Effective and Efficient Use of Experts Early in the Dispute Resolution Process

by

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Introduction

The vast majority of counsel have, at best, a rudimentary understanding of the issues that fall within the expertise of various expert witnesses. For example, many attorneys positively abhor issues regarding damages. Questions that fall within the purview of experts often are left until the end of preparations or deferred entirely. But this should not be how a dispute is evaluated, prepared, or managed. The liability and damages aspects of a dispute are interrelated. A solid liability case, without a correspondingly solid damages claim, normally is of little value. Spending thousands (or even hundreds of thousands) of pounds Sterling in legal fees and costs to establish liability is a poor investment if the maximum potential damages award is in the tens of thousands. In order to evaluate and prepare a matter properly, a party and its counsel have to know realistically what they are "playing for" or defending against early in the dispute resolution process. A reluctance to engage expert witnesses early in the dispute resolution process, whether due to concerns regarding costs or a desire to avoid understanding a complex or difficult field, often results in poor decisions or a less than desirable outcome.

This paper argues that expert issues should be considered and analysed early in the dispute resolution process and that expert witnesses can be utilized

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efficiently and cost-effectively early in any dispute. It first identifies some problems that may arise through a failure to utilize expert witnesses early. It then discusses the 2015 Practice Direction on Pre-Action Conduct and Protocols to place the early use of experts firmly within its precepts. The Pareto Principle, or 80/20 Rule, is then described to support the argument that expert witnesses can, and should be, involved early in the dispute resolution process and that this can be performed cost-effectively. Early evaluation by a qualified neutral is presented as a means to promote timely and cost-effective resolution of a dispute. Finally, this paper identifies and suggests a number of expert-related issues that should be explored and analysed early in any dispute.

The Problems Caused by Ignoring Experts Early

Almost no attention has been focused on the importance of assessing and considering expert issues *early* in the dispute resolution process. This failure can and does result in a variety of pitfalls and problems for parties, their counsel, and the court if a proceeding ultimately is commenced. A dispute that should have been resolved early instead continues, with the plaintiff or the defendant – or both – wasting resources and incurring far more in costs than may be appropriate. Because the particular liability or damages theory that fits the evidence is not considered early, the wrong "type" of expert may be retained, such as a valuation specialist when an accountant is required. Necessary evidence may not be obtained or prepared. A claim that should be worth more, or less, is presented to the court. Even worse, a claim may be presented in such a fashion that the court does not understand the merits of that party's position.

Other than anecdotal evidence of the problems associated with a failure to utilize experts early in a dispute is difficult to obtain. However, more than one experienced counsel has had a case where the amount of damages requested and the actual award obtained have been significantly different. Other cases, believed to be "solid" on liability, have ultimately been lost. Ignoring expert issues in the early stages of any dispute, especially before a claim is filed, likely contributes to the disconnect that often exists between claims and awards and the ability of a court to understand clearly the

contentions and presentations of the parties. Involving experts early in a dispute can only benefit a party's case.

The 2015 Pre-Action Conduct and Protocols

The current Practice Directive on Pre-Action Conduct and Protocols (PDPACP) became effective on 6 April 2015, replacing the earlier 2009 Practice Directive on Pre-Action Conduct. The PDPACP describe "the conduct and set out the steps the court would normally expect parties to take before commencing proceedings". The PDPACP therefore are not mandatory. However, the court has discretion to impose sanctions on a party that has failed to comply with the PDPACP when it should have done so.[1]

The guiding principles behind the PDPACP are reasonableness and proportionality: "Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues."[2] In this regard, the December 2015 amendments to the Federal Rules of Civil Procedure in the United States are similar in that they require that any discovery undertaken after commencement of an action must be "proportional to the needs of the case".[3] Distinct from the US rule, the PDCAP provide that disproportionate costs incurred in complying with the PDPACP "will not be recoverable as part of the costs of the proceedings."[4] Thus, a direct financial incentive exists under the PDPACP to comply with the reasonableness and proportionality principles.

