims.
This discrimination in the process based on quantified claims is conscious. Since we needed a sample with an initial quantified claim and quantified award, this has necessarily biased the sample towards cases with more actual damage awards since the appellate courts may have felt it necessary to describe the original claims when giving a numerical award. We analyzed primarily why awards are being granted, and how claimants get to higher g/c ratio.

However, we have kept some relevant cases where damages were not awarded, i.e. in the data sheet some cases have a Grant/Claim ratio of 0%. We also kept some relevant cases with no quantified claim and/or award when the Court explained how it awarded 100% of the damage claimed. It would be difficult to speculate the number of total damage awards available since we dropped some cases without quantified claims and/or award. The entire sample is also affected by the fact generally only appellate cases are published and original cases may have different results.

**Basic metrics**

The basic metrics for the International portion of our empirical research are the following:

In total, we have extracted from the different databases about 150 cases claiming damages: 75 were relevant to situation 1, 30 were relevant to situation 2 and only a handful were relevant to situation 3; the others did not fit any of those 3 categories.

**International - Situation 1: agreement to agree or negotiate**

**Basic metrics**

About 30/60% of the random cases sampled awarded damages.

Of the cases in the final sample:
- 26 cases—31 claims (83% on average)
- 27 damage awards
- Grant to Claim ratio: 46% / 76%

**General description of sample**

Damages are awarded in most cases because the court or the tribunal considers:
- the agreement is an actual contract;
- there is a breach of contract, and
- the damages are aimed at putting the non-breaching party in the position she would have occupied had the contract been fulfilled, i.e., expectation damages.

Reliance damages are less common than expectation damages (both general and consequential expectation damages). At this stage and considering our case sample, we only have hypotheses as to the reasons for that:
- Greater length of time after reliance costs have already been paid and the contract is breached part-way through performance.
- Judges are more willing to entertain damage awards for large general expectation claims.
- Reliance damages are generally lower than expectation damages and may not be by themselves worth the cost of an international litigation or arbitration.

**Evolution overtime**

The cases show a pronounce decrease in the G/C ratio from the early 1990’s (93%) to the early 2000’s (71%) and then a stabilization over recent years around 60%.

**Evolution with size of the claim**

For International law also, one of the clearer conclusions of the empirical analysis is that the absolute value of the claim seems to be a heavy driver over the G/C ratio. The larger is the quantum the plaintiff claims the lower recovery rate she should expect to get. This seems to indicate that
courts still hesitate to grant very large quantum in compensatory damages. G/C ratios are around 80% for claims below USD 10 millions and around 55% for claims above USD 10 millions (and up to USD 1 billion).

**Claimant’s business risk**

We also extracted data based on qualitative elements. For instance, we classified each case depending of the claimant’s industry type (Distribution, Service, High Tech, Manufacturing). We attributed a claimant’s business risk index to each case with regard to multiple factors (industry, market price volatility, age of the parties, size of the parties). This index ranges from 1 (very low risk) to 4 (very high risk). The findings were rather surprising as High Tech and Service led to cases where damages were not granted. Distribution and manufacturing cases have the highest G/C ratio (over 80%). Service and high tech cases have much lower ratios below 50% and 25% respectively. Moreover, contrarily to our initial intuition, the lower is the claimant’s business risk, the higher is the compensation granted by the courts. In our sample cases with index 1 or 2 have been granted an average 88% G/C ratio, compared to 79% and 46% respectively for cases with index 3 or 4. We can only imagine that evidences are more easily put together by long standing businesses with low volatile prices such as distribution for instance and less so for start up businesses in high tech for instance. This remark has interesting connection with the analysis of new business rule in US Law.

**Claimant’s methodology sophistication**

Sophistication of the methodology provided by the claimant in support of her claim and used in the arbitral tribunal or appellate court decision has some positive impact on the G/C ratio. For instance, those cases with no rationalized claim (sophistication index 1) are below 75% whereas those with moderately sophisticated claim (index 2) are close to 100% G/C ratio. However that positive driver remains weaker than an already mentioned negative driver i.e. the absolute value of the claim. For instance, when claims are larger, index 3 and 4 drive comparable or even lower G/C ratios than index 1. This result is more surprising concerning arbitral tribunal who are supposed to be less reluctant to grant large awards when claims are “too large” in the eyes of the national courts.

