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Effective Use of Financial Experts in Arbitration

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Introduction

One of the big attractions of arbitration – and possibly one of its most valuable attributes – is the flexibility it offers. Unconstrained by the often detailed rules and procedures of domestic courts, arbitrations can be run as the parties wish: to their timetable, to either established rules of arbitration or to a bespoke set of rules, in front of their choice of arbitrators, and with a panel tailored to the issues in dispute.

There is much debate as to whether arbitration is a cheaper, more cost-effective form of dispute resolution than litigation. In its infancy that was a big selling point. Today, as disputes become increasingly complex and cross-border, many are being arbitrated for a variety of reasons and the balance is much less clear.

Regardless, the cost of expert consultants and expert witnesses can be a significant part of the overall bill to the client. Thus, it makes sense to consider ways to get the best value from experts. This is particularly relevant in the field of financial and economic expertise, which can have a major impact on the overall strategy, costs and outcome of a case.

In this article, we explore the value that can be added to the arbitration process by financial and economic experts (referred to collectively as financial experts in this context), either as consultants, as witnesses, or as arbitrators, and how their skills can be best leveraged to achieve a process and a result that is in the best interests of all concerned. We look at:

1. what constitutes financial expertise and when it makes sense to have "supporting experts" with specific skills or expertise;
2. how a financial expert can support the process of arbitration;
3. the dispute resolution forums in which financial experts commonly operate, and hence the dispute resolution experience they can bring to the arbitration process;
4. the types of disputes where financial skills, knowledge and experience can be most beneficial;
5. what it is that a financial expert can bring to the process, from accounting analysis through to complex modelling and everything in between;
6. the use of financial experts in settlement or mediation settings;
7. how a financial expert can assist the tribunal, either as a party-appointed expert or as an assistant or advisor to the tribunal; and
8. the financial expert as arbitrator.

Along the way, we hope to demonstrate to you that financial experts are not just number crunchers: used effectively, they can not only calculate quantum but can add real value throughout the arbitral process.

Training, skills, knowledge and experience

Many financial experts will be qualified accountants or economists, but the skills associated with these disciplines can be many and varied. Finding the right financial expert will usually depend on how they have developed their expertise throughout their careers. Some will be true financial experts, with a deep expertise developed over the years, but they may never have testified. Some will be "expert experts" whose skills, experience and expertise lie more in acting as experts, and others will be somewhere on the spectrum between these two. All are useful in the right circumstances.

The training that accountants undertake is a rigorous one. It is worth noting first that the title "accountant" is not protected: for present purposes, we say those who are chartered or certified (or equivalent) are "qualified" accountants. Qualified accountants will have undertaken a series of professional exams and on-the-job training, backed up with classroom learning. A degree in accountancy, or indeed any business-related discipline, is not necessary. Both authors are mathematicians by degree (which we appreciate does not dispel the notion of being number crunchers) but there is a wide diversity of education backgrounds in the accountancy profession: musicians and linguists are as at home as physicists and chemists.

Commonly, training is undertaken within an accountancy practice and often within mainstream auditing and accounting, though many train in industry. A trainee accountant will often learn a range of skills, including, for example, financial accounting and reporting, business finance, management accounting, taxation, auditing and assurance. Rather like with law, trainees will learn from experienced practitioners and many will work with a range of different sized businesses across a variety of industries. They learn to record, classify, summarise, analyse, interpret and communicate financial information for a range of businesses. This gives qualified accountants a firm commercial foundation and understanding of how different businesses operate, as well as early exposure to senior management. One only needs to look at the variety of roles accountants undertake throughout their careers to appreciate the depth of experience that may be gained and the versatility of the profession.

Once qualified, many accountants remain in professional practice, while others move into industry roles. Accountants can be found at all levels, and indeed many captains of industry are by training accountants (a survey in 2015 found around a quarter of FTSE100 CEOs were chartered accountants). Most maintain their knowledge and skills through continual professional development. The emphasis is for the accountant to make sure that he or she is up-to-date in the fields in which he or she works. For the expert

accountant, that will include keeping up-to-date with developments in dispute resolution and aspects of the law, as well as international accounting and auditing standards, ethical standards and best professional practice.