The PDPACP contain an explicit caution regarding the use of expert witnesses in evaluating a potential claim. Paragraph 7 states:

> Parties should be aware that the court must give permission before expert evidence can be relied upon (see CPR 35.4(1)) and that the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary

[1] Practice Direction – Pre-Action Conduct and Protocols, ¶s 1, 3, 13-16 (2015) (available at: http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm).

[2] *Id*., ¶ 4.

[3] United States Federal Rule of Civil Procedure 26(b)(1) (2015).

[4] Practice Direction – Pre-Action Conduct and Protocols, ¶ 5 (2015).

> to obtain expert evidence, particularly in low value claims, the parties should consider using a single expert, jointly instructed by the parties, with the costs shared equally.[5]

In light of the PDPACP's caution, parties and their counsel may be reluctant to engage experts during the pre-commencement phase due to the costs typically associated with experts. Similarly, the consultation or retention of experts may be delayed or avoided entirely even after an action is commenced due to cost considerations. A reluctance to engage or consult with an appropriate expert witness arguably conflicts with the PDPACP's admonition that before commencing proceedings, the parties should "understand each other's position".[6] However, a well-established principle of mathematics and economics reveals that such concerns usually can be overcome in even the smallest of cases – and certainly in large cases.

The Pareto Principle

In even the simplest and most straightforward of disputes, analysing and assessing liability and damages issues often is an expensive and time-consuming process. Such analyses frequently are beyond the abilities of counsel, who lack the requisite expertise in a particular field in issue. Moreover, the costs associated with the liability and damages aspects of a case usually increase exponentially the more complex the matter or the greater the amount of damages in issue. For example, the magnitude of party costs, which include expert fees, in investment treaty arbitration, is staggering and often amounts to millions or tens of millions of dollars.[7] The cost for experts generally is considered to be similar, as a percentage of total costs, in non-investment treaty arbitration.[8] As a result, consultation with experts may be deferred or even

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[5] *Id*., ¶ 7.

[6] *Id*., ¶ 3.

[7] See, e.g., Matthew Hodgson, "Costs in Investment Treaty Arbitration: The Case for Reform, *Transnational Dispute Management Journal* 11, no. 1 (2014), 1 (available at http://www.allenovery.com/SiteCollectionDocuments/Costs in Investment Treaty Arbitration.pdf); Diana Rosert, "The Stakes Are High: A review of the financial costs of investment treaty arbitration," International Institute for Sustainable Development (2014), 8-10 (available at http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf).

[8] Rosert, "The Stakes Are High," 8.

avoided entirely. Such conduct is not without risk. Certainly, the costs associated with expert witnesses may be viewed as a barrier to early consideration and analysis of critical aspects of any dispute.

Fortunately, Italian economist Vilfredo Pareto posited in 1896 what has become known as the Pareto Principle, also commonly referred to as the 80/20 Rule.[9] "The 80/20 Principle asserts that a minority of causes, inputs, or effort usually lead to a majority of the results, outputs, or rewards."[10] The Pareto Principle applies for the purpose of early evaluation and analysis of disputes as well. For example, one expert has argued that 80% of the benefit from early damages assessment can be achieved for 20% of the costs.[11]

Thus, fears of the costs usually associated with the employment of experts should not necessarily deter parties and their counsel from assessing issues that could benefit from expert analysis early. Ignoring such issues until later in a dispute – even until just after the claim is filed – usually will only result in higher expert costs and higher legal fees. The Pareto Principle ensures that significant and usually cost-saving benefits can be obtained by early consideration of such issues.

Early Neutral Evaluation

"Early Neutral Evaluation" is "a process in which a third party neutral examines the evidence and listens to the disputants' positions, and then gives the parties his or her evaluation of the case."[12] Early Neutral Evaluation does not result in any form of award or final determination. Rather, it results in a reasoned evaluation of the parties' positions by a qualified neutral evaluator. The evaluator listens to the parties' evidence and arguments, normally presented in summary fashion or via short written submissions or both, and

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[9] See generally Vifredo Pareto, *Manual of Political Economy: A Critical and Variorum Edition*, Aldo Montesano, Alberto Zanni, Luigino Bruni, John S. Chipman, and Michael McLure, eds. (Oxford, UK 2014).

