A guide for commercial litigators: working effectively with financial damages experts

HKA

> Counsel and the client should provide as much information as possible to the expert, including facts that would be useful and detrimental to the client's case. It is best to let the expert know all the facts at the outset and understand how they may affect their opinion, rather than have those appear later in the process, forcing the expert to revise their opinions.

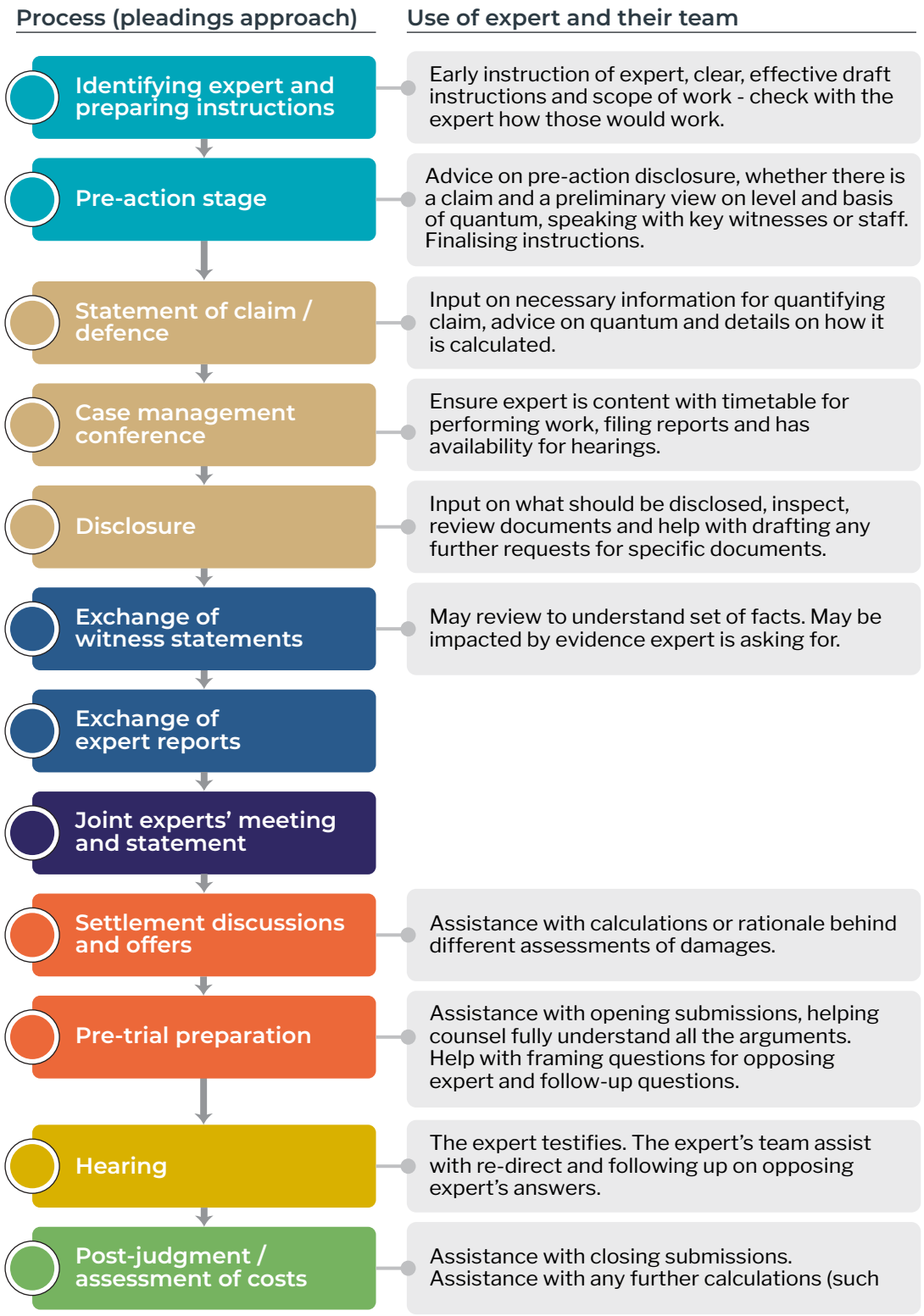
Introduction

Our review of market literature suggests that there is a lot of information and guidance for counsel and their clients on deciding whether to engage a damages expert and on finding and selecting the 'right' person. However, there is significantly less guidance on how, having selected your expert, to effectively work with them.