**Influence of contract length**

It is generally demonstrated that the longer the contract was in force the more likely the court/tribunal will be to grant damages: from 75% to 80% and 100% for contracts of 1-2 years, 3-4 years and longer than 4 years respectively. That is a very intuitive result. However the G/C ratios do not follow the same pattern with 85%, 40% and 55% respectively. The latter result is due to a value of claims significantly higher in the 3-4 years category (USD 204 millions on average) than the average value of claims. That confirms the absolute value of the claim is the stronger negative driver of G/C ratios.

**Expansion of hypotheses**

The hypotheses above are a first step in a larger analysis of why the international law and arbitration results exist in this form. Additionally, the reasons why judges/arbitrators make these decisions, any patterns among cases, and situational factors that may have led to the damage award are also important. Finally, a larger sample size for international commercial arbitration cases would be necessary to confirm certain hypothesis.
International - Situation 2: damage to goodwill, reputation or image

Basic metrics
About 15% of the random case sample awarded damages
Of the cases in the final sample:
• 20 cases—26 claims (77%)
• 21 damage awards
• Grant to Claim ratio: 61%

Sample description and general observations
The quantification of moral damages is not often presented in our cases, although all of them feature some aspect of damage to goodwill, reputation or brand. Most of the cases from the random sample (probably around 85%) did not award damages. One reason for that may be the difficulty in proving and quantifying loss of profits as a result of damage to goodwill, reputation or brand, most of the time considered as consequential damages. One other related reason is that courts were historically hesitant to award these damages.
In our sample consequential damages represent 73% of all the compensatory claims but only 9% of the grants. Most of the grants (86%) are general expectation damages, whereas they represent only 26% of the claims. This shows consequential damages are much more difficult to evidence than (reliance and) general expectation damages.
Reliance damages are less common than expectation damages (both general and consequential expectation damages). At this stage and considering our case sample, we only have hypotheses as to the reasons for that:
- Greater length of time after reliance costs have already been paid and the contract is breached part-way through performance.
- Judges are willing to entertain damage awards for large general expectation claims.
- Reliance damages are generally lower than expectation damages and may not be by themselves worth the cost of an international litigation or arbitration.
International Commercial Arbitration clothes case applying CISG

Court and Parties
China International Economic & Trade Arbitration Commission
Seller, claimant from PRC v. buyer, respondent, counterclaimant from Germany.

Summary of the facts
A Chinese seller entered into a contract with a German buyer for the purchase of clothes. Later, the buyer discovered defects on two deliveries of the goods and raised objections, yet disposed of the goods. Upon receipt of the third delivery, the buyer refused to accept the goods asserting quality problems. The seller had to take the goods back to China and initiated arbitration proceedings requesting the Tribunal that the buyer should pay the price for the three deliveries and relevant interest plus the storage charge and returning cost of the third delivery. The payment of the price difference between air shipment and sea shipment was also claimed.

Claims and justification
Quality problems and defects with goods.

Defense against claims
The buyer counter argued that since the goods delivered had severe defects, its own clients refused to take them. Therefore, the seller violated the obligation to deliver the goods as required in the contract. The buyer had sent seventeen pieces of clothes back to the seller for inspection and the seller had confirmed: “we have found the problems you mentioned”. Moreover, after being urged by the buyer, the seller had entrusted a specialized company to inspect the remainder of the goods in the buyer’s warehouse, and the inspection report indicated that there were serious defects in material, color, and workmanship. The total amount of [Buyer]'s counterclaim is US $275,007.26.

Damages sought
Seller's Claim:
[Buyer] should pay the price of US $8,778 (E_GD) for delivery and should pay interest on this price in the amount of renminbi [RMB] 4,087.30 (E_GD). In addition, the [Buyer] should pay the transportation cost and warehouse fee for transporting the goods back to China, which amounts to Deutsche Mark [DM] 5,830.10 and related cost incurred in China, which is RMB 981.54 (E_CD)
[Buyer] should pay the purchase price of US $53,871.20 for the goods and interest of RMB 25,084 on this amount. (E_GD)
[Buyer] should pay the price difference between air shipment and sea shipment with respect to contract amounting US $11,422.72, together with interest of RMB 5,318.76 on this amount. (E_GD)
[Buyer] should bear the [Seller]'s cost associated with filing the arbitration claim, including but not limited to the [Seller]'s attorneys' fee, which is RMB 30,000.
[Buyer] should bear the entire arbitration fee.