Whilst there is no "professional" qualification for economists, invariably you will find many have one or more advanced level degrees (typically Master's or Ph.D.), and as such have a deep understanding of their particular specialism. Learning how to apply economic theory to real-world issues is a key part of their training, and there is an emphasis on conveying what can be esoteric concepts and analysis in simple language for the lay audience. This experience is usually gained in consulting, government or business and often involves compiling economic evidence and presenting that to senior management, regulators, or courts.

A key distinction is between the disciplines of macro-economics and micro-economics. The former focuses on how economies work and how the key economic variables of GDP, inflation, exchange rates, interest rates and unemployment interact and are determined. The latter focuses on how markets work and how prices and margins are determined given the way customers and competitors interact. Often, complex techniques such as econometrics, grounded in economic and statistical theory, are deployed to model market outcomes and estimate or forecast these variables in alternative circumstances.

Economic expertise can be critical in any dispute involving antitrust or competition breaches, where material changes to the competitive environment need to be considered. It can also be essential in a wide range of commercial disputes, in particular those involving a need to deploy statistical or econometric analysis. The academic rigour an economist brings to the table is an undoubtedly powerful force: a command of statistical methods and financial modelling allows economists to unlock the complexity in many issues.

Sometimes counsel and parties need a financial expert who has a very deep, but very specific, expertise and knowledge of a particular industry which is the subject of the dispute or arbitration. This often arises in particularly complex cases. Such experts are qualified by expertise and experience, perhaps in a certain financial product, in a certain type of business or around a certain process. Often they work in industry rather than professional practice. If the expertise required is very specific, the expert may not have given expert evidence before. Counsel will quickly get a feel for how far an expert can go without stepping outside their area of expertise, and sometimes it is worth considering whether two experts can be successfully combined to address the issues in dispute, rather than place the full range and weight of expert evidence on just one expert.

Regardless of their expertise and experience, the party and instructing counsel need to know that when appointing the financial expert as a witness, then his or her evidence, both in written reports and in oral testimony before the tribunal, will be credible, objective and robust. It is essential that expert witnesses understand their duties to the tribunal.

How can the financial expert support the arbitration process?

Before an arbitration process is launched, consideration will have been given to (1) how much a claim is worth, and (2) whether the claim is worth pursuing. There could be many reasons why parties want to bring or resist a claim. On the one hand, enforcing contracts is good commercial management and if that means resolving disputes through an arbitral process then so be it. On the other hand, the time, cost and distraction to the business associated with disputes cannot be underestimated. Decisions can also be influenced by the need for continuing constructive business relationships, and by reputational considerations.

But in reality, how can a sound decision on whether to bring or resist a claim ever be made without a reasonable estimate of the potential financial impact?

The value of the financial expert will depend partly on the stage at which he or she is engaged, together with the flexibility that the legal team is prepared to embrace. Financial experts could be consulted at a very early stage, to obtain preliminary views on the value of a claim as well as the potential evidence that would be needed around quantum matters. Importantly, such experts will have the ability to assist counsel in obtaining such evidence through focused research and analysis. This can usefully inform the decision as to whether to bring a claim in the first place, or the potential exposure if faced with an incoming claim.

Early consultation is not always the case, though. The authors have worked on cases where we were instructed many months into the arbitration process, and calculated that the claim was worth substantially less than the amount claimed. Had that been known earlier, the decision to proceed, or the strategy adopted by either party, may have been very different.

An early assessment by a financial expert can also highlight key areas that will be disputed. For example, in a post-transaction dispute there may be allegations concerning the quality of due diligence performed and the integrity of data shared. In a breach of contract dispute, the financial expert will be quick to hone in on where and why losses arose, and whether or how those losses were mitigated. Bringing a focus to the key issues will enable the expert to identify merits and potential weaknesses in a claim and will assist legal counsel to understand the type of arguments which need to be made. It will also highlight the sorts of evidence that both parties will need to substantiate their arguments and what the expert witness will need in order to opine. The objectivity, as well as the experience, that a financial expert can bring is a useful cross-check in the heat of the arbitration process.