[10] Richard Koch, *The 80/20 Principle: The Secret to Achieving More with Less*, 2nd ed. (New York 2008), 4.

[11] Carol Ludington, "Eat the Frog First: Address Damages Early," *New York Dispute Resolution Lawyer* 8, no. 2 (2015), 19 (available at http://www.nysba.org/CustomTemplates/SecondaryStandardPubs.aspx?id=32586).

[12] John Somers Blackman, "Neutral Evaluation: An ADR Technique Whose Time Has Come," (1997), 1 (available at http://library.findlaw.com/1999/Sep/1/128447.html).

then provides his or her evaluation. An early evaluation by a neutral can be obtained before a proceeding is commenced or an expert is retained to confirm the viability and magnitude of the anticipated claim. Early Neutral Evaluation also is consistent with the PDPCAP's admonition that "the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings."[13] Early Neutral Evaluation can be an effective means to promote the resolution of the dispute, especially in situations where either liability or damages issues predominate, or where a party may have unreasonable expectations regarding liability or damages, or both.

Often there is a significant disparity between the claimant's position and that of the respondent.[14] This difference may be the result of vastly different views on liability or damages issues. Reducing this gap – and thereby the expectations held by the plaintiff or the defendant – may facilitate settlement or resolution of a dispute. A party who as heard a qualified neutral provide an evaluation of liability or the amount of damages in a dispute should gain a better understanding of the likelihood of achieving their preferred outcome, and thereby become more reasonable toward a negotiated settlement. A neutral evaluation of the core issues – early or even later in the dispute – or as an alternative or adjunct to a formal mediation, should influence the parties' positions. Moreover, presenting a party's liability and/or damages case in a succinct and well-articulated manner to a qualified neutral and receiving their evaluation may assist counsel in refining and preparing the presentation before the court if the dispute is not resolved.

Suggested Issues for Early Consideration

No party or counsel should want to present an unreasonable, excessive, or unfounded claim to an opposing party or a tribunal. However, this occurs far

[13] Practice Direction – Pre-Action Conduct and Protocols, ¶ 8 (2015).

[14] One recent study, for example, found that in a sample of investor-state arbitrations, the respondent's position on damages averaged only 13% of the claimant's. PricewaterhouseCoopers, "2015 – International Arbitration damages research: Closing the gap between claimants and respondents," (2015), 5 (available at www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf).

too frequently. The goal of every lawyer and his or her client should be to present a well-founded, well-articulated, and solidly-based claim or defence. A party that receives a decision from the court that awards only a fraction of the damages requested when liability is found should be the exception and not the rule. Similarly, if a court determines liability issues favourably to the plaintiff, the plaintiff's damages assessment, if any, should be the result. The ideal outcome of a dispute is one in which every cent of damages proffered is awarded based on both the liability findings and the presentation and analysis of the expert witnesses, whether on behalf of the plaintiff or the defendant. While the following suggestions may seem obvious, many are ignored by even the most seasoned counsel.[15]

A party's counsel should start managing any applicable expert witness aspects of the claim or claims as early as possible. Consider the damages theory as part of preparation of the overall theory of the case, including liability. The damages approach must "fit" the liability parts of a claim. A good liability case does not exist without a good damages case, and vice versa. Accordingly, before a claim is filed, or at worst shortly thereafter, select appropriate experts, if reasonably necessary, and get him or her involved. Make sure the proper type of expert is selected with the appropriate qualifications or expertise.

Do not select an expert who has never given an opinion regarding the particular type of claim at issue. Do not retain an expert who has never previously testified before a tribunal – either in court or at a final hearing. Make certain the expert who is retained is comfortable rendering an opinion in the area in question. An expert never should be asked to render an opinion with which he or she is not completely comfortable or which is outside their area of expertise. A well-qualified and experienced expert can dominate the other side's expert if a joint report is prepared or requested by the court. If the expert is not in agreement with the type of claim or theory to be presented, rethink the strategy and theory. After all, they are the expert.

[15] Some of the suggestions made hereafter are adapted from Alan M. Anderson, "Damages Management in IP Litigation," *Intellectual Property Litigation* 19, no. 1 (2007), 6-7.

