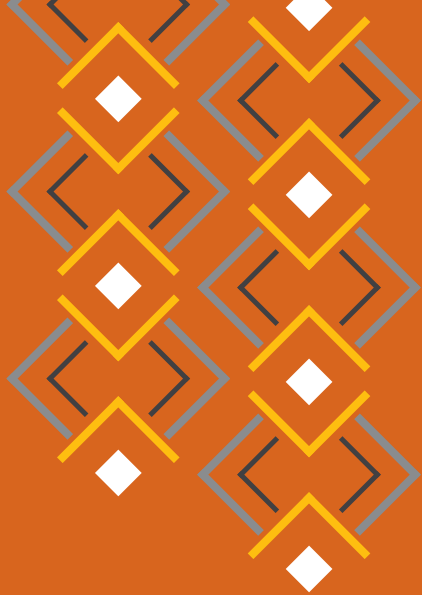
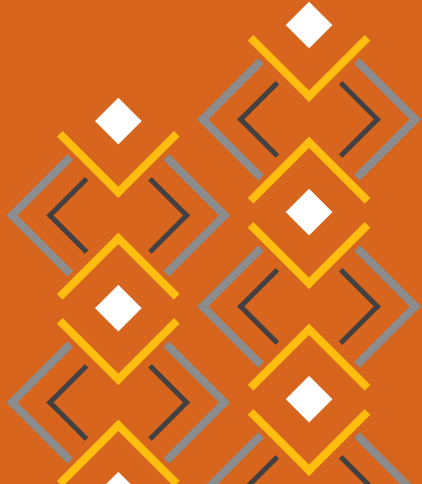


PwC International Arbitration Damages Study



2023 Update





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Introduction

In 2015 we first started looking at publicly available international arbitration awards to understand how claimants, respondents, and tribunals approach the assessment of damages in matters taken to international arbitration. We updated that research in 2017, and are now pleased to present this additional update, which covers awards from 1990 to 2022.¹

A consistent and continuing trend is the disparity between damages claims put forward by claimants and the corresponding damages calculations put forward by respondents. While this, in part, may be due to the nature of the claims in the sample (i.e. claims that have proceeded to hearing and award stage rather than settling beforehand), it highlights the challenges for tribunals in reaching a final damages award when such a broad range is presented to them.

Claims profile

Our study now includes over 180 awards dating from 1990 to 2022. The majority of the awards in our study are administered by the International Centre for Settlement of Investment Disputes (ICSID), as these awards are generally more accessible.

Methodology

We analysed publicly available international arbitration awards to the end of 2022.² Our sample includes only those awards where a tribunal carried out an assessment of damages. Awards in which the tribunal found in favour of the respondent on jurisdictional or liability grounds, and therefore did not proceed to the damages stage, were excluded from the sample. We note that the majority of the cases in our sample related to investment treaty arbitration, since these awards are more often than not publicly available. Where commercial arbitration awards are publicly available, this is typically as a result of subsequent legal proceedings where the award has been disclosed as part of those proceedings.



181

Number of awards



June
1990

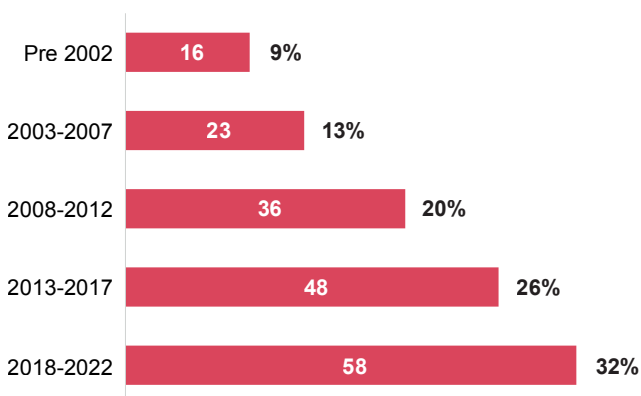
Earliest Award



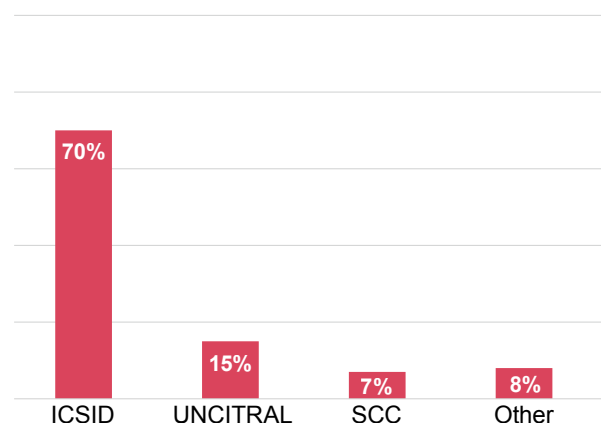
December
2022

Latest Award

Awards by Five Year Period



Awards by Arbitral Institution



¹ In 2020, we also studied non-public ICC Awards with the assistance of Queen Mary, University of London. This study can be found on [pwc.co.uk](https://www.pwc.co.uk).

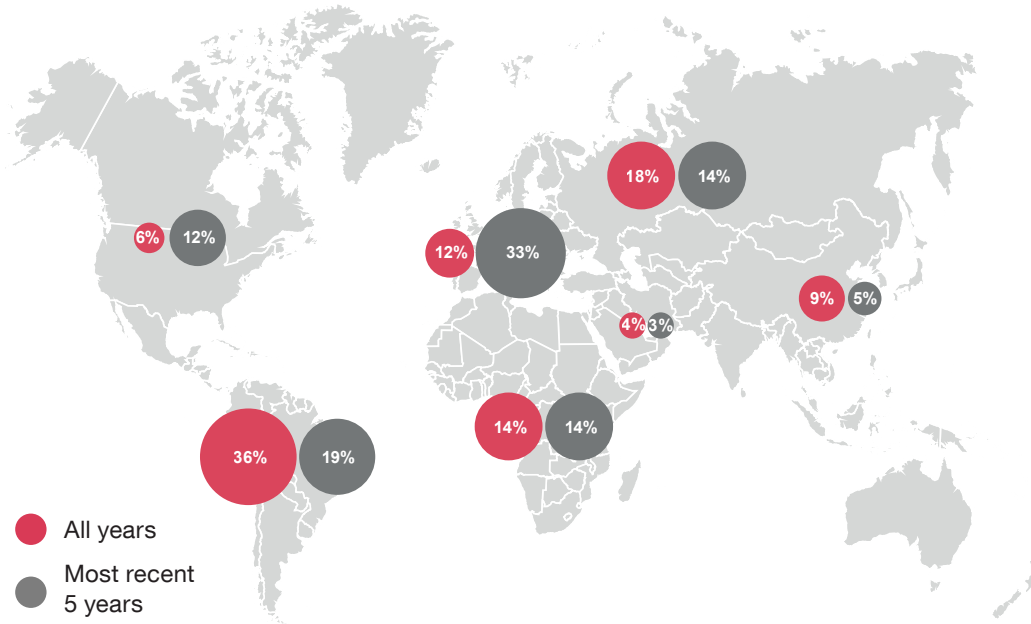
² Our sources for awards were primarily Italaw and ICSID.



