



# Breaches of Agreements to Negotiate: A Comparative Analysis of Damages

**Frank S. Giaoui**

Columbia Law School, New York, USA

## ABSTRACT

Assessing economic loss and compensatory damages for contract breaches traditionally navigates between two practical difficulties: judicial uncertainty and technical complexity. Judicial tension is exceptionally high when objective data is missing, and when information exists, current financial and statistical methodologies are too complex or costly. To reduce inefficient bargaining, unnecessary litigations, and uncertain judicial decisions, there is a need for alternative methods that are both factual and simpler than current quantitative methods. This paper takes from the personal injury doctrine to posit that viable assessment methods include the development of damages schedules for certain economic losses. It uses breaches of corporate agreements to negotiate or to agree in the US and France to illustrate so. After reviewing data sampled from several hundred contract cases, this paper highlights a convergence of seemingly opposed case laws over the last 25 years as a starting point for a standardized damages methodology. The empirical analysis shows strong correlations between plaintiff outcomes and claims quantum, evidentiary levels of sophistication, business risk, and law firm size. Based on these results, this article formulates practical suggestions for parties seeking to improve their chances of success. It delineates the groundwork for additional empirical analysis needed to achieve statistical representation. Using damages schedules combined with artificial intelligence would give rise to predictive decision support systems that assess the probability of obtaining damages and the quantum of those damages. This would trigger a virtuous cycle: assisting judges in their discretionary decisions, and improving the accuracy of predictive models, thus, giving more incentives for all stakeholders to use them. Hence, their use would streamline litigation and eventually generate value for society beyond what can be imagined today.

**Keywords:** Contract Damages, Comparative Law, Law and Economics, Predictive Analytics, Empirical Analysis, French Law, US Law

## INTRODUCTION: TRENDS IN AMERICAN AND FRENCH JURISPRUDENCES AND THEIR APPLICATION IN PREDICTING MONETARY DAMAGES

Several years ago, I was advising a clean-tech start-up in its private placement. After an auction process, my client entered into an exclusive agreement to negotiate with a corporate venture fund. The exclusivity period was extended twice. Eventually, the parties reached an agreement on the business plan, and the fund committed to invest in equity with no condition precedent. The investment contract was signed but was never performed by the fund. As all alternative investor candidates had vanished, the start-up went bankrupt. After an unsuccessful attempt to settle, the client filed a lawsuit for breach of contract claiming full compensatory damages. They were merely granted partial compensation for their advisory fees. All expectation and consequential damages were denied because considered too speculative.

The assessment of economic loss 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, current financial and statistical methodologies are too complex and costly for most cases. This leads to inefficient bargaining, unnecessary litigations, and/or unpredictable judicial decisions. Hence, there is a need for alternative methods that are both objective and simpler than current quantitative methods.

One of those methods would be to develop damages schedules for certain types of economic losses as they exist for personal injury. A good way to start is to study case law and to survey rulings that can be used as precedents for different types of economic damages. As it has been

developed in a previous article<sup>1</sup>, the traditional approach towards damages considering them only as a question of fact is limited and potentially arbitrary. Then, considering the valuation of damages also as a question of law, following rules and methods, appears to be an interesting alternative.

In that same previous article, I argued that the valuation of damages should be considered both a question of law and fact. Literature is abundant on the theory of liability in contracts but is much sparser concerning damages. In France, and until recently amended in 2016, the default rule was specific performance. This could explain the lack of legal scholarship on the subject, yet this lack was also observed in the United States where the default rule is an award of expectation damages. While at first sight, they seem opposed, I have demonstrated that the US and French case laws are in fact less apart from each other than their respective legislation would lead us to believe<sup>2</sup>. Jurisprudence is clearly converging in favor of money damages over specific performance, likely due to a preference for efficiency and predictability in and out of courts, a trend already prevalent in international law when the circumstances of the dispute merit so.

Now in this article, I will present subsequently the literature review, the empirical methods, and finally the results from single variable and then multivariate linear regressions<sup>3</sup>. Motivated by my recent personal experience, I selected breaches of an agreement to negotiate as a type of business situations where I think the use of simple quantitative methods is most relevant to assessing damages: I designed a hypothesis of the relations between certain factual variables and the judicial outcome. Next, I searched and identified several hundreds of relevant cases, and built a comprehensive database. Then, I used the database to validate or amend the initial hypotheses, to identify patterns or correlations, and to suggest damage ranges or scales. Perhaps unsurprisingly after the theoretical results from my previous article, here my empirical analysis and regression models likewise show a clear evolution of both the probability of grant and the claim to grant ratio both in the US and French jurisdictions.

<sup>1</sup> Frank S. Giaoui, *Towards Legally Reviewable Damage Awards*, 1 *Corp. & Bus. L.J.* 173, 173–229 (2020).

<sup>2</sup> Giaoui, *supra*.

<sup>3</sup> Briefly, regression aims to examine whether a set of independent variables does a good job in predicting an outcome (dependent) variable; and, understand which variables in particular are significant explanators of the outcome variable. The study of one explanatory variable is called simple linear regression, while the process of studying several ones is called multiple linear regression.

<sup>4</sup> *Id.*

<sup>5</sup> Practitioners recommend often:

- making the legal entity a party to the agreement;
- including clauses such as tag along, drag along, anti-dilution, exit at a minimum guaranteed price, and;
- advocating for automatic ad hoc procedures like an escrow mechanism in which a third party holds certain shares and “fast-track” arbitration clauses specifying the composition of the

## SECTION 1: PRECONTRACTUAL RECOVERY BY WAY OF BREACHES OF PRELIMINARY AGREEMENTS

### Section 1.1: A shift toward money damages

Exposure to a globalized market inches domestic jurisprudence toward relative uniformity. Marked jurisdictional trends shying away from specific performance<sup>4</sup> push legal practitioners — both at the local and international level — to develop techniques to strengthen an agreements’ binding force and discourage precontractual breaches by way of monetary damages<sup>5</sup>. With more consistent common law precedent than specific performance (particularly in the USA), and an increasing body of international law to back their validity, preliminary agreements, the imposition of good faith duties, and included break-up fee provisions are finding widespread adoption among legal practitioners and free market businesspeople in high-stakes business transactions — of note in M&As, where specific performance is often sought as a remedy.

Especially in today’s volatile global markets, parties are well-justified in taking as many precautions as possible to hedge the risk of investing in a transaction that might never go through. Though in the USA and France specific performance has been, and notably remains, a reliable remedy for breaches like a breach of a share purchase agreement<sup>6</sup>, its availability is objectively limited in both jurisdictions (albeit for different reasons<sup>7</sup>).

Prioritizing economy and efficiency over an obligee’s rights, under the American common law system expectations damages is the default remedy for contract breach. Specific performance is restricted for the most part to disputes in real estate transactions and sales of stock or other unique goods. Like an M&A practitioner summarily mentioned, “in the United States specific performance is generally not available for service agreements: the era of forced labor and slavery is over.”

To a degree, the opposite is true in civil law countries like France, where specific performance has been by and large the default remedy. Under French law, an obligee has a

arbitral tribunal and its powers to sanction a breach of contract on the merits.

<sup>6</sup> In share purchase agreements, “specific performance” can be and is invoked as a suitable remedy. Specific performance has been mentioned as a remedy for the purchaser of a share in Specific Relief Act, 1963, Section 14(3)(b)(ii).”

<sup>7</sup> In terms of availability, as mentioned France to date stills prefers specific performance. In the US, specific performance is still an exception, yet in the context of share purchase agreements just being compensated for the value of the shares is not enough to afford recovery (largely due to future synergies lost). The reliability of remedies then depends on the type of agreement, such as strategic, full acquisitions (where specific performance is preferred) versus minority stake purchases (where monetary damages can more easily compensate for lost investments).

right to force the obligor to perform because the law equates specific performance with the binding force of a contract. But interestingly, jurisprudence and interviews with French practitioners reveal that damages, in particular expectation damages, are more and more considered as the appropriate alternative when specific performance is not economically viable. Recent reforms to the French Civil Code in 2016<sup>8</sup> — themselves inspired by “efficiency-oriented” UNIDROIT Principles, European law<sup>9</sup>, and of course, common law — have narrowed down the availability of specific performance, even in agreements that provide for it.<sup>10</sup>

Perhaps unsurprisingly in today’s data-driven global markets, an emphasis on efficiency, as well as on predictability, makes the idea of hedging risk by favoring pre-set money damages over litigation to compel action for more compelling, as I’ll elaborate below.

### Section 1.2: Freedom of negotiations & preliminary agreements

Much to the reassurance of potential investors, it is a universal principle of contract law that mere participation in negotiations and discussions does not create binding obligation, even if agreement is reached on all disputed terms.<sup>11</sup> The French Cour de Cassation has likewise often restated the French law principle that one of the main tenets that prevails during pre-contractual periods is freedom to contract, or “liberté contractuelle”.

There are several potential steps in a financial or commercial negotiation: negotiations often open with an indication of interest (IOI), move to a non-binding letter of intent (LOI), also called an **agreement to negotiate**, and develop into a term sheet. The term sheet contains the principal terms of the contract and may be already binding, depending on the level of detail included in the terms and conditions. These mature into a memorandum of understanding (MOU), or an **agreement to agree** which contains binding provisions and leaves others to be finalized later. Lastly a final agreement is signed, fully binding on all parties pending satisfaction of the conditions precedent, and the transaction finally occurs during closing.

The agreement to negotiate aims to create a mutual obligation between the parties to negotiate a final agreement in good faith. Consequently, improper termination of negotiations may be penalized, and

aggrieved parties would at least be entitled to reliance damages, both in the USA and France. In some cases, expectation damages may become available; as noted by Bodamer and Gotshal, “failure to negotiate a deal based on a non-binding but detailed term sheet could result in full damages as if the parties had actually signed up a deal”.<sup>12</sup>

Often, the agreement to negotiate, and the agreement to agree, provide for liquidated damages and/or breakup fees for early terminations. These are fees intended to dissuade the less motivated party from terminating negotiations; it also indemnifies the other party for all or part of its loss and thus limits the legal uncertainty surrounding the measurement of damages in the event of an improper termination of negotiations.

## SECTION 2: THE USA AND FRANCE, TWO PATHS CONVERGING TOWARD PRECONTRACTUAL LIABILITY AND RECOVERY

### Section 2.1: The development of precontractual recovery in the USA

United States case law on preliminary agreements has seen an interesting evolution in the last years. The question of the enforceability of statements made during the negotiation period, before any contract is concluded, under Section 90 of the Restatement of Contracts has been raised in particular in *Coley v. Lang*<sup>13</sup> and *Hoffman v. Red Owl Stores*.<sup>14</sup> Generally, courts were of the opinion that preliminary statements were not enforceable when they were so incomplete as to fail the standard set for enforceable promises by Section 2 of the Restatement.<sup>15</sup> Therefore, courts were reluctant to use the promissory estoppel of Section 90,<sup>16</sup> considering that the parties prefer undertaking the risk of losing their own expected profits rather than the risk of having to compensate the lost profits of their counterparty in case of a break up.

Nonetheless, this reluctance eventually gave way to a modern approach starting with *TIAA v. Tribune Co.*<sup>17</sup> In its opinion on the dispute between a defendant borrower and plaintiff lender, Judge Leval found that the intent of the parties can make certain preliminary agreements binding if the parties have in one way or another agreed upon all the key elements of the future contract. According to the court, the agreement at issue became binding when the borrower responded to the lender's letter with an acceptance letter that made no mention of the agreement

<sup>8</sup> French Ordinance No. 2016-131, amending sections of the French Civil Code that govern the Law of Contracts. Effective as of 1 October 2016.

<sup>9</sup> To be discussed further below. See Giaoui, *supra* for a detailed overview of these international law principles.

<sup>10</sup> In apparent contradiction to Article 1103 of the French Civil Code, stating “agreements take the place of the law.”

<sup>11</sup> *Teachers Ins. & Annuity Assn. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

<sup>12</sup> See, B.B. Bodamer, W. Gotshal, « *The New Frontier Of Agreements To Negotiate* », *Law360*, New York, 12 June 2013, 3:21 PM ET

<sup>13</sup> *Coley v. Lang*, 339 So.2d 70, Ala. Civ. App. 1976.

<sup>14</sup> *Hoffman v Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267, 1965 Wisc.

<sup>15</sup> “... so made as to justify a promise in understanding that a commitment has been made”

<sup>16</sup> “A promise which the promisor should reasonably expect to induce action or forbearance of a definite character on the part of the promisee, and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise”

<sup>17</sup> *TIAA v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987).

being contingent on the defendant's ability to employ offset accounting. The key distinction was whether the parties agreed upon all the important elements, but still expressed the desire to formalize their agreement in a later separate contract (what he categorized as a type I preliminary agreement) or, the parties agreed only on some important elements of the future contract, explicitly relying for their determination on future good faith negotiations and an enforceable NDA (a type II preliminary agreement). See *Brown v. Cara* (where the federal court of appeals held that a preliminary agreement bound the parties to negotiate open terms in good faith so long the parties intended to be bound to such a good faith requirement).

