Risky Business: the Consequences of Counting on Liability Alone

By Greig Taylor and Alexander Lee

One of the more difficult situations that can confront a tribunal is when liability is found but the tribunal is not persuaded that the claimant's damages evidence is persuasive. There might be concern over the amount claimed and the fact that several of the assumptions that were built into the damages model are unsupported or even contradicted by the factual findings. But the respondent has chosen not to present an alternative damages amount, or even a damages expert, and so there is no evidence for more credible assumptions or for the quantum of damages that would result from the application of those substituted and accurate assumptions. This can present a real dilemma for the tribunal. How will it arrive at a correct award without evidence to support the appropriate quantum?

The purpose of this article is to discuss and understand these issues, to determine the impact they might have on the arbitral process, and to see what lessons can be learned.

The History of Expert Witnesses and Evidence

Expert witness testimony has been a feature of court proceedings for several centuries, with some examples reaching as far back to the 14th century. Expert testimony has covered a wide variety of topics, from surgeons debating causes of death to merchants describing the standard procedure for writing notes of exchange. Early on, experts were summoned to testify by courts or appointed by courts to special juries to decide on specific matters requiring their expertise. However, as court procedure evolved, the parties themselves would begin to appoint experts who could provide testimony to courts directly. Today, it is more common to have party-appointed experts rather than experts appointed directly by the triers of fact.

Although their testimony is seen as a form of opinion evidence, expert witnesses have been admitted when they have been shown to possess specific knowledge that was necessary for the triers of fact to reach a decision and when the absence of such knowledge would result in a failure of justice. The *Folkes v. Chadd* case of 1782, where the plaintiff submitted the testimony of a well-known engineer on the cause of a harbor falling into a state of decay and the defendants objected that the testimony was a matter of opinion, is regarded as the first case to firmly establish the role of expert witnesses in court proceedings.[1] Because of this and other decisions on the role of experts in court proceedings, expert witnesses became the exception to the "opinion rule," the exclusionary rule that restricts witness testimony to facts rather than opinions.

To justify this exception, it became important to demonstrate to the court the necessity of the expert opinion. When that necessity is not demonstrated, the court will typically view opinion evidence as superfluous and dismiss the expert. In the United States, this necessity principle has evolved into the "Daubert Standard" named for the *Daubert v. Merrell Dow Pharmaceuticals* case from 1993. In *Daubert*, the U.S. Supreme Court determined that the triers of fact should act as gatekeepers regarding the expert evidence and provided several guidelines for admissibility.[2] Subsequently, in *Kumho Tire Co. v. Carmichael* (1999) the U.S. Supreme Court expanded the application of the Daubert Standard to all expert witnesses appearing in federal courts and reaffirmed that courts should consider factors outside of those laid out in *Daubert* where appropriate.[3] Rule 702 of the Federal Rules of Evidence which governs the testimony of expert witnesses in U.S. federal court was amended in 2000 to reflect both *Daubert* and *Kumho.*

Although the trajectory of expert witness testimony in arbitration has generally followed that of court proceedings, there are some differences because of the generally more flexible nature of arbitration. For example, while experts have a duty to assist the tribunal and experts are required affirm this duty before providing testimony, tribunals are not required to adhere to a *Daubert*-like standard when qualifying expert witnesses.[4]

The Benefits of Experts and Expert Reports

Experts have traditionally been sought out for many different reasons, but ultimately can be distilled into the following: a party seeking an independent, expert opinion to present to the court or tribunal in order to support their position or claim; a party seeking to refute a point being made by an opposing party that is the subject of expert opinion; and/or the trier of fact requires an expert opinion on a matter beyond their own experience and expertise. Experts can be hired for one or any combination of these reasons. However, it is universally accepted that the duty of the expert witness is to aid the triers of fact, be

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they a court or an arbitral tribunal, in matters beyond the tribunal's expertise and within the expert's experience.

In the context of expert damages reports, the opinion is typically presented as either a single number or a range of numbers, depending on how the expert chooses to present his or her conclusion. The rest of the expert report then supports this conclusion and sets forth a roadmap for its readers to understand the steps required to reach that conclusion. By exchanging and refining expert reports, opposing experts can help narrow the breadth of issues and focus on the material items on which damages or value turn. Ideally, it is this productive exchange of ideas where opposing conclusions are contrasted with one another and weaker arguments are set aside, that ultimately assists the trier of fact in reaching a damages opinion if liability is found.

