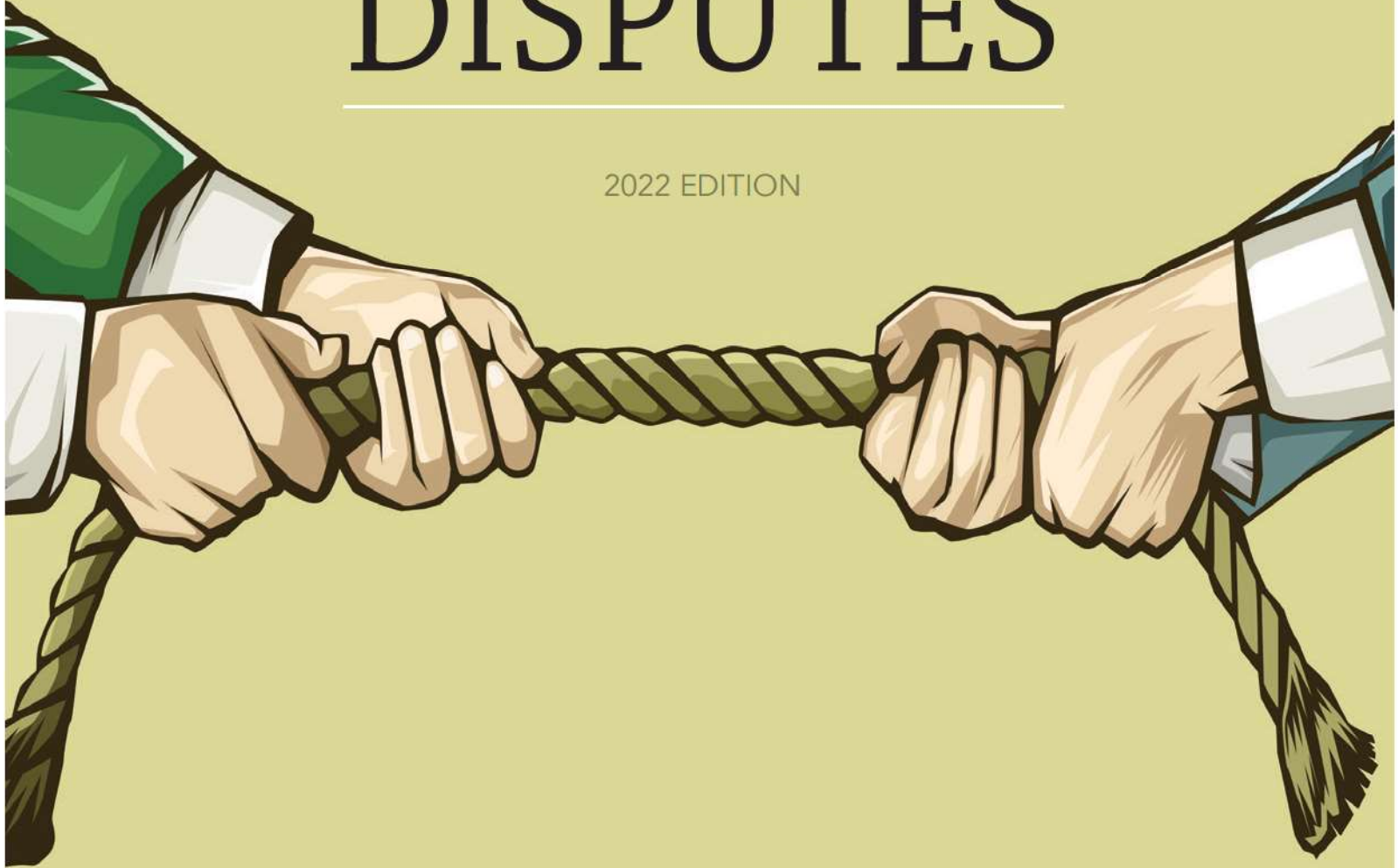


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MANAGING AND RESOLVING
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2022 EDITION



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EFFICIENT AND CONSTRUCTIVE USE OF PARTY-APPOINTED QUANTUM EXPERTS IN RESOLVING COMMERCIAL DISPUTES

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THIS CHAPTER DISCUSSES WAYS TO MAXIMISE the efficiency and usefulness of party-appointed quantum experts, addressing the issue from three perspectives: the parties and their counsel, the experts, and the court or tribunal.

PROVIDING EXPERTS WITH PRECISE AND TIMELY INSTRUCTIONS AND INFORMATION

Listed below are some of the main areas which the instructing parties and counsel could focus on to ensure an efficient use of party-appointed quantum experts.

First, instruct experts early in the process. The timing of engagement can be essential to the value that can be extracted from quantum experts. In cases where merits issues are closely related to quantum, quantum experts can provide early insights that may affect the approach taken by parties in their legal pleadings. Retaining quantum experts early in the process, even before submitting a notice of dispute, can help shape the legal strategy of a case and avoid last-minute shifts in approach.

Second, provide the experts with relevant information in a timely and organised manner. While experts may be able to assist in identifying what information is desired, experts are not aware of all the potentially relevant information that the party may have access to. In such cases, it is important to have fluid communication between the relevant individuals on the client's end and the quantum experts (and their team), such that the relevant information can be identified and exchanged.

Depending on the number of documents and information available, it may be appropriate to compile all the information at once to reduce the number of iterations (and thus improve efficiency), but often this is not practicable. When this is not possible, it is important to release information on a rolling basis as and when it is made available.

