DOLLARS AND COMMON SENSE

- UNDERSTANDING REASONABLE CERTAINTY IN INTERNATIONAL ARBITRATION -

NEIL STEINKAMP
ELIZABETH J. SHAMPNOI
ROBERT LEVINE

INTRODUCTION

Upon a finding of liability, tribunals must make a determination with respect to damages. Claims related to events that have occurred in the past or that consist of a sum certain are straightforward and simple to calculate. Damages resulting from a breach of contract with benefits reaching into the future, or those that would have occurred in a hypothetical world, however, often include elements of uncertainty in their measurement. Such claims for damages may be challenging for claimants to establish and for tribunals to evaluate.

The *CPR Protocol on Determining Damages in Arbitration* (the "Protocol") states that "[i]f a tribunal determines that damages have been incurred, it should award them, even if they are difficult to establish with precision."[1] Indeed, the Protocol is consistent with the findings of courts and arbitral panels globally. Generally, an award is not precluded simply because a damages claim may be difficult to ascertain; however, claims that are "so imprecise as to give rise to doubt as to their existence"[2] should not be awarded. The evidentiary threshold in many contexts for establishing the existence and measure of damages is *reasonable certainty.* This article explores the theoretical and practical considerations of reasonable certainty in the context of international arbitration.[3]

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* Mr. Steinkamp is a managing director in the Dispute Advisory and Forensic Services Group at Stout Risius Ross, Inc., and provides testimony in trials and arbitration domestically and internationally. Ms. Shampnoi is a director in the Dispute Advisory and Forensic Services Group at Stout Risius Ross, Inc., practicing alternative dispute resolution in the U.S. and abroad. Mr. Levine is a senior analyst in the Dispute Advisory and Forensic Services Group at Stout Risius Ross, Inc., specializing in the analysis of damages in complex commercial litigation. The authors would also like to acknowledge and thank Mr. Jay Safer of Locke Lord for his contributions in preparing this piece.

[1] CPR International Committee on Arbitration, CPR Protocol on Determination of Damages in Arbitration, International Institute for Conflict Prevention and Resolution, 1.

[22] *Id.* at 2.

[3] Hillary Heilbron noted in Vol. 1 of this Journal that, despite being "the issue of *greatest relevance* to the parties (emphasis added)," little has been written about damages in international arbitration. This article endeavors to add to the body of thought on this topic with respect to the threshold of reasonable certainty and proving damages in international arbitration. Given the breadth and significance of reasonable certainty,

If a party cannot demonstrate that damages are reasonably certain, the trier of fact is likely to find that damages have not been proven, and may even exclude an expert's testimony. Without this testimony, even successful proof on liability may lead to an award of no damages. United States courts have stated it this way:

> In order that it may be a recoverable element of damages, the loss of profits must be the natural and proximate, or direct, result of the breach complained of and they must also be capable of ascertainment with reasonable, or sufficient, certainty… absolute certainty is not called for or required.[4]

Professional literature, court and arbitral opinions, rules of evidence and treatises often use the phrase "reasonable certainty" when discussing damages. However, the definition of reasonable certainty remains ambiguous. It is important to note that this article does not define a specific checklist, mathematical formula, or mechanical manner of deducing whether damages are reasonably certain. No such specific mechanism exists that can be applied to all matters. Indeed, as described herein, "most courts agree that reasonable certainty as to damages is a flexible, inexact concept."[5] Given the breadth of procedural rules and sometimes limited scope of uniform codes, the threshold of reasonable certainty in the context of international arbitration is a particular challenge. This article provides a discussion of the factors, elements, and/or characteristics of expert opinions that can generally be considered for any matter to determine the extent to which damages opined on by an expert rise to the level of reasonable certainty.

The article is segmented into two sections. In the first section, we present common arbitral rules related to damages. We also review the requirement of certainty in common and civil law systems generally, as well as the requirements in uniform codes of international trade. We then consider certain sources from professional literature for discussion and commentary on achieving reasonably certain expert opinions as to the calculation of damages. Taken together, this article is intended to provide guidance to lawyers and experts toward achieving a reasonably certain result in the context of international arbitration.

I. RULES AND THE THRESHOLD FOR DAMAGES

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this article is not intended to serve as a comprehensive analysis of all relevant aspects of reasonable certainty. Instead, it is intended to provide discussion concerning the factors, elements and/or characteristics of reasonable certainty as it may relate to international arbitration.

[4] *Morris Concrete, Inc. v. Warrick,* 868 So. 2d 429 (Ala. Civ. App. 2003).

