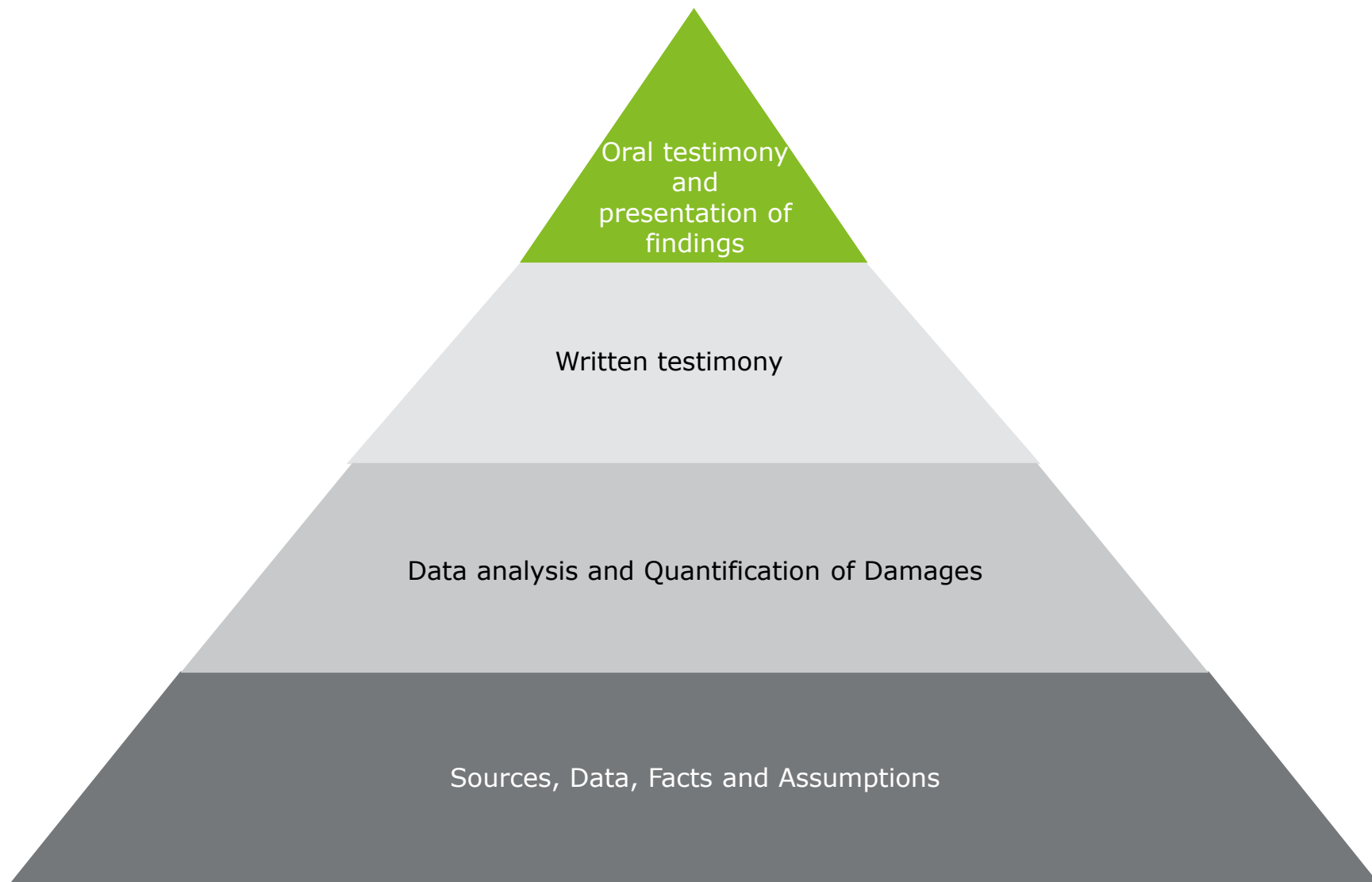


**Building and delivering expert report  
in international arbitration**

Aleksandra Petrovic, ASA  
Ljubinko Atanasov, MBA

Belgrade, 5 April 2019

# Expert testimony pyramid



# Building

# Building expert report in international arbitration

## Computation of economic damages

Supporting the expert in getting more data:



