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4:00 – 5:30 pm

Compensation, Damages and Valuation in International Investment Law and Arbitration

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Panelists:

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Summary

Damages are the most complicated part of any international arbitration claim. While a petitioner may win a claim based on its merits, an unsatisfactory award of damages can render the entire effort moot

Using a hypothetical case, the panelists considered five different topics regarding compensation damages and valuation: identifying an appropriate expert, the evidentiary basis of damages, the importance of time in valuation and damage assessments, the value of a persuasive expert, and the most effective means of witness presentation. As the panel progressed, it became clear that the two concerns for damage calculations are the need for a good expert and the facts of the case that are outside of your control. Below are some of the topics that were discussed on these two points.

1. Choosing an Expert

When looking for an expert, it is vital to find someone who has the ability to communicate clearly. It is always possible that what would have been strong testimony leading to a favorable outcome is lost simply because the expert was not able to clearly and adequately communicate. It is ultimately through the testimony of an expert—not the parties or counsel—that hard financial numbers are assigned that lead to favorable judgments. Because of this, both written and oral communication skills are valued in an expert. It is the expert who will research the facts of a case, draft a report, and potentially defend the merits of that report before the tribunal. If the expert's writing and speech is too technical, it can be a negative. On the other hand, a message without substance damages the reputation of the expert, counsel, and a client's case. It might be worth considering the actual language that your expert speaks. Having someone who speaks the right language can save time and money with translation, but also make for more nuanced testimony and reports.

Another quality to consider is the type and degree of experience the expert has to offer. Hiring an expert who is a leader in their field and respected in the legal community can help persuade a tribunal and make a strong case that much better. A knowledgeable expert will know how far their expertise can go, and when it is time to call in a forensic accountant or petroleum engineer to answer questions beyond the scope of the expert. However, having all of that experience comes at a cost. Certainly there are the dollars and cents to take into account, but time is a commodity as well. If an expert has taken part in dozens and dozens of arbitrations in the past years, how much time have they actually devoted to any single case? How much time did they spend writing the reports for each of those cases? Frankly, the question is how much time can they spend on your case if they have a backlog of others to address? This does not mean that an

expert with more free time is necessarily preferable, but just offers another point of view to consider when looking for an expert.

When hiring an expert, there is an entire set of support staff that comes along. Just like any other field, having a strong support staff makes it possible for an individual to do the best job. For this reason, it can be worth it to look and get to know an expert's support staff. When it comes to the day-to-day conversations or questions about having documents sent back and forth, it is the support staff with whom counsel will be speaking. Likewise, familiarity can shed light on whether your would-be expert and the support staff use best practices needed for a case. For example, having an expert and staff who present the documents and data they relied on upfront to you bolsters against any arguments concerning the veracity of information. Another example would be whether they produce a 100-page or a 10-page report when your experience tells you it should be 50 pages.

In practice, there might be an expert you prefer working with for one reason or another. However, working too often with the same expert can lead to questions regarding your relationship with the expert. Then, when working on a case that might be more speculative than prior ones, these facts might come up in cross-examination. Your opposition has the duty of countering all of your claims and casting doubt where possible. It becomes easier when they can draw connections between you, your expert, the testimony the expert provides, and the outcome of arbitrations. In these cases, candor can serve as a means of avoiding any future problems.

Above all, never forget that a tribunal may sit and appear to be weighing the numbers before them, but they are actually weighing the experts. Clear and convincing evidence backed by strong data becomes unshakeable when coming from a good expert.

2. Considerations Once Arbitration Begins

Having assembled the people necessary to present a strong case does not mean the information is always there to do so. An anecdotal example was given of a case with good merits that was represented by a well-known international arbitration firm with a good expert. However, due to the nature of the claim, the expert's damage calculations contained forward-looking damage projections whose data was not as concrete as the presenting party might have liked. As a result, while the tribunal ruled in their favor, it gave them only a fraction of the damages sought. When seeking damages for actual bad acts that have been committed, it is clear what documents and numbers you are looking for. Invoices, day rates, employee logins, and financial records provide detailed records of what the damages were. However, what if the documents of the subsidiary corporation you are relying on is just boasting to the parent company? Additionally, if the cause of action takes place two years into the life of an asset projected to be in use for 20 years, it becomes more difficult to provide those concrete numbers that tribunals would prefer. If damages involve an industry with significant upfront costs, perhaps the establishment of an oil refinery for crude produced in a foreign country, damages as to restitution may be far easier to prove. Time plays a large role in calculating damage figures.

There is always the chance that after hearing from an expert for the petitioner and one for the respondent, the arbitral tribunal could opt to appoint its own expert. This becomes even more likely when timing issues lead to tribunal's questioning the data before it. Barring any sort of irregularity, an extra expert is overkill. By the time a third expert is called in to present the expert's side of the facts, the arbitral tribunal would have heard from not one, but two different experts who have looked at the same data. Regardless of whether it ultimately helps or hurts the case, an extra expert means hearing the information again for a third time. More importantly, this adds extra costs that could have been avoided. One recommendation is to have the members of the arbitral

tribunal put questions to the experts themselves. Addressing the tribunal's concerns when they are first raised can cut down on costs.

Conclusion

By no means is this an exhaustive list of everything that is necessary for damage calculations, but it does highlight considerations. If nothing else, have a strong expert with the ability to communicate the finer points of the technical data of the case. Make sure this person will spend the necessary time on your case, one whose character is beyond reproach, and one who has the support staff to back them up. Second, there are questions of timing that continue to be raised. Whether it is a result of having too little facts or a case with significant speculative elements, temporal considerations play a crucial role in obtaining a favorable ruling from the tribunal. This can lead to the avoidable occurrence of a third expert being called in, resulting in extra costs that neither side expected. Clearly, damage calculations are not as clear-cut as parties would like them to be, but they play an essential role in the international arbitration process.