Though not uniformly across the 50 states,<sup>18</sup> this modern approach has nonetheless consistently been adopted by subsequent decisions in the more progressive jurisdictions<sup>19</sup> to include agreements to agree, in which the parties undertake to reach an agreement, as type I, while agreements to negotiate, in which the parties only undertake an obligation to continue to negotiate in good faith, as type II agreements.<sup>20</sup> In *Ciaramella v. Reader's Digest Association*,<sup>21</sup> for example, the court found that there was no Type I agreement, because the parties had indicated by their words and their conduct that they did not intend to be bound until the final document was signed. Parties are free to do this so long as their intentions are sufficiently clear. Type I agreements, therefore, do not represent a major change in the case law,<sup>22</sup> unlike type II agreements, which require courts to determine whether a preliminary

agreement was reached, and then to determine the precise content of the obligation to negotiate in good faith.<sup>23</sup>

The interesting question then is what kind of damages a plaintiff can hope to recover when a defendant terminated the negotiations in bad faith, such as when a party violates the spirit of the agreement<sup>24</sup>? The observation of the case law points towards a general trend. First, reliance damages are typically recovered.<sup>25</sup> Second, consequential damages (such as harm to reputation or goodwill) may be recovered, yet the proof of such damages is sometimes too difficult to reach the standard of reasonable certainty.<sup>26</sup> Finally, expectation damages may be recovered if all, or at least most the terms of the agreement have been agreed upon in a detailed term sheet, such that it is possible to understand what the final agreement would have looked like,<sup>27</sup> and the parties would have concluded the final agreement but for the defendant's bad faith breach of the agreement to negotiate.<sup>28</sup>

The latter point is supported by the Supreme Court of Delaware in *PharmAthene v. SIGA Technologies*, where it concluded that the obligation to negotiate in good faith is enforceable and that the plaintiff can recover reliance as well as expectation damages<sup>29</sup> if a detailed, albeit incomplete, preliminary agreement is breached.<sup>30</sup> In this case, a term sheet for a pharmaceutical license has been negotiated, but the two parties have written a "non-binding" notice on both of its pages; the term sheet has been attached to two further contracts, which explicitly required the parties to negotiate in good faith an agreement similar to the term sheets. While the defendant in this case argued the preliminary agreement still had

<sup>18</sup> The new approach has been adopted by at least 13 states, 16 federal district courts, and seven federal circuit courts.

<sup>19</sup> One recent article notes that: "Several states (e.g., California, Delaware, Illinois, New York, and Washington) have long enforced agreements to negotiate, but have typically limited parties' recovery to reliance damages.... Many other states (e.g., Georgia, Hawaii, Kentucky, Michigan, Minnesota, Nebraska, Tennessee, Texas, Utah, and Virginia) have refused to enforce agreements to negotiate at all, citing the inability of courts to craft a sufficient remedy for breach. Many other states have muddled case law or no precedent on the issue."

<sup>20</sup> *Goodstein Construction Corp. et al., v. The City of New York* (80 New York Reports 366), 604 N.E.2d 1356, 590 N.Y.S.2d 425 (1992).

<sup>21</sup> *Ciaramella v. Reader's Digest Association*, 131 F.3d 320 (2d Cir. 1997).

<sup>22</sup> Indeed, the Restatement provides for precisely this situation. Restatement (Second) of Contracts §27 (1981).

<sup>23</sup> Academic Robert Scott's theory is that bad faith exists where (i) both of the parties have promised to make concurrent specific investments in the relationship in order to see whether a project that they are contemplating might succeed, and (ii) thereafter, one of the parties delays making its investment in order to see what the other may find out and then, after the counterparty has made its investment, refuses to continue with the deal.

<sup>24</sup> Of course, one should keep in mind that the Restatement (Second) of Contracts itself admits that "a complete catalogue of types of bad faith is impossible

<sup>25</sup> See, *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 117 Cal. Rptr. 2d 875 (2002); *Valdez Fisheries Development Association, Inc. v. Alyeska Pipeline Service Co.*, 45 P.3d 657 (2002)

<sup>26</sup> *Venture Associates Corp. v. Zenith Data Systems Corp.*, 96 F.3d 275 (7th Cir. 1996); *Logan v. D.W. Sivers Co.*, 343 Or. 339, 169 P.3d 1255 (2007)

<sup>27</sup> *Network Enters. Inc. v. APBA Offshore Prods. Inc.*, 427 F.Supp.2d 463 (N.Y. 2006); *Fairbook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 425-26 (8th Cir.), reh'g denied (2008); *Stanford Hotels Corp. v. Potomac Creek Associates, L.P.*, 18 A.3d 739 (D.C. 2011), *United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 340 (D.C. 2015)

<sup>28</sup> *Public Service Company of New Mexico, Inc. v. Diamond D Construction Co.*, 131 N.M. 100, 33 P.3d 651 (2001), cert. Denied, 131 N.M. 221, 34 P.3d 610 (2001); *United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 346 (D.C. 2015); *Siga Technologies, Inc. v. Pharmathene, Inc.*, A.3d, 2015 WL 9591986 (Del. 2015)

<sup>29</sup> For readers outside of the USA, under American law there are two general categories of damages that may be awarded if a breach of contract claim is proved, compensatory and punitive. Compensatory damages, also known as actual damages, cover the injury caused by the breach and can be further divided between general damages (which includes expectation damages and reliance damages, both injuries directly resulting from the breach) and special damages (also known as consequential damages, indirect injuries arising from the breach).

<sup>30</sup> *PharmAthene, Inc. v. SIGA Technologies, Inc.*, 2011 WL 4390726, (Del. Ch. 2011), confirmed by *SIGA Technologies* 2013 WL 2303303 (Del. Supr. May 24, 2013).

many unsettled parts -- and it would be utter speculation to try to predict how those parts would have been negotiated so as to fashion an expectation damages remedy -- the Supreme Court nonetheless concluded that prior to breach the parties were under an obligation to negotiate in good faith a license close to the one generally described in the term sheet. Therefore, the defendant breached his obligation by insisting on drastically different terms that went against the spirit of the preliminary bargain, even though key attributes of the final agreement were not yet laid out. In all, the plaintiff could recover expectation damages in the form of a fair payment that he would have received had the agreement been finalized.

## Section 2.2: The development of precontractual recovery in France

As mentioned in prior sections, negotiations in France, like in the USA, may be freely conducted so long as within a framework of good faith. Consequently, improper termination of negotiations may also be penalized.<sup>31</sup> But perhaps in a more consistent move than in the USA, the rules relating to contract negotiations — which were non-statutory before the reform of 2016 — have now been fully codified under the new Article 1112<sup>32</sup>.

This amendment is the last in a line of several decisions holding that the improper termination of preliminary negotiations may give rise to liability in tort, chief among them being the *Manoukian* decision,<sup>33</sup> the emblematic French case on agreements to negotiate and the extent of damages (arguably a type II agreement case). In it, Fashion Company Alain Manoukian had been in negotiations to purchase the Struck clothing company from its shareholders until midway through, despite having signed a draft agreement, the latter sold the company to another potential buyer. After the initial suit, the lower courts, whose decisions the French Court of Cassation affirmed, found that the Struck shareholders had improperly and unilaterally terminated negotiations and awarded Alain Manoukian EUR 400,000 in damages for the costs it had incurred. However, the court denied Alain Manoukian's request for "expectation" damages based on the loss of the opportunity to earn profits from the business it had

expected to acquire, precisely due to the lack of a definitive agreement.

Like the American doctrine of reliance damages, this decision exemplifies the French doctrine of "negative interest" (*intérêt négatif*), pursuant to which "the negotiator must always be placed in the situation in which he would have found himself if he had not begun negotiations with the party that improperly terminated."<sup>34</sup> As Philippe Stoffel-Munck points out, "it is one thing to provide compensation for the disappointed hopes and the loss of an opportunity to enter into an agreement with a third party during the negotiation period; it's another matter entirely to hold that the termination caused a loss of profits."<sup>35</sup>

In the *Manoukian* case, the absence of an agreement excluded indemnification for the profits that the victim might have hoped to obtain through entering into an agreement. In other words, "[i]t is important not to get around the absence of an obligation by granting the victim indemnification equivalent to the contract that was not entered into."<sup>36</sup> The loss of the opportunity to achieve the profits relating to the planned agreement can be indemnified only where the terminating party may be held liable in contract — i.e., where the negotiations have been "contractualized"<sup>37</sup> and the terminating party has failed to comply with the obligations contained in the contractual documentation. Again, it is a question of what stage did the failed contract negotiations managed to reach; at the very least, French judges are likely to indemnify the victim of an improper termination of preliminary negotiations for all costs relating to the negotiations, including travel,<sup>38</sup> improvement of premises,<sup>39</sup> preliminary studies, and the use of outside lawyers and other consultants.<sup>40</sup>

The *Manoukian* decision has served as a precedent for several more decisions reinforcing the holding.<sup>41</sup> <sup>42</sup>In a decision dated September 18, 2012, under the former Article 1382 of the French Civil Code, the Commercial Chamber of the Court of Cassation held again that because the lower court had held that "the wrongful conduct of Company S consisted of improperly terminating negotiations to the detriment of Company B, it could not indemnify the latter for the 'loss of the opportunity' (*perte*

<sup>31</sup> Several legal scholars prefer characterizing this liability as contractual: Philippe Delebecque & Frédéric-Jérôme Pansier, *Droit des obligations, Contrat et quasi-contrat* [The Law of Obligations, Contract and Quasi-Contract], 7th ed., Litec, 2016, No. 79, p. 54; see Rudolf Von Jhering, *Ceuvres choisies* [Selected Works], Vol. II, trad. Meulenaere, 1893, p. 23.

<sup>32</sup> *Supra* note 8, at 6.

<sup>33</sup> Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 26, 2003, No. 00-10243 and 00-10949.

<sup>34</sup> Denis Mazeaud, "La genèse des contrats: un régime de liberté surveillée [The Birth of a Contract: Freedom within Limits]," July-Aug 1996, p. 44, spec. No. 21, p. 49.

<sup>35</sup> Philippe Stoffel-Munck, *L'abus dans les contrats, essai d'une théorie* [Unfair Conduct in Contract Law: An Attempt at a Theory], pref. R. Bout, th. LGDJ, 2000.

<sup>36</sup> Philippe Malaurie, Laurent Aynès, & Philippe Stoffel-Munck, *Les obligations* [Obligations], 2013, 6th edition, No. 464, p. 218.

<sup>37</sup> Philippe Delebecque & Frédéric-Jérôme Pansier, *Droit des obligations, Contrat et quasi-contrat* [The Law of Obligations, Contract and Quasi-Contract], 7th ed., Litec, 2016, op. cit., No. 82, p. 58.

<sup>38</sup> Cass. com., March 20, 1972, Bull. civ. IV, No. 93.

<sup>39</sup> Cass. civ. 3rd, Oct. 3, 1972, Bull. civ. III, No. 491.

<sup>40</sup> Cass. com., Jan. 7, 1997, D. 1998, Jur. P. 45, note P. Chauvel.

<sup>41</sup> See also, Cass. Civ. 3, June 28, 2006, RTD Civ. 2006, 754 (J. Mestrelet & B. Fages) and JCP G 2006, II, 10130 and JCP E 2006, 1524 (O. Deshayes), cit. in. John Cartwright & Martijn Hesselink, *Precontractual Liability in European Private Law*, Cambridge University Press, Feb. 17, 2011, p. 30.

<sup>42</sup> There is strong persuasive force in the precedents by the Cour de cassation, despite the fact that lower appellate court may still defy these.

*de chance*) to achieve the profits that might have been hoped for from a latter agreement with a third party if the first contract had been entered into."<sup>43</sup>

### SECTION 3: NEGOTIATIONS & MONEY DAMAGES IN PRACTICE

#### Section 3.1: Breakup Fees as the Tool Du Jour

A break-up fee clause is "a provision stating that if the deal is not consummated by a failure to reach an agreement, one party will pay the other a liquidated amount. Plainly, such a provision can deter a party from walking away from a deal, as well as provide a mechanism for recovering some or all of the other party's opportunity costs expended on a failed deal."<sup>44</sup> As a result, it reduces the uncertainty over damages in case of litigation after a breach of an agreement to negotiate or an agreement to agree.

Breakup fees in our context are used in letters of intent, preliminary agreements, and option contracts. They first appeared in connection with acquisitions of equity interests in listed companies, and in particular in agreements entered into by the shareholders of a target company when they undertake to tender their shares to the offer. Though these provisions used to be generally included when entering into a buyback agreement, a capital increase, or a public offering, they are now used in a much wider range of situations and can be found in agreements relating to unlisted companies as well as industrial agreements, commercial ventures, and construction projects.

