FINANCIAL DAMAGE ANALYSIS IN INTERNATIONAL ARBITRATION: FAULT, CAUSATION AND THEIR IMPACT ON THE QUANTUM

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A. An Introduction to Fault Causation and its impact in determining Quantum:

It is a well determined principle of law that a person whose wrong or fault causes an injury to another party must in equity compensate the other party for their loss, such compensation has historically been provided either by penalizing the wrongdoer through incarceration, or by imposing financial penalties. In the realm of Financial Damage Analysis upon which this paper seeks to dwell, the primary means of penalizing the party whose fault caused the injury is through payment of compensation. Once the fault is determined and it is proven that the fault caused the injury, then the important question upon which the adjudicating body has to determine is How Much? Or in other words the Quantum. This paper will seek to detail the impact of fault and causation on determination of damages.

Equity will not suffer a wrong to be without a remedy[1] is considered as a basic maxim of Jurisprudence. The purpose of damages is to recompense anaggrieved party for the injury it has underwent at the hand of the respondent. In case of expropriation, it is the

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[1]Judge Larry Primeaux's Blog about Practice in Mississippi's Chancery Courts., Maxims: No Wrong Without a Remedy, September 9, 2013 § 1 Commenthttp://chancery12.wordpress.com/2013/09/09/maxims-no-wrong-without-a-remedy/

duty of the state to provide the claimant with the monitory value of the asset(s) taken[2]. In case of breach of contract, claimants are reimbursed by an award of damages which seeks to reinstate them in the same monitory position they would have been in if the contract had proceeded as planned. However there are boundaries imposed on the quantum of damages. Unforeseeable damages or those which are extremely remote will not be awarded. In the words of Alderson B in *Hadley v Baxendale*[3]*:*

> *"where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*[4]*."*

It is generally accepted that the main object of awarding damages is to place the aggrieved party in the identical pecuniary position that they would have otherwise been if the contract had been performed in the same manner envisioned by the parties. Damages are therefore a natural consequence of the breach and are directly derived from the principle *pactasuntservanda*[5], this is in orderto substitute a pecuniary onus for the obligation which was promised but not completed. While determining damages the

[2]Michael Pryles, 'Lost Profit and Capital Investment' (2007) 1(1) World Arbitration & Mediation Review 1-17. Available at http://www.arbitration-icca.org/media/0/12223892171920/damages_in_the_international_arbitration_paper.pdf

[3][1854] EWHC J70

[4]Also see Judgments - Jackson and another (Original Appellants and Cross-respondents) v. Royal Bank of Scotland (Original Respondents and Cross appellants), Available at http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050127/bank-2.htm

[5]Pryles (n. 2)

tribunal will look intothe loss suffered *(damnum emergens)*, including the costsinvolved in performance of the contract, and the lost profits*(lucrumcessans),*

However although the legal position on direct damages is clear and they can be recovered and certain damages which fulfill the conditions of being too 'remote', 'unforeseeable' or 'speculative' cannot be recoveredand there are situations whence grey areas may arise for the tribunals to decide based on facts and circumstances. In general while determining the damages to be conferred, tribunals may be need to decide the profits which the aggrieved party would have otherwise made in case there was no breach of contract or expropriation.While determining this the tribunal will need to look into a variety of factors and future profits and also take due consideration of interest rates, inflation and incidental risks.

B. The concept of fault in International Arbitration:

John Stewart Mill was famously quoted describing the origins of fault *"To human beings, who, as hitherto educated, can scarcely cultivate even a good quality without running it into a fault"*[6] . In arbitration fault is often defined to be the malicious intent to harm.

During deliberations, arbitrators are likely to emphasize which party was at fault rather than which party performed well.[7]Finding of fault is often primary step required to

[6]John Stuart Mill, Principles of Political Economy,1848

determine liability. The correlation between fault and liability can be seen from a recent proposal to reform the French Civil Code suggests introducing punitive damages into French tort law, *'One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages in addition to compensatory damages'*[8]. From this it is clear that the reason for the fault is a wrongdoing with malafide intention.

