



WHO WHAT WHEN WHERE AND HOW OF DAMAGES CALCULATION - POINTS TO BE AWARE OF

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11 March 2021

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OUTLINE

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AGENDA

Whose loss are we calculating?

What does the loss encompass?

When is the valuation date/claim period?

Where does the dispute relate to?

How is the loss calculated?

The takeaways

Further case studies

WHO

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WHOSE LOSS ARE WE CALCULATING?



Review and analyse the evidence



Identify whose loss

ASPECTS TO CONSIDER



Has any loss been passed through to others by the Claimant?



Should a different party be bringing the claim?

CASE STUDY – EVIDENCE OF PASS-THROUGH

THE CASE

Delay in completion of a petrochemical plant, meant ongoing use of an alternative source at a higher cost.

DAMAGES ISSUES

Who actually suffered the loss (i.e. with which party does the loss sit?)

MATTERS TO CONSIDER

- Whether costs of alternative material have been passed-through
- Consider how the claim is framed/ who is included



WHAT

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WHAT IS THE BASIS OF LOSS?

Loss of value

Loss of opportunity

Loss of profits

Liquated damages

Sunk cost

Loss of reputation

Return on investment

...and others!

“To ask for the full amount of the future revenue stream when also claiming recoupment of all investments is wanting to have your cake and eat it too”

Himpurna California Energy Ltd v PT Perushaan
Listnuik Negara, 4 May 1999

WHAT DOES VALUE MEAN?

Fair Market Value (most common in cases)

Replacement Value

Value in Use

Fire Sale Value

Book Value

Synergistic Value

When talking of value, people can mean different things, be clear what is applicable



CASE STUDY – CONSTRUCTION

THE CASE

Shareholder dispute regarding shareholding in a joint venture

DAMAGES ISSUES

What is the loss suffered? Are there multiple or alternative losses?

MATTERS TO CONSIDER

- Loss of profits from contracts awarded
- What about future profits?
- **Alternatively** the loss as a result of wasted investment
- Was there a loss of reputation?

WHEN

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WHEN IS THE VALUATION DATE?

The valuation date will depend on the type of loss being assessed

Loss of value

Specific point in time – at date of breach

Loss of profits

Set period of time - i.e. contractual/ useful life, at date of breach or date of award

Sunk costs

Set period of time – i.e. investment period, at date of breach

Business interruption

Period of interruption

WHEN IS THE VALUATION DATE?

Choice between the date of breach OR date of award will determine the information to be considered (both internal and external)

Date of breach
(no hindsight)

OR

Date of award
(hindsight)