Generally, the beneficiary of the option or of any precontractual undertaking must pay the breakup fee in case they decide to withdraw from the negotiations. However, with the growing competition between investment funds participating in tender offers, sometimes the acquirer is required to pay the breakup fee. In that situation, the fee is called a **reverse breakup fee**. In the case of a tender offer, the target **company** sometimes agrees to pay a breakup fee if the board of directors decides to accept a competing buyer offer.

#### Section 3.2: Industry Case Study of Reverse Breakup Fees Schedules

As we have seen, reverse break-up fees may be paid by potential acquirors. Across industries, an observation of the 11 deals with largest reverse break-up fees by dollar

value<sup>45</sup> shows that reverse break-up fees can be categorized as follows:

- Four are payable for financing failure (Verizon Wireless, Pfizer/Wyeth, Merck/Schering-Plough and the Heinz LBO).
- Three are payable for antitrust or other regulatory failure (AT&T's ultimately terminated acquisition of T-Mobile, Google of Motorola Mobility and ICE of NYSE).
- Three are payable by reason of any breach that causes a failure to close (Mars/Wrigley, the Archstone Enterprise real estate sale and Dow Chemical/Rohm and Haas).
- One is payable under circumstances akin to those that trigger payment of an ordinary, fiduciary break-up fee (Exelon/Constellation Energy).

Of all these fees, only one is structured as a "pure option" fee (granting the acquirer a right to terminate the deal at a later time for the option price without the target retaining some right of specific performance), the fee payable in the Mars/Wrigley deal -- the reverse break-up fee received a great deal of attention at the time but turned out to be an outlier after all. Nonetheless, most reverse breakup fees are a mixture of pure option fees and liquidated damages. As Thomson Reuters analyst summarizes it: "Most target companies and sellers retain some right of specific performance before allowing the buyer to walk away from the deal."<sup>46</sup>

To summarize, the qualitative analysis above leads us to two shadow scales of break-up fees:

- roughly between 1% and 3% of deal value validated by French case law;
- roughly between 3% and 5% validated by American case law.

Empirical research with more statistical analysis is then necessary to try and find correlations between break-up fees validated by case law (in absolute or relative terms) and factors listed by Delaware Chancery Court.<sup>47</sup> Unfortunately, available studies offer little clear guidance as to the way a judge might calculate awarded compensation. Our empirical analysis offers, however, a glimpse at some general trends within the two jurisdictions and, interestingly, at some trends which are common to the two jurisdictions in question, all which will be of great value to professionals in need of knowing exactly how much they could expect to get, or to pay, in case the

<sup>43</sup> Cass. com., September 18, 2012, No. 11-19.629. See also Frank Giaoui, *Towards Legally Reviewable Damage Awards*, Arizona State University, Corporate and Business Law Journal

<sup>44</sup> *Id.*

<sup>46</sup> "Largest Reverse Break-up Fees in M&A History" Practical Law, Thomson Reuters, September 12, 2013.

<sup>47</sup> Factors such as:

- 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 to the merger;
- the degree to which a counterparty found such protections to be crucial to the deal, bearing in mind differences in bargaining power; and
- the preclusive or coercive power of all deal protections included in a transaction, taken as a whole.

negotiations are breached in bad faith, regardless of the presence of a breakup fee of any kind.

## SECTION 4: THE RESULTING CASE FOR PREDICTIVE ANALYTICS

One of the main points of this study is probably nothing new to an experienced practitioner: contract drafting between two parties, especially sophisticated ones, is a constant tug-of-war. While on one side of a transaction is a buyer without any intent to complete the transaction is trying to include the broadest term possible waivers in the letter of intent, the seller on the other end is actually hoping to close and is aiming to draft the letter of intent in as detailed a manner as possible and to include termination provisions such as liquidated damages or break-up fees. But it is precisely this apparent and basic truism what opens the door to a breakthrough in a market that has remained relatively unchanged for the last decades.

Where parties' interests are seemingly so polar, how can a middle point between opposing interests ever be reached? I posit that the jurisdictional trends so far highlighted in this writing — and studied more closely in my prior article where I studied the courts adoption of reference schedules<sup>48</sup> — can serve as a starting point for leveraging data analytics in favor of facilitating transactions. The ability to predict damages in this context, and thus rely less on could unquestionably remove considerable uncertainty from negotiations, increasing efficiency and benefitting both parties.

So far, this article has been limited to examining U.S. and French case law and legal scholarship on breaches of agreements to negotiate. But beyond being a merely erudite analysis, the purpose of this theoretical section has been to underscore the looming convergence of two major jurisdictions — despite their fundamental differences — and lay the groundwork for a major development in the legal market as fixed break-up fees and damages scales become more prevalent: the use of machine learning and predictive analytics to expedite outcomes by reducing the need to rely on soft-skills like negotiation or unpredictable litigation. To this end, the following section is an empirical quantitative study into break-up fees and damages scales as used by contemporary practitioners in a variety of large-scale international transactions beyond M&As.

## SECTION 5: METHODOLOGY

### Section 5.1: Research Questions & Project Design

With the prior literature review in mind, this research aims to identify any trend or pattern in the damages compensation that a court would grant for a contract breach in the United States and France, primarily concerning recoverable damages, or losses that were

reasonably, certainly, and foreseeably incurred as a result of a breach of an agreement to negotiate.

The methodology employed in this research borrows from classical empirical research in social sciences, being based on the extraction of relevant data to test previously developed working hypothesis, corroborating or amending them as a result. Using existing scholar studies and professional experience, I developed several hypotheses as to how the courts and judges decide on damage compensation. After sample collection and analysis, I then determined what data variables I need to collect from case law to confirm, disapprove, or amend my hypotheses.

### Section 5.2 Initial Hypothesis

As I am interested in the identification of general trends showing consistency in the grant of damages — even if the exact methodology used to calculate the quantum remains fuzzy — I will track the granted quantum in absolute value as well as in percentage of the claimed quantum. The underlying assumption is, in fact, that there might be a behaviorally meaningful correlation between these two elements: it seems reasonable to suppose that confronted with the uncertainty of the calculation of the exact damages (especially concerning expectation damages), judges might rely on a rule of thumb (for example: 50% of the claimed quantum) or otherwise simplify their task.

As will be amply discussed below, the behavioral economics literature has convincingly shown the strength of the so called “anchoring effect”<sup>49</sup>: the claimed amount might by itself have an influence on the final granted, as it works as an unconscious anchor for judge's decision making. Thus, uncovering the exact link between the two quanta in the determination of damages in case of a breach of an agreement to negotiate (or breach of an agreement to agree) is one of the main purposes of our empirical research. It should be noted, however, that if identifying certain trends is possible, I will also analyze outlier cases, trying to understand the factors that put them apart from the rest of our data set.

### Section 5.3 Methodological Challenges

Arguably, the most serious methodological challenge for this research is its comparative side; as the legal systems analyzed are different, any result can only point in the right direction, without warranting a clear conclusion.

#### 5.3.1 Sample Size Limitation

Moreover, as very detailed rulings are needed to be able to extract useful data and trends (especially the quantum of both claims and grants), it should be noted that finding relevant and representative cases is a great challenge. Although as part of my doctoral research I've gathered 905 cases, dated between 1989 and 2016, I was only able to

<sup>48</sup> Giaoui, *supra*.

<sup>49</sup> Reference in literature

manually code data from 208 of them that were fully documented in the database -- a sample that could be considered relatively modest in size compared with the abundance of case law, and which unfortunately further decreases in size as cases unsuitable for studying breach of agreements to negotiate are culled. This overall lack of documentation could be indicative of the legal community's limited interest in quantitative analysis, a challenge present equally in the United States and France. To my knowledge, this research represents the first attempt amongst comparative lawyers to systematically measure contractual damages. Nonetheless, over time I may be able to overcome this difficulty in sample size limitation as more advances are made in the development of analytical technologies and the availability of information on public and private legal databases increases.

### 5.3.2 Selection Biases

Thanks to Priest and Klein's published research on the subject (1984)<sup>50</sup>, I'm aware that cases that get carried to court do not necessarily constitute a representative sample of all disputes that take place.<sup>51</sup> However, recent studies concerning this matter have given more nuance to this conclusion: Klerman and Lee have argued (2014-2015)<sup>52</sup> that while selection effects do exist, they are partial and still allow for valid inferences to be drawn from the percentage of plaintiff trial victories. As Schweizer has established (2016)<sup>53</sup>, "empirical analysis confined to data from litigated cases seems possible and fruitful despite the selection effect." Thus, in addition to having tolerance against this effect, in theory, I can also embrace several selection biases in the context of this research.<sup>54</sup>

The first selection bias pertains to the comparative component of the analyses. The United States and France are characterized by different proportions of commercial disputes that are litigated and those that are settled out of court. The common knowledge is that a majority of commercial disputes are settled out of court in the United States, while, given the lower cost of litigation, the proportion of settlements is (probably) lower in France. Likewise, the inclusion of a liquidated damages clause in a contract -- a common practice in international transactions as highlighted in the earlier literature review -- reduces the

number of cases that continue to the verdict stage<sup>55</sup>. However, the potential difference in the share of litigated cases between the jurisdictions should not affect the validity of the conclusions drawn from the observations on the sample. After all, I focused primarily on litigated cases and their outcomes (as opposed to non-litigated cases and their outcomes). In a way, even if there is selection bias, I am embracing it in order to predict not all cases but litigated cases primarily as they are used as reference (or potential threat) by all parties, even those who would rather not litigate.

The second selection bias is the fact that as my selected disputes are litigated, they are arguably the ones in which the involved parties face the highest degree of uncertainty. In other words, because those parties have very different expectations about the potential outcome of the litigation, they are less likely to settle in the first place. This said, this subset of cases is ideal for a study aiming to reduce judicial uncertainty.

A third selection bias is that not every litigated case is necessarily published online. This is especially true regarding first instance cases and is the reason my sample is mainly composed of appeal/last resort cases. While this bias seems to have decreased over time as a greater proportion of cases are collected and then published in major databases, the only way to definitively address this issue would be to manually access all the dockets of the jurisdictions under investigation -- an endeavor beyond my current scope and means. However, this trend sets up the foundations for fruitful future research.

### Section 5.4: Sample Description

I focused on breach of agreements to negotiate cases covering the period from 1990 to 2016, to allow both to uncover the general metrics or ratios and their evolution over time. For the same reason, collection tended to focus on cases from superior courts (largely supreme and appellate federal courts in the US, and the Cour de Cassation in France<sup>56</sup>). For the US, I concentrated mainly on New York, California, and Delaware as major commercial hubs. For France, most cases were extracted from the jurisdictions of Paris and Versailles.

<sup>50</sup> Priest G.L. and Klein B., "The Selection of Disputes for Litigation," *The Journal of Legal Studies*, 13(1), 1-55. 1984.

<sup>51</sup> And ultimately it would be useful to obtain a more representative sample of MA cases upon which to anchor the analysis.

<sup>52</sup> Klerman, D.M. and Lee, Y.-H.A., "Inferences from Litigated Cases," *The Journal of Legal Studies*, 43(2), 209-248, 2014. Klerman D.M. and Lee, Y.-H.A., "The Priest-Klein Hypotheses: Proofs and Generality," USC Class Research Paper 14-34 USC Law Legal Studies Paper 14-43, available at <http://ssrn.com/abstract=2538854>, 2015.

<sup>53</sup> Schweizer Urs, "Litigated Cases: The Selection Effect Revisited," *Journal of Institutional and Theoretical Economics* 172, 409-416-ISSN 0932-4569, Mohr Siebeck, 2016.

<sup>54</sup> Bias here referencing a type of error that systematically skews results in a certain direction.

<sup>55</sup> However, this reduction is more significant in the US than in France, considering the settlements that are proportionally more frequent in the US.

<sup>56</sup> It should be noted, however, that the French Cour de Cassation is supposed to only rule on questions of law and not of fact. Moreover, the appellate decision is rarely published online if it is confirmed by a decision of the Cour de Cassation; therefore, I mainly focused on Cour d'Appel decisions which have not yet been subject to a ruling from the Cour de Cassation. This should not mean that the French database is less relevant, as a self-censorship can easily be observed: very often, if a party chooses not to pursue the case before the Cour de Cassation, it is because its traditional position has been rightly applied by the appellate court.



To compose the database, I first extracted 150 cases per jurisdiction through keyword searches in legal databases<sup>57</sup>. This allowed me to compute the win rates on this large sample of cases. Next, another sample of around 30 random cases per jurisdiction was extracted. This latter sample was overbalanced towards cases granting damages, to analyze my hypothesis concerning the factors influencing the decision to grant damages and the final recovery rate. I have nonetheless kept some cases where damages were not granted in this second set too, to assess what factors might explain these decisions. Heavy methodological constraints were respected to obtain a representative database. For instance, from the first sample of 150 cases we randomly extracted one out of 5 cases to respect the distribution of the results in terms of chronology and other descriptive criteria.