Economic damages can be classified in two distinct groups:

1. Investment (actual) costs
2. Lost profit/Business value

# Investment costs

# Investment costs

## Types of costs

**Investment costs relate to all expenses incurred during the contractual case.**

### Types of expenses:

- Negotiation and planning costs
- Capital contributions and loans
- Financial costs Marketing costs
- Costs of particular assets contributed to the investment
- Costs of recruiting or relocating personnel
- Travel and accommodation expenses
- Insurance, sometimes consulting services

# Investment costs Verification

## **In order for an expense to be included in the overall calculation of damages, 4 criteria need to be satisfied:**

- Expense has to be linked to the investment and investor (link can be direct or casual/logical)
- Expense has to be documented (for ex. appropriate invoice)
- Expense has to be paid (or sufficient evidence of certain future payment)
- Expenses have to be reasonable, necessary and not excessive

Proof needs to be clearly stated for all 4 criteria

# Investment costs

## Challenges & Remedies

### **Challenges:**

- Specialized knowledge to verify reasonability
- Lack of clear link to contractual case/reasonability and accessibility to the relevant documents
- Pre-contract expenses
- Too many documents too little time > Cost efficiency implications, potential for error bigger

### **Remedies for challenges:**

- Have specialized expert on the board
- Cross-check and „reality test“
- Random sample