Damages awarded
(1) [Buyer] shall bear the cost of DM/US $5,830.10 for shipping back the No. FL26 goods and related interest at a 6% annual interest rate, calculated from 8 May 1998 to the date this award takes effect. (E_CD)

(2) [Buyer] shall pay the cost difference between air shipment and sea shipment in the amount of US $7,653.01 (total difference of US $11,422.72 minus the cost difference for 1,236 pieces of

34 Our ref. 2IA-1, claim and counterclaim, decision dated 31/01/2000
http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000131c1.html

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clothes in the amount of US $3,769.71) and corresponding interest at a 6% annual rate, calculated from 20 March 1998 to the date this award takes effect. (E_GD)

(3) Except for the 1, 236 pieces of clothes and the No. FL26 delivery, [Buyer] shall pay the contract price of US $36,092.70 and corresponding interest on this amount at a 6% annual rate, calculated from 15 May 1998 to the date this award takes effect. (E_GD)

(4) [Seller] shall pay the [Buyer] the loss of profit resulting from 1, 236 pieces of defective clothes (17,778.50 x 20%) = US $3,555.70 and other transaction costs (loss of custom fee of US $2,842.41, transportation fee and moving fee inside Germany of US $657.45 and warehouse fee of US $1,371.96) and corresponding interest on the above amount. The interest shall be calculated from 19 June 1998 to the date this award takes effect. (E_GD)

(5) [Seller] shall pay 70% of the cost of repairing the clothes, which is US $37,641.78 x 70% = US $26,329 and corresponding interest on this amount. The interest shall be calculated from 15 May 1998 to the date this award takes effect. (E_CD)

Type of damages
All types and more particularly expectation $30k/$53k ~ 60%

Conclusive end
As to the buyer’s claims for customers’ loss, loss of discount fee, and loss of orders, the Arbitration Tribunal held those losses were not foreseeable by the seller at the conclusion of the contract (Article 74 CISG), therefore, they should be dismissed.

Takeaways
The Tribunal held that the buyer had repaired the goods at a reasonable cost and resold them at the same price as provided in the contract. However, it should have given notice to the seller especially about the cost it was going to incur. The buyer had not properly performed its obligation to mitigate the loss and it had to bear 30 per cent of the cost of repairing. As to the defective goods inspected and remained unsold, the Tribunal decided that the buyer did not have to pay their price and the seller should pay the cost incurred in Germany, including transportation, moving and warehouse fees, and 20 per cent of the contract price as the loss of profit resulting from the defective goods.
International Litigation art books case applying CISG

Court and Parties
Handelsgericht (Commerical Court) Zürich
Seller (Italian claimant) v. buyer (Swiss defendant)

Summary of the facts
A Swiss buyer (defendant) commissioned an Italian seller (plaintiff) on several occasions, to print, bind and supply art books. When the buyer failed to pay the outstanding purchase price, the seller sued it. Thereafter, the buyer claimed lack of conformity of one shipment of books, entitling it to a price reduction and damages. It also alleged that there was an agreement between the parties to defer payment.

Claims and justification
During the years 1995 and 1996, the [seller] - and in part company A. S.p.A., whom it [seller] merged with on 23 December 1995 - received various commissions by the [buyer], who is acting as a publishing house for art books. The orders concerned the printing, binding and delivery of art books and catalogues. With [seller]'s claim, [seller] demands payment of outstanding invoices regarding various commissions.

Defense against claims
Italian £ 20,000,000, book binding costs: rejected since books bought with no lower value.
Lost profits DM 180,000: denied; seller, stuck to schedule, did not breach. DM 10,829: seller did not accept risk.

Damage award
The [buyer] is to be ordered to pay to the [seller] an amount of [Italian Lire] It£ 162,329,851 plus interest on It£ 164,997,395 at a rate of 11.5% from 1 October 1996 to 31 December 1996, at a rate of 9.875% from 1 January 1997 to 31 May 1997 and at 9.375% from 1 June 1997 to 3 December 1997, as well as 9.375% interest on It£ 158,996,534 from 4 December 1997. The [buyer] is to bear the cost of the proceedings and to reimburse the [seller] for its costs.