Identify a realistic theory under the applicable law as early as possible. Being realistic does not preclude being creative, provided the expected evidence supports the approach. One should make certain that both the documentary and the testimonial evidence will support the theory. Do not hesitate to consider alternative theories if the path the evidence will take is not entirely clear at the outset. However, this does not mean that an "A; if not A, B; if not B, C; etc." approach ultimately should be adopted. Expert evidence is not a game of darts. Proper consideration early in the process should avoid the need and inclination to present alternative expert theories based on identical or similar sets of facts.

Next, make or obtain a realistic preliminary determination of the likely magnitude of the claim in light of the applicable law and underlying theory. This is where the 80/20 Rule is especially applicable. A realistic preliminary analysis can be obtained if the expert performs 20% of the necessary work. For example, an initial damages assessment by a qualified and appropriate damages expert "involves few, if any, documents, a small number of interviews, and limited research."[16] An initial assessment by an expert identifies viable liability theories, a rational range or magnitude of damages, and key issues and needed evidence. Fit the amount of effort and cost to be spent on expert witnesses to the size of the claim. It makes no sense to spend £400,000 in expert fees and costs to attempt to recover £500,000 in damages. Rational decisions cannot be made, either to file a claim or the amount of effort to be expended, unless counsel and the client understand the realistic size of the claim.

Assign responsibility and accountability for preparation of the expert-related issues early to a suitably senior member of the team. Make certain this person coordinates the work of the expert throughout the proceeding. Do not assign responsibility to someone who has no prior experience working with experts or no education, training or experience relevant to the particular expert's issues. If an inexperienced or unqualified individual is assigned the

[16] Ludington, "Eat the Frog First," 19.

task, too often important information is missed or excessive time and effort spent, resulting in increased costs.

After the theory or theories to be pursued have been identified and confirmed, the appropriate expert selected, and the expert-related tasks assigned, focus on the gathering of information on the issues that are relevant and that must be established for the theory to prevail. Ask the expert as soon as possible what information and facts he or she needs to have to formulate the opinion that will be presented. It makes no sense to pursue a particular strategy if the necessary evidence is not obtainable or is obtainable only with excessive cost. Provide the expert with the right documents and information from the start.

Insist on the involvement of the expert who will testify – not that individual's staff – from the beginning and throughout the process. This does not mean that more "cost-effective" subordinates cannot be utilized. But too much delegation by the expert to his or her staff often results in important issues being missed, excessive time and costs spent on insignificant or irrelevant points, and duplication of effort. The testifying expert may then have to spend a significant amount of time "getting up to speed" prior to trial. A testifying expert who is ill-prepared and too unfamiliar with important details and information will be subjected to devastating cross-examination.

Finally, think about how the expert's evidence will be presented to the court in an informative, interesting, and straight forward manner from the very beginning of a case. Consider instructive demonstratives that may be used to explain the expert's opinion and how it fits the evidence. Expert witness testimony does not need to be, and should not be, a boring and stultifying part of the case. If expert issues are considered and addressed early in the life of a dispute, a better and more cost-effective outcome or resolution, should be the result.

Conclusion

Expert witness evidence often is an essential aspect of a dispute. However, counsel frequently ignore or defer early involvement of expert witnesses. The potential adverse consequences of not properly addressing

expert issues early in the dispute resolution process are clear. Liability determinations or damages awards that are less than satisfactory – for the parties, counsel, and the court – are the likely result. Instead, expert witness issues should be analysed early in the dispute resolution process. This early involvement is consistent with the principles behind the 2015 Practice Directive on Pre-Action Conduct and Protocols. Early involvement and assessment by experts can be obtained and performed cost-effectively in light of the Pareto Principle. Early Neutral Evaluation by a qualified neutral is a particularly useful and recommended method to resolve a dispute early or to learn the adequacies or inadequacies of a claim. By addressing expert issues early, parties and their counsel can ensure a better understanding of their case, present their claim more clearly to the other side and the court, and hopefully lead to a faster, more efficient resolution of the dispute.