Which regions and industries are most frequently represented?

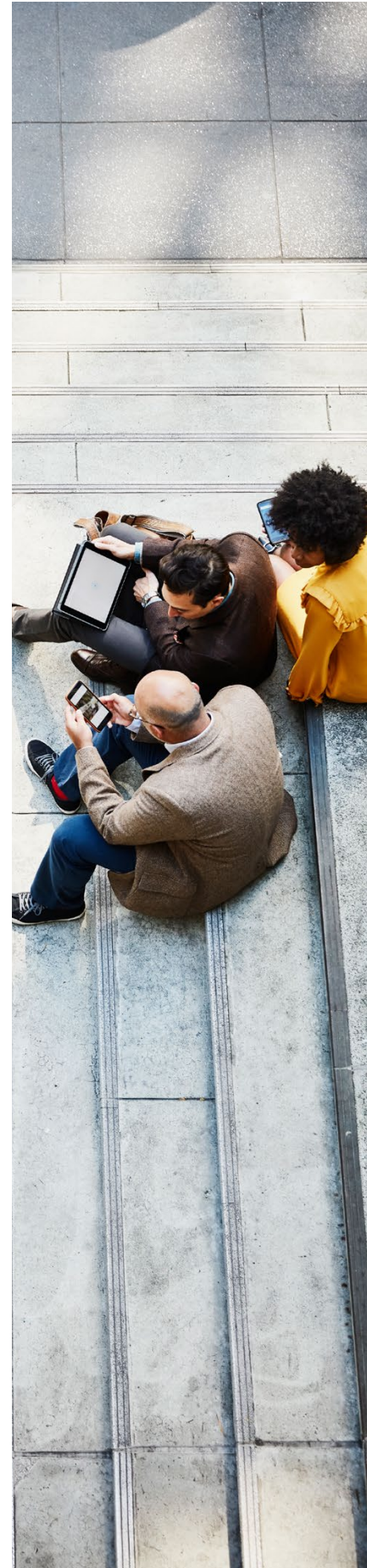
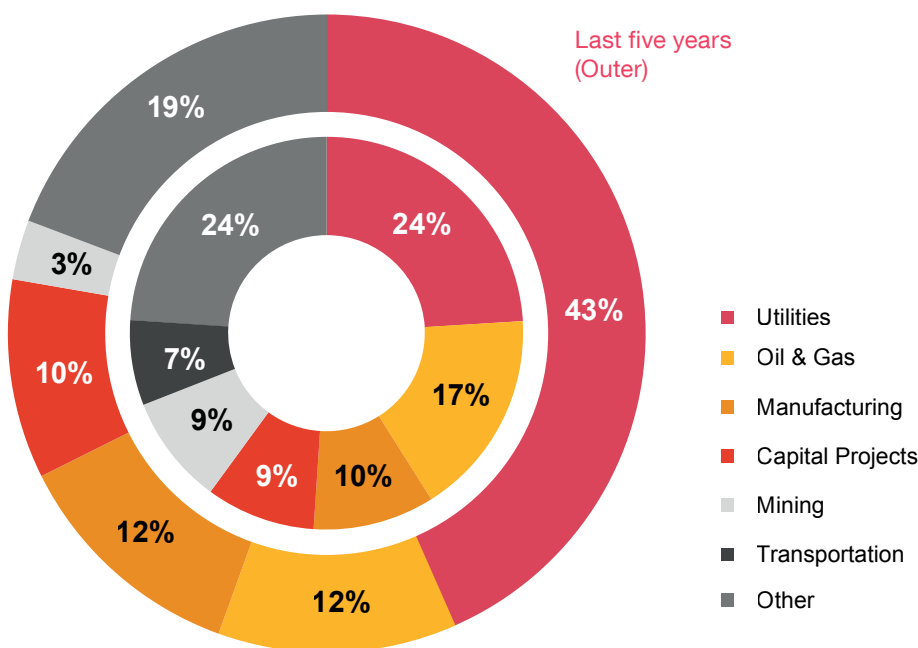
The region most frequently represented in the awards across the study period is South America, followed by Central and Eastern Europe and then Africa. However, we note that, contrary to historical trends, Western Europe was the most frequently represented region in the most recent five year period. This is almost entirely due to the large number of Energy Charter Treaty (ECT) claims brought against Spain in recent years.

Awards by region



The energy sector is the most frequently represented industry in the awards, with utilities and oil and gas together comprising over 40% of awards over the study period. In the most recent five year period, this increased to 55%, again largely due to the ECT claims brought against Spain.

Awards by Industry



Diversity in international arbitration

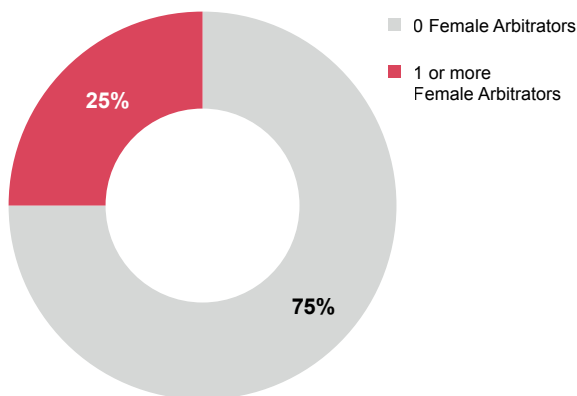


Are diversity efforts working?