Takeaways
The CISG does not determine which degree of certainty is necessary for a judge to form his or her profit hypothesis, and what is the relevant point in time for the calculation. However, the thwarting of a pure profit chance generally does not lead to a reimbursable damage. The buyer's loss of profit must be considered normal for the buyer's kind of business, and the seller, at the time of the conclusion of contract, must have been in the position to foresee such a consequence. The seller is only liable for further, extraordinary loss of profit if buyer has pointed out the risk of that particular type of loss and if it was ascertained that the seller is willing to bear this additional risk. Damages resulting from a loss of goodwill must be "substantiated and explained concretely."

35 Our ref. 2IL-3, claim and counterclaim, decision dated 10 February 1999
http://cisgw3.law.pace.edu/cases/990210s1.html

Frank S. Giaou  2 October 2017
National courts seem more generous in matter of granting damages than arbitral tribunals
As already explained we have over-weighted our sample with quantified cases in order to perform our analysis. From the random sample we have extracted 20 cases or 26 claims, 6 claims are from international commercial arbitration cases and 20 from international litigation cases. 4 out of the 6 (67%) arbitration claims and 15 out of the 20 litigation claims (75%) were awarded damages with average G/C ratios of 43% and 85% respectively for an overall average of 61%. The figures in percentage are almost exactly the same when we focus the analysis on expectation damages (general and consequential). It somehow contradicts the common belief that in matter of international commercial disputes resolution, arbitral tribunals are more generous with damages grants than national courts.

But larger cases are still brought before arbitral tribunals
In our sample of arbitration cases, the average claim is $4.2 million (one huge claim of $16.4 million) and the average grant is $87 K. In our sample of litigation cases, the average claim is $300 K and the average grant is $273 K. All figures are in 2015 dollars.

Grant rates have decreased over time
Not only international arbitration does grant lower grant to claim ratios than international litigation, but also the grant to claim ratio is steadily decreasing over time, which is similar to the decreasing grant to claim ratio found in US Courts. International litigation has also a steadily decreasing ratio, which is slightly above the ratio for International Situation 1 and the US Situation 2. Overall, the Grant / No Grant proportion stays stable from 70% to 80% and 75% respectively in 1995-1999, 2000-2005 and 2006-2014. Average G /C Ratio (on cases granting damages), decreases from 78% to 80% and 58% respectively.

The absolute value of claim impacts negatively G/C ratio
Grant / No Grant proportion increases from 67% to 82% and 100% for absolute value of claims in range of $ 0 - 30 K, $ 30 – 300 K, $ 300+ K respectively. However, average G /C Ratio (on cases granting damages), decreases from 88% to 72% and 62% respectively.

Damages are more likely granted when reputation is important to the claimant’s business
Reputation index measures how important is the reputation criteria in the claimants business. Our hypothesis was that the greater reputation was in the claimant's business, the more likely the arbitrator or the court would grant damages and the higher would be the G/C ratio. However, based on the cases in our database, we did not found a significant difference between the G/C ratio in cases where reputation was an important criterion and cases where it was not, stable around 80%.

Sophistication of court’s legal reasoning
This analysis is slightly different from the one we did on sophistication of claimant’s methodology. Here result suggests that court are actually more precise in their reasoning (index 3 or 4) when their decision is NOT TO GRANT or to GRANT LOWER G/C (64%) than when they decide to GRANT HIGHER G/C (98% with index 1 or 2). Does that mean that arbitrators and judges are expected to be very generous and feel they need to justify their position more when they are not so generous?

Expansion of hypotheses
The hypotheses above are a first step in a larger analysis of why the international law and arbitration results exist in this form. Additionally, the reasons why judges/arbitrators make these decisions, any patterns among cases, and situational factors that may have led to the damage award are also important. Finally, a larger sample size for international commercial arbitration cases would be necessary to confirm certain hypothesis.