Effective use of damages experts can generate significant value for the parties in a dispute. We have, on many occasions, been deployed effectively as damages experts, although sometimes circumstances have led to less effective use of our services. This white paper collates our experiences as well as the guidance expressed in third-party reference materials to promote an effective working relationship between lawyers and damages experts.

Working effectively with damages experts starts with when and how you engage with an expert, however there are things to consider at all stages of the engagement.

A typical UK civil litigation process



Early engagement

It is important that the parties in a dispute consider the issue of damages as early as possible, ideally, alongside the liability issues. This means that counsel and the client work together early on to develop a preliminary assessment on the anticipated type and level of damages and how this fits into the facts of the case, the legal framework, and the available evidence. A damages expert could be engaged during this early stage to assist in developing an expectation of the preliminary damages and a discussion of the evidence needed to support the approach adopted.

We have found it to be effective if a damages expert is involved in this early stage, for example for the following reasons:

1. The expert(s) can narrow down the focus on quantum issues thus avoiding unnecessary work.
2. The expert(s) can assist with disclosure to ensure that each party has all the relevant documents at an early stage and thus reduce the possibility of requiring multiple disclosure rounds or inadvertently missing key documents. Similarly, experts can assist with identifying relevant potential witnesses.
3. The expert(s) can assist the parties with understanding the quantum issues earlier, meaning the parties are more prepared for settlement discussions or to resolve the dispute earlier (and thus quicker and more cheaply).

In helping the party with estimating a 'ballpark figure' for damages, the expert can assist the party and its legal advisors with deciding whether the claim is worth pursuing and under what legal framework. This may for example improve the usefulness of early settlement discussions or highlight the ability to deploy a counterclaim. This can also feed into the party's budget considerations and could assist with a party securing third-party funding if necessary.

An important element of the damages expert's role is to help the parties develop their understanding of the damages quantification issues in the case. Testing the case with experts can help parties and their counsel to develop their case by identifying the strengths and weaknesses in the prospective damages claim or how the technical/financial issues affect legal issues such as, for example, causation.

This early engagement has another advantage: it allows the instructing counsel time to test the expert's proposed methodology, how they communicate their opinion, and whether that is a good fit for their case. This can avoid the situation of an 'unhappy marriage' between a client and the expert. This can occur when, later on in the engagement (e.g., after significant work on the expert report), the party and their expert find that they have divergent views on the damages and the rationale behind them.

There is, of course, a balance to strike between incurring early costs in engaging an expert and incurring them later when the case theory is sufficiently developed. In our experience, contrary to some expectations, engaging a damages expert early, rather than late, often saves money for the parties. Engaging experts early can mean:

- avoiding the costly process of quantifying and preparing the legal pleadings on a claim and then later re-quantifying or changing the basis for a claim following the involvement of an expert and having to reissue and change pleadings;
- establishing comprehensive disclosure and discovery in a more systematic and effective way – experts can help with drafting disclosure requests, particularly for specific financial/accounting documents;
- the parties being more informed and prepared on quantum issues for settlement discussions where settlement is an ideal outcome for the parties; and
- the expert's team being more efficient due to increased flexibility in schedules (e.g., late engagements can mean several team members doing small parts of the work to fit around existing engagements or duplication of work).

"Testing the case with experts can help parties and their counsel to develop their case by identifying the strengths and weaknesses in the prospective damages claim or how the technical/financial issues affect legal issues."

We often think of it as a form of insurance. The client pays a limited cost early on for the expert's preliminary views. By doing so, the client is thus protected against finding out later that: the quantum is not worth the action; the client does not have adequate information to quantify a claim (or particular aspects of a claim); or key client staff have moved on before the expert has a chance to talk to them.