[5] Matthew Milikowsky, *A Not Intractable Problem: Reasonable Certainty, Tractebel, and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market,* Colum. 108 L. Rev. 452, 467 (2008).

Arbitral Procedural Rules

To understand the threshold of reasonable certainty, one should first look to the procedural rules promulgated by various arbitration associations internationally. There is, however, little guidance provided in these rules with respect to the threshold for damages calculations or opinions. Provided below are examples of the rules followed by tribunals to arrive at awards (emphasis added as noted below):

- "(1) When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone; (2) The award shall state *the reasons upon* which it is based; (3) The Award shall be deemed to be made at the place of the arbitration on the date stated therein.[6]"

- "When the Court scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, *the requirements of mandatory law at the place of the arbitration*.[7]"

- "Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. The tribunal shall state *the reasons upon* which an award is based, unless the parties have agreed that no reasons shall be given.[8]"

- "The arbitrator may grant any remedy or relief that the arbitrator deems *just and equitable* and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.[9]"

- "The Tribunal may grant any remedy or relief…which is within the scope of the agreement of the parties and *permissible on the law(s) or rules of law applicable to the dispute* or, if the parties have expressly so provided, within the Tribunal's authority to decide as *amiable compositeur* or *ex aequo et bono.* The Tribunal will

[6] *ICC Arbitration Rules,* International Chamber of Commerce 2013, 35.
[7] *Id* at 48.
[8] *International Dispute Resolution Procedures*, International Centre for Dispute Resolution, June 1, 2014, 31.
[9] *Commercial Arbitration Rules and Mediation Procedures,* American Arbitration Association, Oct. 1, 2013.

decide a dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized to do so."[10]

- "The Tribunal will state *the reasons upon* which the award is based, unless the parties have agreed that no reasons are to be given."[11]
- "The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.[12]"

As demonstrated by the above collection of arbitral rules governing awards, there is no clear guidance as to the degree of certainty or speculation that is required or acceptable. Therefore, significant latitude is afforded to tribunals to determine when sufficient certainty has been proven. We will next review the requirements of different jurisdictions.

Common Law and Civil Law Considerations

The extent to which the the fact of loss and the quantum of damages is proven can vary across assorted systems of law:

- In many common law jurisdictions, "the certainty rule applies only to proving that the breach resulted in claimant's loss…and does not require the claimant to prove with certainty the amount [of the loss]."[13]
- In civil law jurisdictions, the certainty requirement varies from establishing certainty of the fact of loss only, to requiring certainty in the quantum of the loss as well.[14]
- The United Nations Convention on the International Sale of Goods ("CISG") does not "expressly mandate that damages be proved with certainty… [but] imposes a burden on the claimant to provide evidence of damage."[15]

[10] *Jams International Arbitration Rules*, JAMS International, Aug. 1, 2011, 22.
[11] *Id* at 24
[12] *JAMS Comprehensive Arbitration Rules & Procedures,* JAMS, July 1, 2014, 26.
[13] Gotanda, John Y. "Recovering Lost Profits in International Disputes" Georgetown Journal of International Law (fall 2004) 61-112.
[14] *Id*.
[15] *Id.*

- The International Institute for the Unification of Private Law Principles of International and Commercial Contracts ("UNIDROIT Principles") also requires that damages "be established with a reasonable degree of certainty."[16]

A claimant may therefore face different thresholds of proof related to both the fact and measurement of damages based upon the local system of law; terms agreed to by the parties; or rules adopted by the arbitral tribunal. Accordingly, claimants, counsel, and damages experts must be conscious of the issues of damages estimation, and understand how the threshold for damages may be applied. Indeed, the threshold of absolute certainty leaves little room for interpretation by the parties, whereas *reasonable certainty* seems a less exact measure. In the following section, we will demonstrate how the concept of reasonable certainty has been characterized by various authorities on the matter.

II. ATTEMPTS TO DEFINE "REASONABLY CERTAIN"

Characterization of the Standard

A tribunal's interpretation of reasonable certainty has been shown to be subjective, and can vary by jurisdiction and tribunal. Professor Corbin of Yale Law School has stated this well in his book *Corbin on Contracts*:

> What is a 'reasonable estimate' and what is 'reasonable certainty'? No answer that is even 'reasonably' definite can be made to such questions…Thus, the meaning of this standard can only be determined in relation to a particular set of facts…the meaning and application of the standard in respect of particular facts will depend on personal characteristics of the one applying the rule. In the international context, one could expect varying approaches to interpretation of the notion of reasonableness because judges/arbitrators will be representatives not only of different legal systems, but, even more importantly, of different national, cultural, and religious backgrounds."[17]

Notwithstanding the "varying approaches to interpretation" identified above, courts and learned commentators have provided a definition or interpretation of what reasonably certain means in the context of damages calculations. The following is a collection of certain of those interpretations (emphasis added in each):

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[16] *Id.*

[17] Djakhonigir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. Cont. L. 1, 13 (2006), citing A L Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law,* West Publishing Co, St Paul, Minn Vol 5, 2002, 107.