For an efficient review of documents by quantum experts, it is useful to classify information by category, e.g., financial information, industry or market analyses, regulation, and correspondence. It is also desirable that the information is provided in an electronic and searchable format. Ideally, experts should be provided with access to a full and complete record of relevant documents, in particular if such documents may be subject to disclosure by the court or tribunal.

Third, when appropriate (and permitted), experts should be granted access to the relevant fact witnesses. Fact witnesses familiar with relevant events and evidence can help experts better understand the facts and context surrounding the dispute. Experts with better understanding of the facts and context can achieve a more accurate quantum analysis. Fact witnesses may also assist experts in understanding relevant documents and

their roles in the events surrounding the dispute, such as reasons or uses of certain contemporaneous documents produced by the parties.

Fourth, provide experts with clarity as to the applicable law, as this can have ramifications that may impact the quantum approach. For example, the applicable law can provide guidelines as to the standard of value or the date of valuation applicable to the case at hand, both of which in turn significantly affect the quantum experts' analysis (e.g., whether a fair market valuation or a sunk costs approach should be used, or if the date of breach or more recent date should be used for valuation purposes).

Fifth, understand the limitations of the quantum experts' expertise. Asking a quantum expert to opine on issues beyond their scope of expertise can undermine the experts' credibility. In such situations, it is better to either rely exclusively on contemporary evidence on the subject, or to engage an additional expert who can provide the required input that is beyond the quantum experts' expertise (e.g., technical or engineering expertise to determine construction timing and costs).

Finally, and above all, it is essential that parties understand and respect the independent nature of the experts' work. If ex-

perts yield to pressures to obtain certain predetermined results they may adopt extreme assumptions that erode their overall credibility. Extreme assumptions are not only unlikely to be accepted by a court or tribunal but can also result in the court or tribunal doubting the independence of the experts and putting less weight on (or discarding) the experts' testimony.

WHAT EXPERTS SHOULD DO TO ENSURE EVIDENCE IS RELEVANT, UNBIASED AND UNDERSTANDABLE

The overriding duty of a quantum expert witness is to aid the court or tribunal with complex, technical issues, such as the valuation of damages. Experts must be conscious of this duty not only when remaining independent and unbiased but also by keeping their analysis and evidence relevant. It is often the case that experts get caught in too much detail or get derailed by fascinating yet irrelevant tangential analysis which does not assist the court or tribunal in resolving the dispute.

Experts can further aid the court or tribunal by producing reports which: (i) are well-structured, providing up front summaries and conclusions of the analysis, and clearly signposting the different steps in the analysis; (ii) have a balanced level of

technical complexity, bearing in mind that the members of the court or tribunal are ‘sophisticated laypeople’, in that while they likely have experience in the subject matter, usually they are not economists or finance professionals; (iii) clearly differentiate between what are statements of fact, what are legal instructions, and what are the experts’ own assumptions derived from their analysis or professional experience; and (iv) provide sensitivity analyses, allowing the court or tribunal to test the impact of changes to key assumptions on the resulting damages figure.

In the case of arbitrations, the rules and guidelines of arbitration institutions related to expert evidence are generally high level and provide flexibility to the parties’ and the tribunal in deciding on the approach to be taken. It is important, therefore, that experts are aware of any procedural orders which affect the presentation of their written and oral testimony. Furthermore, experts can gain valuable insights from the rules of domestic jurisdictions. For example, in England and Wales, Practice Direction to Part 35 of the Civil Procedure Rules has clear directions as to the structure and contents of expert reports.

WHAT THE COURT OR TRIBUNAL CAN DO TO GUIDE AND IMPROVE THE EFFICIENCY OF THE PROCESS

There are multiple ways in which a court or tribunal can guide the parties and their experts to maximise the value it extracts from such experts. These methods vary depending on the applicable rules and procedures.

Below are three examples that can be encountered at different stages of arbitral proceedings, which can significantly improve the efficiency of the process and increase the value of the quantum experts to the tribunal.

First, prior to the hearing, request a joint expert statement, submitted by the experts appointed by both sides, which clearly summarises the points of agreement and disagreement. The process of creating such a statement, which typically involves at least one ‘without prejudice’ meeting between experts, can in itself help reduce the areas of disagreement. While a common feature in UK litigation, joint expert statements are not used often in international arbitration.

Second, during the hearing, witness conferencing (also referred to as ‘hot-tubbing’), which involves the concurrent examination of both experts by the tribunal, can assist in clarifying key

issues. It allows the tribunal to ask both sets of experts any questions it may have, until it is fully satisfied. This method is particularly effective to counter situations of ‘ships passing in the night’, often seen when experts receive different sets of instructions.

Finally, after the hearing, if needed issue a partial decision and ask the experts appointed by both parties to submit a joint report and valuation model, following precise indications to reflect the findings and directions in such a partial decision. The joint model should be interactive, including options to allow the user to decide between the remaining points of disagreement (be it due to different legal positions or diverging expert opinions). If managed properly, the impact of this additional step on the overall length and cost of the proceeding will be relatively low, while the benefits can be significant, as it provides the tribunal with a tool validated by the experts of both parties with which it can quantify the damages dynamically, based on its subsequent decisions on the outstanding points in dispute.

CONCLUSION

The reliance on independent quantum experts has become the norm in most commercial disputes. The efficiency and useful-

ness of such experts, however, will depend on the way in which they are instructed and informed by parties, how well they perform their overriding duty to assist the court or tribunal and how the court or tribunal guides the process in order to maximise the value obtained from experts.

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