It has been observed by Blaxell J that while the work of commercial arbitrators should not be approached with a view to finding fault,[9]:

> *"The extent to which an arbitrator must go in meeting these requirements will depend on the nature of the decision and on the particular circumstances of the case. If the dispute involves simple issues of fact a rudimentary identification of the issues, evidence and reasoning might be all that is required".*

In commercial arbitration, parties who have been on the losing side in a number of arbitrations will often see the fault in the system or the other parties rather than in their own conduct. However the determining of liability for fault is a straightforward matter and has been extensively provided for in numerous national laws. Below is the example of the Romanian Civil Code.

Art. 998: *"Any deed of a person, which causes to another person a loss, obliges the person due to whose fault the loss was occasioned to repair such loss".* The extent of the loss and therefore the liability is usually determined by the tribunal. For example,

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[7]Kristina Klykova, 'Bias in Arbitral Decision-Making: Rescuing the Mentschikoff Archives from a Half Century of Oblivion' (2014) 31 Journal of International Arbitration, Issue 2, pp. 289–315

[8]22 Sep. 2005, Art. 1371:

[9]In D & M (Australia) Pty Ltd v Crouch Developments Pty Ltd [2010] WASC 130

claims as to faulty construction or manufacture, misrepresentation, defenses of force majeure, and the like are fundamentally dependent on the factual findings that a tribunal will make.

In order for the aggrieved party to successfully claim for damages for breach of contract by the other party, the aggrieved party must be able to prove that it has incurred additional loss in excess of the agreed sum; the aggrieved party has to prove the fault of the party in breach caused the loss[10],

The Tribunals have often observed that in addition to the applicable standard for valuing the Claimants' losses and other related quantum issues, there are "*core*" threshold quantum issues that it must first resolve. Among these issues concern the impact on the Tribunal's determination of quantum, fault plays a major role.

The Tribunal has a wide margin of discretion in apportioning fault among the parties. Usually the tribunal agrees to reduce the award of damages if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility

However determining the role of fault in quantifying damages becomes complicated when we deal with disputes between states. A question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by 'fault' one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms

[10] Manner/Mosimann, pp. 1197, 1210; Schwenzer, para. 71.12.

of the primary obligation, it is only the act of the State that matters, independently of any intention.[11]

Dr. Pérez Loose cited the following statement of principle from a decision of Ecuador's Supreme Court of Justice, which specifically addresses clause 3 of Article 24 of the Constitution:

> *"With [the] principle of proportionality of the penalties as a basis, all democratic legal orders state that the measures or sanctions adopted within any legal or administrative proceeding must be proportional with the facts or acts established as violations. In this way, administrative responsibility is graduated in accordance with the fault"*

Therefore, the State, without fault under international law, can be held to a legitimate claim, leading to reparation by the State. Rainbow Warrior arbitration, clearly shows that international law does not distinguish between contractual breach and the breach by any other method.

As previously advanced, one could consider subjective elements such as fault, or malicious intent to quantify them. In the Desert Line case, the Tribunal found that the violation of the applicable BIT and the physical duress exerted on the executives of the claimant was malicious and constitutive of a fault-based liability. However, it is difficult or even impossible to allocate an amount of compensation to a given degree of fault. In line with this, a number of cases have shown that fault seem to play the role of a

[11]J. Crawford, Commission's Articles, 84, The Content and Scope of the FET Standard, Chapter 6: The Content of the FET Standard; Alexandra Diehl

gatekeeper, allowing arbitrators to be more generous in awarding a higher amount of compensation[12]

In this case the Tribunal finding in favour of Desert Line Projects, stressed the 'physical duress exerted on the executives of the Claimant' and that the breach of treaty was 'malicious...therefore constitutive of fault-based liability'.[13]Ripinsky and Williams adopt a similar line of argument by arguing that it is permissible to take the fault of a state into account in setting the amount of compensation[14].

It is often difficult to find a case in the context of violating arbitration agreements, where the party in breach could prove that it was not at fault. In some cases a tribunal may wish to undertake experiments in aid of their determination of fault. For example, a claim that garments are faulty because the dye leaches on washing, could be tested via experimentation. Site inspections might also be conducted by experts for similar reasons.

However if the parties have tried in good faith to reconcile their positions, one of them cannot, in the event the negotiations fail, use for its benefit the proposals of the other to deduce an alleged admission of fault.[15] Under Swiss law, a claimant asking for contractual damages does not have to establish fault of the respondent.