Similarly, the damages expert can also support counsel when it comes to client discussions on case management. For example, the expert can reinforce the need for the client to make staff available and provide documents promptly. Ensuring as much information is given to the expert as possible can prevent revising an expert's report for 'new' facts or counsel needing to amend pleadings.

Finally, by engaging early, the expert and counsel can work in a collaborative manner to develop factual and quantum cases in parallel. This avoids inconsistencies between the theory of loss and the expert's views/rationale for the quantification of such loss, which minimises the chance of the party submitting a case that diverges from the evidence of its expert(s).

The importance of effective instructions

Working effectively with a damages expert also benefits from clear instructions being provided to the expert that define the scope of work, the required deliverables, and the case timeline. These instructions should include a background to the dispute and the information, facts, and, where necessary, the assumptions the expert should rely on. The expert must be provided with the information and access to relevant people (e.g., factual witnesses) necessary for their work at the earliest opportunity.

Counsel should consider its instructions to experts carefully, ensuring they are reasonable and credible. If an expert's opinion is constrained by instructions and based on facts which are not proven/accepted, then the court or tribunal may be forced to give little to no weight to the expert's opinion.

Effective instructions also prevent experts from straying from their area of expertise. In many cases, it is reasonable and appropriate for instructions to evolve over time such that the expert has the information and legal input necessary for them to give a supported opinion. However, this does not negate the efficiency of providing the basic instructions clearly at the start of the engagement.

Counsel and the client should provide as much information as possible to the expert, including facts that would be useful and detrimental to the client's case. It is best to let the expert know all the facts at the outset and understand how they may affect their opinion, rather than have those appear later in the process, forcing the expert to revise their opinions.

Experts should test the evidence and information provided to them, considering all the documents, and asking any necessary questions to enable them to consider all arguments or reasonable possibilities.[1]

1 For example, in the UK Civil Procedure Rules, Practice Direction 35, 2.3: *'Experts should consider all material facts, including those which might detract from their opinions."*

"....by engaging early, the expert and counsel can work in a collaborative manner to develop factual and quantum cases in parallel. This avoids inconsistencies between the theory of loss and the expert's views/rationale for the quantification of such loss, which minimises the chance of the party submitting a case that diverges from the evidence of its expert(s)."

In addition, particularly in matters with simultaneous exchange of expert reports, a situation can arise where opposing experts receive differing instructions.[2] Inconsistent instructions between experts of the same discipline can result in the experts answering 'different questions' and can be very unhelpful to the court or tribunal.

It can also mean a lower level of engagement between opposing experts, reducing the potential for the narrowing of issues (see 'Joint meetings' below) and can ultimately result in the need for additional hearing time (and therefore additional costs being incurred) which might otherwise have been avoided. It might also reduce the possibility of an early settlement between the parties or reduce the effectiveness of settlement discussions.

In such cases, the parties can liaise with the damages experts to agree on a list of expert issues that the experts should address in their supplemental reports or in a joint statement. Alternatively, the parties can seek the direction of the court or tribunal in ensuring all important issues are covered by the experts.

2 Courts or tribunals may require counsel to seek to agree instructions to the experts. For example, in the UK Civil Procedure Rules, Guidance for the instruction of experts in civil claims, 21 states: *'Those instructing experts should seek to agree, where practicable, the instructions for the experts, and that they receive the same factual material."*

Importance of the damages expert's overriding duty to the court or tribunal

Damages experts usually have an overriding duty to the court or tribunal. For example, the UK Civil Procedure Rules state: *'It is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid".*[3]

A similar duty is set out in the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration: *'An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced".*[4]

Counsel should expect damages experts to guard their impartiality and independence with vigour given that overriding duty. Counsel should not jeopardise the impartiality of their expert.[5]

Whilst it may be observed that there is a tension between their duty to their client and their duty to the court or tribunal, a damages expert fulfilling their overriding duty to the court or tribunal will necessarily be fulfilling their duty to their client.[6] The opinion of a biased or partial expert will be given reduced weight by the court or tribunal and will therefore be unhelpful to the client.