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2 October 2017
International - Situation 3: Lost profit damages to new businesses

Relevant and quantified cases for new businesses were difficult find. There may be different reasons for this fact:
1. New businesses generally begin in the domestic sphere before expanding to the international.
2. New businesses may have fewer resources to take their cases to international litigation or arbitration.
3. New business claims may be more likely to lead to settlement given the difference in bargaining power and the non-existence of a “New Business Rule” as in the U.S.

Of the cases in the final sample:
• 5 cases—5 claims
• 3 damage awards
Conclusion

As already explained, this analysis is by no means statistically conclusive as regards the sample sizes in each individual situation and law. However some results are consistent enough across the board to be worth mentioning and suggesting interpretations or further research.

We observe a certain consistency for the basic metrics: 30-40% likelihood of grant and, among those cases granting something, a 40-50% grant to claim ratio both in situation 1 and situation 2. The trends are upward in French law and it is downward in American law but they both converge towards similar percentages. International law gives slightly higher percentages and situation 3 gives significantly lower percentages. However we also observe wide deviations from those % metrics averages as only a small proportion of all cases actually fall close to the average % metric.

The next question hence arises: How and why do cases deviate from the average?
To answer the question, the analysis detailed above can be summarized into four main conclusions.

The first clear conclusion of our empirical analysis is that there is a negative correlation between the absolute value of the plaintiff’s claim and the percentage of that claim actually granted (G/C ratio or recovery rate). This is true for situations 1 and 2 in all 3 laws (France, US and even more surprisingly in International law) and also for situation 3 in US law. The gap between claim and defense widens when claim increases, so court decision logically reflects this wider gap. That may also indicates there is a ceiling for the compensatory damages courts will eventually grant. Asking for too much may look “repugnant” to the court, and may hinder the plaintiff’s ability to recover damages. This “moral valuation” cannot be excluded either when extremely high damages are actually granted to plaintiffs. In those outlier cases, courts often mention bad faith of defendant as if they needed to justify why they depart from the full compensation principle to grant “hidden punitive damages”.
Anyway understanding why courts still hesitate to grant very large compensatory damages could be an interesting avenue for further research.

Secondly, the analysis of methodologies used by the claimants leads us to three remarks:
- There is a clear positive correlation between the sophistication of the methodology used by the claimant and the successful outcome of the case for that claimant. Sophistication of the methodology developed by the claimant in support of her claim has logically a positive impact on the likelihood to be granted damages. This is true for situation 1, 2 and 3 in the US and in France. Cases decided under international law could not allow a similar analysis.
  However that positive driver remains weaker than an already mentioned negative driver i.e. the absolute value of the claim as very sophisticated claims have comparable or even lower G/C ratios than moderately sophisticated ones when their claims are larger. This is particularly true in France confirming a historical hypothesis of reluctance when claims are “too large” in the eyes of the court.
- DCF (discounted cash flows) supposed to be the golden standard of lost profits methodology is very rarely used in the cases of our samples! This is certainly a route for normative conclusions at least for those cases where economic stake is important.
- As situation 2 concerns loss of reputation, goodwill and image, primarily intangible assets, we would have expected some evidence based on qualitative indicators such as client satisfaction, employee satisfaction, image for recruiting (“great place to work” index) and more generally speaking ESG (environmental, social and governance) indicators. Such was not the case, probably because those indicators are still too recent. This is probably a route for improved judicial expertise in the future.

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However, the third result is somehow counter intuitive: Claimant operating in mature and stable industries (distribution and services) have much better chance to be granted damages than those operating in more risky industries such as high tech or manufacturing. This is very consistent across the three laws and it somehow contradicts the economic theory saying that risk should be compensated by higher damages for claimants operating in thin markets. One possible explanation is that those claimants in high tech industries are probably smaller / younger than those in distribution and, as such, they command much less ability to evidence their lost profits (see new businesses in situation 3).

The fourth and last result concerns specifically international commercial disputes resolution: Larger cases are still brought before arbitral tribunals, however, in our sample, national courts seem more generous in granting damages than arbitral tribunals. This latter result somehow contradicts the common belief that arbitral tribunals are supposed to be less reluctant to grant large awards when claims are “too large” in the eyes of the national courts.