[12]Marc Allepuz, Moral damages in international investment arbitration Revista del Club Espanol del Arbitraje (Numero 17/2013)

[13]Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17

[14]S. Ripinsky& K. Williams, Damages in International Investment Law 312 (BIICL 2008). See also the supportive suggestion in System of the Law of Nations: State Responsibility Part I, 46 (I. Brownlie, Oxford U. Press 1983) ('The existence and extent of culpa may affect the measure of damages...')

[15]Fry, Without Prejudice and Confidential Communications in International Arbitration (When Does Procedural Flexibility Erode Public Policy?), 1998 Int'l Arb. L. Rev. 209, 212

The final determination of liability arising out of fault in a given case will depend largely on the particular circumstances of that case, such as the nature and duration of the contract, the weight of the breach and the injury caused by the fault,[16]

C. Causation in international arbitration:

Let us now examine causation, although different legal systems may find different ways to analyze causation, there always exists a uniformity whereby the claimant seeks to prove the effect of the liability. The position under English law is that *"causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them."*[17]Even under relatively simple facts, where a party is due to deliver goods and fails to do so, the party which would be the recipient may suffer numerous effects. I.e. firstly the loss of utilizing the goods, the impact of such a loss will be dependent on how the party uses the goods and any actions taken by the party. For example if the party wishes to utilize the goods for personal purposes then there is no more doubt about causation and the main issue is the determination of quantum of loss. However if the party intends to utilize the goods with a view to make other goods, or to sell them, there will then need to be further investigation as to causation. Such an investigation will need to make use of factual evidence to establish injury caused by the breach.

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[16]BGE 103 II 129 para. 4; BGE 91 II 372 para. 11; BGE 82 II 142 para. 3.

[17]Monarch Steamship Co. v. KarlshamnsOljefabriker, [1949] A.C. 196 (H.L.) 228 (Eng.).

However causation is often not simple. Usually it is complicated by the twin phenomena of: globality and concurrency[18]. Globalityis the result of causation not being a simple matter witha single traceable effect;instead there usually are multiple causes with numerous effects leading to a "global" effect. It often occurs in construction, IT, and technology projects thatwhere the interruption and delay is triggered by a numeroushappenings and causation is determined by complex interplay of various matters so that it is challenging, unrealistic, or sometimes impossible apportion the blame among the numerous causes. This in itself would not bar the claimant from seeking compensation if all the causes pointed at the defendant's liability.

However this is not the case in reality, as the claimant is generally not able to prove that all the causes were attributable to the defendant or the defendant may prove that there were causes which could not be attributed to him which caused the loss. Also although the purportedreasons are made known to be the legal responsibility of the defendant, the question then arises as to how to attribute the delay and financial effect to the defendant.Causation although a matter of fact need not be proven using direct factual evidence, rather, it can be demonstrated from inference or by deducing from facts. If, numerous breaches of contract can be attributed to the defendant and undue delay and disruption is the result of such breach as a matter of liability, these circumstances may suffice to institute the claim. Frequently, in such circumstances, the facts and the conclusions will surface only in the course of a trial and perhaps the scrutiny of that evidence happens only during closing submissions, since, the claimant has been focused on proving liability. Under these circumstances, the Tribunal will most probably be

[18]The Hon. Sir Vivian Ramsey,Establishing Claims For Damages, Costs And Interest In International Arbitration,American University International Law Review 2011 Article 1211

concerned with the standard of fairness: if the claimant hasmade its case adequately to alert the defendant to the case which is being prepared against it so it sees the case it has to meet.

Concurrent causes are the 2nd pertinent problem. When the claim is global in nature it can often occur that a few causes re attributable to the defendant and a few causes for the delay and disruption can also be attributable to the claimant. This can lead to complications, as it is the concurrency which leads to the disruptive effect.The issue of concurrency can arise even if the case is of a simple nature. The tribunal will have to boil down the matter into two questions of causation: (1) what event caused the critical delay; and (2) for how long did that event cause critical delay.