The financial expert may also bring insights without breaching any confidences: having seen or worked in matters opposite the other party's experts, or having been engaged by the other party's lawyers. Understanding how the other side might approach the claim, and where they may focus, can be very valuable for the development of the claim strategy. An experienced financial expert will be able to identify the key points that are likely to be made by the opposing expert. Anticipating what's coming can give counsel and parties a valuable strategic advantage. Likewise, the expert may have been involved in similar cases or seen similar issues, or have specific industry knowledge or access to colleagues who can bring that expertise. It is also possible that the expert will have worked with, or testified before, a particular arbitrator, and so may be able to share his or her experiences and perspectives.

When to instruct your expert is a finely balanced decision. Holding back the instruction can keep costs down, certainly in the short-term. That is attractive. But instructing late in the process brings the risk of an expert witness not having sufficient time to properly consider all the relevant issues. As a result, the expert evidence could be weakened. It is important to remember that the evidence relied on by an expert witness will not be limited to just the parties' disclosure; often the expert witness will want or need to consider documents and information in the public domain. If that consideration is forced to happen for the first time under cross-examination, the expert, and the party's case, may be rather exposed.

Moving on from the instruction, the process is also worth exploring. With the flexibility that arbitration brings, there is no reason for experts to be tied to the somewhat rigid practice of separate reports, exchange of reports, meetings of experts, joint reports, supplemental reports, and so on. The expert's input into the arbitration process could take any form that the parties agree, and alternative, bespoke

processes may bring greater benefit, higher quality evidence, and efficiencies both in terms of time and cost.

By way of example, consider expedited or short-form arbitration. Quantum will usually be calculated using a financial model. There is no reason why the experts cannot be directed to meet and agree the model early in the process. If that model can be agreed, then the tribunal will need only consider the assumptions to feed into the model. The submissions become far simpler: a list of alternatives assumptions, together with each expert's view, can be provided for the tribunal to consider. Cross-examination or concurrent evidence can be limited accordingly. Once the tribunal reaches a view on the alternative assumptions it is a simple task to insert these into the model and thereby to calculate quantum or a suitable range.

There is increasing focus, certainly in England, of ensuring experts are instructed on the same basis and have access to the same information. We have regularly written expert reports only to find, on exchange, that there is very little commonality of instructions and hence limited scope to narrow the issues with the other expert, or that the other expert's report introduces new information or evidence which needs to be considered. Might there be scope within an arbitration process to ensure instructions are identical? Or taking it a step further, and recognising that often it is only through exploring the quantum issues in a case that the correct questions to ask become apparent, should the experts be consulted as to what they should opine on?

The dispute resolution forums in which financial experts commonly operate

Financial experts are regularly involved in many of the common forms of dispute resolution: domestic litigation, arbitration, adjudication, disciplinary tribunals, mediation (or informal negotiations), and expert determination. They also act in different capacities: as a member of a party's team, as a partial expert advisor, or acting as an independent expert providing written and oral testimony in different courts.

That variety of experience is a powerful tool. Experts who have acted in a range of forums and in a range of roles are likely to be the most versatile and flexible in helping you to leverage their skills. They will understand the importance of the private, cost-effective and time-sensitive nature of the arbitral process and will have their own ideas about how they can contribute most effectively.

Many financial experts, particularly those who are qualified accountants, will also have experience in making binding "expert determinations". Determinations are quite common in post-acquisition disputes but can arise in a range of situations. Those who have acted as expert determiner will have an appreciation of running a dispute resolution process (albeit determinations are different to arbitrations), the formalities around such a process, and will appreciate the need to seek counsel's opinion on matters concerning the law. They will also know the importance of receiving concise, clear and robust submissions (or may have experienced the frustrations of rambling, ambiguous and flimsy ones). In this capacity, some financial experts will have presided over hearings themselves. All of this gives the financial expert a useful perspective that other experts may not bring.

