

CEG International Arbitration and Litigation



Establishing and Measuring Damages in Commercial Disputes

Courts and arbitral tribunals hear many disputes involving the calculation of damages designed to make the claimant whole. As trade has become more global, there has been a significant growth in the number of these disputes between companies of different national origins in which international arbitration is the chosen forum for dispute resolution. Whatever the forum for dispute resolution and whatever the alleged wrongful conduct that a claimant puts forth as the cause of damage, the process of proving and measuring damages hinges on correctly performing two critical steps: establishing the appropriate counter-factual and applying the appropriate valuation methodology for measuring damages. CEG's economists are well trained and experienced in creating the appropriate framework for analysing damages and in the techniques of valuation.

To prove causation and to establish the framework for measuring damages, one has to compare:

- The actual and projected outcome with the wrongful conduct; with
- What would have been the outcome (up until the present and in the future) "but for" the wrongful conduct.

In our experience, this is the critical first step in any analysis of damages and deserves careful attention early in the litigation. This first step is rarely as simple as it is often assumed to be, and getting it wrong can have a significant impact on proving and measuring damages, as well as on defending against damage claims. Often there are a number of plausible counter-factual situations that might superficially appear consistent with the facts, and choosing the right one can considerably affect the course of the litigation. The choice of the counter-factual can affect everything from whether one has credible evidence available to support a claim of damages to the methodology and data one can use to measure damages. The question of how to measure damages and what evidence is required is often determined by the characterisation of the "with" and "without" situations.

The challenge for damages analysis is to:

- Appropriately recreate and predict the "but for" world.
- Provide credible evidence to support the "but for" scenario.
- Appropriately quantify the financial effects on the

CEG International Arbitration and Litigation

Establishing and Measuring Damages in Commercial Disputes

claimant of the difference between the “but for” scenario and what will be the actual outcome for the damaged party. This is an exercise in valuation.

- Address the critical problem of separating the effects of the wrongful conduct from the effects of other factors that would have impacted the economic welfare of the claimant, with or without the wrongful conduct.

CEG is an economic and financial consulting firm based in Europe, North America and Asia-Pacific. Our experts have specific expertise in economics and finance as it relates to the estimation of damages. In addition, the firm has substantial expertise in a number of industries including energy, telecoms, transport, banking, insurance, and software, as well as heavy industries such as cement and steel. This expertise can be very useful in analysing what might have happened in an industry situation with and without the alleged wrongful conduct. It is this combination of economic, finance and industry experience that makes CEG an excellent choice for International Arbitration and Court matters across the globe.

CEG experts have been retained to...

- Assess the magnitude of litigation exposure.
- Develop theories of damages.
- Help outside counsel to develop arguments on both liability and damages.
- Help outside counsel to identify appropriate evidence for both liability and damages.
- Calculate damages using sound economic and financial techniques.
- Develop expert reports and provide expert testimony.
- Rebut the opinions of opposing experts.
- Prepare trial demonstratives.

We have applied our economic and financial techniques to many different types of disputes.

A few examples include:

- Commercial Impairment: the estimation of lost profits over time from a lost business opportunity which would be discounted to a present value using an appropriately determined discount rate.
- Intellectual Property: lost profits from sales diverted to the offending product or lost revenues from the non-payment of appropriate royalties.
- Dominant firm engaged in anti-competitive conduct (e.g., margin squeeze) that reduced value of rival firm—generally computed as the present value of projected lost profits.
- Cartel engaged in raising prices—measured as the effect on buyers of higher prices.

CEG is an economic and financial consulting firm based in Europe, North America and Asia-Pacific. Our experts have specific expertise in economics and finance as it relates to the estimation of damages.

Recent cases for which CEG experts have provided damages analyses include...

- The determination of lost profits and reasonable royalties in a series of six high-stakes patent infringement cases between Broadcom Corporation and Qualcomm.
- Expert report and testimony in two arbitrations between mobile telephony operators in Europe.
- Expert report and testimony in Scandinavian arbitration involving a European telecom equipment operator and a US supplier.
- Calculation of damages in a breach of contract case between 911Notify.com and Verizon Delaware, Inc.

CEG International Arbitration and Litigation

Establishing and Measuring Damages in Commercial Disputes

- Work for Tele2 against Cesky Telekom in a forthcoming Czech Court proceeding involving liability and estimation of damages in a margin squeeze case.
- Work for Vivendi and its subsidiaries in a number of Austrian Arbitration Panels and the Polish courts involving considerable damages and concerning the operation of the Polish telecom operator PTC.
- Expert report and testimony in an ICC proceeding involving two international insurance companies.
- Assisted buyers in estimating the “prevailing market price” for natural gas during a contract renewal arbitration.

Recent IP damages cases for which CEG economists have provided damages analyses...

- Determination of commercial success of a new drug and delivery system for Dey, L.P. v. IVAX Pharmaceuticals, Inc. and Eon Labs, Inc.
- Breach of contract damages in a case between Kalitta Air, LLC, as assignee of American International Airlines, Inc. v. Central Texas Airborne Systems, Inc.
- Determination of reasonable royalties and lost profits in a patent and theft of trade secrets case between Advanced Neuromodulation Systems, Inc. and Advanced Bionics Corporation.
- Determination of reasonable royalties and lost profits for patent infringement and breach of contract in the case Timeline, Inc. v. Proclarity Corporation and Microsoft Corporation Case No. CV05-1013JLR.
- Determination of reasonable royalties in the case Cardiac Pacemakers, Inc., Guidant Sales Corporation, Mirowski Family Ventures, LLC, and Anna Mirowski v. St. Jude Medical, Inc. and Pacesetter, Inc.
- Business valuation in the case *In re: 3dfx Interactive, Inc. and William A. Brandt, Jr., Trustee v. nVidia Corporation and nVidia Investment Company* Case No. 02-55795 RLE. (Fraudulent Transfer).



- Calculation of reasonable royalties in the case Semiconductor Energy Laboratory Co., Ltd. v. Chi MEI Optoelectronics Corp., International Display Technology Co., Ltd., International Display Technology USA, Inc., Westinghouse Digital Electronics, LLC and CTX Technology Corporation.
- Determination of lost profits from reasonable royalties in the patent infringement case: Mallinckrodt, Inc., et al. v. Masimo Corporation.

CEG's team of experts includes:

Michael K. Dunbar
Prof. Bruce Grundy
Nils von Hinten-Reed
Tom Hird
Prof. Robert C. Lind
Paul Muysert
Jason Ockerby
Paul Reynolds

The professional biographies of each expert can be found on www.ceg-ap.com

Competition. Regulation. Damages.

BRUSSELS

Avenue LeGrand 61
B-1050 Brussels
Belgium
Phone: +32 48579 3457
Fax: +32 2791 9203
nvhr@ceg-europe.com

LONDON

20 Garrick Street
London WC2E 9BT
United Kingdom
Phone: +44 20 3178 6692
Fax: +44 20 7664 7878
pmuysert@ceg-europe.com

SILICON VALLEY

622 Park Road
Emerald Hills, California 94062
United States
Phone: +1 650 299 9339
Fax: +1 650 299 9299
mdunbar@ceg-northamerica.com

SYDNEY

Suite 6, 21 Mary Street
Surry Hills NSW 2011
Australia
Phone: +61 2 9282 0450
Fax: +61 2 9282 0499
jason.ockerby@ceg-ap.com