An illustration would be the case of a power station where one of the concludingevents is linking of the power plant to the local power grid for transfer of power produced at the plant. Under normal circumstances this is the owner's responsibility and the next steps which include the required testing is the job of the contractor. Supposing the owner, notwithstandinggreatestpains, has been incapableof arranging the grid connection in a timely manner, that this stops the contractor from completing his work. Predictably the contractor tests the generators before the final connection to the power grid. However on the last day one generator due to a fire is badly damaged during the testing and this leads to delay of the final testing by the contractor. This leads the contractor to complete the testing after replacement of the generator only after three months delay. However the owner simultaneously makes the delayed connections accessible to the grid. The question arises as to which party will be liable for the consequent disruptions in electricity supply. Will the owner or the

contractor be able to claim compensation for loss? These answers show us the complex nature of circumstances with which a tribunal will have to deal. In case the contractor selected a longer time frame for replacement of the generator insteadof a shorter period because he realizes that the grid connection would not be ready. Or if in case the owner decidesto wait for the replacement generator before applying to connect to the grid. These factors which point out the complex situations leading tribunals to decide based on the 'unique facts of each case'.

"Causation" plays multiple roles in arbitration. Firstly it aids in determining liability; illustratively injurycaused by wrongfulstate action will be attributed to the State; the state may also be liable if it had a duty to act but remained inactive. Secondly causationhelps us to establish the quantum of damages or compensation payable to the aggrieved party. Tribunals seek to find a causal link between the wrongful conduct and the injury caused. They base pecuniary damages on this. In case of direct expropriation injury can directly be inferred and is caused by the act of the appropriating state.

Causation has historically been divided into two kinds' i.e, causation-in-fact (*causa sine qua non)* and causation- in-law (*causa causans)*. While the first encompasses the causal conditions, the second will be "the cause or causes"[19]. The rules which will determine if there is causation-in-law are those which entail directness, or foreseeability.

Claims for damages can only be made for injury caused by the actions of the party at fault; the onus of proving that the quantum flowed from the misdeed of the other party will therefore lie on the party who makes the claim. The importance of the role of

[19]http://lawjournal.mcgill.ca/userfiles/other/2003502-somerville.pdf

Causation in determining the quantum of compensation cannot be understated. In order to satisfy the tribunal the claimant must demonstrate to that there is a sufficiently proximate causal link which satisfies the requirements of being not too remote. This is of importance as the injury can be a consequence of multiple sources. The principle of causation can cover a wide range of issues like, multiple, intervening and contributory causes and limitation on liability such as foreseeability and proximity vs. but for test'. Also in some circumstances although the defendant may have caused the injury the aggrieved party may also be partly responsible and this contributory fault may reduce the liability.

An illustration to determine causation has been provided for in a paper by Frederick C. Dunbar, Arun Sen titled Counterfactual Keys to Causation andDamages In Shareholder Class-Action Lawsuits[20]; It provides *"Causal dependence among actual events implies causation. If 'c' and 'e' are two actual events such that 'e' would have not occurred without 'c', then 'c' is a cause of 'e'."*[21]The causation of loss will therefore depend upon the question of how, if at all, injury wasproduced by the defendant's actionable behavior. Tribunals have addressed the importance of a causal link on numerous occasions, notably in UPS v. Canada[22], where the tribunal stated that damage

[20]Frederick C. Dunbar, Arun Sen titled Counterfactual Keys to Causation and Damages In Shareholder Class-Action Lawsuits;Dunbar, Frederick C.; Sen, Arun, Wisconsin Law Review;2009, Vol. 2009 Issue 2, p199

[21]See Lewis, supra note 12, at 200…David Lewis, Causation, 70 J. PHIL. 556 (1973), reprinted in CAUSATION 193, 194 (Ernest Sosa & Michael Tooley eds., 1993) … http://hosted.law.wisc.edu/lawreview/issues/2009_2/2_-_dunbar_sen.pdf;

[22]United Parcel Service of America Inc. v. Government of Canada, UNCITRAL - See more at: http://www.italaw.com/cases/documents/1140#sthash.cbsAAmXf.dpuf

must flow from some cause, also in the case of Feldman v Mexico[23]the arbitrators heldquantum of damage should be"adequately connected" to the violation,also in the case of S.D. Myers v. Canada[24]where the tribunal ruledproximate harm must be the result of breaching NAFTA provisions[25].