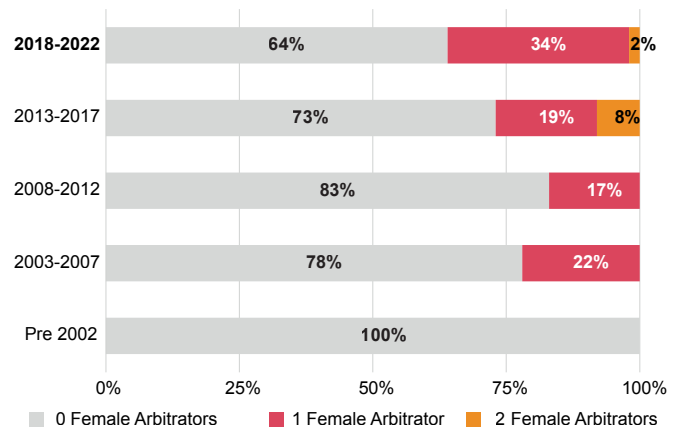
For this year's study, we also evaluated the diversity of tribunals and experts in the award population to assess the impact of recent gender diversity efforts such as the Equal Representation in Arbitration pledge and the Equal Representation for Expert Witnesses pledge.

We first identified all instances in our sample of awards where a tribunal included at least one female panel member. On an overall basis, we identified that a quarter of matters had a tribunal with one or more female members on the panel. When we look at this information over time, the trend is increasing - in the most recent five year period, just over a third of tribunals included a female panel member.

Proportion of tribunals with at least one female member



Percentage of tribunals with 1 or more female arbitrators

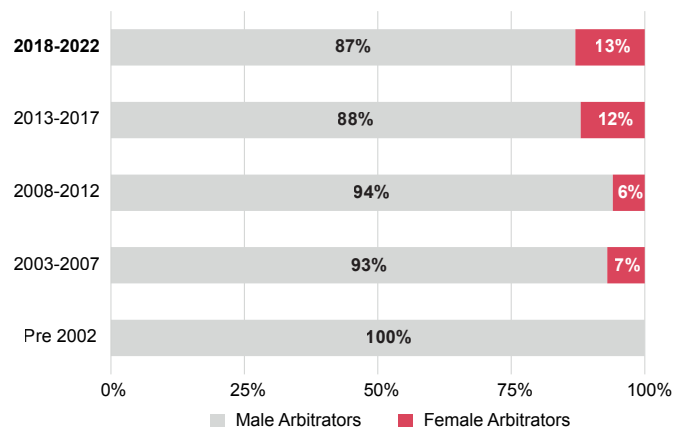


We see few cases where a tribunal includes more than one female panel member - in fact we identified no instances of this in our sample prior to 2015. Therefore, when looking at the proportion of available tribunal seats occupied by a female member (where almost all tribunals have three members), the numbers show there is still a long way to go. On an overall basis, 50 of the approximately 540 tribunal seats covered by our study have been occupied by a woman (approximately 9%), and in the most recent five year period the proportion was 13%.

We also note that of those 50 tribunal seats occupied by women, approximately two thirds of these seats were occupied by the same two individuals, with 17 individuals taking the remaining slots. That is, only 19 individual female arbitrators have participated in the 181 tribunals in our sample (consisting of 543 tribunal seats).

When it comes to quantum expert witnesses, it is harder to get a complete picture from the data as in some instances only the expert's firm is identified rather than the individual expert(s). However, over the course of our study when an expert was named, we observed that approximately 10% of matters in our sample included a female expert engaged by either party (9% for claimants and 6% for respondents). In only one case were female experts engaged for both the claimant and respondent (though both acted as joint experts rather than as the sole damages expert).

Overall gender split for tribunals





What damages methodologies are most frequently put forward?

Our research shows that parties put forward a range of different methodologies for calculating damages. We have grouped these methodologies as follows:



Income approach:

This approach converts anticipated economic benefits (or losses) into a net present value at the valuation date. The most common form of this approach is the discounted cash flow (“DCF”) methodology.



Market approach:

This approach assesses value by comparing the business or asset being valued to similar, comparable businesses or assets in the market.



Asset approach:

This approach assesses the market or book value of assets, net of liabilities.



Cost approach:

This approach, as used in this study, reflects a variety of methods to capture historic costs, cash flows, or invested amounts (often referred to as ‘sunk costs’).



Other:

This category includes approaches not covered by the above-referenced categories, for example contractually-specified calculations or a “reasonable return” approach.

We note that parties often use multiple methods for calculating damages, therefore we have sought to capture the methodology indicated by the party as their primary methodology. We also note that in some instances a methodology was not clearly indicated, or in the case of respondents, a damages calculation was not put forward (rather, the respondent only commented on the claimant’s calculations).



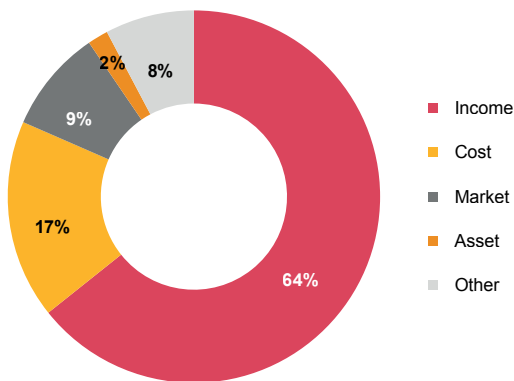
Damages Methodologies



Which methodologies are used by claimants?

By far the most common methodology used by claimants for their primary claim is the income approach, with it being used in almost two thirds of cases overall. The cost approach comes second, being used by claimants in just over 15% of cases. The market and asset approaches are infrequently used at only approximately 9% and 2% respectively. With respect to the market approach, this infrequent use is typically due to a lack, in the claimants view, of sufficiently comparable companies or transactions.

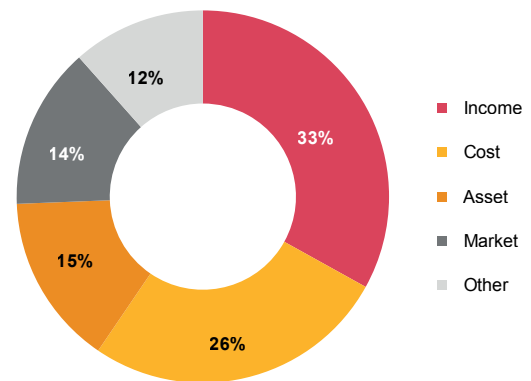
Primary Method Used by Claimant



Which methodologies are used by respondents?