We conclude on three overall recommendations to parties (particularly new businesses and businesses with goodwill damages) who want to improve their chances of success in recovering lost profit damages:

1) Draft their contracts so that it would be clear to the parties (and the courts) there would be foreseeable lost profit in case of breach. The safest way is probably to insert a liquidated damages clause into their contracts. In a way, it should be stated that the parties have contracted because it is their intent to reduce the inherent risk of their business.

2) Before litigating (or in parallel to litigation), certainly try to settle on expectation damages even at a discounted value. This is generally true for most disputes, but it is all the more relevant when quantum is speculative and likely weighted average grant is as low as 15% of the claim (one third of 45%).

3) If they still want to go to Court, then prepare higher standards of evidence and calculation methodology to demonstrate their expectation general damages and even more so their consequential damages … Expectation damages may be the default rule but they are more difficult to evidence – and hence less generously compensated – than reliance damages. Daubert 36 standard is clearly a higher evidentiary standard for new business than

36 In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 584-587, seven members of the Court agreed on the following guidelines for admitting scientific expert testimony:

• Judge is gatekeeper: Under Rule 702, the task of "gatekeeping", or assuring that scientific expert testimony truly proceeds from "scientific knowledge", rests on the trial judge.

• Relevance and reliability: This requires the trial judge to ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable foundation". Concerns about expert testimony cannot be simply referred to the jury as a question of weight.

• Scientific knowledge = scientific method/methodology: A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound "scientific methodology" derived from the scientific method.

Latest amendment of Rule 702 in 2011 made the language clearer. The rule now reads:

RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

While some federal courts still rely on pre-2000 opinions in determining the scope of Daubert, as a

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for any other well-established business. It requires that the expert set forth a reliable methodology that is based on objective market forces.

**Appendix 1. Data base extraction and analysis as of February 2017**

*Add detailed description of database*

The research plan and what has already been accomplished can be summarized as follows:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Laws</strong></td>
<td><strong>Situations</strong></td>
<td></td>
</tr>
<tr>
<td>1. Breach of an agreement to negotiate or to agree</td>
<td>150 cases extracted 30 cases indexed 1F#</td>
<td>75 cases extracted 26 cases 31 claims indexed 1I#</td>
</tr>
<tr>
<td>2. Damage to goodwill, business reputation or image</td>
<td>150 cases extracted 30 cases indexed 2F#</td>
<td>30 cases extracted 20 cases 26 claims indexed 2I#</td>
</tr>
<tr>
<td>3. Lost profits and lost chance for new businesses</td>
<td>30 cases extracted 8 cases indexed 3F#</td>
<td>20 cases extracted 5 cases indexed 3I#</td>
</tr>
<tr>
<td><strong>Legal databases</strong></td>
<td>Lexis Nexis</td>
<td>Westlaw</td>
</tr>
<tr>
<td>used as sources of case law</td>
<td>Dalloz</td>
<td>Lexis Nexis</td>
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<tr>
<td></td>
<td>Lamyline</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>Pace, Unilex, Uncitrul International Arbitration Case Law</td>
</tr>
</tbody>
</table>

In each cell cases are indexed with:
- a number (1, 2 or 3 coding the situation)
- then a letter (F, U or I coding the source of law)
- finally a number from 1 to 30+ coding the order by increasing dates (1 for years close to 1995 and 30+ for years close to 2015)

For instance 2U25 would code the 25th oldest case in the US law for damage to goodwill. In some cells we may have more than 30 cases, hence 30+.

Then there are 4 initial figures we will document for each cell:
# cases w quant claim: number of cases documented with quantified damage claim
# cases w quant grant: number of cases documented with quantified damage grant
% cases granting damages (win rate): number of cases granting damages as a percentage of total number of cases claiming damages
% G quantum/C quantum (grant rate): average ratio between damage grant and damage claim

technical legal matter any earlier judicial rulings that conflict with the language of amended Rule 702 are no longer good precedent.

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Appendix 2. Bibliography abstract (a complete bibliography is available on demand)

1- French Civil Law

1.1- Books, dissertations


1.2- Articles


2- American Common Law

2.1- Books, dissertations


Draft - Please do not cite, quote, or circulate without author's permission.


2.2- Articles


3- Private International Law

3.1- Books, dissertations


### 3.2- Articles


Paulsson Jan, « The expectation model », p. 57.

Appendix 3. Graphs produced for the analysis