Calling in the experts

For Judges and arbitration Tribunals to better understand the complex financial issues coming out of the downturn, greater emphasis is being placed on the expertise of Expert Witnesses

The use of expert witnesses and forensic analysts in litigation and arbitration is now a crucial part of any major dispute, say lawyers. The downturn has brought greater need for clarity in demystifying accounting and corporate finance issues. Experts may play a strong role in helping to build and support a client's case and better define and refine the key issues in dispute.

"Outside experts are playing an ever-more important role in terms of analysing the technical aspects of a claim, presenting the key material facts and countering the claims of the other side," says José Miguel Judice, Head of Arbitration at PLMJ in Lisbon. "In my view, in cross-border disputes and particularly in arbitration, it is not possible to engage an expert witness too early in a case."

Strategic role

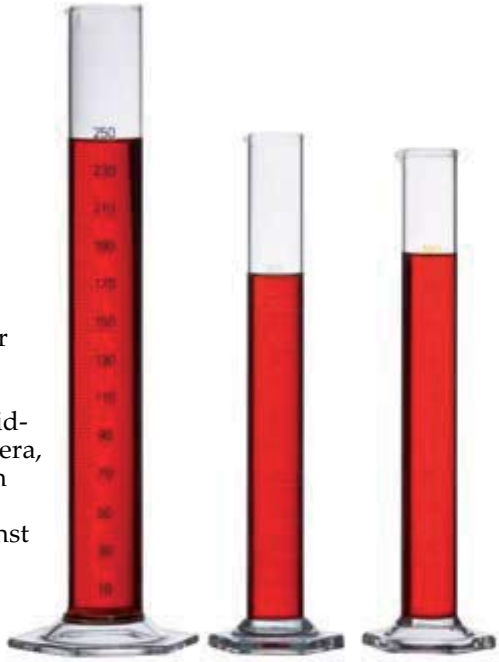
Such an upturn in demand is prompting growth in the expert witness and forensic sector itself. The `Big four´ accounting and audit firms, Deloitte, Ernst & Young, KPMG and PwC, have dedicated expertise, while boutique and international expert firms like Accuracy and FTI Consulting are becoming better established across Spain and Portugal.

In Spain, we are playing an increasingly prominent role in helping to resolve domestic disputes; but it is in the international and cross-border spheres, and particularly arbitration, that we have felt the most obvious upturn in terms of demand, says Javier López Andreo, Head of Forensic at PwC in Madrid who oversees a team of around 40 analysts, accountants and economists.

"We see a growing demand for very specific types of expertise from businesses and law firms. We are being asked to play ever-more crucial roles in understanding and communicating the financial or technical aspects of a case at the hearing stage and more often than not before then, with greater reliance being placed on our findings to define the actual strategies used in a dispute."

Adding value

Lawyers may be using outside experts earlier, but at what stage depends on whether they are representing the plaintiff or defendant. Experts are more likely to be retained sooner in formulating claims than responding to them. And despite the importance of their contribution, experts are careful to point out that there is always a clear delineation between the role of the lawyer and the witness.



"It is always the lawyers' case and they set out the arguments, we are only ever there to try to present the technical issues in the most accessible way," says Madrid-based Ricardo Noreña Herrera, Head of Fraud Investigation & Dispute Services for the Mediterranean region at Ernst & Young. "But obviously in terms of adding value, the more time we have to really drill down into the data or issues the better. When responding to a claim you are already working to a timetable – but not of your own making."

A higher profile is also bringing greater pressures, admit many Forensic analysts. It is routine for an Expert Report to be submitted to the Court, or more likely arbitration tribunal, to support a party's position, but more often than not, experts are now being asked to justify their findings in person.

"We have to not only present an excellent and correct Report but also be able to stand by what we have presented under cross-examination, by counsel and the tribunal itself," says José Rovira, Madrid Partner with independent financial analyst firm Accuracy. "We have to be prepared to be challenged on the general approach, but be ready to explain a very detailed assumption in our calculations and it is at this stage where a client's claim can stand or fall."