The types of disputes where a financial expert's skills, knowledge and experience can be beneficial

Thus far we have considered what skills, knowledge and experience the financial expert has to offer. So how and where can counsel use them to add real value?

The classic example is in the assessment of loss: arising from breaches of contract, breaches of warranty, disputes under bi-lateral investment treaties, or investor-state disputes or similar. There are two main themes of loss to consider: loss of profits – either past or future, and/or loss of value. More often than not it is an accountant who will assess such losses: looking at where profits have been or will be lost, and considering what would have happened but for the breaches or actions of the offending party. Likewise, the accountant is skilled in assessing change or diminution in value of a business or shareholding, and many accountants are also valuation specialists.

Typically, there will be a model underlying the expert's calculations – sometimes simple, sometimes rather more complex – and some of the most satisfying cases we work on are those where we can work closely with the client in developing and testing that model. Stepping back, "loss" is actually a general term and sometimes the expertise required will need deeper consideration. Whilst the accountant is good at the wider commercial considerations, there may be instances where there is a very specific cause of loss that needs a particularly detailed assessment. For example, the assessment of losses in cartel cases needs a focus on how the market and pricing for a product has been affected by the cartelists, and what that market would have looked like but for the cartelists' actions. That detailed modelling is the domain of the expert economist.

Financial experts will deploy economic analysis in many disputes which consider a counterfactual (but-for) world. Economic analysis provides tools to understand how markets and commercial situations may have developed: focusing on understanding not what has happened but why it has happened. This involves analysing not just the outcomes, but what has driven those outcomes: why do consumers choose what they choose? Why do firms behave in the way they do? It can be more complex than a factual investigation, as it seeks to identify relationships and incentives to understand the dynamics of a particular situation. From this understanding of the dynamics, the financial expert can extrapolate to predict how outcomes will change in the but-for counterfactual world. Economic analysis of this nature has a firm place in proceedings: for example, in *Enron Coal v EWS* the UK Competition Appeal Tribunal rejected the challenge that economic analysis (relating to rational decision-making) was not relevant to determining how a buyer would likely have acted in a counterfactual world, when evidence from the buyer himself was also available.

Invariably the quantum calculation will rest on a complex mix of fact and assumption. Both are open to challenge. Facts may be open to different interpretations (or there may be potentially contradictory facts), and different experts may arrive at (or be instructed to use) different assumptions. It is worth spending some time with your expert understanding how those facts and assumptions interact. Usually the expert will not only make an assessment of loss, but know how that assessment would change if different facts or assumptions are adopted. Sometimes called sensitivity analysis, it allows both the expert and counsel to explore which argument and evidence is going to have most bearing on a case, and conversely what has little impact.

Using a financial expert for the quantum aspects of a case is only half the story. There are many instances where counsel could use a financial expert to provide evidence in respect of liability too. One such example is in financial reporting. Ongoing consideration under contracts can be linked to financial performance: if that performance is reported incorrectly, the amounts paid under the contract will be wrong. Licence agreements and royalties are one example, stage payments in long-term contracts is another. Here the right financial expert can opine on whether the reporting was right by reference to the contract or by reference to generally accepted accounting principles, as appropriate.

Another example is the interpretation of contracts especially as they relate to financial issues. It is all too easy for ambiguity to be unwittingly introduced as contracts are drafted: a misplaced comma or a misworded clause can cause ambiguity. In the UK the authors use the *Chartbrook Ltd v Persimmon Homes Limited* as a seminal example during training, where (paraphrasing) the fee due under the contract was a percentage of rental charge less costs and incentives. But is that a percentage of the rental charge after costs and incentives are deducted from the rental charge, or a percentage of the rental charge before costs and incentives are deducted? The House of Lords held that the key question was what a reasonable person would have understood the parties to be using the language in the contract to mean. In situations like this, the financial expert can assist the court or tribunal in interpreting financial language in contracts and the implications of different interpretations.