- "[R]eparation must…re-establish the situation which would, *in all probability*, have existed if that act had not been committed."[18]
- "Does the court think that, given all of the circumstances, this plaintiff has presented *sufficient evidence to make it fair* to award it the damages in question."[19]
- "[T]he amount claimed 'must be *probable and not merely possible*.'"[20]
- "While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is *speculative and conjectural*."[21]
- "[A] claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be *neither speculative nor too remote*."[22]
- "The plaintiff has the burden to present evidence with a tendency to show the probable amount of damages to allow the trier of fact to make 'the most *intelligible and accurate estimate* which the nature of the case will permit.'"[23]
- The amount of alleged loss "*could not be speculative, possible or imaginary*, 'but must be reasonably certain."'[24]
- Lost profits damages should not be based on "too many undetermined variables" and "competent proof" addressing these variables could have removed the "lost profit claim from the *realm of impermissible speculation*."'[25]
- "[D]amages must be demonstrated with reasonable certainty and *must not be unduly speculative*…"[26]

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[18] The Factory at Chorzów (Claim for Indemnity) (The Merits), (1928) PCIJ, Series A, No 17, 47.

[19] Robert M. Lloyd*, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 Tenn. J. Bus. L. 11, 18 (2010).

[20] Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB (AF)/07/04, 188 (2012), citing S. Ripinsky and K. Williams, *Damages in International Investment Law* (BIICL 2008), 164.

[21] Lloyd *supra* at 37 (citing *Katskee v. Nev. Bob's Golf of Neb., Inc.,* 472 N.W.2d 372, 379 (Neb. 1991).

[22] S.D. Myers, Inc. v. Government of Canada (UNCITRAL), Second Partial Award of October 21, 2002, para 173

[23] Glen Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?,* Alb. L. Rev*,* 74.2, 637, 643 (2010 / 2011) (citing *Duane Jones Co. v. Burke,* 306 N.E.2d 237, 247–48 (N.Y. 1954) (quoting *SUTHERLAND ON DAMAGES* § 70 (4th ed. 1916)).

[24] *Id.* at 644 (citing *Kenford Co. v. Erie County*, 67 N.Y.2d at 259–60, 493 N.E.2d at 234, 502 N.Y.S.2d at 131).

[25] *Id.* (citing 155 N.Y. at 405, 624 N.E.2d at 1012, 604 N.Y.S.2d at 917).

[26] *Waguih Elie George Saig and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, 150 (2009)

- "Section 287 of the [German] Code of Civil Procedure sets the standard of proof as "*mere probability*," which is arguably *a lower standard* than reasonable certainty.[27]
- "[D]amages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences… Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an *intelligent estimate without conjecture*."[28]
- "[A]nticipated profits may be recovered when '"they are reasonably certain by proof of actual facts, with present data for a *rational estimate* of their amount.'"[29]
- "The tribunal needs to be able to assess the information provided so as to determine whether or not the *figures and underlying assumptions are reliable*."[30]
- "Tribunals must assess damages on the basis of the applicable legal principles, which generally include the principal that the burden of proof in civil cases is the balance of probabilities. Thus, tribunals must be satisfied, with the burden on the claiming party that the loss and the quantification is *more likely to be true than not*."[31]

As noted above, attempts to define reasonably certain have considered phrases such as "rational estimate"; "impermissible speculation"; "intelligent estimate"; "imaginary"; "neither speculative nor too remote", and; "intelligible and accurate estimate". These phrases demonstrate attempts to better convey expectations and to frame the evaluation of the damages testimony.

In an article for the Business Litigation Section of the Dallas Bar Association in 2011, Hon. Martin "Marty" Lowy noted that "[w]hatever methods are used, the final calculation, as well as all of its elements, should be reasonable. Put another way, the expert, like the jurors, *should not leave common sense behind.*"[32] (Emphasis added.)

Regarding the courts' varied assessments of "reasonably certain," in 1929, Professor Charles T. McCormick succinctly noted:

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[27] Eric C. Schneider *"Consequential Damages in the International Sale of Goods: Analysis of Two Decisions"* J Int'l Bus L, 615 – 618 (1995)

[28] *Delahanty v. First Penn. BK, N.A.,* 464 A.2d 1243 (Pa. Super. 1983).