Cases excluded were missing information about one or more key parameters (e.g., quantum value of claim, quantum value of grant, etc.). The specific cases that I excluded varied depending on the particular section of my analyses that I was conducting.<sup>58</sup> Further, I excluded cases that were outliers to improve the explanatory power of my statistical linear and multivariate regression models.<sup>59</sup>

In all, for US cases, out of the resulting sample of 35 cases<sup>60</sup>, I found 11 cases granting damages (31%). For France, out of the resulting sample of 30 cases<sup>61</sup>, I found 21 cases granting damages (70%). All the data extracted and analyzed are laid out on excel spreadsheets, but throughout my different studies I have produced summary tables and graphs (storylines) for the most important findings.

Table 1: Summary of Sample Used in the Analysis of the Different Criteria

	Situation(s) & Jurisdiction(s)*	Cases Used	Cases Excluded	Total Cases
Quantum Value of Claim	All	160	48	208
Sophistication of Damage Proof	All except Situation 2 in International	120	60	180
Length of Negotiation	All except Situations 1-3 in International	30	66	96
Business Risk	Situation 1 in all jurisdictions	63	33	96
Reputation	Situation 2 in all jurisdictions	66	20	86
Law Firm Size (S1)	Situation 1 in U.S.	12	23	35
Law Firm Size (S2)	Situation 2 in U.S.	13	15	28

<sup>57</sup> Primarily Westlaw and Lexis Nexis for the US, Dalloz, Lexis Nexis and Lamyline for France

<sup>58</sup> For example, I could have included a case in my analysis on the convergence between jurisdictions but not in my analysis on the sophistication of damage proof, because it had a quantum value of claim while missing a sophistication level.

<sup>59</sup> For example, in evaluating trends based on the sophistication of damage proof, I removed cases that deviated significantly from the

## Section 5.5: Outcomes Analysis

I used two main metrics to quantify the outcomes in the cases sampled, a win rate and a recovery rate. The win rate refers to the probability for a claimant to be granted any amount of compensatory damages by the court. In cases where the claimant wins, I generate a recovery rate, which represents the proportion of their claim quantum that is granted by the court.

I then performed several successive analyses with these metrics: First I focused on the general trends of the outcomes, over time and by types of damages, across the two jurisdictions. Then, I considered the different criteria that could influence the outcomes.

### 5.5.1 General Trends of the Outcomes

In this first analysis, I measured and compared how the jurisdictions each evolved in their total win rate and recovery rate over time. I visualized simple trend lines out of these calculations and observed whether the jurisdictions respectively increased or decreased in their grant values from one time period to the next. I calculated these measurements based on three time-ranges that I established for each jurisdiction. To avoid producing skewed results, I prioritized equalizing the number of cases that fell under each of the time ranges for each jurisdiction. As a result, the jurisdictions (which varied in the number of cases they provided in the data) were assigned similar but slightly different sets of three time-ranges. Moreover, I assessed the degree to which these trend lines converged over time; in other words, the degree to which the jurisdictions progressed towards a similar win rate and recovery rate.

Table 2: Time Ranges Used for Analysis on Convergence between Jurisdictions

	Range 1	Range 2	Range 3	Mean Year
United States	1989 - 1997	1998 - 2006	2007 - 2015	2005
France	1990 - 1998	1999 - 2007	2008 - 2016	2009

### 5.5.2 Criteria Influencing the Outcome across Jurisdictions

In my next analysis, I identified criteria that could influence the outcomes and determined their relative weight in explaining the recoverable damages. My intuition as to the relevant factors was first of all grounded in the idea that judges might be sensitive to some business factors, most likely in the form of what has been called in

average grant values for their corresponding sophistication levels. I made it a rule to keep the number of outliers that I removed less than ten percent of the original sample. In doing so, I considered it a priority to also preserve the original sample size as much as possible.

<sup>60</sup> 17 cases in the first instance, 15 in appeal, and 3 in the last resort.

<sup>61</sup> 1 case in the first instance, 27 in appeal, and 3 in the last resort.

behavioral literature “attribute substitution”<sup>62</sup> -- in other words, faced with the uncertainty and difficulty of the calculation of the real damages, judges might unconsciously proceed by answering different, simpler questions as decision proxies. I kept in mind that while the quantitative data can be extracted as is from the dataset, the qualitative data needs to be consistently coded<sup>63</sup>. Working with the data, I took note of various parameters that commonly described contract breach cases across the jurisdictions and concentrated on five of these factors after identifying which seemed most relevant to court decision-making on the outcome of a particular lawsuit.

#### A. Quantum Value of Claim

First, the quantum value of claim is defined as the amount of money the defendant declares as their damages. It is measured in thousands of U.S. dollars or euros and is not scaled. The outcome was defined as two different metrics: the win rate (the probability for a claim to be granted), and the recovery rate (the proportion of quantum of claim being granted). Win rate and recovery rate were calculated over time and compared by jurisdiction to evaluate possible convergence towards a common value. Time was measured in years and divided into three relatively equal ranges of years for each jurisdiction. Also, I define the win rate as either \$0 (no grant) or more than \$0 (grant). In the same way, the recovery rate studies the grant as being defined as the amount of money awarded to the claimant (including legal fees).

#### B. Sophistication of the Parties' Methodology

As the disputing parties have to prove or argue among themselves the exact quantum of the real damages, one would expect that the greater the sophistication of the methodology used for this calculation the better the results. Despite not having full access to expert reports in collected court opinions I devised a sophistication index to especially test, the link between this index and the recovery rate based upon the assumption that a report not mentioned by the court was likely not deemed persuasive. The index thus scales sophistication from 1 (the lowest) to 4 (the highest). This index also allowed me to see whether the sensibility of judges to greater sophistication evolved over time.

Level 1 was assigned to cases in which the claimant makes a single claim (which may include different heads or types of damages?) without any discernible basis. Level 2 was assigned to cases in which the claimant makes multiple claims based on different heads of damages but does not provide any further explanation. Level 3 was assigned to cases in which the claimant makes claims based on

different factors and provides simple justification (e.g., only qualitative). Level 4 was assigned to cases in which the claimant makes claims based on different factors and provides sophisticated justification (e.g., both qualitative and quantitative), possibly including an expert witness report in their initial complaints.

#### C. Business Risk

The law & economics tradition would seem to suggest that the risk linked with the particular business endeavor at hand might play a role: in fact, the riskier the business (e.g. a novel tech venture) the less certain the exact quantum of the real damage for the plaintiff, for she might have failed to achieve the awaited results even if the contract had been concluded. I then devised a business risk index which will allow us to test this intuition.

The business risk is the degree to which the claimant's business performance is volatile. This index ranges from 1 (very low risk) to 4 (very high risk)<sup>64</sup>. In order to classify the cases on a risk scale, I extracted data based on qualitative elements. For instance, I classified each case depending on the claimant's industry type (Distribution, Service, High Tech, Manufacturing, and Construction). I have attributed a claimant's business risk index to each case about multiple factors (industry type, market price volatility, tenure of operations, and size of the business).

The same consideration seems to suggest that the type of industry in which the two parties are involved is important: if significantly different trends can be observed for different industries, one can either infer that judges unofficially help some industries more than others (for example, this might be expected for the high-tech industries in jurisdictions like California), or that the industry type is itself used as a proxy for the risk factor.

#### D. Law Firm Size

I also became interested in uncovering any link between the final result, especially in terms of the recovery rate, and the size of the law firms representing the claimant in court. If such a link exists and if it is positive, it is plausible to infer either that judges are simply more prone to award more damages to clients defended by large firms, or that those firms are simply more sophisticated and can therefore use their larger resources to better substantiate their clients' claims. Unfortunately, this analysis was not conducted in France for breach of agreements to negotiate cases due to the extreme variation of the quantum value of claim across my different categories and which could have biased my results. Similarly, I did not conduct an analysis

<sup>62</sup> See, DANIEL KAHNEMAN & SHANE FREDERICK, REPRESENTATIVENESS REVISITED: ATTRIBUTE SUBSTITUTION IN INTUITIVE JUDGEMENT. (2002).

<sup>63</sup> Which will be covered *infra*.

<sup>64</sup> To calculate risk, analysts use simple ratios: the degree of combined leverage (DCL) is the combination of degree of operating leverage (DOL) and degree of financial leverage (DFL).

DCL= DOL X DFL

DOL = Change in EBIT/Change in sales

DFL = Change in EPS/Change in EBIT

DCL= Change in EPS/Change in Sales

evaluating the results of each specific firm at this stage because of the relatively small sample.

Law firm size is measured by the number of attorneys working at the law firm. It is scaled from 1 (Very Small) to 4 (Very Large). For the US, Very Small includes local law offices with less than 5 lawyers; Small covers national law office with less than 100 lawyers; Large, major national law firm with over 100 lawyers; and Very Large, major international law firm with over 300 lawyers.

#### *E. Length of Negotiations*

Lastly, another seemingly relevant factor seems to be the length of negotiations, the duration of the claimant and the defendant's contractual relationship or – alternatively— the duration of negotiations to reach a contract, which intuitively is directly linked to the quantum of restitution damages but may also be correlated with the quantum of the expectation damages granted. It is measured in years and is not scaled. Beyond reliance damages, it is likely that as time invested into the negotiations goes up, courts will be more receptive to allowing claimants to recover wider damages.

#### **Section 5.6: Revised Hypotheses**

My early analyses noticed, a certain consistency for basic metrics (win rate and recovery rate especially) and convergence overtime between the French trend (upward) and American one (downward) towards similar rates. However, in some cases, a wide deviation from those average metrics exists. To explain the deviation, I propose the following hypothesis.

The first hypothesis is that there will be a negative correlation between the quantum of the plaintiff's claim and the recovery rate<sup>65</sup>. Supporting this hypothesis, I also suggest more substantial intuitions. First, when claiming for compensatory damages, it is expected that plaintiffs

will encounter a psychological ceiling: the court will agree to grant compensatory damages only up to a specific point. It is expected to encounter this ceiling especially in France where the courts are even more reluctant to grant damages<sup>66</sup>. Second, it is plausible that the higher the quantum value of the claim, the more likely the defendant is to feel threatened and, hence, will protect its interests by spending more time and money on the case. Furthermore, the anchoring effect is expected to affect the compensatory damages granted by the court<sup>67</sup>.

The second hypothesis is that there will be a positive correlation between the sophistication of the plaintiff's demonstration and the successful outcome of its case. The more the plaintiff will develop on its methodology - using sophisticated financial and economic valuations methods for instance - the more likely the court will be tempted to grant its demand. Generally speaking, sophistication refers to the level of effort put into one's demonstration. It thus concerns the claimant (in its claim for damages), the defendant (in the evaluation it makes of what it should be liable for), and the court (in the effort it puts to explain its final award).

A third hypothesis may be that the length of the relationship between the parties before the breach will impact the outcome: the longer the pre-contractual negotiation or the contract itself, the more the judge will be likely to award damages. Indeed, the courts could be tempted to compensate for the effort made into the relationships as well as the time and resources devoted to it.

The hypothesis regarding law firm size is simple: the larger the law firm is, the more costly its services are and thus better results in litigations should reasonably be expected. If that intuition turns out to be too simplistic, it may be

<sup>65</sup> An intuitive explanation, provided by Choi for a similar trend uncovered in securities arbitrations (but only relevant for the decrease of the recovery rate), is that judges "may be less willing to grant a higher compensation ratio for larger claimed compensation amounts, all other things being equal, simply because they are reluctant to award large sums. Large claims are more likely to be inflated by the claimant than are small ones" (Choi, Stephen; Fisch, Jill E.; and Pritchard, Adam C., "The Influence of Arbitrator Background and Representation on Arbitration Outcomes" (2014). Faculty Scholarship. Paper 1546). Somewhat similar biases to the ones my results point to were also uncovered by previous studies of human cognition; Chapman and Bornstein showed, for instance, that asking for exorbitant amounts of damages creates negative perceptions of the plaintiff, making her seem selfish and less generous (which doesn't preclude, however, the award from being higher because of the anchoring effect, on which more will be said below). While I agree that my results may show that judges and jurors are reluctant to award large amounts, I am not convinced that the explanation lies, as Choi seems to suggest, in their disbelief as to the reliability of the evidence provided in favor of the claim.