In contrast to the overwhelming use of the income approach by claimants, we see respondents using a range of methodologies when responding to claims. The income approach is still the most common method, but is used by respondents in only a third of cases overall (i.e. half as much as claimants), while the cost approach is used in almost 30% of cases (i.e. almost twice as much as claimants). The market and asset approaches are used more frequently by respondents, each being used approximately 15% of the time.

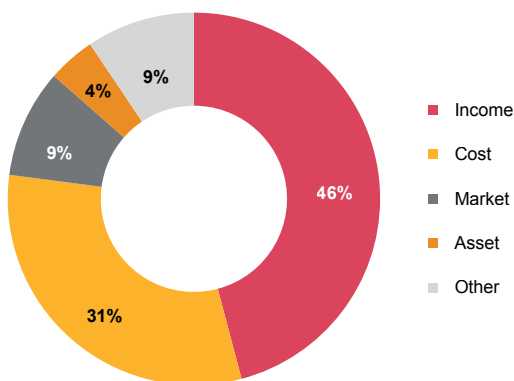
Primary Method Used by Respondent



Where do tribunals land?

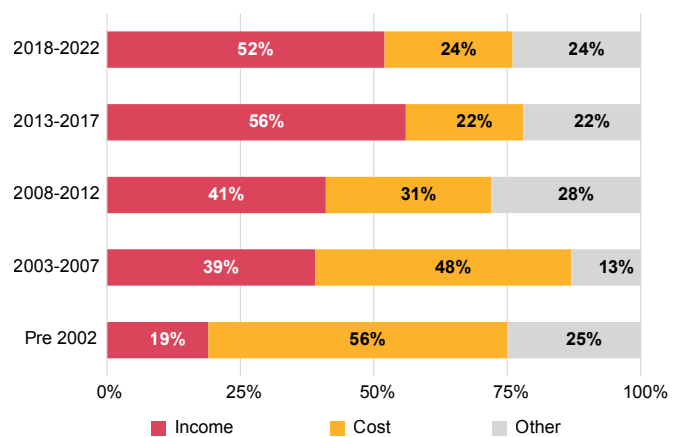
Tribunals often base damages awards on an income approach, considering it in almost half of cases. They also regularly consider the cost approach (approximately a third of the cases in this study).

Primary Method Used by Tribunal



However, we see over time that tribunals have become increasingly comfortable with the income approach, and have consequently decreased their usage of the cost approach.

Primary Method Used by Tribunal Over Time

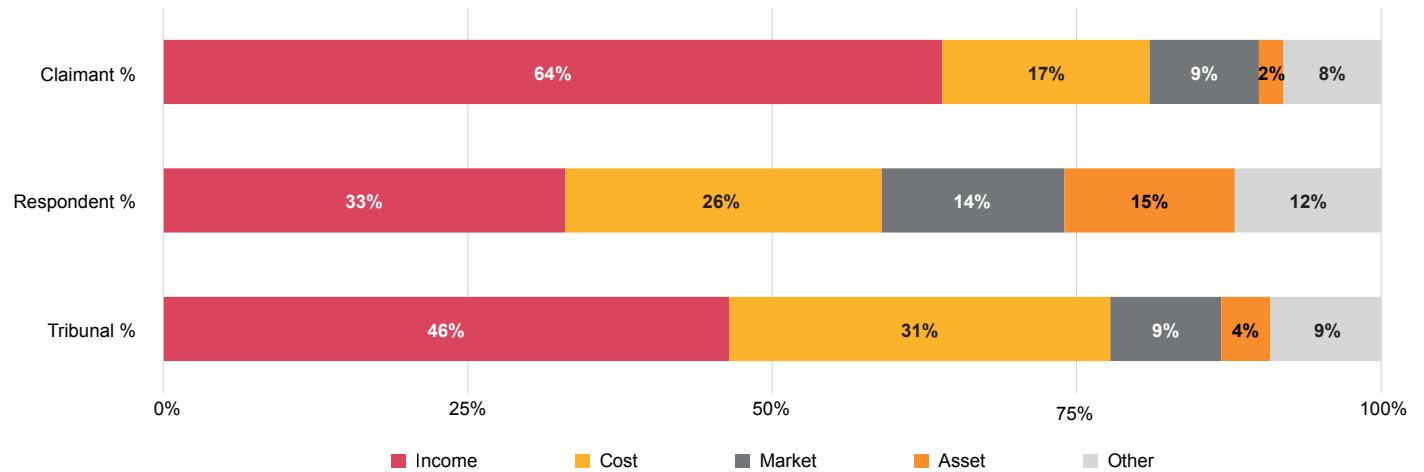




Why the difference?

As shown on the prior page, claimants, respondents and tribunals place different weight on the various damages methodologies.

Comparison of Primary Methods



Differences in approach between claimants and respondents are often the result of different instructions with regard to legal assumptions. For example, the parties may differ in their view as to whether the alleged expropriation was legal or illegal, which can then impact the methodology used (i.e. an income approach versus a 'sunk costs' approach).

Parties may also differ in their opinion of the perceived feasibility of an investment and the likelihood of it becoming or continuing as an operating enterprise. This also contributes to the differences between approaches proposed by claimants and approaches ultimately used by the tribunal. Typically where we see tribunals reject the income approach, it is because the tribunal has considered the approach to be too uncertain or speculative, for example because the company or asset in question is a new venture or does not have a sufficient track record of operations.

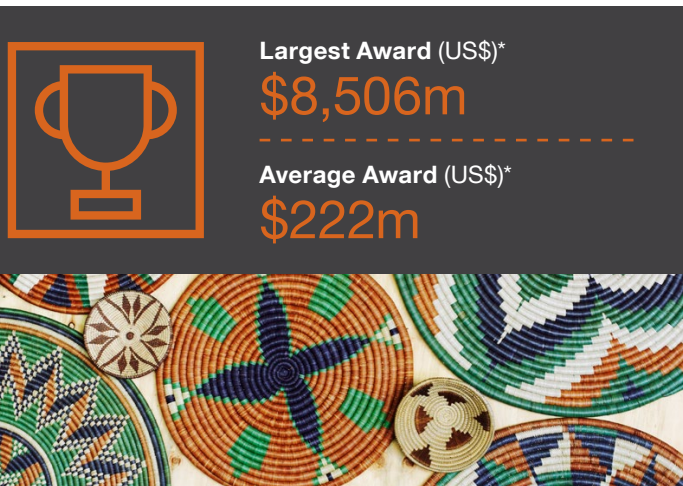


Award Outcomes

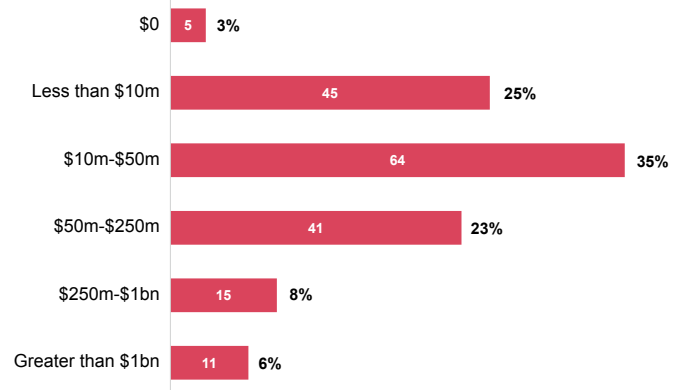


How much do tribunals award?

