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"Your expert works with you, not for you"

How to make the most of damages assessment experts in international arbitration proceedings

In September 2017 we held a very successful AnwaltSpiegel Roundtable in cooperation with our partners Accuracy, Deutsche Institution für Schiedsgerichtsbarkeit (DIS) and the Association of Corporate Counsel Europe (ACCE). With Dr. Ekaterina Lohwasser and Roula Harfouche (both are partners at Accuracy in Munich and London respectively), Dr. Anke Sessler (Partner at Skadden Frankfurt office) and Dr. Clemens-August Heusch (Head of European Litigation, Nokia) on the panel we discussed the question "How to make the most of a damages assessment expert in international arbitration proceedings?"

In addition to this, Thomas Wegerich interviewed the four panelists in order to make the most important findings of the event accessible to the readers of Dispute Resolution.

DisputeResolution: *Ms. Lohwasser, how would you describe the major tasks of a damages assessment expert?*

Lohwasser: Part of the work that the damages expert performs is "visible" to the tribunal. This type of work usually includes:

- submission of expert report(s) where the expert explains his or her opinions and critiques those of the opposing expert;
- potentially pre-hearing meetings between experts of each party and joint statements of experts;
- expert testimony at the hearing where the expert is examined, cross-examined and re-examined;
- potentially expert conferencing or "hot-tubbing".

A lot more of the work done by the expert is not "visible" to the tribunal or the opposing party but can be essential to the success of the case.

One of the key "invisible" contributions of a quantum expert is his or her active role in the internal debates involving the client and counsel, in particular with regard to the interaction between the legal arguments, the "but for" scenario and the quantum of damages. Internal debates help rehearse and strengthen case arguments. It is definitely better for contradictions to be raised and dealt with internally (among the client, counsel and expert) than having to face them for the first time when dealing with the opposing party.

Further examples of an expert's discrete work: quantum experts typically assist counsel on the damages part of legal submissions, on drafting disclosure requests from the opposing party in respect of financial documents and on preparing counsel to cross-examine the opposite experts.

DisputeResolution: *Ms. Harfouche, at which stage of the proceedings should a damage assessment expert be called in?*

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Harfouche: It is a difficult balance to strike for the client and counsel between incurring the costs of getting the expert involved early; and involving the expert later in the case if needed, when the case theory is sufficiently developed, thereby saving those costs in case the action does not progress.

This is particularly the case in bifurcated proceedings, where the tribunal hears and makes an award on liability in the first phase, and then on quantum in a separate subsequent phase if needed.

I will nevertheless say: get your expert involved as early as possible. Most experts will say that, and this is not to create extra work for ourselves. Here are the main reasons why it is best to involve a quantum expert early:

- They can provide a ballpark figure for damages. This will save the client from bringing in claims that are not worth the costs and time involved.
- Based on the early analysis of the expert, counsel can adjust the legal theory of the case, to ensure there are no inconsistencies between:
- The theory of loss developed by counsel with the client and the arguments and claims amount used in the request for arbitration; and
- The expert's views on the likely loss amount and rationale for the loss.
- The expert's analysis, interpretation, and insight, seen through the lens of his/her area of expertise will be useful for counsel and the client to develop the but for scenario, challenge and debate it internally, and therefore make it more robust.
- It can be considered as a form of insurance: the client pays a limited cost early on for the expert's work, and it is protected against finding that the quantum is not worth the action or that it does not have the right information to estimate it.
- If the client is reluctant to spend money or time early on, then at the very least, counsel should interview, together with the client, and select the "right" quantum expert, at the very least to ensure they are not engaged by the other party. Having to find an expert at the last minute is risky.

DisputeResolution: *Ms. Lohwasser, please describe from your quantum expert's perspective the key points of best practice for the appointment of a damages expert in arbitration proceedings?*

Lohwasser: In my experience here are the major points of best practice:

Make sure your expert assists you with the legal submissions. Financial experts are not lawyers, but can assist you by reviewing and commenting on the parts of submissions related to the damages and the "but for" scenario: first submissions, responses to the opposing party or post-hearing briefs.

Keep the expert informed on any new facts and any changes in direction on the legal theory, pleadings and arguments, as they may affect quantum, in particular the "but for" scenario. Effective and timely communication with the expert gives him or her the possibility to develop an informed and factually supported opinion that will be most useful to the client. For example, changes in fact witness statements are normal, but the experts should be informed about them, preferably not at the very last minute. I think every expert has his or her own horror story to tell in this regard. A rush to perform all the necessary changes in the valuation model and the report following last minute changes in relevant witness statements increases the risk of errors dramatically.

In certain jurisdictions such as England, and increasingly in international arbitration, experts are asked to meet. If possible, ask your expert to meet the opposing expert to discuss areas of agreement and disagreement, and set them out in a joint statement. This is not a negotiation session; its main benefit is to help tribunal focus on the areas of disagreement that mostly affect damages. Ask your expert to set out a list of the material areas of disagreement between the experts, even if there is no meeting of experts. This will help you develop an efficient strategy to cross-examine the opposing expert .

And last but not least a very important, and potentially controversial point: remember that your expert works with you, not for you. Push, but do not push too hard ▷

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for changes you want the expert to make in order to benefit the client, because this may make the expert's opinions vulnerable to attack. Experts value their credibility and their reputation and should not appear to be "hired guns". They need to be comfortable with and believe what they have written, in particular when it comes to being cross-examined at the hearing. Tribunals respect experts who are not puppets, which they can spot from a mile away. Counsels need to educate clients that it is in their best interest to have a strong, independent, expert, not against their interests.

DisputeResolution: *Ms. Sessler, do you agree with what we have heard so far from a lawyer's perspective?*

Sessler: I agree with Ms. Harfouche that damages experts should be selected and involved early. This is important in order to ensure consistency and to have a clear view at the beginning of proceedings which economic arguments are likely to work and which are not. From my experience, finding the right damages expert for a given case can take some time. And it also sometimes takes a certain warm-up time until the cooperation works smoothly. One also must keep in mind that damages experts often need a lot of information from the client, which needs to be well and early organized. I find it useful to have joint discussions with the client and the expert or with other experts at certain stages, especially with regard to the definition of the task and the discussion of the result.

It is my experience that working with experts is very time-consuming and has to be organized and steered with care.

DisputeResolution: *Mr. Heusch, please tell us from your in-house perspective about the most efficient use of damages assessment experts in practice.*

Heusch: From an in-house perspective, active communication and engagement is crucial for the efficient use of a damages assessment expert in arbitration (and litigation). It would be a mistake for a client to view the expert as some sort of sub-contractor for the outside counsel and to take a passive approach. A reliance on outside counsel to communicate with the expert can unintentionally cause the counsel to act as a filter of ideas. Direct communication with the expert and his or her team is therefore valuable for the client at all stages of the case but especially at an early stage when the outline of the expert report is being developed. Allowing for direct and active communication between the client and the expert shall not exclude the counsel but rather allow all three parties to collaborate and jointly contribute to the damages assessment.

Engaging the expert and his or her team as a client also helps the expert to understand specific client requirements, for example potential spill-over effects to other client business that need to be taken into account but the outside counsel might not be fully aware of. Active communication with both the expert and the counsel can thus help the client to avoid lengthy revisions of expert reports when submission deadlines are approaching fast.

Finally, active engagement with damages assessment experts is also a great opportunity for the client to increase related in-house competence that can prove valuable in future cases.

DisputeResolution: *Thank you very much for participating in this interview and for sharing your practical insights with our readers.*