There are other situations where financial experts can be deployed to address issues around what a "reasonable person" would have done. This commonly arises in professional negligence cases. But it also has relevance within arbitration. If the work of a financial professional is being called into question, or matters rely on what a financial professional did or said, then the financial expert may be called upon to opine on what a reasonable person would have done in the same circumstances.

Other roles for the financial expert

Providing advice or opinion on matters of liability or quantum is a core element of the financial expert's role. However, there are many other aspects of a dispute where the expert can provide support.

We regularly assist parties and counsel in drafting the financial aspects of claims and defences and in particular those that address loss and damage. In preparing the underlying calculations, the financial expert will collect and consider relevant supporting evidence. This will assist the instructing lawyers in identifying documents for disclosure. Also (and just as important), the expert will be able to identify classes of relevant documents that are likely to be in the possession of the opposing party, including those that relate to accounting and management information. This can assist with the preparation of document requests.

At this stage, the expert will also be able to consider any evidence that contradicts their underlying assumptions, and what the implications might be. Invariably the process identifies gaps in the evidence, which allows the party plenty of time to find the additional evidence to support its case, or will inform counsel regarding potential weaknesses and the need for factual witness statements.

With a broad understanding of financial and commercial issues, the financial expert is well placed not only to analyse accounts and other financial documents disclosed in the arbitration, but also to research and collate relevant information that is in the public domain. This is critical: the expert should be well equipped to deal with anything that might be raised in cross-examination. It can also be very useful in assisting counsel in the preparation of the case.

The financial expert can also help by identifying flaws in the other party's arguments and expert evidence and especially in relation to the financial aspects. A thorough review of the other party's expert evidence is vital: the devil is often in the detail. This will be important preparation for counsel. Equally, a review will quickly highlight areas of agreement or near agreement, and so pinpoint where the real battlegrounds will lie. Experienced experts may be able to give a view on how or if agreements could be reached, and so streamline the expert evidence process.

Using financial experts in settlement or mediation settings

Sometimes, often for reasons of cost or speed, or in an effort to preserve relationships, the parties may elect to use a combination of mediation ("Med") and arbitration ("Arb") in order to resolve their dispute. There are a variety of different permutations, generally known as Med-Arb, Arb-Med, Arb-Med-Arb (also known as "AMA") and similar combinations. Effectively, one process is undertaken and if it fails may be stayed while the other is used.

As well as arbitration, many financial experts will have experience of mediation. This could be through preparing advisory reports for mediation, assisting with submissions, or attending the mediation itself in an advisory capacity. Some of us are even trained mediators.

A financial expert who understands both the arbitration and the mediation processes, and who is persuasive and skilled at negotiation, can be a powerful member of a party's team. For example, in one mediation we spent time with the opposing party helping them to understand certain errors in their calculations and we persuaded them that our approach was correct, thereby helping the parties to reach an early settlement.

How the financial expert can assist the tribunal

One of the benefits of arbitration is that it offers the parties engaged in the dispute an opportunity to select the arbitrators. In our experience, and notwithstanding the wide range of commercial disputes that are resolved in arbitration, it is common for the tribunal to comprise entirely lawyers. Whist there will always be legal issues, for which this legal input is essential, the quantum of damages awarded will usually depend upon commercial, financial, and economic arguments.

The tribunal will need to master these other aspects of the dispute in order to ensure that the decision reached is of the highest quality, yet more often than not they will do this primarily through reliance on independent financial expert evidence. This could come from party-appointed experts, or from tribunal-appointed experts.

We have also seen cases where the tribunal recognised their limits on the financial aspects of a case, and asked the parties for permission to appoint their own expert to assist them – not as a witness, but as a behind the scenes advisor and sounding board, to help the tribunal navigate through some very complex documents and calculations. The tribunal's expert can assist in framing questions to the parties and in identifying the key points of difference between the parties' expert evidence. Who can better understand the points put forward by opposing financial experts than another financial expert? The expert can help the tribunal to focus on what really matters in the financial or quantum issues of the dispute, and can also help in the preparation for hearings and in drafting of the award.