Causation plays a major role in assisting tribunals quantify the amount of compensation payable based on the injury caused by the wrongdoing. If the causation is clearly defined the determination of damages will be easy. For example in *Feldman v. Mexico*[26], it was concluded by the tribunal that the actions of the Mexican government in denying tax rebates to Feldman was wrongful. In this case the tribunal determined the quantum of damages as the same as the amount of rebates which were unpaid. Also similarly in the case of*Occidental v. Ecuador*[27], wherein the person investing was deprived of rebates in tax merely because of his nationality, the tribunal ordered payment of damages equivalent to the quantum of rebate withheld.

Although the above examples have proved comparatively straight forward, on numerous occasions difficulties and confusion arises when cases involve Notwithstanding

[23]Feldman v Mexico CASE No. ARB(AF)/99/1

[24]S.D. Myers, Inc. v. Government of Canada, Second Partial Award –Available at http://www.italaw.com/cases/documents/977

[25]Bjorklund, Andrea K,Causation, Morality, and Quantum, Suffolk Transnational Law Review , Vol. 32, No. 2 , Summer 2009http://www.questia.com/library/journal/1G1-223600121/causation-morality-and-quantum

[26]ICSID Case No. ARB(AF)/99/1

[27]Occidental v. Ecuador LCIA Case No. UN3467

these two relatively simple cases, causation is much more likely to prove difficult in cases involving abuse of principles of fair and equitable treatment. As KajHober[28] has noted:

> *"Violation of the fair and equitable treatment standard does not automatically result in the elimination of the investment, as is mostly the case with expropriation, but rather results in a decline in the business in question, or in other negative impact on it. The difficulty is to determine the extent to which this is caused bythe violation of the fair and equitable treatment standard and not by other factors."*[29]

At bottom are questions of fairness; Respondent States should be held responsible for the harm they cause, but not more than that. Requiring proximate causation serves to limit damages to "the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."[30] A requirement by the tribunals of closeness as a relevant factor in finding causation decreases the odds of the tribunal of granting damages which are unequal to the injury caused.

The events to be considered in determining causation however ultimately are based on the facts of the case. While determining the quantum of damageseconomic loss will not necessarily be the measure, but will rather be a cap on the quantum of damages awarded should economic loss be less than the damages claimed. The economic loss will also be calculated taking into consideration lost opportunity costs. However in cases where there is breach of contract, the determination of the loss will frequently be computed based upon the profits lost or the third party liability caused as a consequence to the breach.

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[28]KajHober, Remedies in Investment Disputes, in INVESTMENT TREATY LAW: CURRENT ISSUES III 1, 10 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., 2009)

[29]Bjorklund, Andrea K, (n. 24)

[30]United States Of America (Claimant) v. Canada (Respondent) Lcia Case No. 81010, Available at http://www.italaw.com/sites/default/files/case-documents/ita0997.pdf ,

There are two kinds of causal links pure or transitive. A causal link is said to be pure if the damage is caused by the wrongful act without any intervening happenings.This is usually uncommon. Thus, if a State unfairlyseizes a ship, causing the shipping company to go bankrupt, causing injury to the shareholders, the causal link between wrongful act and loss is transitive: as the loss was caused indirectly through the bankruptcy instead of the arrest.

Transitive causal links do not discount the obligation of the wrongdoer – even where a *lucrumcessans* is claimed. The victim has an obligation to prove non-remoteness. The standardexplanation of this opinion is enclosed in the *Administrative Decision num. 2* of November 1, 1923 of the US-German Mixed Commission:

> *"It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. – It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act… All indirect losses are covered provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."*

In the above illustration, to be able to claim damages the victim needs to prove each element of the chain of events: that as a consequence of the arrest the company went bankrupt, and because of this bankruptcy the shareholders lost money. And *vice versa*: if the state could prove that the bankcruptcy was caused by some other reason then it could escape liability.

In the case of *LG&E vs. Argentina*[31], the arbitral tribunal held that it should calculate 'actual loss' caused by Argentina's conduct. The question here was on causation, i.e, quantum of loss caused to investor due to the unlawful act.

The subject matter of reparation according to Crawford's ILC article commentaries "is the injury resulting from and ascribable to the wrongful act"[32]. As illustrated in the words of Smutney, causation will

> *"Operate to incorporate a sense of proportionality into the obligation to make reparation for wrongful acts as they require tribunals to make determination about the reasonableness of requiring one party or the other to bear the burden of losses when they occur"*[33]

As provided under Article 39 of the ILC, with regard to international claims made by a State "*Account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured state or any person or entity in relation to which reparation is sought*"[34]. Respondent countries in arbitration have however in practice been unsuccessful in attempts to demonstrate that injury was caused by the general economic situation. An Illustration being the case of *CMS vs Argentina*[35], where the response of the state of Argentina that the injury was not its fault but rather caused by major economic crisis was rejected by the tribunal.