Other matters

Single breach or multiple breaches

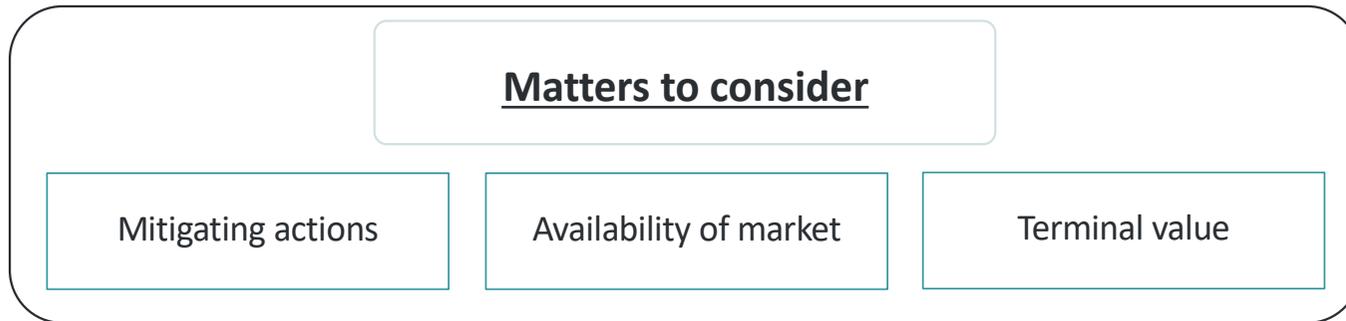
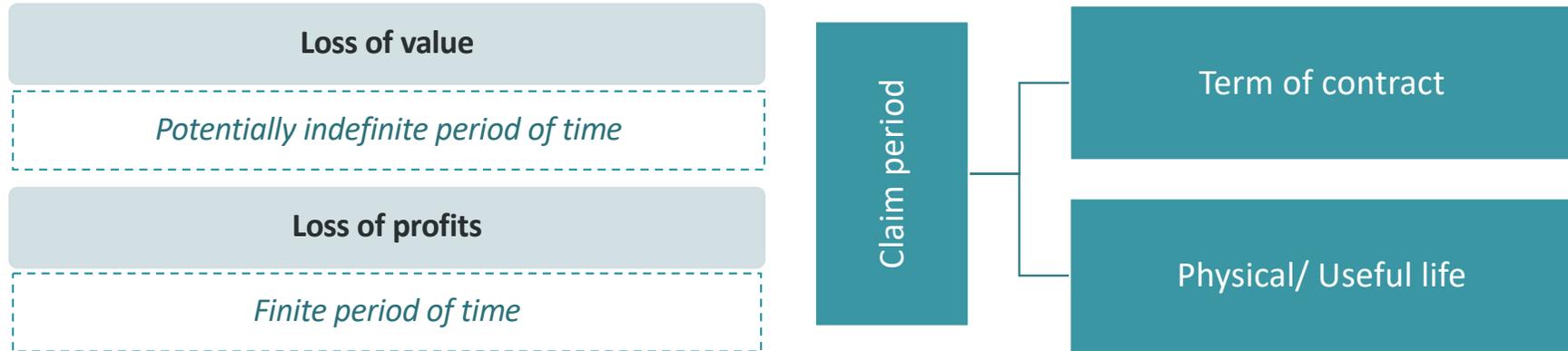
Lawful and unlawful expropriations

Losses/(benefits) after breach

OIL PRICES – LAST 10 YEARS



HOW LONG IS THE CLAIM FOR?



CASE STUDY – DETERMINING THE USEFUL LIFE

THE CASE

Fire in a coal mine caused a closure. The coal mine ended up closing permanently

DAMAGES ISSUES

- Ongoing assumptions as to profits and useful life
- Would the mine have otherwise closed and if so, when?

MATTERS TO CONSIDER

What is the realistic useful life of the mine?

- Physically
- Economically
- Socially



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WHERE DOES THE DISPUTE RELATE TO?

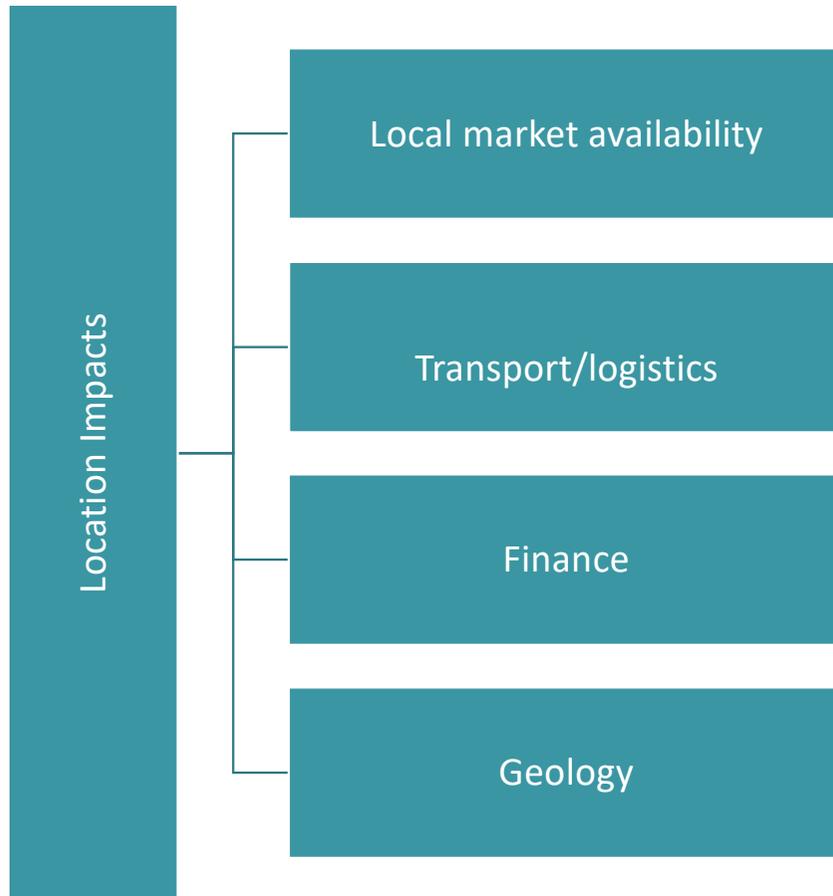
The country/countries the dispute relates to can have significant implications on the claim