We see a wide range of award values in the claims we reviewed, ranging from no damages awarded to over US\$8.5 billion. However, there are few awards at this end of the scale, and the average award was approximately US\$222 million. The majority (approximately 65%) of awards are less than US\$50 million, and only 6% of awards are over US\$1 billion.



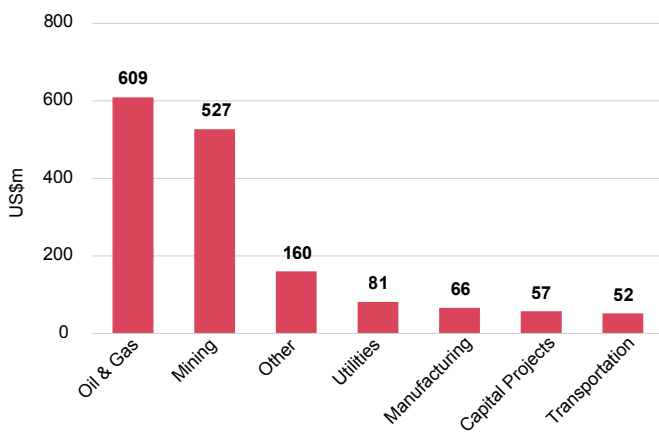
Awards by Award Range



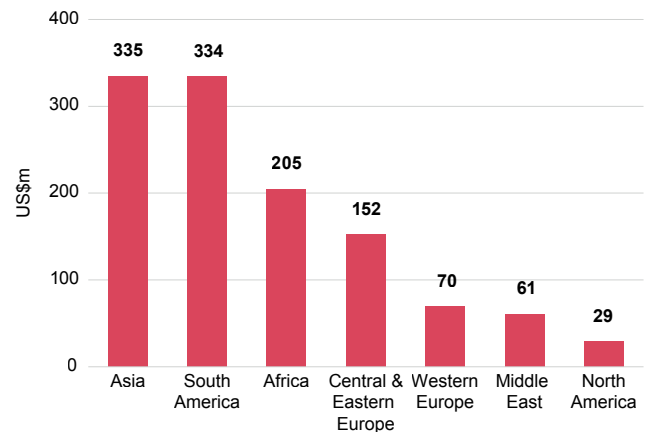
On average, the largest awards are in the oil and gas and mining industries. The average awards in these industries (approximately US\$609 million and US\$527 million respectively) dwarf the average awards for other industries (which average less than US\$100 million).

On a regional basis, large award averages were seen in South America and Asia, primarily driven by some large oil and gas/mining awards.

Average Award by Industry



Average Award by Region



3 Adjusted for inflation. Excludes an award of US\$37 billion in the Yukos matter.

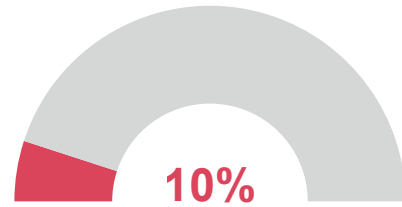




How successful are claimants?

Typically, respondents put forward much lower damages amounts when responding to claims. On average over the course of our study, when a respondent does put forward an alternative damage calculation, that damage calculation is only approximately 10% of the amount put forward by the claimant. This amount has fluctuated over time, ranging from 3% in 2003 - 2007 to 30% before 2002. This is due, in part, to the lower number of data points as respondents often do not put forward alternative damages amounts.

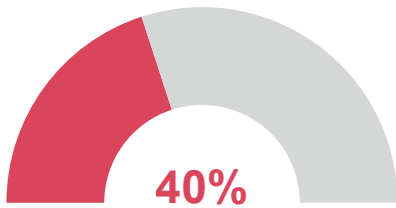
Average Respondent Amount as a % of Claimed Amount



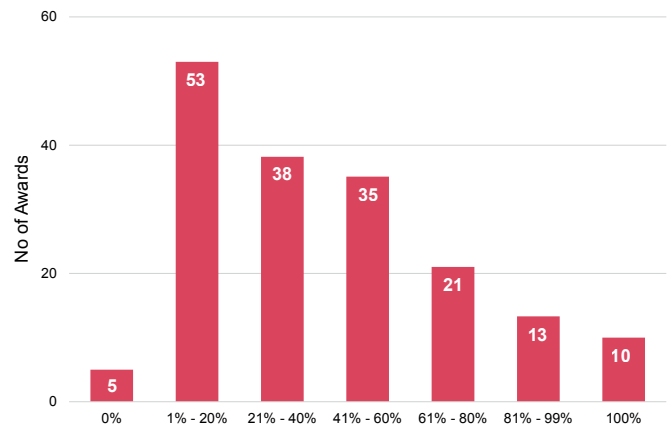
But how does that translate to the final award? On average, claimants that advance to a damages award (i.e. where a claim is not first rejected for liability or other reasons) receive approximately 40% of the amount claimed. This rate has fluctuated over time, and in the most recent five year period was higher - at almost 50%.

For awards that have overcome the jurisdiction and merits hurdles, it is relatively rare to see claimants receive all or nothing in an award (only approximately 8% of cases). Rather, claimants most commonly receive between 1% and 20% of their claim, and the majority will receive between 1% and 59% of their claim.