A further way in which a financial expert can help a tribunal is where arbitration is used to deal with outstanding issues after the main aspects of the dispute have been resolved. The parties may have reached agreement on all but one or two issues, and rather than void the agreements, they may choose to put just those outstanding issues to arbitration. Outstanding issues will necessarily be specific points and the flexibility of arbitration allows parties to choose an arbitrator who has the right mix of experience, knowledge and skills to rule on the issue or issues.

The financial expert as arbitrator

Throughout, we have looked how financial experts can help in an arbitration process. But why not consider the financial expert as part of the tribunal or even as a sole arbitrator? After all, the flexibility of arbitration allows the parties to select arbitrators of their choosing. If the issues in dispute are predominantly financial in nature, then there may be real benefit in appointing a financial expert to the tribunal. A few very senior experts are already recognising the value that they can bring in that role.

Some financial experts are also members of the Chartered Institute of Arbitrators or other relevant bodies. To join, they will have undertaken studies and exams. Initially, this may have been done for professional development: to better understand the process and rules of arbitration. It is all part of the breadth of experience a financial expert can bring and will certainly assist the expert who is appointed to an arbitral tribunal.

Including a financial expert as a member of the tribunal is a useful and prudent step. There is an increasing scrutiny of decisions, and arbitrators from a legal background are recognising that the credibility of the panel and the award could be enhanced by diversifying the make-up of the panel to include non-legal specialists. Including a financial expert on the panel can be very valuable where there are complex commercial issues to be decided, as well as where quantum is large and complex.

Where any outstanding issue being resolved through arbitration is a financial one, such as the final quantum assessment, a financial expert could be a most effective arbitrator, either as a sole arbitrator or as part of a panel.

Conclusion

We said that in this article we hope to demonstrate to you that financial experts are not just number crunchers: used effectively, they can add real value throughout the arbitral process. We hope we have done more than that. The flexibility of arbitration allows counsel to take full advantage of the wide-ranging skills, knowledge and experience of financial experts. Leveraging those skills, knowledge and experience early in the process – potentially even before a claim is formally brought – can be very beneficial to a party's case.

We also hope to have shown, or at least planted a seed, that financial experts are well-placed to act as arbitrators or at the very least can be a useful addition to the tribunal as a member or as adviser to the tribunal. Financial expertise is critical in many arbitrations. Under arbitration, parties and counsel are free to consider innovative ways to use experts, find a process that best fits the dispute in hand, and ultimately reduce time and cost associated with expert evidence. We say that using financial experts effectively, and in innovative ways, is critical if the quality of arbitral awards is to remain pre-eminent.

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Kathryn Britten provides forensic accounting and dispute resolution services in complex commercial situations. She regularly testifies as an expert witness in disputes – both domestic litigation and international arbitration – and has extensive experience in high profile and international cases. Kathryn is one of the United Kingdom's most senior forensic accountants and expert witnesses, having written hundreds of reports and given oral evidence on many occasions.

Kathryn's work ranges from investigations or supporting clients through investigations, providing pre-action and ongoing advice and support in litigation and international arbitration, through to acting as an independent expert witness. She also acts as an expert determiner and advises clients in mediations and negotiations.

Kathryn is a partner in AlixPartners, based in London. She is a fellow of the Institute of Chartered Accountants in England and Wales, and trained mediator and a member of the Chartered Institute of Arbitrators.

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Greg Huitson-Little works with clients on the financial aspects of litigations and disputes. He provides advice throughout the litigation process: during pre-action stages when considering whether to bring a case, an early assessment of where losses may lie, advice in relation to information and evidence that may be required, right through to detailed assessment of losses and the preparation of expert evidence for use in court or arbitration.

Greg has a particular interest in matters relating to intellectual property and technology, but nevertheless maintains a broad, pan-industry practice. He has worked in both domestic litigation and international arbitration settings, as well as expert determination processes both as an advisor and as determining experts.

Greg is a director in AlixPartners, based in London, and a fellow of the Institute of Chartered Accountants in England and Wales.

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