Effective damages experts can navigate this potential tension by being candid with their client on the strengths and weaknesses in their case. This will help the client and counsel rehearse the rebutting arguments they will face (e.g., at the hearing) with a friendly audience rather than a hostile one. Having these (admittedly sometimes challenging) discussions early will benefit the client and instructing counsel rather than hinder them.

As we discussed above under 'The importance of effective instructions', damages experts can and should test and probe 'what they are told'. Their role is not to advance the case for the client. Rather, independently, impartially, and objectively to give their opinion to assist the court or tribunal.

Damages experts should state the facts or assumptions on which their opinion is based and not omit to consider material facts which detract from their concluded opinion.[7] Experts should take account of both parties' cases, and avoid taking a position on disputed facts or law.

Experts may provide alternative calculations, sensitivities or analyses where relevant. This may include:

- qualitative discussion of the impact of different assumptions;
- flexibility in their damages model with inputs for different assumptions or scenarios;
- or agreeing a joint damages model (see below under 'Joint Meetings').

This can reduce the chances of the court or tribunal giving little to no weight to the expert's evidence because they do not accept the factual assumptions used by the expert.

3 UK Civil Procedure Rules, 35.3.

4 Chartered Institute of Arbitrators, Protocol for the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4.3.

5 For example, see, Law Gazette, *"Lawyers must do better': Lord Hodge criticises use of expert witnesses".*

6 Jones v Kaney [2011] UKSC 13, 99: *'There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus, the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client."*

7 National Justice Compania Naviera SA v Prudential Assurance Company Ltd ('The Ikarian Reefer') [1993] (No.1) 2 Lloyd's Rep 68.

A typical arbitration process

Note: The above is a typical 'pleadings approach' process. Under the 'memorial approach', statements of claim / defence are served with the witness statements and expert reports, and there may be two (or more) rounds of memorials such as before and after disclosure.

Expert report

It is helpful for counsel to review and discuss the expert's draft report with them before it is finalised. However, counsel should avoid the temptation to write or re-write the expert's report for them. It is often obvious when an expert's report is not in their 'voice' and otherwise becomes clear in effective cross-examination. Experts who are comfortable and familiar with their reports are more effective under cross examination.

Instead, counsel should ensure the legal and factual information in the draft expert report is complete and correct and assist with drafting such that the report is grammatically correct, clear, and well-structured. It is also helpful to highlight any weakness in logic and analysis that warrants further work. Counsel should also use this review to ensure that they fully understand the basis of the expert's opinions, as if they do not, that will weaken their submissions to the court or tribunal.

If something is not clear in the expert's report, counsel should ask open questions of their expert. The expert should provide explanations in clear language. Clarifying and simplifying technical language will make their expert report more effective and approachable to courts and tribunals.

Counsel should suggest changes, rather than demand them, to prevent damaging the expert's impartiality. Counsel can push their expert on their opinion, but should not push too hard, recognising the expert's overriding duty to the court or tribunal.

"Counsel should suggest changes, rather than demand them, to prevent damaging the expert's impartiality. Counsel can push their expert on their opinion, but should not push too hard, recognising the expert's overriding duty to the court or tribunal."

> Taking issues ‘off the table’ can enhance the effectiveness of the dispute resolution process. This is because the parties can focus more on the key issues and not on issues which are, for example, non-material. Effective joint statements narrow the issues for the court or tribunal to consider and can result in shorter, more effective hearings and quicker issuance of judgments or awards.

Joint meetings and joint statements of experts

Joint expert meetings are an important part of litigation in the UK and an increasingly important part of international arbitrations. However, they are often under-budgeted and given inadequate time in the procedural timetable.

Joint expert meetings are held without prejudice.[8] Typically, counsel and the parties do not attend expert meetings.[9] In the joint meetings, experts meet (either physically or virtually), typically, but not always, after their reports have been filed. The meeting usually follows an agreed agenda shared in advance and gives the experts the opportunity to discuss their respective reports.