<sup>66</sup> The French doctrine is particularly divided on the question. While the majority stands by the opinion that damages are only aimed to compensate the plaintiff's loss and not to sanction the defendant, a

breach has been made by the cassation Court in 2011: confronted to an action in exequatur brought by an American plaintiff, the Court acknowledged that the mere principle of punitive damages is not, in itself, against the public international order as long as it is not disproportionate with regards to the loss and the breach of contract (Civ. 1re, 1er déc. 2010, n° 09-13.303, D. 2011. Actu. 24, obs. Gallmeister; D. 2011. 423, note Licari; Rev. crit. DIP 2011. 93, note Gaudemet-Tallon; RTD civ. 2011. 122, obs. Fages; RTD civ. 2011. 317, obs. Remy-Corlay).

<sup>67</sup> Diamond et al. show that a very large ad damnum may exert a boomerang effect, leading to such a negative impression that compensation may start to diminish. However, Marti and Wissler showed that the boomerang effect is not strong: when mock jurors were provided with traditional jury instructions (for example, to disregard the ad damnum), the effect did not appear at all; in that study, the only factor that reduced the final award was providing jurors with a range of verdicts in similar cases. In a recent study, Campbell et al. showed, conclusively in my opinion, that ad damnum, even when it is very high, has a very powerful anchoring effect, overwhelming the credibility effect for high amounts; in fact, the authors of the study concluded that no response strategy was effective against high-value anchors.

nuanced taking into consideration the specific expertise of the law firm.

Lastly, according to contract and economic theory it can be expected to see judges account for and compensate certain risks taken by companies. As such, the hypothesis would be that claimant operating in riskier industries are (unofficially) granted a higher damage award.

## SECTION 6: EMPIRICAL RESULTS

In this part, I analyze the effect of the criteria on the grant, considered either as the win rate or the recovery rate. The first part studies the evolution of the grant over time in the two jurisdictions considered. Then, I analyze the effect of each of the criteria, taken individually, on the grant.

### Section 6.1: Convergence Over Time Between Jurisdictions

In a previous article, I have established a striking convergence between jurisdictions over time. For a more detailed analysis, the reader is kindly asked to refer to this article<sup>68</sup>. The objective of the present analysis is to identify the individual trends on grants in the two different jurisdictions.

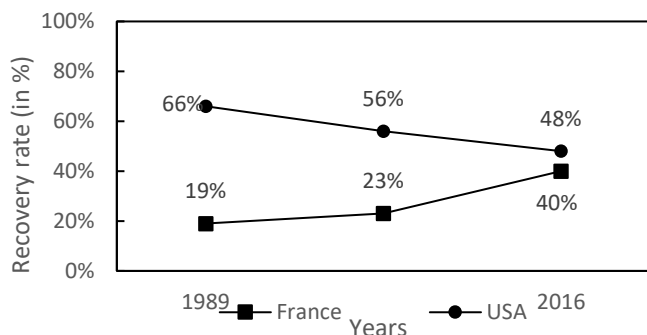


Figure 1: Evolution of the recovery rate (in %) (N = 99 out of 123 cases)

Again, the data shows convergence between jurisdictions is clear. The recovery rate in France doubled over time and the US decreased by a third. The average recovery rate was as low as 19% in the late 1980s/early 1990s and increased over time in France. On the other hand, it was as high as 66% in the late 1980s/early 1990s and declined over time in the United States. Although the average recovery rates

in France and the United States experienced opposite trends over time, they both converged towards a percentage between 40% and 50% in recent years.

Desegregating the results by situation leads to the following observations: In the United States, the average recovery rate was as high as 85% in the late 1980s/early 1990s and declined over time. In France, the trend over time was similar to that in the United States. However, the average recovery rates approached mid-40s% to low-50s% in recent years. On first impression, this is likely explained by globalization trends and other factors discussed below.

#### 6.1.1 The Trend in the US

The first relevant trend in the US is the general decrease in win rates: I have observed a decrease from 33% in the first analyzed period to 26% in the third one. While the data provided is not sufficient to warrant a general conclusion about the tendencies of the US case law, it is consistent with the findings of previous studies in related areas. For instance, Lahav and Siegelman<sup>69</sup> show that the plaintiff's win rate in adjudicated civil cases in federal courts fell from 1985 till 2009 from 70% to 35%; the win rate started falling around 1985 and did so until 1996, then slightly increased and then stayed the same from the early 2000s onward.-- the authors considered several possible explanations of this dramatic fall, rejecting most of them.<sup>70</sup> A somewhat similar trend may be observed in securities arbitration in the US. As shown by Schultz<sup>71</sup>, while claimants prevailed in 53 percent of awards from 1997 to 2002, they prevailed in only 43 percent of awards in 2005, 42 percent in 2006, and 37 percent in 2007. There does not seem to be a readily available explanation for this decline, but it is consistent with findings related to the effect of the selection of arbitrators with prior experience representing brokers<sup>72</sup>.

Whatever the particularities of the data set in these studies, the results seem to point to a general trend without an immediate satisfactory explanation. In the words of the authors of one of the cited studies, "a significant puzzle remains unresolved"<sup>73</sup>. As I have shown above, if the falling win rates are combined with a decline in the recovery rates, there could be a more general pro-defendant shift to be explained.

<sup>68</sup> Giaoui, F., 2019, *Ibidem*

<sup>69</sup> Lahav, Alexandra D. and Siegelman, Peter, The Curious Incident of the Falling Win rate (July 7, 2017). Available at SSRN: <https://ssrn.com/abstract=2993423>

<sup>70</sup> For instance, they reject the possibility that the explanation is derived from the modification of the composition of the terminated cases by nature of the suite. Moreover, their data shows that probabilities of grant decreased for several unrelated areas, which means that the explanation cannot be derived from a doctrinal development in a certain body of law. The selection bias hypothesis is also rejected. While a possible factor could come from the Supreme Court position of disfavoring litigation (the probability that the Supreme Court rules in a way that allows a plaintiff to bring a private enforcement action has fallen from around 68% in 1970 to 18% in

2013), this doesn't seem to explain all their data. Whatever the explanation may be, there seems to be a clear correlation between the decline in the win rate and the fact that cases won by plaintiffs became longer relative to those won by defendants. This seems to indicate that there is a shift in judicial perspectives making it harder for plaintiffs to win.

<sup>71</sup> Schultz, Lawrence S. 2008. Storm Clouds in Arbitration. Pp. 351-93 in *Securities Arbitration 2008: Evolving and improving*, edited by David E. Robbins. New York: Practising Law Institute

<sup>72</sup> Attorneys as Arbitrators Stephen J. Choi, Jill E. Fisch, and A. C. Pritchard, *The Journal of Legal Studies* 2010 39:1, 109-157

<sup>73</sup> Lahav, Alexandra D. and Siegelman, Peter, *art. cit.*

Data conclusively show that there is a substantial decrease in the recovery rate in this particular scenario in the US jurisdictions across the three periods: from 66% during the period 1989-2002 to 56% in 2003-2006 and finally 48% in 2007-2015. This trend, which is one of the main results presented in this paper, can only partially be explained in conjunction with the other trends. Particularly, it seems to be linked to a global increase in the average amounts claimed from \$25 million in 1989 – 2002 to \$89 million in 2007 - 2015. As I will show below, there is a strong negative correlation between the quantum value of claim and the recovery rate, even if the increase in the quantum value of claim translates into an increase in the quantum value of grant from \$5 million to \$10 million respectively.

### 6.1.2 The Trend in France

In contrast to the US cases, the data shows that the recovery rate has consistently increased over time in France, from an average of 20% to 40% in 1985 and 2015 respectively. Moreover, the expectancy damages have followed, if not induced, the same trend. Indeed, splitting the dataset in three similarly sized samples of successive periods between 1990 and 2016, I observed an increase of the recovery rate from 30% to 34% and finally 40% for all the cases where expectancy damages have been claimed. This trend is the reverse of the one presented for the US cases, but, interestingly, the final recovery rate seems to be approximatively the same in both jurisdictions.

One might probably explain this evolution by a cultural shift in the perception of money in French society in general.<sup>74</sup> Similar results for the UK prompted some researchers to look into a cultural and generational shift of judges as a possible explanation<sup>75</sup>. It should be noted, however, that the data lends itself to such a cultural explanation, for there is an observable shift in the attitude of the UK's Court of Appeal. In fact, over the period 1990 – 2004, the Court of Appeal reduced the quantum of 32% of the decisions; in the period 2005 – 2015, on the other hand, these decisions seem to have been reduced considerably (12.5%). The Court rules, nowadays, more on the grant/no grant decision (overturning the decision in 40.5% of cases and confirming no grant decisions in 25% of cases), and while also *raising* the granted amount in 12.6% of cases. Although some social and economic considerations could likely explain those evolutions, my intuition is that a certain cultural shift, deliberate or not, has taken place at least at the level of the British Court of Appeal. Indeed, while it has been considered in the US in the 70s and 80s that grants were too lenient, therefore leading to a more reasonable amount of damages, the trend is reversed in France: judges have been considered too conservative

when it is a matter of money and damages and, as a result, they seem to be more and more likely to award higher grants. Further qualitative research is needed to confirm that hypothesis. This could also stem from the importance of the jury in the US in the same period, while in France only professional judges are operating in this type of litigations.

If there is a cultural explanation as suggested above, it may be that a certain implicit harmonization has been reached between the two jurisdictions; the dataset is however insufficient to know whether this trend will be preserved over time or if it is only a temporary and accidental alignment.

To sum up, the data shows a clear evolution of both the win rate and the recovery rate. While trends in the US and France go in opposite directions, they seem to converge around similar win rates and even more similar recovery rates. The explanations of these shifts may come in different forms. They are probably partly linked to different social and economic evolutions in these two jurisdictions, which are still to be uncovered. I do think, however, that the data motivates further research primarily into the cultural evolution governing the decisions on liability and allocation of damages.

### 6.1.3 Trends by Types of Damages

The data for the US shows conclusively that reliance damages are generally better compensated than expectation damages<sup>76</sup>. To test my initial hypothesis, I designed a ratio by adding the amounts of granted damages for both types of damages, dividing the obtained sums by the sum of claimed damages for both types of damages.<sup>77</sup> All the damages considered here are those awarded to the plaintiff.

The results show that almost all cases claiming reliance damages are granted some damages, with an overall recovery rate of 46%. This is not surprising: courts grant more easily reliance and restitution damages, as those are easier to calculate and constitute obvious and uncontested damages for the plaintiff. It should be noted, however, that the average reliance damages claim (\$ 0.6 million) is also much lower than the average expectation damages claim (\$ 62 million); a certain reluctance to grant too large amounts when confronted with uncertain calculations might explain the corresponding difference in the recovery rates, the average reliance damages grant being of \$0.5 million and the average expectation damages grant being

<sup>74</sup> French attitudes to money used to disdain even talking about it.

<sup>75</sup> Laleng, Per, Winners, and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002-16) (September 6, 2017). Forthcoming, *Journal of Personal Injury Law* No. 1, 2018. Available at SSRN: <https://ssrn.com/abstract=3060362>

<sup>76</sup> Perhaps unsurprisingly since reliance damages are generally easier to calculate.

<sup>77</sup> As a general principle, I observed that the quantum of reliance damages claim is only a fraction of the quantum of expectation damages claim. I excluded one outlier case (1US13), which has an unusually large reliance claim.

of \$21 million.<sup>78</sup> I also observe that one out of three cases in which the plaintiff claims expectation damages provide for some damages, with an overall recovery rate of 20%.<sup>79</sup>

Generally, expectation general damages (“EGD”) represent the largest claimed amount of damages; in fact, expectation general damages represent 76% of the claimed amount, and reliance damages represent only 24%. The proportion is reversed for the granted amounts<sup>80</sup>: only 26% correspond to expectation general damages, while 74% correspond to reliance damages. The explanation seems intuitively simple: on one hand, reliance damages are easily proven, as they represent the damages incurred because of the investments made by the plaintiff in reliance on the contract performance. Expectation damages, on the other hand, are difficult to prove and subject to great uncertainty<sup>81</sup>.

As I will see below, an increase in the quantum of claim strongly correlates with a decrease in the recovery rate. It turns out that, while reliance damages in my French dataset were claimed for an average of € 1.4 million and a median of € 121 thousand, expectation general damages were claimed for an average of € 14.5 million and €496 thousand, and expectation consequential damages (“ECD”) were claimed for an average of €5.4 million and a median of € 765 thousand. This might, therefore, give an additional explanation for the observed discrepancy between the recovery rates of the different types of damages in my dataset. The data shows that the recovery rate for reliance damages was 93%, all but one of the cases

granting 100% of the claimed damages. For EGD, on the other hand, the recovery rate was 29%, while most ECD claims failed, except for one outlier case, *Pavie v Mazars-Pavie et Associes*<sup>82</sup> (in this case, however, defendant’s bad faith was particularly obvious).

