



How Forensic and Quantum Experts Can Assist Counsel and Triers of Fact with Jurisdictional and Causation Topics in Arbitration/Litigation



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May 2, 2024

As first published in the [Female Fraud Forum's](#) Spring 2024 Newsletter – The FFF in Focus

Forensic and quantum experts are well equipped to use a variety of forensic and financial skills to assist counsel and triers of fact when arguing and deciding topics related to both jurisdiction and causation. Although jurisdiction and causation are generally considered legal issues to be argued by counsel and decided by triers of fact, forensic and quantum experts are able to use their skills to assist with these topics when the facts of the case allow.

In this article, I discuss two specific cases on which I personally worked, when such skills were used in either jurisdiction or causation arguments, and specifically highlight when such arguments were successful.

In Case #1, the expert on both quantum and fraud topics used forensic skills to investigate allegations of bribery and corruption to help the tribunal assess jurisdiction. This case was an investor-state dispute involving a bilateral investment treaty (“BIT”) between a European country (claimant) and an Asian country (respondent). Specifically, the expert identified red flags of fraud (bribery and corruption) related to the winning of the Government’s tender process, as well as potential bribery payments made during the process.



Some of the red flags of fraud included unusually high commissions and early payment requests from an “advisor” who lacked the proper experience. In this case, the respondent was successful in having the tribunal find that they did not have jurisdiction to hear the case as a result of the alleged bribery and corruption.

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In Case #2, the quantum experts, of which I was one, used funds tracing skills to assist with jurisdictional issues. At the beginning of the case, counsel had not asked for this type of analysis; however, upon review of the claimant’s arguments and the documents produced, we worked with Counsel to develop a plan to trace the funds of the original investment as well as alleged subsequent investments. Case #2 was an investor-state dispute under a BIT between a European country (claimant) and a Latin American country (respondent). The funds tracing process using the available documents produced by the claimant and financial analysis of the companies’ financial statements showed that the US parent entity had made the investment directly, and no funds for the investment flowed through the claimant. After discovering that the US parent made the investment and that the US parent was neither a party to the dispute or a company domiciled in the European country party to the BIT, the respondent argued this matter as a point of no jurisdiction. A decision in this case is pending.

Further, forensic and quantum experts can use both forensic and financial skills to show a lack of causation, i.e., that the alleged actions are not the cause of the alleged harm to the claimant’s business operations. For example, in Case #1 (from above), the expert provided analysis to demonstrate the claimant’s business suffered from financial mismanagement, transfer pricing, and other issues that lead to the company’s bankruptcy, not the alleged actions of the respondent. As mentioned above, in Case #1, the tribunal found that it did not have jurisdiction, therefore, this matter of causation ultimately became moot.

While both of these examples were investor-state cases under various BITs, these types of forensic and financial skills can be utilized across a variety of arbitration and litigation matters to assist counsel and triers of fact in the determination of jurisdictional and causation topics. Further, while the examples illustrate these techniques being used by respondents, such forensic and financial skills can similarly be used to show a claimant has proven jurisdiction and/or causation, depending, of course, on the facts of each case.

About the author

Laura Connor Smith has over 20 years of experience in commercial damages and valuations. She has been retained as an expert and supported the named expert on numerous occasions.

Laura has testified and submitted expert testimony relating to damages, economics, and financial issues and is frequently involved in large litigations or international arbitrations, including investor-state cases in allegations of Breach of Contract and Expropriation and Fair and Equitable Treatment. She has testified on matters with disputed values of up to US\$639 million.

Laura has provided accounting and financial advisory services for clients in a wide range of industries including telecommunications, pharmaceuticals, wholesale and retail, transportation, natural resources,



banking and related financial industries, insurance, and medical devices. She has extensive experience in assisting with internal and external investigations of financial institutions.

She specializes in damages analyses involving complex contract disputes, intellectual property, valuations, investigations, and bankruptcies both domestically and internationally. Her in-depth experience supplements her depth of experience in large international arbitrations involving both contract and treaty claims.

Laura is a Certified Valuation Analyst and Certified Fraud Examiner with a master's in business administration. She is a member of the National Association of Certified Valuators and Analysts and the Association of Certified Fraud Examiners.

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