[31]LG&E vs. Argentina ICSID Case No. ARB/02/1

[32] ILC articles on state responsibility. Article 31, Comment 9

[34] ILC Articles on state responsibility, Commentaries *supra n.96, at 240*

[35]CMS vs ArgentinaICSID Case No. ARB/01/8

However in the case before the ICSID tribunal of Enron v. Argentina[36], a softer approach was taken.

> "232: *While unfortunate events do not in themselves amount to a legal excuse, neither would it be reasonable for a claimant to believes that they are not affected by some of the effects…This is something the tribunal will duly take into account in determining the compensation that follows finding of such liability"*[37]

The ICSID tribunal however ruled in *LG&E vs Argentina* that the proximate causation of the claimants losses was attributable to the steps taken by Argentina, although the company would have also been affected by the economic crisis.

In the case of *CME Stockholm*[38]it was argued by the Czech Republic that the investors had not proved *'causation'*, and that the investors behavior had resulted in contributory negligence and would therefore be unable to claim damages. The panel in this case although unable to support the Czech Republic based on the facts did not dispute the principle involved.

Although it is widely accepted that behavior of the aggrieved claimant which includes attributes of fraud, misrepresentation, bribery or any other illegal behavior are presented as a strong defense against liability, it is also of importance that in disputes on investment treaties it is very often that unlawful conduct of the investor is claimed as a

[36]ICSID tribunal of Enron v. ArgentinaICSID Case No. ARB/01/3

[37]Enron Creditors Recovery Corp. Ponderosa Assets, L.P.. (Claimants) v. The Argentine Republic. (Respondent). (ICSID Case No. ARB/01/3). Available at http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf

[38]CME Stockholm IIC 62 (2003), 14th March 2003, Ad Hoc Tribunal (UNCITRAL)

defense of contributory negligence during the jurisdiction phase, while hearing the merits and also while coming to determining of quantum of damages.[39]

D. Special Circumstances:

The roof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established. Usually in a claim for damages the cause is attributable to the defendant, however sometimes the fault can also be attributable to the claimant and this reduces the level of damages. Basic dicta of International and national laws applied by many arbitral tribunals generally place an obligation upon the party which is injured to take all reasonable steps with a view to mitigate its losses. This principle has been elucidated in International conventions such as the UNDROIT and the United Nations Convention for International Sale of Goods, it is also widely accepted in all common law jurisdictions although this is not the case in some civil law countries.

The principle is not restricted in its applicability only to breach of contract cases[40]. In *CME Stockholm,* the Czech Republic's claim that the investor had failed in its duty to

[39] Kluwer: Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence, By Mark Kantor, Page.111,

[40]Mark Kantor, Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence,Kluwer, Page.113,

mitigate losses and such a duty arose "*from the moment it was aware of the circumstances giving rise to a breach"*. In this case the tribunal acknowledged the principle of mitigation, however based on the facts, Czech Republic arguments failed. The principle of mitigation was further acknowledged by successive tribunals in the ICSID cases of *Middle East Cement Shipping and Handling Co. Vs. Republic of Egypt*[41]and *Amco Asia vs Indonesia*[42]

The claimant's contributory acts leading to injury act as a very important mitigating factor, however a variety of other causes may also be reasons for limiting the quantum of damages. In the case of *Metalclad v. Mexico*[43] the claimant argued that Mexico's refusal in granting a waste disposal permit to Metalclad caused them pecuniary loss and they were liable to receive damages; however the tribunal refused to accede to this and instead concluded that the fall in share prices of Metalclad was caused by numerous other factors.