A Different Approach

Sometimes, however, the affirmative damages position is unchallenged by expert testimony. That situation is uncommon but may occur for several reasons. As examples: (1) opposing counsel may believe that their liability position is strong enough that they do not need to directly address quantum issues; (2) the defendant or respondent may have a time or cost constraint that is limiting their ability to pay an expert to reach an independent conclusion; (3) the opposing expert may have argued internally that he or she were at an information deficit that would have prevented them from producing an independent conclusion that satisfied his or her professional responsibilities; (4) the amounts are *de minimis* and would not justify the cost of hiring an expert to produce an independent opinion on those amounts; (5) the quantification of damages is so simple that an expert report would be redundant to their pleadings; or (6) opposing counsel believes that a *Daubert*-like challenge may result in the expert's opinion being rendered invalid.

If an opposing expert is engaged, they are directed by the strategic priorities of their clients and counsel and, either through omission or instruction, may forgo presenting an independent opinion in favor of focusing exclusively on critiquing the work of their counterpart. This may be due to their belief that a strong enough critique could disqualify the damages conclusion presented to the trier of fact, resulting in an inability to award any damages. While most international valuation standards allow for reports that exist solely to comment on another valuation (e.g., Canadian Institute of Chartered Business Valuation standards refer to these as "limited critique reports"), as discussed later they may not aid the trier of fact in determining what the damages or the value should be. Alternatively, when an expert declares that they have not provided a conclusion as a result of their inability to reliably quantify damages, their issue will typically relate to the alleged speculative nature of the inputs to the damages or valuation calculation. However, barring some fundamental flaw in the analysis of the expert putting forth a value, we do not believe it is advisable for an opposing expert to simply refuse to submit conclusion on damages or value without a thoroughly researched and well-supported defense of that choice.

Advantages or Disadvantages for Counsel?

The choice to forgo presentation of an opposing conclusion on value may be a strategic one, but it also creates opportunities and challenges for claimants. Next, we summarize a number of viewpoints from discussions we have held with leading international arbitration counsel.

The first opportunity is to clearly communicate to the tribunal that there is only one number, or a range of numbers, in the record regarding damages or valuation. By refusing to offer a number, the opposing side or opposing expert is limited in their ability to argue what the damages or valuation could or should be, which makes claimant's number in a sense the default.

Another area of opportunity, and potential challenge, lies in cross-examination of the opposing expert, when presented. The aim of any effective cross-examination is to impair the opposing expert's credibility in the eyes of the triers of fact. One strategy is to clearly establish that the opposing expert did not present their own valuation or methodology. Establishing this fact early on is important in setting the tone vis-à-vis assisting the trier of fact. Then, the exploration of why such a conclusion was not presented. Was it an instruction from counsel? If so, how does this comport with the expert's duty? If it was not an instruction, why did the expert choose not to present a value conclusion absent the explicit instruction? In an arbitration setting, tribunal members are familiar with the Daubert Standard and the fact that courts have taken a dim view of experts who did not render a relevant opinion. Therefore, whether the expert was under instruction or not, the message from claimant's counsel is that the opposing expert is not fulfilling their duty to the arbitrators.

Building on this cross-examination strategy, the next step is to attempt to blunt the critique points the opposing expert raised by showing that the opposition's lack of a conclusion also meant that their comments lacked an underlying methodology. The aim here is to highlight the contrast between one expert, who based their analysis on a replicable methodology that the arbitrators could examine, and the opposing expert, who did not. When successfully deployed, this strategy demonstrates that the opposing expert's critique was performed without a methodology. That then forces the opposing expert to rely more on less quantifiable factors like "professional judgment" or "past experience" to justify their critique.

However, this cross-examination strategy is not without its drawbacks. The cross-examination must not deflect attention from the initial damages or valuation conclusion or unnecessarily highlight any potential issues with it. In

addition, an experienced opposing expert will take any opportunity upon cross-examination to repeat and reinforce their critique points. One approach is to conduct a limited examination that simply ignores a few of the critique points. That is difficult to do as there is always a temptation to go after everything, but ignoring an argument can sometimes be the best way to demonstrate that it should not be taken seriously. Therefore, though it may seem like an advantage if the other expert does not present a competing number, it does present tactical issues that normally do not exist.

What Is a Tribunal to Do?

Faced with a situation in which a respondent either does not present a damages conclusion or even retained an expert, and in which claimant's counsel has effectively highlighted this and taken the position that there is only one amount in the record if liability is found, how does a tribunal respond? To try and answer this question, we surveyed several leading international arbitration arbitrators, who cited two recurring themes: (1) the importance of maintaining neutrality and impartiality and (2) having an understanding of the applicable rules under which they must operate.

