

SHEET 22

What role can non-judicial expert evidence play in assessing economic damage?

Non-judicial expert evidence refers to all expert opinions or reports, whatever name these may be given (private expert opinion, amicable expert opinion, party's expert opinion), which unlike court-appointed expert evidence, does not involve the appointment of an expert by the court.

By providing the court with a better understanding of the nature and scale of the economic damage suffered by the claimant, non-judicial expert evidence makes a valuable contribution to proceedings. However, non-judicial expert reports are only of any real use when the data, hypotheses, methods, and premises on which they are based are fully transparent and clear, so that adversarial debate can be held on the validity and soundness of their conclusions.

The aim of this sheet is to assist litigants and their lawyers in presenting non-judicial expert reports, so that these can contribute as effectively as possible to finding the fairest solution to a dispute. This sheet only covers the recommendations on best practices to use when submitting non-judicial expert reports.

The issue of the ethics of court-appointed experts is dealt with in [sheet 21](#). The rules of ethics applicable to court-appointed experts must be followed by registered experts when undertaking a non-judicial assignment, as well as by all private technical consultants when providing a technical opinion. These rules impose obligations of independence, impartiality and objectivity.

The national council of companies of court experts (*Conseil national des compagnies d'experts de justice – C.N.C.E.J.*) provides recommendations on non-judicial expert evidence in its expert witnesses' handbook ("vade-mecum de l'expert en justice", which sets out guidelines for how private experts should behave, particularly regarding reference to the exhibits used.

1 – Scope of the non-judicial expert's role

The scope of the non-judicial expert's or consultant's role must be precisely defined. It is important to explain both which subjects should be covered in the non-judicial expert report and which should not.

Non-judicial expert reports should be fully transparent as regards the scope of the role defined by the party (or its lawyers) which instructed the private expert or consultant. The judge should be able to easily identify the assumptions made by the party or its lawyers,

the hypotheses that the expert or consultant decided to use and the conclusions reached by the expert or consultant.

The scope of the non-judicial expert's or consultant's role must be aligned with their areas of expertise.

2 – Data, information and documents used

Non-judicial expert reports must clearly state the sources of all data, information and documents used. Non-judicial expert reports must include full and precise references to the external sources they use and attach all of these as an annex.

The data used must come from reliable and properly identified sources. Accounting data used by a party in support of its claims should be certified by an independent third party (for example, certification by their auditor).

Corrections, reworking and changes applied to the raw data originally provided to the expert or consultant must be fully traceable, precisely described and properly explained.

3 – Models used

Non-judicial expert reports must clearly state the methodological approach used to identify and quantify the different types of damage analysed. The methods and models used must be suited to the characteristics of the activity concerned and the competitive functioning of the markets in question.

Their validity status and the scope of their results must be debated.

4 – Hypotheses used

All hypotheses used by non-judicial experts or consultants must be duly explained and justified based on factual and concrete evidence.

Where there is no other choice but to formulate an ad hoc hypothesis, non-judicial experts must make this clear and incorporate sensitivity analyses to assess the degree of validity of the results obtained using the hypothesis formulated and other hypotheses which could have been considered.

5 – Scope and reliability of results obtained

Non-judicial expert reports must be transparent about the scope and validity of the conclusions presented. In particular, they must present information to allow analysis of the reliability of the results obtained, their sensitivity to the main hypotheses and parameters and their validity with regard to the tangible characteristics of the sector concerned.

6 – Reproducibility of calculations

Non-judicial expert reports must be accompanied by all evidence required for a third party to be able to reproduce the analyses and results they contain

For this purpose, all data used must be provided in an annex in workable digital format (Excel files, Stata files, etc.).

It is also essential to provide the details of all mathematical calculation formula and IT programmes used, in digital format, so that the parties involved may easily consult and reproduce them.

7 – Accessibility

Non-judicial expert reports must contain a summary written in non-technical language which is accessible to non-specialists in numerical subjects (accounting, finance, or economics).

The reasoning and conclusions obtained must be clearly written, showing the underlying insights and mechanisms.

Non-judicial expert reports should ideally follow a step-by-step approach, first presenting the reasoning and simple calculations used, then if necessary, explaining their limitations and the need to use more sophisticated approaches.

8 – Value of non-judicial expert evidence in court proceedings

The Court of Cassation has ruled that the courts cannot refuse to examine a report by an expert who is not appointed by the courts, provided the report has been duly disclosed in the proceedings and submitted for adversarial debate between the parties, even when the opposing party was neither called upon nor represented during the expert's investigation (Art. 15 and 16, Code of Civil Procedure, [1st Civ., 9 September 2020, no. 19-13.755, published in the Bulletin.](#)).

However, the court cannot base its entire decision upon this report. For this to take place, the parties must provide other evidence to support it ([Divisional Court, 28 September 2012, no. 11-18.710](#); [1st Civ., 9 February 2022, no. 20-13.814](#), notary public; [2nd Civ., 17 November 2022, no. 21-15.708](#), notary public). Even where the non-judicial expert report has been prepared at the request of both parties with the involvement of both of their respective experts, the expert report must be corroborated by other evidence (2nd Civ., 9 February 2023, no. 21-615.784, notary public). This approach applies even if the opposing party has been duly invited to participate in the non-judicial expert report ([3rd Civ., 14 May 2020, no. 19-16.278](#), published in the Bulletin; 2nd Civ., 24 May 2022, no. 21612.081, notary public)

If a detailed statement of reasons is provided by the trial judges to whom each party has submitted a non-judicial expert report, it could be considered that the court has “*decided between two divergent analyses*” and that it “*has not based its decision exclusively on a non-judicial expert report prepared at the request of one of the parties, but has decided between two divergent analyses*” ([Commercial Chamber, 1st March 2023, no. 20-18.356](#)).

Even so, calling upon a court-appointed expert to play a consultative role, even during the deliberations (Art. 257, Code of Civil Procedure, see [sheet no. 23](#)), helps to avoid any complaints that the court is basing its decision exclusively on a non-judicial expert report.

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