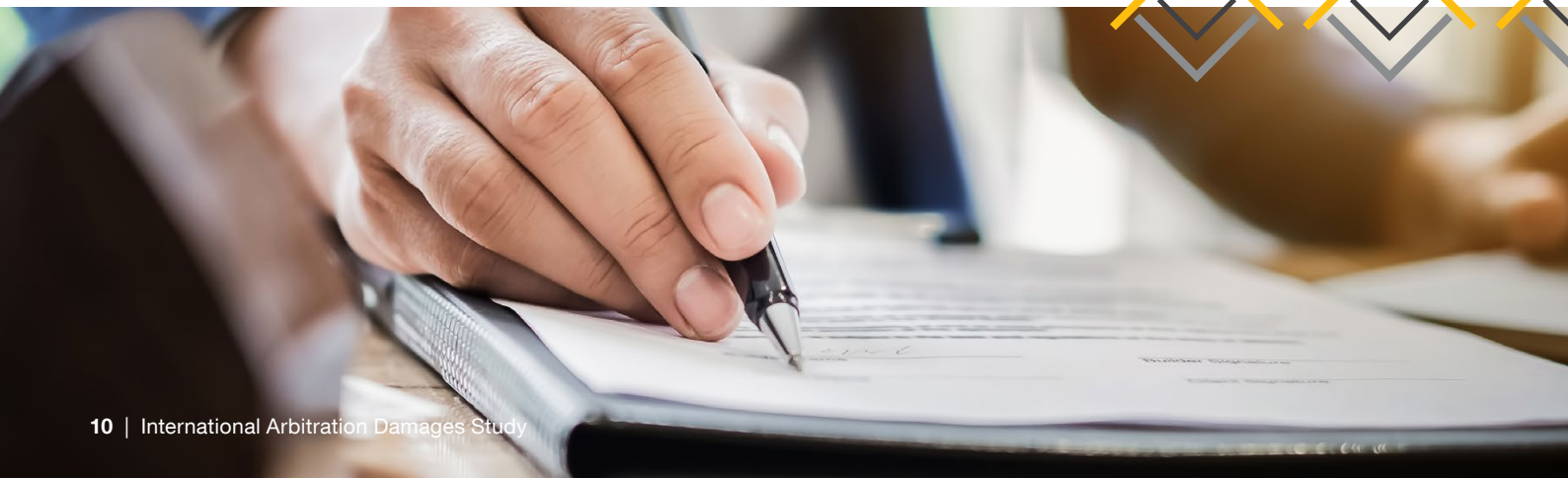
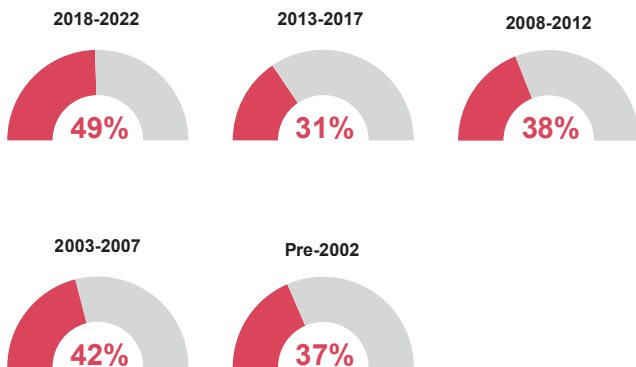
Average Award as a % of Claimed Amount



Awards as a % of Claimed Amount



Award as a % of Claimed Amount



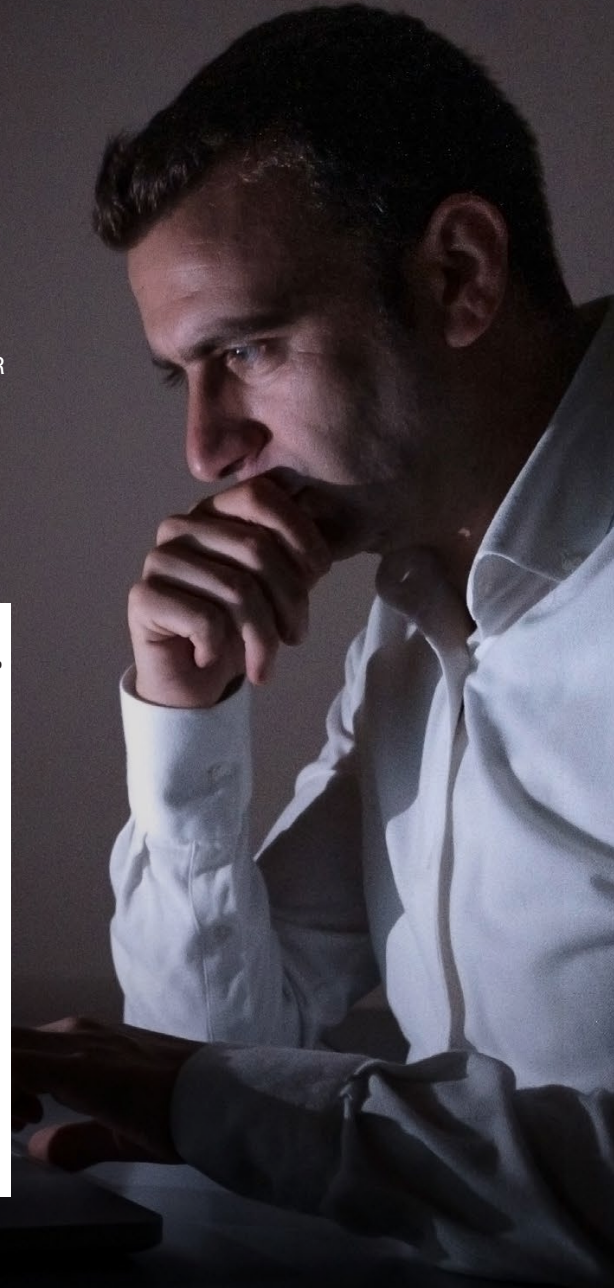
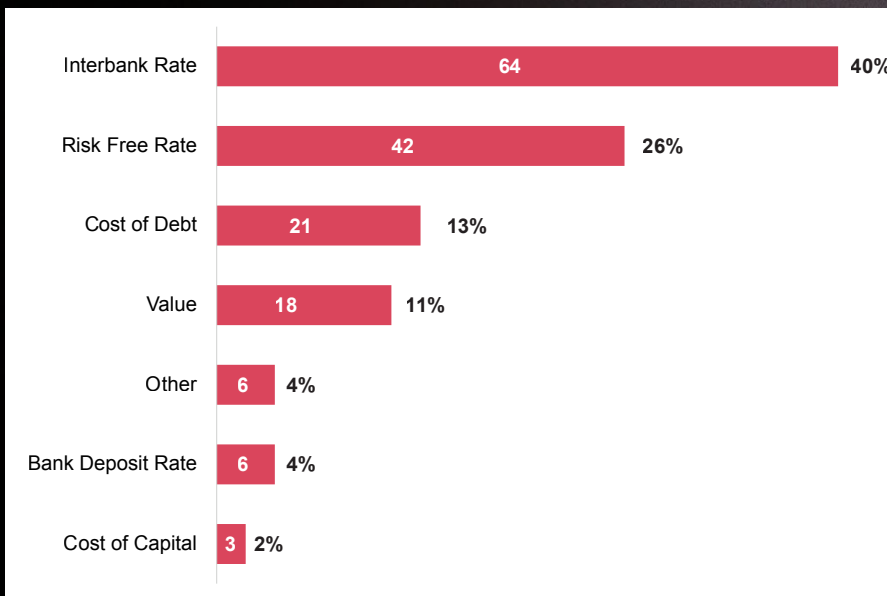