In cases that have clear issues with regard to the claimant's calculation, but in which there is no opposing damages conclusion in the record, the tribunal is left in the uncomfortable position of potentially having to step into the shoes of the expert witness. Yet even if there is a clear path based on the facts and the assumptions to establishing a different quantum some arbitrators may feel that they are overstepping and "putting their thumb on the scale" if they take charge in this way and so assist the respondent in reducing the damages to the detriment of the claimant. Therefore, those arbitrators might hesitate before taking steps to establish a quantum different from the one presented by claimant wherein respondent's expert has not presented a contrary figure.

To put it more strongly, one arbitrator felt that the respondent's choice not to present a damages case might be viewed as a foreclosure on their right to respond, thereby effectively endorsing the claimant's position should they prevail on liability, stating:

> If respondent wanted to gamble on just presenting on liability and not providing an opposing quantum for the damages they have to bear the consequences if they lose on liability.

However, not all arbitrators think alike. Another arbitrator specifically referenced their ability to choose another approach if they believed that the claimant's analysis was not flawless, but that the respondent has not convinced the arbitrator that damages should be set to nil:

> Having been invited to consider its critiques of the claimant's analysis, I think the respondent opened the door for an alternative calculation, so I do not think that I am stuck with the claimant's number or nothing. And in this particular scenario, as the critiques are in the record, I think I would have the power to apply the critiques to come up with an alternative calculation.

Turning to the various institutional rules under which arbitrators must operate, it may be argued that certain rules grant arbitrators substantial powers and authority to enable them to reach a conclusion they feel is warranted. For example, the International Chamber of Commerce's rules empower arbitrators to "establish the facts of the case by all appropriate means," and the International Centre for Dispute Resolution's rules expressly empower arbitrators to direct parties to "focus their presentations," etc. Article 22.1(iii) of the London Court of International Arbitration rules go further to make clear that the tribunal can "conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."

> Arbitrators do recognize that these powers should be wielded sparingly, but how many arbitrators would be truly comfortable attempting to manipulate an excel spreadsheet or deriving an entire new damages figure? As one arbitrator remarked, "I never want to hang my hat on something that the parties did not have an opportunity to comment on." The potential solution here is to raise it with the parties for comment rather than let it surface for the first time in an award, yet this may indicate the tribunal's position on liability.

Other alternative solutions to this dilemma include re-opening the hearing and directing the respondent to present a damages conclusion, while also giving the claimant an opportunity to respond; requesting that specific quantum issues be addressed in post-hearing briefs; or issuing a partial award on liability, making findings regarding quantum issues, and then directing the parties to jointly calculate an alternative damages award. Each of these, however, increases the time and costs of the proceeding, a recurring complaint by users of arbitration, and gives the respondent another opportunity to rebut the original damages conclusion which they previously chose not to do, which would likely result in objections from one or both parties.

Therefore, although various tools and techniques are available to arbitrators to deal with such a situation, none is ideal, and outcomes clearly depend on the choices of arbitrators and the selected arbitral rules. Nevertheless, in the interest of preserving the overall fairness of the proceedings, the arbitrators we spoke to universally expressed a clear preference for the respondent's expert to fulfill its duty and submit a proper damages conclusion.

Conclusion

Counsel and experts have many considerations to contemplate in determining whether to submit a competing damages or valuation conclusion. They must assess whether the perceived strategic benefits would be outweighed by the opportunities the conclusion could present to claimant's counsel. More likely than not, it will depend on the choice of arbitrators and the prevailing arbitral rules that guide the arbitrators in enabling them to make their own determination of quantum, or whether they can only award what is in the record. Counsel also has to consider whether they want to place the tribunal in the uncomfortable position of having to make this determination, or potentially increasing the time and cost of the proceeding, which has been the major source of complaint by users of arbitration.

In our view, this tactic does not further the goal of assisting the trier fact in deciding on the appropriate value or quantum, which is at heart the primary purpose of an expert.

Endnotes

1. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1768&context=lcp, page 410-411.
2. https://www.law.cornell.edu/rules/fre/rule_702.
3. https://www.theexpertinstitute.com/a-brief-history-of-expert-witnesses-in-u-s-courts/.
4. https://www.crowell.com/documents/Using-Experts-in-Arbitration_Dispute-Resolution-Journal_Ruttinger-Meadows.pdf.