Noreña Herrera at Ernst & Young agrees: "Being an expert in a major international arbitration can be a daunting undertaking. It is where you find the most capable lawyers and the tribunal will most likely be comprised of specialists either in the type of dispute or the business sector in which the parties operate. There is very little room for error."

El uso de expertos independientes en conflictos judiciales y extrajudiciales, es actualmente un tema clave en la gestión de un conflicto, afirman los abogados. La crisis económica ha provocado entre las empresas, una mayor exigencia en cuanto a la simplificación de los complejos productos financieros y contables. Los expertos o peritos juegan un papel muy importante en el desarrollo del argumento jurídico, además de ayudar a definir y refinar los aspectos clave del conflicto.

Common ground

Some note, however, growing differences in the way the Courts and Tribunals are looking to guide parties' use of experts.

"Our role has always been well understood pre-trial, where we analyse the data and look for evidence either to support a position or oppose it, and more often than not we are now called as Expert Witnesses in the trial or arbitration," says Fernando Cuñado, a Partner in KPMG's Madrid-based EMEA Forensic Dispute Advisory Services Group. "Increasingly, we are also seeing arbitration Tribunals wanting to work more closely with us – engaging us directly to offer a third neutral opinion or, where we are already retained by a party, instructing us to find common ground with the other side."

There are growing instances of experts being asked to highlight where they agree or where they would agree were it for one or more missing factors. In Portugal, this is driven by the need to be more efficient and reduce costs.

We are increasingly being asked to find common ground, while the rise in 'expertise clauses' in contracts is also raising the possibility of avoiding a formal hearing altogether, adds Cuñado García-Bernalt. "We are asked at a very early stage to quantify what exactly is in dispute, to compare the technical financial findings with industry norms and better help the lawyers give the client a more realistic appraisal of his chances of success."

Such a role is even more acute in ad hoc arbitration or where an arbitral award will take in more than the strict legal interpretation of parties' arguments. The legal position may be clear but the industry norms suggest a different practical understanding of a party's position.

While there is the need for dedicated and expert analysis, retaining even a leading Forensics team is only part of the wider dispute strategy, all insist.

Judice acknowledges that experts may simply cancel out the evidence of each other, or that of a third-Court appointed expert and it is not always easy for them to find common ground. "But what is important is the realisation that we as lawyers can no longer work alone."

"Our job is to resolve the client's issues and to bring in the very best expertise to be able to do that. But like law firms you have to use the most highly regarded players and to recognise that some may have specific niches. Retaining outside experts is not a cheap option but normally it is worth the cost."

Focusing on the detail

Eduard Saura

Con el incremento de conflictos corporativos cada vez más complejos, las empresas optan por la seguridad de analistas expertos y con experiencia, los cuales manejan datos con soltura y son capaces de hacer "careos" de forma rigurosa, dice Eduard Saura de Accuracy.

Independence, experience and sector knowledge are the key factors in selecting an expert witness, says Eduard Saura, Madrid Managing Partner of independent financial analyst firm Accuracy.

"In light of increasingly complex commercial environments, and international arbitrations, we are seeing law firms in particular mirroring their own clients – they want more senior experts, who have a mastery of the data and can stand up to rigorous cross-examination."

It is at the hearing stage when a client's case can often stand or fall. An ability to clearly communicate complex issues and robustly defend forensic findings is vital, he says.

"The counterparty's lawyers will exploit any evidential weakness and so you have to demonstrate confidence via a written Report and in the way the facts are presented at the oral stage – from our perspective the only way to do this is to truly understand the underlying data."

The relatively low leverage at Accuracy means that partners and senior consultants are always involved with the raw analysis, while the firm can also build industry-specific teams, he says. Major disputes virtually always now require industry – or jurisdiction – specific expertise."

He sees a rise in disputes involving mid-size companies in the infrastructure and energy sectors – areas of focus in the Madrid office – related to loss of profits and unforeseen costs resulting from delayed or cancelled projects.

"Companies of all sizes have expanded abroad and participated in large tenders through consortiums. Disputes initially arise from the project complexity but are exacerbated by cultural issues, in the way the contract is managed and day-to-day problems are solved, particularly when a public authority is involved. Having seen greater demand to link the 'delay analysis' with the quantum analysis we have thus integrated both expertises within Accuracy."