#### 6.1.4 Possible explanations

Several researchers seem to point in the same direction. For instance, but in a different jurisdiction (the UK), Per Laleng<sup>83</sup> suggests that the substantial fall of favorable outcomes for claimants in Court of Appeal cases (from 48% in 2002 – 2011 to 37.9% in 2012 - 2016) might be explained by a generational shift of judges. He was able to show that more experienced judges have a pro-claimant bias, which means that part of this evolution over time might be explained by the gradual replacement of pro-claimant judges with a new generation of judges with a pro-defendant/respondent mindset. I did not conduct a similar analysis over my data set, but it is a plausible hypothesis that the evolution might be linked to a generational shift; whether this is so should be further analyzed.

If a similar generational shift is observed in contract damage cases, however, its explanation might lie in the cultural perception of damages.<sup>84</sup> For the US, one significant discovery of previous research<sup>85</sup> was that, at the end of the 1990s, a significant proportion of jurors had, despite empirical evidence to the contrary, the impression that there was a “litigation explosion” and “far too many frivolous lawsuits”.<sup>86</sup>

<sup>78</sup> These figures are in constant 2016 US Dollars and exclude the outlier 1U13 case.

<sup>79</sup> The cases in the sample for France feature a wide variety of compensatory damages claimed: expectation general damages (EGD), expectation consequential damages (ECD), reliance damages (RD). The graph below represents the repartition of damages, both claimed and granted, as a percentage of total quantum. It has been conducted only in Situation 1 since mainly one type of damages will be claimed and granted in Situation 2 (ECD).

<sup>80</sup> Giaoui, F., 2019. *Indemnisation Du Préjudice Économique*. 1st ed. Paris: L’Harmattan.

<sup>81</sup> In the database, it appears that while it is common to cumulate EGD and ECD, EGD is rarely cumulated with RD.

<sup>82</sup> CA Paris, 10/01/1990, 89/13910. In this case, court was convinced by basic evidence from the claimant, considering the obvious bad faith of defendant. 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 (1) they hold Albert Pavie liable for breach of agreement, (2) launch a lawsuit to seek damages and that (3) they still benefit a ROFR on the sale of Albert Pavie’s securities. On the contrary, Albert Pavie considered he was free to sell at any time and he did so to ACL Audit despite the ROFR. 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 million Francs for general expectation and secondarily 5 million Francs for moral and economic consequential damages for bad faith breakup of the agreement to agree. In total, they sought 10 million Francs (in 1987 value) which represent 2.26 million € (in 2015 value).

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 any time. Hence MPA is not entitled to damages. The first instance decision awarded 10 million Francs while the final sentence on appeal reduced this amount by 3 million Francs to finally award 7 million Francs (in 1987 value, representing 1.58 million € in 2015 value).

<sup>83</sup> Laleng, Per, Winners, and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002-16) (September 6, 2017). Forthcoming, *Journal of Personal Injury Law* No. 1, 2018. Available at SSRN: <https://ssrn.com/abstract=3060362>

<sup>84</sup> In a recent article, Valerie P. Hans argues that the jury damage award decision making has strong political and cultural dimensions. Relying, inter alia, on research conducted by Yale’s Cultural Cognition Project, she argues that cognitive dissonance avoidance might incline people to solve contradictory empirical claims in ways which cohere with their cultural values; if, therefore, it were to be shown that the general attitude towards monetary awards shifted, this might explain in part the evolution that I uncovered (even though the shift would go into opposite directions in the US and France).

<sup>85</sup> Valerie P. Hans, *Business on trial: the civil jury and corporate responsibility*, YUP, 2000

<sup>86</sup> Significantly, jurors whose members were critical of civil litigation were more likely to give lower awards. While my research doesn’t allow us to corroborate or dispute these hypotheses, the evolution that I uncover might be linked to this shift in the general perception of litigation in the US. A word of caution, however, is in order. While Hans’s research refers to jurors, most of the cases in my database (and certainly all of the French cases) were decided by judges. While one might think that a similar conclusion can easily be drawn about judges, it should be mentioned that recent research by Kahan and

A detailed analysis has then been conducted on each of the considered variables, controlling for the effect of the claim each time it appears necessary.

### Section 6.2: Criteria Analysis

As it has been stated in the methodology section, the grant outcome is studied considered as the win and recovery rates. The quantum value of claim, sophistication, business risk, and law firm size are studied successively.

The next two tables present the results of the linear regressions for each criterion per the two usual variables which are the win rate and the recovery rate. The first conclusion stemming from those results is that the jurisdictions do not, overall, dramatically impact the relationships between the win rate and the recovery rate and each criterion.

Table 3: Linear regressions for win rate

	Win rate				
	Linear Regression				
	Adj. R2	N	BIAS	Coefficient	FR
Quantum Value of Claim (Ln)	0,7302	160	0,8740 *** (0,01661)	-0,0314 *** (0,0017)	0,0088 (0,0127)
Sophistication	0,8695	134	0,1871 *** (0,0144)	0,1637 *** (0,0059)	-0,0054 (0,0149)
Length or relationship	0,7075	30	0,3154*** (0,0368)	0,1609 *** (0,0189)	0,0142 (0,0369)
Risk	0,0429	63	0,6813 *** (0,0326)	-0,0200** (0,0098)	-0,0367 (0,0276)
Law firm	0,1402	26	0,1478 (0,0923)	0,0795 ** (0,0353)	N/A
			(0,0300)	(0,0106)	(0,0243)

Table 4: Linear regressions for recovery rate

	Recovery rate				
	Linear Regression				
	Adj. R2	N	BIAS	Coefficient	FR
Quantum Value of Claim (Ln)	0,7269	160	0,5472 *** (0,0164)	-0,0306 *** (0,0017)	0,0075 (0,0125)
Sophistication	0,6731	120	-0,0113 (0,0237)	0,1252 *** (0,0086)	-0,0271 (0,0184)
Length or relationship	0,7455	30	0,0829 (0,0303)	0,1452 *** (0,0156)	0,0058 (0,0303)
Risk	0,6372	63	0,4985 *** (0,0193)	-0,0604 *** (0,0058)	0,0067 (0,0164)
			(0,0646)	(0,0222)	(0,0539)
Law firm	-0,0865	13	0,2666 * (0,1313)	-0,0087 (0,0411)	N/A
			(0,0362)	(0,0093)	(0,0212)

Note: \*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$ ; (Standard errors are indicated into brackets)

colleagues seems to suggest that “professional judgment imparted by legal training and experience confers resistance to identity-protective cognition — a dynamic associated with politically biased information

processing generally — but only for decisions that involve legal reasoning”. How much judges are influenced in their legal reasoning by their cultural values is therefore still a debated empirical issue.

### 6.2.1 Quantum Value of Claim

The initial hypothesis is the more the plaintiff claims the relatively less she will be awarded by the judge. Indeed, I can formulate the hypothesis according to which the judge will be less likely to find a defendant liable if the claim is unreasonable. Therefore, and other things equal, the win rate should be reduced when the quantum value of claim increases -- that is to say, the win rate and recovery and quantum value of claim are negatively correlated.

More, even if the grant value is influenced by several other criteria (see below), the increase in the quantum value of the claim will, by definition and other things equal, reduce the recovery rate since the latter is defined as the value of the grant divided by the value of the claim. More than this simple mathematical observation, it is very likely that a judge could react negatively to a potentially unreasonable claim formulated by the claimant. I can also assume that in those situations, the defendant will be more aggressive in response to a potentially excessive claimant's demand. If these hypotheses are verified, they demonstrate the importance of selecting the optimal value of claim to maximize the grant. Asking for more will not necessarily result in more grants for the plaintiff. In order to analyze these hypotheses, I divided cases into two categories depending on whether the quantum of the respective claims is below or above 10 million dollars. Analyzing these two subsets, in the US I observed that the win rate falls from 57% to 33%, while the recovery rate falls from 74% to 16% respectively.

An intuitive explanation, provided by Choi for a similar trend uncovered in securities arbitrations (but only relevant for the decrease of the Recovery rate), is that judges "may be less willing to grant a higher compensation ratio for larger claimed compensation quantum, all other things being equal, simply because they are reluctant to grant large sums. Large claims are more likely to be inflated by the claimant than are small ones"<sup>87</sup>. Somewhat similar biases to the ones our results point to were also uncovered by previous studies of human cognition; Chapman and Bornstein<sup>88</sup> showed, for instance, that asking for exorbitant quantum of damages creates negative perceptions of the plaintiff, making her seem selfish and less generous (which doesn't preclude, however, the grant from being higher because of the anchoring effect, on which more will be said below).

<sup>87</sup> Choi, prec.,

<sup>88</sup> Gretchen B. Chapman & Brian H. Bornstein, *The more you ask for, the more you get: Anchoring in personal injury verdicts*, 10 APPLIED COGNITIVE PSYCHOLOGY 519-540 (1996).

<sup>89</sup> The relative effects of sophistication and the quantum value of claim on the quantum value of grant in the US can be described through the following function:

$$\text{WinRate} = 1.106 \times 10^{-4} + 8046 \times \text{Sophistication} + 4.195 \times 10^{-4} \times \text{Claim} + 2332 \times [\text{Sophistication}]^2 + (1.912 \times 10^{-4}) \times (\text{Sophistication} \times \text{Claim}) - 3983 \times [\text{Claim}]^2, \text{ with } R^2 = 0.90.$$

While I agree that our results may show that judges and jurors are reluctant to grant large quantum, I am not convinced that the explanation lies, as Choi seems to suggest, in their disbelief as to the reliability of the evidence provided in favor of the claim. My reluctance is justified by two tangential reasons:

First, the data shows that the quantum of the initial claim has a stronger impact on the recovery rate than the sophistication of the claim.<sup>89</sup> The rate at which the quantum value of grant grows increases by 4664 per unit with respect to the sophistication of the damage proof but decreases by 7996 per unit with respect to the quantum value of claim. The second derivative of the function is 4664 with respect to the claimant's sophistication. The quantum value of grant increases at a rate of 4664 with respect to this criterion. The second derivative of the function is -7996 with respect to the quantum value of claim. The quantum value of grant decreases at a rate of 7996 with respect to this criterion.

The absolute value of the second derivative with respect to the quantum value of claim is about 1.71 (7996/4664) times greater than that with respect to the claimant's sophistication. Therefore, the effect of the quantum value of claim on grant could be considered about 1.71 times greater than that of the claimant's sophistication. As a result, it seems that a claim should first fix its claim quantum and then sophisticate it to increase its potential grant. However, an increase in sophistication appears very unlikely to compensate for a higher claim quantum.

Second, the only researchers (to the best of my knowledge) who investigated the link between what they called the implausibility index and the recovery rate (in tort cases only) seem to have shown that no significant link exists. In fact, computing an index of implausibility by dividing the plaintiff's pain and suffering *ad damnum* by the total for special damages claimed in the form of past and future medical expenses, lost wages, and property loss, Diamond et al.<sup>90</sup> showed that there was no significant relationship between the implausibility index and the proportion of the quantum requested by the plaintiff that the jury granted for pain and suffering.<sup>91</sup> Furthermore, there was no relationship between the index and the number of comments accepting the plaintiff's *ad damnum*, using the *ad damnum* as a starting point, or recalling the *ad damnum*. This seems to be a counterintuitive result, as one could expect that higher claims simply seem less plausible, but my own research seems to corroborate the results. In

<sup>90</sup> Diamond, Shari Seidman and Murphy, Beth and Rose, Mary R. and Meixner, John B., *Damage Anchors on Real Juries* (Sept 20, 2011). Available at SSRN: <https://ssrn.com/abstract=1883861>

<sup>91</sup> Here it is worth keeping in mind that jurisdictions often establish ceilings on the amount of recovery of nonpecuniary losses, considering its proportion with the recovery awarded for pecuniary losses.



fact, while I am unable to reproduce the exact same idea in the context of breach of agreements to negotiate, for it is not clear how to compute an implausibility index here, I did reproduce an analogous index for the second situation, concerned with the harm to goodwill, business reputation or imagine, which will be discussed at length in a subsequent paper. Considering, as Diamond et al. did in their own research, that the ratio between the invisible damage and the total damage is a good proxy for the implausibility of a certain claim for decision makers, I calculated an index of implausibility by dividing expectancy consequential claims by the total quantum of those claims. If our index is relevant as a proxy and if there is a link between the implausibility of a claim and the final recovery rate, then there should be a strong negative correlation between my index and the recovery rate. I obtained, however, a correlation coefficient of approximately 0.09, which seems to indicate an insignificant relationship between the two indexes.

These two arguments seem to suggest, albeit indirectly, that my intuitive explanation of the uncovered trend (decision makers think higher claims are less likely to be true to the facts) is, at least, in need of additional evidence. As it stands, my data, as well as previous research in tangential areas, seem to suggest, on the contrary, that the implausibility of a claim doesn't influence the recovery rate, at least if implausibility is computed based on the invisible damage/total damage ratio. In other words, my intuition that higher claims are simply less plausible doesn't do a good explanatory work. The uncovered trend remains, therefore, unexplained.

