How to get the best out of damages experts

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A panel at GAR Interactive Damages discussed the role of experts in presenting damages in arbitration – debating the appearance of bias, the use of joint reports and how proactive a tribunal should be.

John Fellas of Fellas Arbitration said the arbitration community needed to face up to a reality. He said in more than 30 years of practice he had "never seen an expert come up with a less favourable damages calculation for the party that engaged him or her than that offered by the opposing expert."
He said this is "not necessarily nefarious" since, alongside a duty to the tribunal, the expert will typically "bring to bear his or her judgment or expertise on behalf of the party that engaged them."

Nevertheless, Fellas said, where experts base their damages analysis on assumptions provided by counsel, they could assist the tribunal by "giving reasons and offering some rationale or economic analysis" that support such assumptions.

Domitille Baizeau of Lalive said that it is not necessarily correct to describe damages experts as "hired guns," as by helping parties frame their cases they are themselves part of the counsel team.
Experts' interest in avoiding misleading the tribunal lies in the risk of damage to their own credibility and wider reputation, she said.

Working together
Australian arbitrator **Doug Jones AO** recalled one arbitration in the Middle East, in which he said two experts agreed on a quantification method and an amount of damages – eventually giving a joint presentation that "left both parties squirming." Neither party challenged the damages calculation when invited and it was also accepted by tribunal.
He said this showed that when tribunals "proactively" manage experts this can help ensure that they actually "work together in the interest of clients *and* the tribunal."

Carole Malinvaud of Gide suggested it is often too early for a tribunal to give precise instructions on damages at the outset but it can give some "general guidance", such as requiring clear indication of assumptions and sources set out in annexes.
She also highlighted the importance of an "equilibrium between experts" since they are not always of the same calibre and experience. A joint report "only works if the experts are as skilled as one another" and it complicates the work of the tribunal if the experts are not "playing with the same tools."

Baizeau agreed that it is incumbent upon tribunals to remind the parties that the goal is to avoid ending up with two opposing expert reports that act like "ships passing in the night."

However, she said she found it "very disturbing when tribunals impose working together from the outset before they have a clear idea about what the case was about."

"When it's done too early, it doesn't work because the experts don't know what they are supposed to agree and disagree on. I am in favour of tribunal's insisting on joint work – but it's a question of when."

Jones agreed, saying "it's a question of proactive case management and it should never be for the tribunal to impose something on the parties that they're uncomfortable with." He said the most effective processes are reached by agreement with counsel and the parties.

Fellas commented that it is important that experts have "free reign at the beginning," noting from experience as counsel that experts may suggest an approach to damages that counsel has not thought of.

He said that the joint approach suggested by Jones "imposes a discipline in the first instance" on the opposing experts, as they know that they will "sooner rather than later" have to sit down and compare their views and their reports.

Timing is everything
Baizeau explained that her preference is to require expert reports with the parties' first round of submissions and then, after the second case

management conference, the tribunal should “press the pause button” and consider whether a joint memorandum and meeting of experts is useful.

Baizeau acknowledged there may be “reluctance” from counsel, who might consider this “effectively preparing a third report including points of agreement and disagreement,” and from some arbitrators – but tribunal engagement in damages during a second case management conference is beneficial, she said.

Responding to Baizeau, Jones argued that providing expert reports alongside the parties’ first submissions puts them “in a camp that is clearly identifying with a particular party.” He said “psychologically, that emphasis remains with them throughout the arbitration… and they effectively become the advocate for the party’s position on damages.”

In Jones’ experience, he said this often means the tribunal then “chooses” one expert over the other when issuing its award and that “constitutes an enormous waste of expertise.” The tribunal should have the benefit of both expert’s views, experience, methods and assumptions rather than effectively “wasting the other expert’s work.”

“There is no better way to waste costs in arbitration than to deploy experts and waste their expertise; because many experts command higher hourly rates than lawyers,” he said.

*GAR Interactive Damages was chaired by **Alexander Demuth** of Alvarez & Marsal and **John Trenor** of WilmerHale. The sponsors of the event were Alvarez & Marsal, HKA, Cornerstone Research, Accuracy and King & Spalding. The conference took place via Zoom on 4 February and a recording of each of the event's sessions is available in the article:*
https://globalarbitrationreview.com/how-get-the-best-out-of-damages-experts