The expert will aim to understand the opinion of the opposing expert. Typically, experts will seek to narrow areas of disagreement on the technical and quantum issues. They will also identify areas of agreement. These areas of disagreement and agreement are normally collected into a joint statement signed by both experts. It aims to summarise the key issues into an easy-to-digest format for the court or tribunal.

Counsel should avoid undermining the joint meeting process by, for example, trying to discourage experts from reaching agreement.[10] Likewise, counsel should not encourage their expert to advocate their client's case in the meeting. The experts may wish for counsel to check the joint statement to ensure it captures the legal and factual points correctly, however they should not seek general comments or suggestions.[11] Counsel should also avoid the temptation to write the joint statement for the expert. In our experience, it becomes very clear when parts of the joint statement have been commandeered by counsel and legal argument and language creep in – we expect that it is also evident to the court or tribunal and may affect how they view the expert.

The role of the experts is not to negotiate for the parties or to resolve issues between the parties.[12] Neither can they 'offset' disagreements on issues by agreeing one issue in favour of one party and another for the other party. However, experts may look to agree 'figures-as-figures' where they consider it appropriate. This is where the damages experts agree the calculation or methodology of damages on different sets of instructions or assumptions. This reduces the number of decisions the court or tribunal need to make on damages.

Taking issues 'off the table' can enhance the effectiveness of the dispute resolution process. This is because the parties can

8 For example, Chartered Institute of Arbitrators, Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(a).

9 For example, in the UK Civil Procedure Rules, Practice Direction 35, 9.4: *'Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions."*

10 For example, in the UK Civil Procedure Rules, Guidance for the instruction of experts in civil claims, 18.7 states: *'Those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions."*

11 For example, in BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915 (TCC), paragraph 18: *'To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide."*

12 For example, in the UK Civil Procedure Rules, Practice Direction 35, 9.2 *'The purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues…"*

focus more on the key issues and not on issues which are, for example, non-material. Effective joint statements narrow the issues for the court or tribunal to consider and can result in shorter, more effective hearings and quicker issuance of awards.

Similarly, it can allow the experts to agree on a damages model or methodology, thereby reducing the need for post award/judgment calculations or supplemental submissions and hearings.

Effective joint meetings, and the resulting joint statement can result in:

- narrowing the disputed issues;
- a shorter reference statement for courts and tribunals to refer to rather than many, long expert reports and supplemental documents;
- identification of the key issues or conflicting instructions; and
- agreement on certain issues, calculations or methodologies.

In summary, joint meetings and statements can significantly improve the effectiveness of the hearings that follow.

Experts' assistance with submissions and cross-examinations

As mentioned before under 'Early engagement', one of the roles of an expert is to assist counsel to ensure they have a good grasp of the quantum and financial issues of the case. As such, counsel should utilise the damages expert to aid in understanding the quantum and financial issues that will arise in submissions and cross-examination.

Experts know and appreciate that submissions and cross-examination are counsel's domain. They will not attempt to re-write or re-structure them. However, they can help in clarifying or supplying context on technical or damages issues and making sure that their position is correctly and accurately articulated in submissions.

With respect to cross-examination, experts can often comment and advise on the cross-examination of both opposing experts and factual witnesses that have provided evidence that affects the quantification of claims (and even on liability issues in some instances where these are financial). Such commentary can help indicate questions that need to be tightened up or areas where a question may not achieve its intended purpose for example.

Experts can also give views on 'follow-up' questions. Using their experience and knowledge, they can help form 'decision trees' on how the opposing expert may answer a question. The expert can then explain the consequences of those answers and possible follow-up questions.

Experts are also likely to spot the weak or contradictory parts of the opposing expert's evidence (particularly technical parts). They are likely to be able to assist during the hearing by passing relevant information about the answers being given to counsel. The expert and their team can also review hearing transcripts and communicate matters of importance to aid counsel in drafting closing submissions. These can include identifying where the opposing expert has contradicted themselves, or implicitly agreed with the party's case.