How are interest rates formulated?

When determining the rate to be used for pre-award and post-award interest, we tend to see tribunals select a benchmark rate and then apply an uplift (e.g. LIBOR + 2%) to fit the benchmark to the facts of the case. The most commonly used benchmark by tribunals is an interbank rate such as LIBOR or EURIBOR (approximately 40% of cases). This is followed by the use of a risk free rate such as US Treasury bills or the bond rate for the applicable country. We also see the claimant's cost of debt or a market cost of debt being used, with the assumption that the claimant could have used the awarded funds to pay down debt.

Given the expected end to the publication of USD LIBOR rates, we expect to see tribunals move away from interbank rates. It is yet to be seen whether tribunals will increase their use of risk free rate benchmarks or will move to LIBOR replacements such as the secured overnight financing rate (SOFR). In the study period we saw only one award where this was considered, and in that instance the tribunal simply noted that if LIBOR were to be phased out, interest should be based on whatever mechanism was put in place to replace LIBOR.

Interest rate benchmarks used for pre-award interest

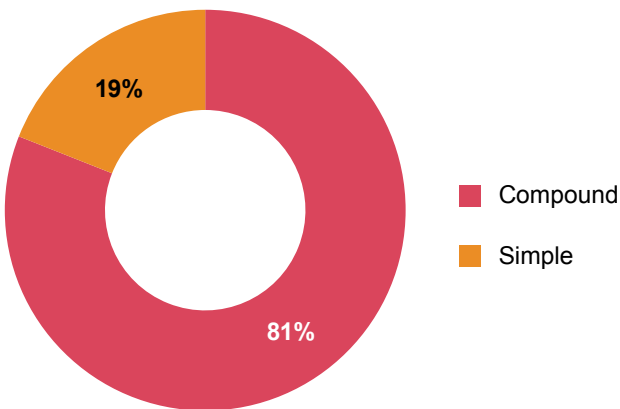




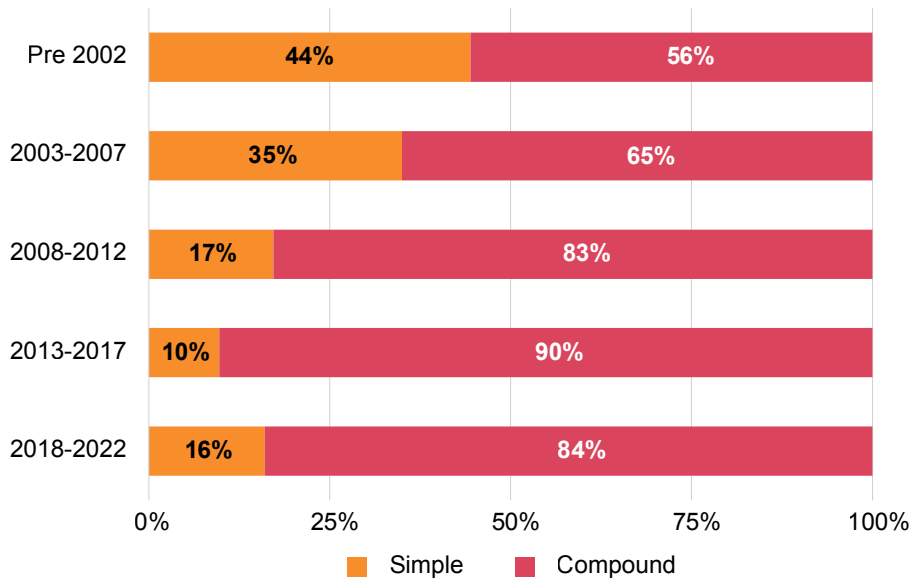
How often is interest compounded?

Tribunals overwhelmingly allow for compounding of interest, with compounding used in over 80% of cases for pre-award interest (and similarly for post-award interest). In older awards, tribunals leaned more towards simple interest, but within the last fifteen years it has fallen out of favour. In instances where we do now see the use of simple interest is typically for specific reasons, such as it being the method stipulated in a contract between the parties or the method required under the relevant law.