[29] *Independent Business Forms, Inc. v. A-m Graphics, Inc.,* 127 F.3d 698 (8TH Cir. 1997).

[30] Hilary Heilbron *"Assessing Damages in International Arbitration: Practical Considerations"* J Damages Int'l Arb, Vol. 1, 7 (2014)

[31] *Id.* at 19

[32] Hon. Martin "Marty" Lowy, *Proving and Defending Lost Profits Damages, Dallas Bar Association, Business Litigation Section,* Paragraph S (2011).

> [A]n examination of a large number of the cases, in which claims for lost profits are asserted, leaves one with a feeling that the vagueness and generality of the principles which are used as standards of judgment in this field are by no means to be regretted. It results in a flexibility in the working of the judicial process in these cases – a free play in the joints of the machine – which enables the judges to give due effect to certain "imponderables" not reducible to exact rule.[33]

"Best Efforts"

The discussion above demonstrates the "free play in the joints" described by McCormick. This supports the concept of a "best efforts" doctrine when evaluating the threshold of reasonably certain. However, a comparison of the following three opinions demonstrates the wide latitude used when evaluating whether "best efforts" necessarily results in a reasonably certain result.

- "If the best evidence of damage of which the situation admits is furnished, this is sufficient."[34]
- "The quantity of proof is massive and, unquestionably represents business and industry's most advanced and sophisticated method of predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by [the plaintiff] in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, [the claimant's] proof is insufficient to meet the required standard."[35] "
- "While some variables in the current case may be more amenable to assessment than others…looking at the totality of relevant and necessary variables that would comprise the calculation of damages, we are simply unable to have confidence that the estimation of the entire picture is one that meets a test of 'reasonable certainty.'"[36]

A review of the case referred to in *Kenford Co. v. Erie County* is instructive. In that matter, the court's concerns appear to rest with the foundation for the analysis of the expert. That is, while the expert may have utilized "business and industry's most advanced and sophisticated method" in the calculation, if the foundation of such analysis is speculative or unreliable, the result may be speculative or unreliable, as well. The court in that case

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[33] Lloyd, *supra* at 47(citing Charles T. McCormick, The Recovery of Damages for Loss of Expected Profits, 7 N.C. L. Rev. 235, 248 (1929).

[34] *Id.* at 49(citing Charles T. McCormick, Handbook on the Law of Damages §27 at 101 (1935).

[35] *Id.* at 52(citing *Kenford Company, Inc.. v. County of Erie* 493 N.E.2d 234, 236 (N.Y. 1986)).

[36] Mobil Oil v. Canada *supra* at para 477.

appears to emphasize the importance of the "foundation" of the expert analysis in its determination of whether the result is a reasonably certain measure of the damages.[37] The importance of a "stable foundation" was also noted in *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1976) where the court indicated "the plaintiff must show 'a stable foundation for a reasonable estimate' of damages…."[38] With a "stable foundation," or a "(clear) factual base…the easier it is for the tribunal to assess the accuracy and reliability of any consequent calculations…"[39] Simply put, a logical premise of damages, corroborated by sufficient appropriate evidence is paramount to establishing a claim of damages with reasonable certainty.

With respect to the latter quote, from *Mobil Oil v. Canada*, the tribunal addresses explicitly the sufficiency of the evidence used as the foundation of the claimant's expert analysis. Here, the claimants' request for damages was bifurcated into past and future periods. On the question of the past periods, the tribunal determined that they had not been presented sufficient evidence of actual loss (i.e., the claimants had not proven the fact of loss with certainty). Regarding the future period, however, the market-based factors representing the basis of the expert's analysis (oil production forecasts, oil future prices and exchange rate futures), as well as decisions by the Canada-Newfoundland Offshore Petroleum Board that "require an estimation of…expenditures which have not yet been made or even identified…" were determined to be insufficient. The tribunal stated:

> Ultimately, after undertaking a critical examination of these variables, the Majority considers that there is *insufficient certainty* and too many questions still remain unanswered to allow it to assess the with *sufficient certainty* the amounts of damages…The Tribunal has applied the reasonable certainty standard … which has not led to a conclusion *per se*, but rather a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination.[40] (Emphasis added.)

Plainly stated, the tribunal in *Mobil Oil* did not have "confidence that the estimation of the entire picture is one that meets a test of 'reasonable certainty.'"[41] The tribunal found that "the Claimants are entitled to recover damages" provided that sufficient evidence of the

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[37] Banks, *supra* at 645 (citing *Kenford*, 67 N.Y.2d at 262, 493 N.E.2d at 236, 502 N.Y.S.2d at 133.