It should be noted, however, that while judges, juries and arbitrators are more reluctant to grant high quantum, the anchoring effect of these quantum is still strong. In the aforementioned paper, Diamond et al.<sup>92</sup> show that very large *ad damnum* may exert a boomerang effect, leading to such a negative impression that compensation may start to diminish. However, Marti and Wissler<sup>93</sup> showed that the boomerang effect is not really strong: when mock jurors were provided with traditional jury instructions (for example, to disregard the *ad damnum*), the effect did not appear at all; in that study, the only factor that reduced the final grant was providing jurors with a range of verdicts in similar cases. In a recent study, Campbell et al.<sup>94</sup> showed, conclusively in my opinion, that *ad damnum*, even when it is very high, has a very powerful anchoring effect, overwhelming the credibility effect for high quantum; in fact, the authors of the study concluded that no response strategy was actually effective against high value anchors.

As in the case of the US, and as expected given my earlier behavioral and economic explanation of this trend, our data shows that in France there is a clear negative link between both the probability of grant and the recovery rates and the total amount of the claim. Our data is, however, less conclusive than for the US dataset.<sup>95</sup>

The win rate decreases from about 60% to 40% as the quantum value of claim increases. The recovery rate decreases from about 20% to 17%. The ranges of quantum values of claim (K€) used are 0-30, 30-150, 150-400, 400+-. The average quantum value of claim is about € 15,061,000 and the median is about € 578,000.

As discussed above, inspired by similar research into the recovery rate in cases of body injury, I lastly tried to devise a plausibility test, defined as the ECD/total claim ratio, expressed in percentages. The initial intuition is that larger quanta of claim might simply seem less credible to the decision-making body. Amongst the relevant cases for my current inquiry, I only found four cases in which the amount of ECD demanded is known. For these cases, the credibility index is the following: 1F01: 50%, 1F05: 19%, 1F15: 10%, 1F24: 34%. As to the final percentage of ECD awarded, the results are as follows: 1F01 – 40%, 1F05 – unknown, 1F15 – 15%, 1F24 – 2.5%. My data seems inconclusive and the hypothesis cannot be corroborated or invalidated without further empirical research.

### 6.2.2 Sophistication of Claimant's Methodology

Again, I hypothesize that the more the plaintiff develops on its methodology in support of its claim, the more likely the judge will be tempted to grant such a claim. My data shows that the likelihood of damages being granted increases from 0% to 20%, 80% and 100% respectively, while the recovery rate increases from 0% to 54%, 59% and 65% when the sophistication ratings are respectively 1, 2, 3 and 4.

This trend seems intuitive: the recovery rate should normally increase when the claim is better supported by the provided evidence. Intuitively, the claim is better supported if the employed methodology is sophisticated. While the provided data seems to indicate that more sophisticated claims get higher recovery rates, the general impact of the sophistication index (as previously defined) on the final recovery rate is positive if controlled for claim. Also, this impact changes over time. In fact, splitting our dataset in three time periods containing similarly sized samples (T1 – 1991 – 2007, T2 – 2008 – 2011, T3 – 2012 – 2015), I can easily remark that the sophistication index did not have a clear trend over time in France and did somehow increase in the US.

<sup>92</sup> Diamond et al., *art. Cit.*

<sup>93</sup> Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask for: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. Experimental Psychol. 91, 94 (2000).

<sup>94</sup> John Campbell, Bernard Chao, Christopher Robertson, David V. Yokum *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments* 101 Iowa L. Rev. 543 (2016)

<sup>95</sup> The equations:

Win Rate =  $-0.033\ln(\text{Claim})+0.820$ , with  $R^2 = 0.72$  and, Recovery Rate =  $-0.045\ln(\text{Claim})+0.4484$ , with  $R^2 = 0.68$

describe the probability of grant and the recovery rate respectively as functions of the Quantum Value of Claim in France.

Table 5: Sophistication Index overtime

Time periods	1991 - 2007	2008 - 2011	2012 - 2015
Sophistication Index (US)	2.09	1.8	2.75
Sophistication Index (France)	2.125	2.33	2.18

However, the importance of sophistication as an explanatory factor seems to have changed considerably in France. The correlation coefficient between the sophistication index and the recovery rate is  $-0.27$  in T1,  $-0.03$  in T2, and  $0.54$  in T3. On the other hand, the same coefficient stayed steady in the US:  $0.5$ ,  $0.27$ , and  $0.58$  respectively. Admittedly, the data set is too small for any conclusive arguments as to the correlation between the two factors; however, the results point in a direction, which has yet to be corroborated by further research: French judges seems to become more and more sensitive to the sophistication of the methodology used as evidence of the claim to prove the amount of damages. On the other hand, the study of more generic data on the US seems to indicate that cases are becoming more and more sophisticated.

Table 6: Other metrics on US Sophistication 96

Time periods	1989 - 2002	2003 - 2009	2010 - 2015
Average number of pages	9.92	15.5	20.25
Average number of tags	84.25	155.45	167.08
Average number of tags 'Sophistication'	0.92	0.91	9.67
Average number of tags 'Sophistication' per pages	0.09	0.06	0.47

Then, as the number of pages of cases, the number of tags I have used for this analysis as well as the particular number of tags 'sophistication' increased over time in the US, I could conclude that, on the sample of 35 cases, cases are becoming more sophisticated in the US. This result seems to be confirmed by the average number of tags 'sophistication' per pages, multiplied by 5 in 20 years. Furthermore, as the overall sophistication indices did not increase in the US over time, I can conclude that claimants in the US are developing their arguments to achieve the same level of sophistication overall. This surprising result could stem from the perception of sophistication by judges. As they are more aware of sophistication methodologies used by claimant, they can become stricter to accept them, which leads claimants to develop their methodologies

<sup>96</sup> The same kind of analysis is currently performed on 8,000 cases using Machine Learning and Natural Language Processing.

<sup>97</sup> This being likely due to the same French perceptions of money discussed *supra*.

<sup>98</sup> For the US, the equation: Win Rate=  $-0.05 \times Risk^2 - 0.6749 \times Risk + 1.2676$ , with  $R^2 = 0.45$  describes the win rate as a function of the claimant's business risk.

more carefully. In other words, over time it takes more sophistication to meet the evidentiary threshold.

The analysis of methodologies used by the claimants leads me to remark that 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. The 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. However, that positive driver remains weaker than an already mentioned negative driver i.e., the absolute value of the claim. Very sophisticated claims have comparable or even lower recovery rates 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.<sup>97</sup>

### 6.2.3 Claimant's Business Risk

As has been explained previously, business risk depends among other criteria on the industry. Thus, I analyzed the cases in our dataset corresponding to the industry in which the parties are active.

In the US, as the business risk increases, the win rate decreases from above 80 % to about 40 %.<sup>98</sup> At the end, the win rate increases towards the business risk level of 4 because it is accompanied by high sophistication levels. While in France, as the business risk increases, the win rate decreases from above 70 % to about 30-50 %.<sup>99</sup> Win rate increases towards the business risk level of 4 because it is accompanied by low quantum values of claim.

The data shows that the grant likelihood is similar for all industries (damages are granted in approximatively one third of all cases), except for construction (where the dataset doesn't contain any winning case). However, when damages are granted, Services and Manufacturing industries get higher recovery rates (80% and 58% respectively), than High Tech industries (11%). In France, a very similar trend exists even though the impact of the claim on the win rate is much stronger. This seems to corroborate my hypothesis: high tech industries are by their nature riskier, and it is more difficult to determine what the real damages are, especially for expectancy damages, as myriad of factors could upset expected gains even if a contract were to be finalized and performed. As such, this intuition is further supported by our results concerning new businesses, which will be presented in a separate article.

Making the parallel here with the study of Pedro Bordalo, Nicola Gennaioli and Andrei Shleifer about the Saliency Theory of Judicial Decisions<sup>100</sup>, I can argue that judges are

<sup>99</sup> For France, the equation is adjusted to Win Rate=  $-0.1209 \times Risk^2 - 0.6749 \times Risk + 1.2676$ , with  $R^2 = 0.99$

<sup>100</sup> A model of judicial decision making in which the judge overweighs the salient facts of the case. The model accounts for a range of recent experimental evidence bearing on the psychology of judicial decisions, including anchoring effects in the setting of

influenced by factors such as the risk and the quantum value of the claim. Indeed, in their article the authors note about the reliance damages that “If this loss is salient in the context of the case, the judge sets high damages (potentially above the assessment) to reflect its perceived severity. If in contrast the loss is not salient, the judge sets lower damages (potentially below the assessment) to avoid an unfairly high penalty on the defendant”<sup>101</sup>.

In fact, looking at the risk indexes that I devised earlier, the data shows that 8 out of 17 claimants (47%) with business risks 1 or 2 are granted damages, compared to only 2 out of 18 (11%) for companies with risk indexes 3 and 4. When damages are granted, those operating in relatively safe businesses have on average a recovery rate of 72%, while those operating in risky businesses have a recovery rate of 31%. It seems, therefore, that my hypothesis is vindicated: judges are reluctant to grant an amount close to the one claimed by the plaintiff when her business is risky, and the contract could have failed to bring the awaited results anyway.

Another explanation might simply be that companies in manufacturing and services are larger and better established, which means that they can more easily show what the real damages are, for the negotiated contract was supposed to be integrated in a well-established business scheme. This is confirmed by the distribution of cases and average recovery rate depending on claimant’s risk/uncertainty index if we assume that the larger the company, the lower the risk/uncertainty – everything else being equal. A further plausible assumption would be that larger businesses are generally less risky, which explains the link between the risk index and the Recovery rate. Further research is required in order to choose between the two alternative explanations although they are probably intertwined.

Whatever the explanation, it must be noted that these results seem to contradict expectations based on the law & economics literature. In fact, claimants with higher risk indexes probably operate in thinner markets, in which there is no easily available alternative to the breached contract; therefore, one could expect the Recovery rate to be higher. As Robert Scott noted<sup>102</sup>, as long as a substitution market exists, the claimant will be granted an amount corresponding to the difference between the contract *ex ante* and the market price *ex post*, along with incidental expenses<sup>103</sup>. Indeed, when the market is well developed, it is not complicated to determine the amount of damages placing the claimant in the situation that would have been his if the promisor had fulfilled his promise<sup>104</sup>. However, the application of the principle of reparation complicates the estimation challenge when there is no immediately accessible market for substitution. In this case, the value of

the performance for the party who has not breached its obligations must be established directly. The beneficiary of the promise may have more difficulty proving his or her loss at that time. By recognizing this, contract law allows the claimant to choose among different ways of measuring (at the time of breach of the contractual obligation) which will give the best financial equivalent of performance, allowing thus a better recovery rate.

Overall, we can conclude that 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.

#### 6.2.4 Law Firm Size

As stated above, I tried to analyze whether the size of the law firms involved has any influence on the final outcome of the case. The win rate increases from 20 percent for smaller law firms to above 40 percent for larger law firms. The calculations of the win rate are made with respect to the following groups of law firm size: 1, 2, 3 and 4.

The recovery rate increases from 18 percent for smaller law firms (categories 1 and 2) to about 35 percent for larger law firms. In the sample, size of lawyers clearly matters for claimants’ outcome. The results seem to clearly indicate that the size of the law firm matters

In fact, out of the 3 claimants with smaller law firms (1 to 2), only 1 was granted damages, whereas out of the 9 claimants with larger/international law firms, 6 were granted damages. More, the recovery rate increased from 18% to 35% between smaller and larger law firms respectively. The results are striking, as the amounts of claims are generally larger for those using large law firms; while, as discussed above, larger claims are linked to lower recovery rates in general, having a larger law firm seems to offset some of, if not, these negative impacts.

For obvious reasons, larger law firms are generally involved in cases with larger stakes, where both the claim and the final grant are higher. In terms of quantum, it should be noted that, on average, law firms of the fourth category obtain \$26.5 million of granted damages, those of the third category obtain on average \$1.2 million, and those of the third category \$40 thousand in granted damages. The link between the firm size and the final grant and the recovery rate might be explained by the higher sophistication of the larger law firms (2.5 on average for smaller law firms and 3.25 for larger ones) or by the fact that plaintiffs solicit larger law firms only when their claims are serious and economically significant.

damages, decoy effects in choice of legal remedies, and framing effects in the decision to litigate.

<sup>101</sup> Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, *Saliency Theory of Judicial Decisions*.

<sup>102</sup> SCOTT Robert E., An introduction to contract remedies in American Common Law, *Contracts class, Columbia Law School*, spring 2016.

<sup>103</sup> UCC, Section 2-712, 2-713 and 2-715(1).