Country Risk Premium

Currency/currencies under which the loss is calculated



OTHER LOCATION IMPACTS



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HOW IS THE LOSS CALCULATED?



INCOME BASED

*“the value of an asset or business **is best determined** by calculating the stream of income or benefits that it will yield its owner and then discounting that stream of income to present value using an appropriate discount rate.”*

ARB/03/19 – Suez v Argentina

*“...the DCF methodology [income based approach] is **not appropriate** for a business that never operated and where a satisfactory basis for its projected revenues has not been demonstrated.”*

ARB/11/23 – Franck Charles v Moldova



MARKET BASED

*“Such method is **widely used** as a valuation method of businesses, and can thus be safely resorted to, provided it is correctly applied and, especially, if appropriate comparable are used.”*

ARB/AF/11/2 – Crystallex v Venezuela

*“...the Tribunal has not been provided with any significant evidence of such transactions and it would be **a most speculative enterprise** to try and determine the compensation due...”*

ARB/01/8 – CMS Gas v Argentina



ASSET BASED

*“The book value method applied to a recent investment is considered an **appropriate method** of calculating its fair market value when there is no market for the assets expropriated.”*

ARB/02/8– Siemens v Argentina

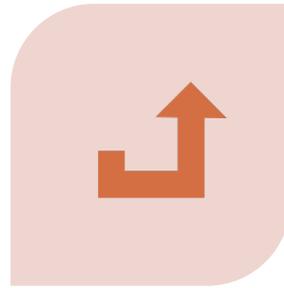
*“...it would be **inappropriate in the present circumstances**. CMS is a minority shareholder in TGN which is an ongoing company with a record showing profits.”*

ARB/01/8 – CMS Gas v Argentina

OTHER APPROACHES AND CONSIDERATIONS



WASTED COSTS



RETURN OF
INVESTMENT



LOSS OF
OPPORTUNITY



CASE STUDY – CHOOSING THE APPROACH

THE CASE

Local government implemented tariff changes resulting in loss of value to investment

DAMAGES ISSUES

Appropriateness of applying an income based valuation approach?

MATTERS TO CONSIDER

- Whether there was sufficient information to support future cash flow forecasts
- Whether an alternative approach would capture the value of the investment

KEY TAKEAWAYS

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KEY TAKEAWAYS

Who	Early identification of the claimant can assist the adaption of the claimant's case strategy and shape a significant part of the defence for the respondent
What	Identify what the loss is and test the reliability of the information itself
When	The period of claim or the valuation date can greatly impact a claim value
Where	The location can have significant implications on the claim due to country risk, exposure and local conditions
How	There are several approaches to valuation, and it is not always agreed which to use and how to apply each approach

FURTHER CASE STUDIES

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CASE STUDY – OIL RIG

THE CASE

Contract termination allegedly as a result of technical defects.
Respondents case was that this was termination for convenience following a downturn in the market

DAMAGES ISSUES

- State of the market at the time - timing was critical
- True costs of operation both with and without the alleged technical issue
- Who bore what costs





CASE STUDY – AFRICAN GAS CONCESSION

CASE Dispute re value of a gas concession alleged to be expropriated

DAMAGES ISSUES:

- Market
- Location/logistics
- Concession Obligations
- Geology
- Party
- How to value

CASE STUDY – INTEGRATED OIL AND GAS COMPANY

THE CASE Claim in relation to alleged expropriation of company including

DAMAGES ISSUES

- Location – logistics
- Location – country risk
- Solvency/availability of finance
- Period of claim
- Ownership



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