[38] *Wathne Imports, Ltd. v. PRL USA, Inc.* 63 A.D.3d 476 (2009) (citing Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1976).

[39] Heilbron *supra* at 21

[40] Mobil Oil v. Canada, *supra* 200.

[41] *Id.* at 202

quantum could be later furnished; however, zero damages were awarded in the tribunal's decision.[42]

Rather than granting an award of zero damages as in *Mobil Oil*, it is also within a tribunal's discretion to exclude an expert witness's report or testimony altogether when an opinion is perceived as irrelevant or unreliable and therefore falling short of reasonably certain. Sources of rules of evidence in international arbitration have stated:

- "[t]he Arbitral Tribunal shall…exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons" including "lack of *sufficient relevance* to the case or materiality to its outcome…(Emphasis added.)"[43]
- "[i]f the Arbitral Tribunal is not satisfied that either written opinion or testimony of an expert is not in accordance with the expert declaration…the Arbitral Tribunal shall disregard the expert's written opinion and testimony either in whole or in part, as it considers appropriate in all the circumstances."[44]

It is therefore essential that experts' findings are prepared and presented such that they demonstrate "sufficient relevance" and are within their "area of expertise"[45] lest their opinions be excluded and leave a claimant without measurement of their damages.

Local Interpretation

Further complicating the threshold of reasonable certainty in international arbitration is the local interpretation and implementation of the doctrine, even when the proceedings are conducted under auspices of a universal standard. In his article *Proving the Quantum of Damages*, Sieg Eiselen notes that:

> [o]ne of the concerns with conventions unifying or harmonizing law internationally is that such legislation will, despite a single text, fail in its aims as courts in different countries will interpret and apply the provisions of such a convention differently. This may be compounded by the fact that certain issues, such as procedural issues, will usually fall

[42] *Id.* at 205

[43] *IBA Rules on the Taking of Evidence in International Arbitration*, International Bar Association, May 29, 2010, 19

[44] *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration,* Chartered Institute of Arbitrators, Sept. 2007, 8

[45] *Id.* at 9

> outside the scope of the unifying legislation leading to further discrepancies and disunity of international decisions.[46]

Eiselen uses the example of the CISG to illustrate this concern. As discussed above, certain jurisdictions may require claimants to prove with certainty both the fact and quantum of loss, while in others, certainty as to the fact of loss alone is sufficient so long as the quantum can be estimated with a claimant's "best efforts." In his study, Eiselen points out that "[t]here is no such provision in the CISG [specifying the threshold of certainty]."[47] Eiselen uses the example of three arbitral decisions, each subject to the CISG and decided in separate jurisdictions to demonstrate his point. Where a "gap" exists in the CISG's approach to reasonable certainty in the fact and measurement of damages, relevant domestic law is applied in each case, resulting in "a move away from uniformity."[48]

This discussion illustrates the challenges experts face: if the courts and tribunals provide varied guidance on what is or is not reasonably certain and how that threshold may be applied, how is an expert to know whether his or her work is reasonably certain? A common theme in the materials and opinions described is that the expert must develop a foundation for his or her work that is based on sufficient facts and data. The expert must then build on that foundation with their best efforts using the documents and information reasonably available to them. Ultimately, tribunals retain considerable discretion evaluating the foundation of a claim and sufficiency of the evidence, thereby "ensuring that the assessment of damages is fair and that the claimant is properly, but not excessively compensated."[49]

III. CONCLUSION

A "reasonably certain" threshold for expert testimony is a function of "best efforts" having regard for the merits of the case. Arbitration tribunals enjoy wide discretion in determining whether or not the expert's testimony qualifies as "best efforts". Tribunals will look toward several potential variables including, but not limited to: (i) *soundness of the opinion* based upon; (ii) an *acceptable methodology* underpinned by; (iii) *relevant data;*, and possibly judged against (iv) the *intellectual rigor that could be expected of an industry expert, if applicable*.

While reasonable certainty may not be precisely defined in federal or state courts, there is the possibility of even greater ambiguity when considered in the context of international arbitration. Unless set by rule or agreement, the arbitrators would not necessarily have to

[46] Sieg Eiselen, *Proving the Quantum of Damages* Journal of Law and Commerce 25:375, 375

[47] *Id.* at 376.

[48] *Id.* at 381.

[49] Heilbron *supra* at 25

consider reasonable certainty specifically as it relates to expert testimony. However, one would expect that an expert opinion that is not reasonably certain will be provided much less weight.

Ultimately, for several reasons, achieving reasonable certainty of expert opinions in any venue will provide greater opportunities for the opinions to be accepted and given the weight they deserve within the context of the evidence provided.