Closing remarks

In this white paper we have set out some guidance on working effectively with damages experts. Our aim is to promote more effective working relationships between parties, instructing counsel and damages experts.

The steps to achieve this are relatively simple. They involve engaging early with a damages expert, giving them effective instructions and comprehensive information, and respecting and guarding their impartiality and duty to the court/ tribunal.

When deployed effectively, a damages expert can improve the robustness of a party's claim or counterclaim and reduce the likelihood of their evidence being afforded little to no weight. This can lead to improved outcomes, even where the judgment or award is adverse to the party. The improved outcomes will typically outweigh the cost of the expert.

Further reading

HKA, *'What does a Court or Tribunal want (and not want) from a party-appointed quantum expert witness: perspectives from a practising expert and arbitrator"* [https://www.hka.com/what-does-a-court-or-tribunal-want-and-not-want-from-a-party-appointed-quantum-expert-witness-perspectives-from-a-practising-expert-and-arbitrator/]

Expert Witness Institute, *'Essential Do's and Don'ts for Expert Witnesses"* [https://www.ewi.org.uk/News/essential-dos-and-donts-for-expert-witnesses]

Civil Procedure Rules part 35 [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35]

Practice Direction 35 [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35]

Expert Witness Journal, *'How to get the best from your Expert -Practical advice for Instructing Solicitors"* [https://www.expertwitness.co.uk/articles/news/how-to-get-the-most-from-your-instructions-to-experts]

Global Arbitration Review, The Guide to Damages in International Arbitration Fourth Edition. Chapter 7: "The Function and Role of Damages Experts"; Chapter 8: "Strategic Issues in Employing and Deploying Damages Experts" [https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration/4th-edition]

Melbourne TEC Chambers, *'Getting the most out of expert witnesses- lessons from the Victorian Bushfires"* [https://mtecc.com.au/getting-the-most-out-of-expert-witnesses-lessons-from-the-victorian-bushfires-2/]

The authors

Roula Harfouche
Partner, HKA

Roula Harfouche is a Partner in the London office of HKA, and a Fellow of the ICAEW. She has over 21 years' experience performing and managing valuations in a variety of contexts, in particular in disputes. Roula specialises in contentious valuations and the assessment of complex damages in international arbitration and litigation cases. She has been appointed as expert and has testified in English and French on the assessment of damages and complex valuation issues.

Roula is recognised among the leading expert witnesses worldwide by Who's Who Legal in the *Thought Leaders Global Elite* list, in Arbitration, for the quantum of damages and in forensic accounting.

Roula has worked on matters before the UK High Court, the UK Family Division, the Patents Court, the French commercial court, the Singapore International Commercial Court (SICC), as well as in LCIA, ICC, SCC, HKIAC, PCA, Cairo Regional Center For International Commercial Arbitration (CRCICA), the Swiss Chambers' Arbitration Institution (SCIA), the Netherlands Arbitration Institute (NAI), and ICSID arbitration forums and under the UNCITRAL rules, and in mediation.

Leon Fellas
Associate Director, HKA

Leon Fellas ACA MSCI IMC is an Associate Director in HKA's Forensic Accounting and Commercial Damages practice. He has a decade of experience in contentious valuations, commercial and corporate reporting valuations, damages and forensic investigations.

Leon specialises in contentious valuations and complex damages assessments in civil litigation, international arbitration and expert determinations. Leon has worked on matters before the UK High Court, UK Family Division, Cayman Islands Grand Court, Singapore International Commercial Court, Family Court of Australia as well as LCIA, ICC, SCAI and ICSID arbitration forums and under UNCITRAL rules and in mediations. He has also acted as a shadow expert to single joint experts.

Leon is an associate of the Institute of Chartered Accountants in England & Wales (ICAEW) and a member of the Chartered Institute of Securities and Investments (CISI). He also sits on the advisory Members' Panel of NEST, the UK's biggest pension scheme.

HKA

HKA.COM