Compounding method used for pre-award interest



Compounding method used for pre-award interest



How we can help



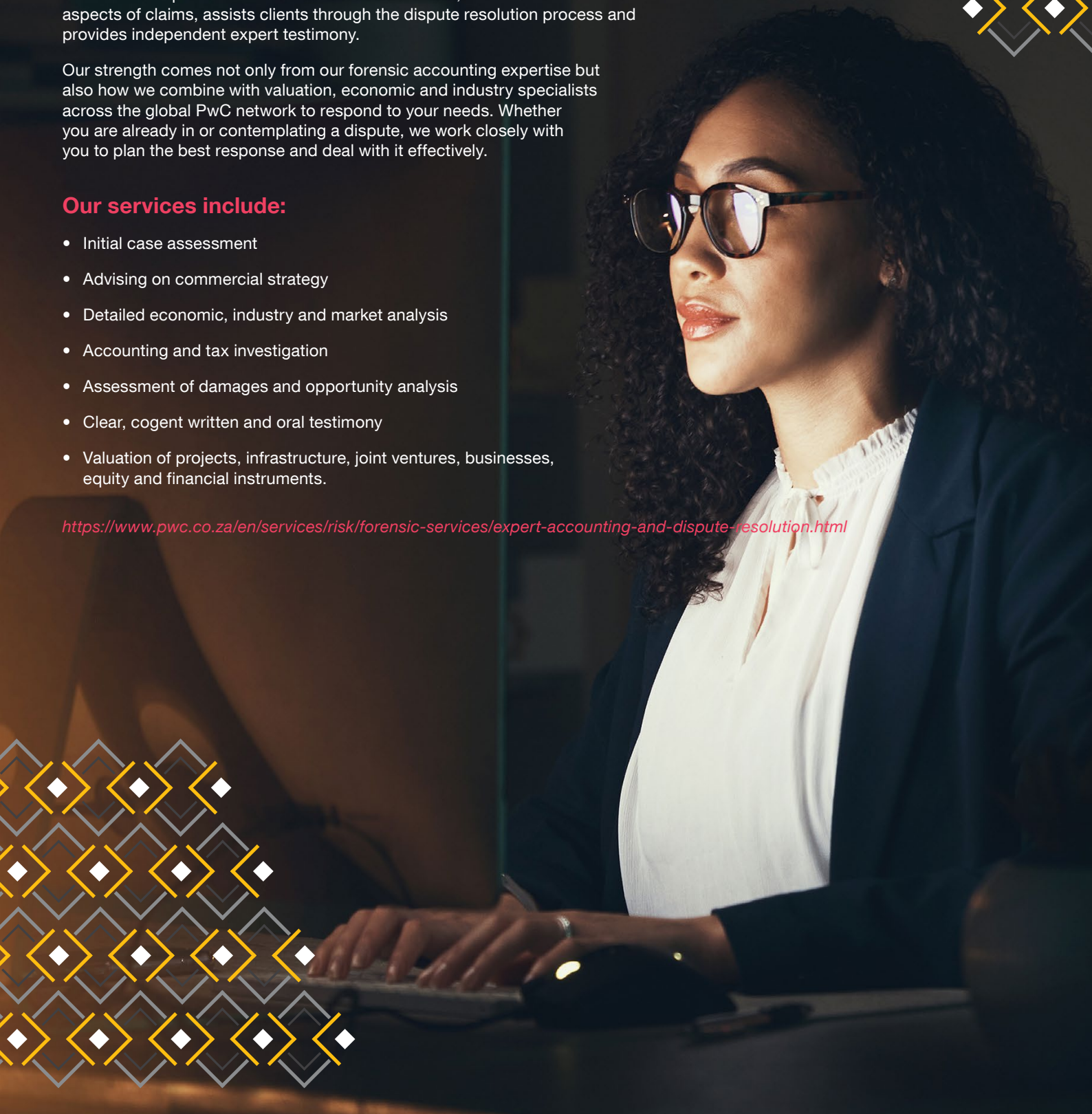
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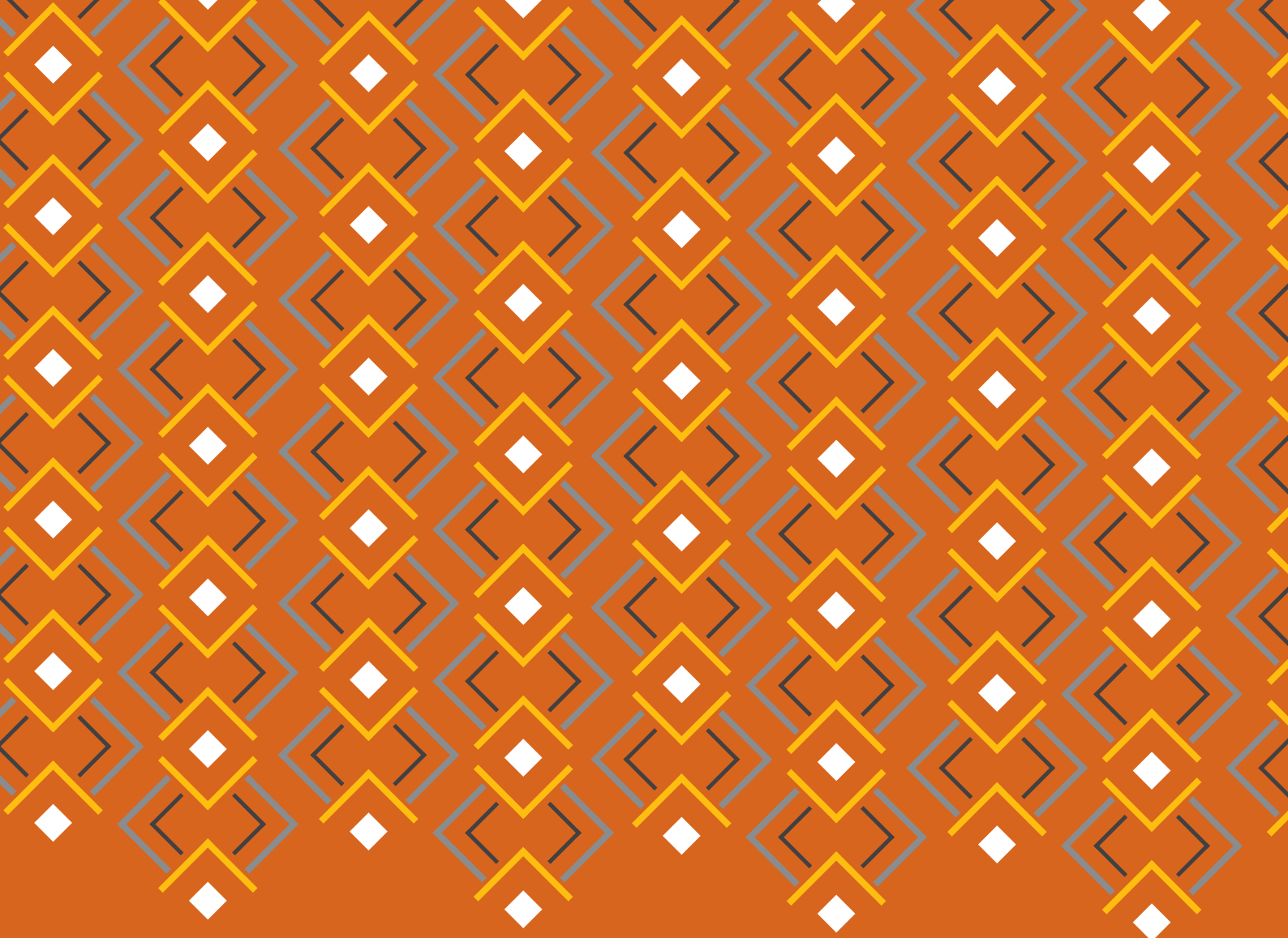


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