There are certain factors which have been evolved by judicial decisions in common law countries, the general principles are as follows hereunder

a) *If the damage is caused by an inevitable accident: "inevitable accident" or an accident which the defendants had no control over will reduce the liability of the defendants to the extent of loss caused by the accident.*
b) *Where there is a novusactusinterveniens: Where there is a new intervening act which the defendant had no control and this causes the damage. Nevertheless, in case the novusactus could be foreseen by a reasonable defendant then he would be liable.*

[41]Middle East Cement Shipping and Handling Co. Vs. Republic of Egypt ICSID Case No. ARB/99/6

[42]Amco Asia vs Indonesia ICSID Case No. ARB/81/1

[43]Metalclad v. MexicoICSID Case No. ARB(AF)/97/1

c) Contributory act on the part of the aggrieved party.

Difficult situations can arise and injury may be caused to the claimant if the defendant abuses his rights under the legal process. The principle of abuse of rights prohibits the application or use of a legal right where its use would cause intolerable injury to the opposite party.

An illustration being that Claimants may rely upon this doctrine in arbitration proceedings with State entities; it will also be applicable when the State entity makes claims of jurisdictional objections based on arguments that its domestic laws do not permit it to submit itself to the jurisdiction of arbitral tribunals.

The Doctrine of Abuse of Rights was used by the host state to a great extent in the arbitrations arising out of the Asian financial crisis, special reference should be made to the cases of Himpurna[44] and Patuha where they were used to deny claims for damages.

In both of these arbitrations U.S based companies entered into agreements with the Indonesian state electricity corporation, PT (Persero) Perusahaan Listruik Negara ("PLN"), with a goal exploring and developing the geothermal capacities of Indonesia, and building of power plants for the PLN. Due to a major economic crisis in Indonesia the PLN failed to go ahead with purchasingthe energy as per the contract. Himpurna[45] and Patuhasought arbitration and claimed damages of US $2.3 billion and US $1.4 billion, respectively. Both cases were heard by a tribunal which came to the conclusion

[44]Himpurna California Energy Ltd v. PT. PLN (Persero), ad hoc arbitration under UNCITRAL rules, Final award of 4 May 1999 (Arbitrators, Jan Paulsson (President), Antonino Albert de Fina, Setiawan SH)

[45]Case NoteKarahaBodas and Himpurna arbitrations, Available at http://www.biicl.org/files/3931_2000_himpurna_and_karaha_bodas_arbitrations.pdf

that PLN had breached the terms of the contract, and that Himpurna and Patuha were entitled to receive damages. However the tribunal while taking consideration of the dismal economy in Indonesia provided only 10% of the claimed amount and stated that damages which were excessive and which would impoverish Indonesia would amount to an abuse of rights[46]

E. Conclusion:

The importance of finding out the causation of the injury and of defining the party who is at fault for the purpose of determining quantum of damages cannot be understated. However the task of proving causation must be done with care as there are numerous difficulties. To be successful in making a claim the claimant must show that the breach which is the subject of each claim is attributable to the actions of the respondent. Quite frequently this is the most challenging obstacle confronted by a claimant. The two causes for this are. Firstly, severalactions that potentially contributed to the defects, delay and additional costs which are the subject of the claim. Secondly, it is exceedingly difficult for the claimant to demonstrate the causal link amongst each claimed event or breach and the delay and costs caused.

However once the tribunal finds the causal link between the party at fault and the injury then it is free to award damages. The quantum of damages should be based on the pecuniaryinjury caused to the plaintiff, mitigating factors, the loss of future or expected

[46]Pryles (n. 2)

earnings. However caution must be exercised and due consideration must be given by the arbitral tribunal to the facts and circumstances of the case.

In normal court proceedingsif a jury goes decides on an unreasonable amount of compensation they can be guided and brought to line by the judge or by appeal, however in International Arbitration in case arbitrators get carried away and award a unconscionably excessive amount of compensation there is little or nothing that the party can do. Parties and arbitrators should therefore be especially conscious. Arbitrators should keep in mind that the result of granting of compensation should not be the unjust enrichment of the claimant, or the unreasonable impoverishment of the party/state which is in the wrong.

Under normal circumstance quantum of damages should be awarded with a view to compensate the claimant for loss or injury which he has suffered and on the other hand to put him in a position which he would have been if no wrong had been committed to him.

While determining the level of compensation arbitrators can be guided by frameworks such as the CPR Protocol on Determination of Damages in Arbitration[47]

[47] Protocol on determination of damages in arbitration, Available at,http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/704/CPR-Protocol-on-Determination-of-Damages-in-Arbitration.aspx

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