<sup>104</sup> *Freund v. Washington Square Press, Inc.* Court of Appeals of New York, 357 N.Y.S.2d 857, 314 N.E.2d 419 (1974); See also UCC, Section 1-305.

More than the absolute size of claimants' law firms, it is interesting and relevant to compare the relative sizes of claimants' and defendants' law firms. In this analysis, we show that the claimants using law firms of similar size than defendants have, on average, a recovery rate of 46% while a larger law firm could achieve a higher 76% ratio. This result seems fairly logical if we think of the means accessible to different types of law firms. While a very small local law firm operates a few lawyers, with a lot of cases going on, international law firms have the ability to allocate several lawyers to one single case when needed. They also have access to more resources, financial (to appoint experts who conduct highly sophisticated studies) but also humans (paralegals for instance). This paradigm is particularly important when we see cases involving thousands of pages of information. In this scenario, a very small law firm would struggle incorporating every piece of evidence to make its case, which is not the same for international law firms. However, 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. Reversely, we could imagine a plaintiff with a case involving very high quantum to entrust large law firms with its interests. 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 a point where 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. 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 evidence of the money spent, whereas it is much more challenging to evidence and hence to be granted EGD, and even more so ECD.

I can then interpret the results by saying that the reliance damages stemming from the breach of contract are very likely to be granted as long as the defendant is found liable. More, very large law firms have an advantage demonstrating the latter. This is true only for breach of agreement to negotiate claims, which is a litigation very well established before US courts. 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.

6.2.5 Length of Relationship

My initial hypothesis predicated that as more time is invested in negotiations, and parties invest more resources in hopes of eventually reaching a final agreement, courts would be more willing to allow for higher or more diverse damages. But contrary to the case of France, which will be presented below, in the US I failed to uncover a clear positive link between the win rate or the recovery rate and the length of relationship.<sup>105</sup>

As the length of negotiation increases, the win rate does not change significantly. The relatively unchanging win rate can be explained by the fact that its baseline is already very high at 70-80 % and does not allow for much upward growth. The high baseline win rate is consistent with the historical tendency of the United States to make grants more liberally than France. In fact, while damages were granted in 36% of cases were negotiations were less than one year long, they were granted in 13% of cases were negotiations were more than one year long. Concerning the Recovery rate, there doesn't seem to be an obvious difference between the treatments of the two subsets of cases.<sup>106</sup>

Table 7: Length of Agreement/Negotiation and recovery rate in the United States

Length of negotiations (in months)	Claim Quantum	Recovery rate (all grants)	Recovery rate (only grants)	Win rate	N
[0 ; 6 ]	3,773.00 K\$	0.14	0.55	0.75	4
] 6 ; 12 ]	168,023.00 K\$	0.34	0.50	0.67	3
] 12 ; 48 ]	4,662.00 K\$	0.60	0.79	0.67	3

In France, however, I observe that the length of the relationship between the parties has a key influence on the win rate and the recovery rate. As the length of relationship increases, the win rate gradually increases from 40% to

80%. More, when the relationship lasts less than 12 months, the recovery rate is around 12% while this number climbs to 51% when the relationships last more than 12 months.

<sup>105</sup> The equation: Win Rate= 0.0217 × [ Length ] ^2 - 0.1138 × Length+0.7757, with R2 = 0.77, describes the win rate as a function of the length of agreement in the United States

<sup>106</sup> However, there seems to be a, albeit insignificant, positive correlation between the Recovery rate and the length of negotiations in this case, the coefficient being approximatively 0.3.

Table 8: Length of Agreement/Negotiation and recovery rate in France

Length of negotiations (in months)	Claim Quantum	Recovery rate	Recovery rate (only grants)	Win rate	N
[0 ; 6 ]	7,448.93 K\$	0.05	0.11	0.50	6
] 6 ; 12 [	28,103.34 K\$	0.18	0.31	0.57	7
[ 12 ; 48 ]	5,065.33 K\$	0.35	0.48	0.71	3

Therefore, French law and US law seem to behave similarly for the length of relationship, except for the win rate in the US which stays relatively steady. The impact is striking for French civil law, the likelihood of a judge to find the defendant liable is converging towards around 80% in both jurisdictions for the longest relationship in my sample lasting more than 12 months.

It can be concluded that the length of relationship is a positive driver for the recovery rate and the win rate in both jurisdictions. More, both the single-variable analysis and the two variables analysis controlling for claim value show the driver for the win rate is stronger for France than the US.

### SECTION 7: EMPIRICAL CONCLUSIONS

This empirical study highlighted certain converging trends between outcomes under U.S. and French law. Future studies with larger sample sizes will increase the robustness of these findings. Nevertheless, some results are already consistent enough across the board to be worth mentioning and to suggest interpretations or further research.

Our five factual variables impact the ability of a plaintiff to obtain the desired outcome of a litigation both in terms of win rate and recovery rate in the following ways:

- Quantum Value of Claim (negative impact);
- Sophistication of Claimant's Methodology (positive impact);
- Claimant's Business Risk (negative impact);
- Law Firm Size (generally positive impact); and
- Length of Relationship (positive impact).

Overall, the data shows a clear evolution of both the win rate and the recovery rate in the US and French jurisdictions. While the two trends go into opposite directions, they seem to converge around similar and stable win rates and recovery rates. The explanations of this shift are probably linked to globalization of legal practices in certain areas of business law and to converging social and economic evolutions in these two jurisdictions.<sup>107</sup> Those explanations are still to be detailed and confirmed. I do think, however, that my empirical analysis provides a motivation for further research into the shifting perceptions governing the decisions on liability and allocation of damages as a remedy for contract breach.

<sup>107</sup> As evidenced in my other writings.

### SECTION 8: GENERAL CONCLUSION

Breaches of agreements to negotiate cases presented several useful qualities for my goal of standardized damages methodologies. First, agreements to negotiate are widespread contracts in many business situations, particularly M&As for our interests, allowing for more effective sample composition. Secondly, by virtue of their prevalence those agreements have a considerable degree of international homogeneity across global jurisdictions that makes them excellent subjects for comparative studies.

Having decided on a test subject, I designed hypotheses of the relations between five factual variables and the judicial outcomes. Next, I searched and identified over one hundred relevant cases, and built a comprehensive database. Then, I used the database to validate or amend the initial hypotheses, to identify patterns or correlations, and to suggest damage ranges or scales. The resulting sample demonstrated that while at first sight, they seemed opposed, US and French case laws, in several fields, have been converging rapidly over the last 25 years. This may lead to increased commonalities in their respective statutes and legislation, perhaps particularly in the application of "penalty clauses" and "liquidated damages clauses."<sup>108</sup> Damages guidelines and schedules for the recovery of economic losses may consequently be built based on prior awards of damages for breach of contract. The introduction of such schedules could benefit academic researchers, parties redacting contracts, and attorneys in their pre-litigation discussions or arguments before the court (or arbitral tribunal).

The occurrence of these clear converging trends with respect to the win rate, and even more with respect to recovery rate between the United States and France, leads me to hypothesize that globalization is at work. It is no surprise that with the advance of logistics, transportation, telecommunications and other digital technologies, the world is becoming smaller and the borders of international business transactions are becoming more and more invisible. It is also a fact that companies and big conglomerates have enhanced their global presence. This forces professional services providers to become global as well in order to continue to be competitive and to serve their clients as they chase business opportunities abroad. As a result, in recent decade's law firms, investment banks

<sup>108</sup> Likewise, it wouldn't be too surprising to eventually see such convergence in terms of heads of damages (e.g., expectation consequential damages = *lucrum cessans*).

and accountancy firms, among other services providers, have had to adapt themselves to this new reality. This powerful globalization trend, which started in the 1990's and is still ongoing, shows no signs of weakening despite recent political postures.

With my findings in mind, reiterate practical recommendations to parties who wish to improve their likelihood of success and the quantum recovered in damages for lost profits:

- Contracts should be drafted so as to make it clear to the parties (and the courts) that there will be foreseeable lost profits in case of breach. The safest way is probably to include liquidated damages clauses in contracts. In this way, the parties also express in the contract their wish to reduce the risk inherent in their business.
- If parties still wish to go to trial, they should be prepared to meet higher standards of evidence and calculation methodology to prove both their expectation damages and their consequential damages than they would need to prove their reliance damages. Expectation damages may be the default rule in the U.S., but they are more difficult to prove—and thus less generously compensated—than reliance damages.<sup>109</sup>
- When courts calculate damages, they rarely (or at least only superficially) rely on objective methods and quantitative techniques. Contract theory is beginning to look at techniques that have long been used in disciplines outside the law, including economics (game theory where information is asymmetrical), econometrics (probabilities and tests of contract theory), finance (market multiples); marketing (price positioning of a brand); organizational environment (ISR and ESG indices), behavioral techniques from sociology and psychology. A reasoned use of certain of these techniques would result in considerable progress towards making judicial decisions less arbitrary and more predictable. This study has attempted to contribute to that goal.

At this point, additional empirical analysis should be performed in more depth to achieve statistically representative samples and more width in order to explain the judicial behaviors observed. Eventually, the use of damages schedules combined with artificial intelligence technology (such as natural language processing, machine learning, and deep learning) would give rise to predictive systems. Such systems would make it possible to assess—in advance, instantaneously, and with a high degree of accuracy—both the probability of obtaining (or being ordered to pay) damages and the quantum of those

damages. The development of predictive technologies could prove useful for all participants in and users of judicial systems. Furthermore, if they were broadly adopted, these AI technologies based on schedules would trigger a virtuous cycle: assisting judges in making their discretionary decisions, providing data to improve the models, giving more incentive for judges (and all stakeholders) to use them and so on. In that, their use would drastically increase judicial legitimacy and reduce uncertainty. It will make predictions more reliable, streamline unnecessary litigations, and eventually generate value for society far beyond what can be imagined today.

## ACKNOWLEDGEMENTS

*The author would especially like to thank the Chair of his advisory committee, Professor Avery Katz, and his advisors, Professors Eric Talley and Alejandro Guarro, who actively contributed to his research at Columbia Law School. The author also thanks Professors Jonathan Askin, Laurent Aynès, Aditi Bagchi, Mark Barenberg, George Bermann, Patrick Bolton, Anu Bradford, Richard Brooks, David Capitant, Suzanne Carval, Robert Cottrol, Albert Choi, Joan Divol, Philippe Dupichot, Bénédicte Fauvarque-Cosson, Joel Feuer, Martin Gelter, Ronald Gilson, Victor Goldberg, Jeffrey Gordon, Anne Guégan, Georges Haddad, Stephen Halpert, Geneviève Helleringer, Sophie Hocquet-Berg, Patrice Jourdain, Jeremy Kessler, Caroline Kleiner, Alan Koh, Russell Korobkin, Yves-Marie Laithier, François-Xavier Lucas, Stefano Manacorda, Daniel Markovits, Sophie Robin-Olivier, Christina Ramberg, Alex Raskolnikov, Joel Reidenberg, Paul Rogers, David Rosenbloom, Darren Rosenblum, Gregory Rosston, Jeffrey Fagan, Carol Sanger, Robert Scott, Ruth Sefton-Green, David Schizer, Steve Thel, Ran Tryggvadottir, Christina Tvarno, Liliane Vana, Pascal de Vareilles-Sommières and Timothy Webster for their generous advice. Many legal practitioners had the kindness and patience to participate in the field interviews: Forrest Alogna, Laurent Aynès, Claude Bendel, Cyril Bonan, Emmanuel Brochier, Matthieu de Boisseson, Pascal Chadenet, François Chateau, Adam Emmerich, David Katz, Alain Maillot, Olivia Maginley, Ryan McLeod, Jonathan Moses, Christian Pierret, David Rosenbloom, Paul Saunders, William Savitt, Richard Shepard, Christine Sévère, attorneys, Claire Karsenti and Maurice Nussenbaum, expert witnesses, and Norbert Giaoui, general counsel. The author is grateful to Jennifer Bader and Diego Lobo who provided excellent legal translation and editing assistance, and to his research assistants, mostly brilliant students at or graduate from Columbia, Paris 1 and Yale: Mohini Banerjee, Salomee Bohbot, Unique Cheon, Tonbara Ekiyor, Joan Gondolo, Megan Ji, Jordan Johnson, Philippe Lachkeur, Mickael Le Borloch, Sophie Moskop, Ana Carolina Nakamura, Vasile Rotaru and Swara Saraiya, who provided substantial assistance in extracting, coding and analyzing hundreds of cases.*

--0--

## How to cite this article

Giaoui, F. S. (2022). Breaches of Agreements to Negotiate: A Comparative Analysis of Damages. *American Journal of Trade and Policy*, 9(2), 77-98. <https://doi.org/10.18034/ajtp.v9i2.623>

<sup>109</sup>Indeed, upon a finding that the preliminary agreement binds the parties, its breach is likely to end up in compensation for reliance

damages (negative interest) in France and expectation damages in the US.