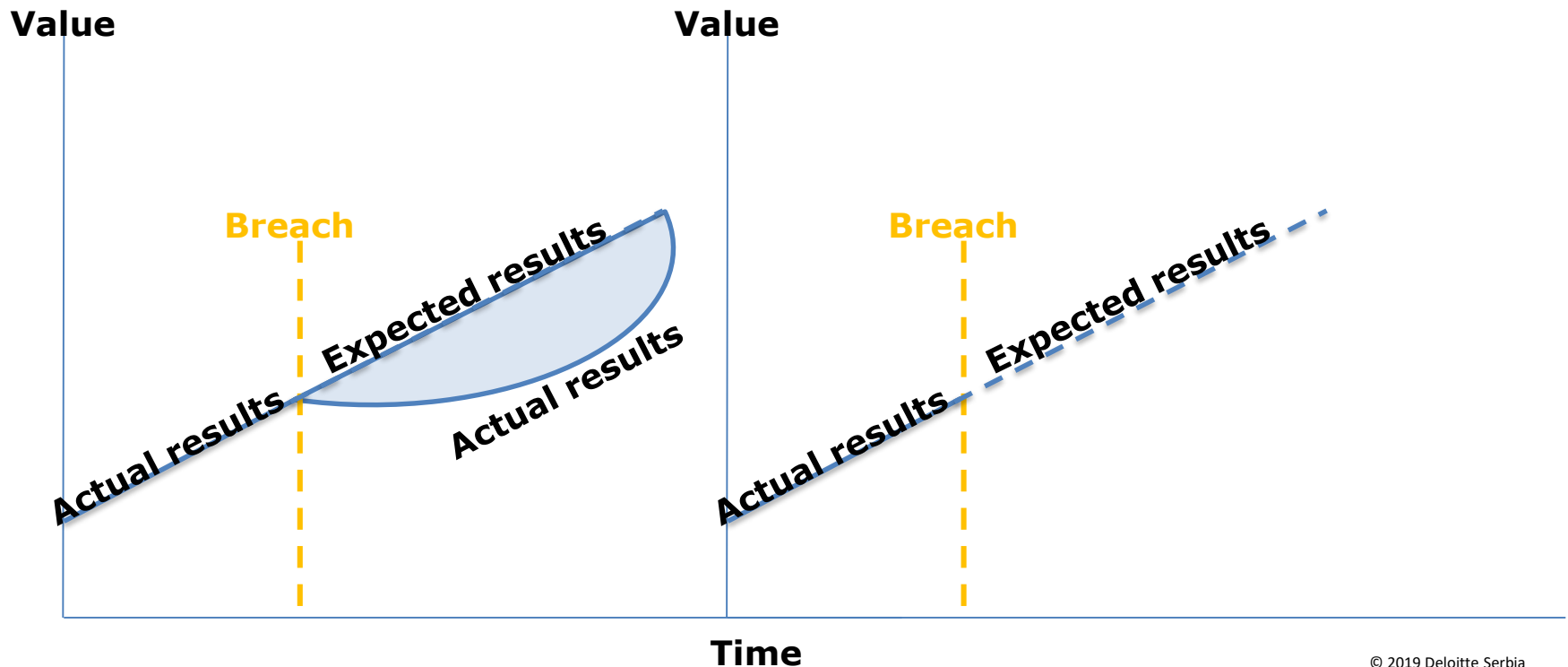


# Lost profit and business value

# Lost profit and business value

## Overview

- The activity of a company is interrupted for a certain period or the activity of a company is interrupted indefinitely
- Both scenarios rely on but-for assumption
- In first scenario only incremental result, i.e. difference between expected and actual results is counted as damage



# Lost profit and business value

## Challenges & Remedies

Lost profit projection is based on hypothetical unrealized revenue and avoided costs needed to generate that revenue.

As such proving the hypothesis becomes a challenge.

Unrealized revenue-avoided costs = unrealized lost profit

**Biggest challenge:** How to project something that did not happen?  
Reasonable certainty about the forecast?

### Other challenges:

- Date: ex-ante/ex-post
- Discount rate
- Pre-award interest
- Taxation
- Mitigation

# Lost profit and business value

## Challenges & Remedies

### Remedies for challenges:

- Comparable companies
- Prior experience of the claimant / historical financial results of the claimant
- Claimant's experience at other locations (Yardstick method)
- Industry averages
- Pre-litigation/arbitration projections
- Computation from the contract

Regardless of the method chosen, estimating lost profit is not an exact science. It is an ESTIMATION. As such, the only thing an expert should be concerned about is reliable ARGUMENTATION.

The fact that the lost profit cannot be measured exactly should not benefit the wrongdoer.

Relevant valuation methodology: Income, Market, Cost approach.

# Delivering

# Written and oral testimony

## Challenges & Remedies

### To enable effective outcome of written and oral testimony you need to:

- Define the scope
- Plan adequate time
- Consider teaming with other experts

### Challenges:

- Legal counsel can be suggestive
- Time for preparation and knowledge of all evidence materials
- The claim structure and number of possible scenarios

### Remedies for challenges:

- Expert's opinion are their own and need to be built on a firm factual and methodological basis
- When certain legal principle have to be satisfied in damage calculation, then expert may be instructed by legal counsel. This must be disclosed in report to protect credibility and independence
- The expert should be appointed before the submission of the SoC

In a room sitting between the claimant's and respondent's counsel the expert should act with authority. The expert is the one who has the ability to significantly contribute in dispute resolution.

# Written testimony

## Written testimony

### Structure of the report

**Written testimony or expert report needs to be based on a pre-determined scope.**

Usually the structure of the expert report consists of:

1. Introduction
2. Executive summary
3. Background of the case
4. If applicable – rebuttal of other experts report
5. Analysis and quantification of economic damage
6. Conclusion
7. Appendix

The goal of the expert report is to provide an independent, objective and accurate assessment of the quantum that is easy to read and digest by the arbitrators and counsels.



# Written testimony Argumentation

## **Written testimony needs to be based on adequate argumentation:**

- Argumentation must be convincing
- Argumentation must be credible
- Argumentation must be supported by theory or practice
- Argumentation must be supported by appropriate documentation

## **Examples of credible sources of argumentation for inputs used in written testimony:**

- Official/professional literature
- Data from comparable companies
- Historical financial results
- Yardstick method
- Industry averages
- Pre-litigation/arbitration projections
- Computation from the contract

# Written testimony

## Credibility

One of the first things an opposing expert looks at is the overall credibility of the report. This often means that the opposing expert will start by recreating calculations to check for errors before proceeding to cross-examine the entire written testimony for overall integrity.

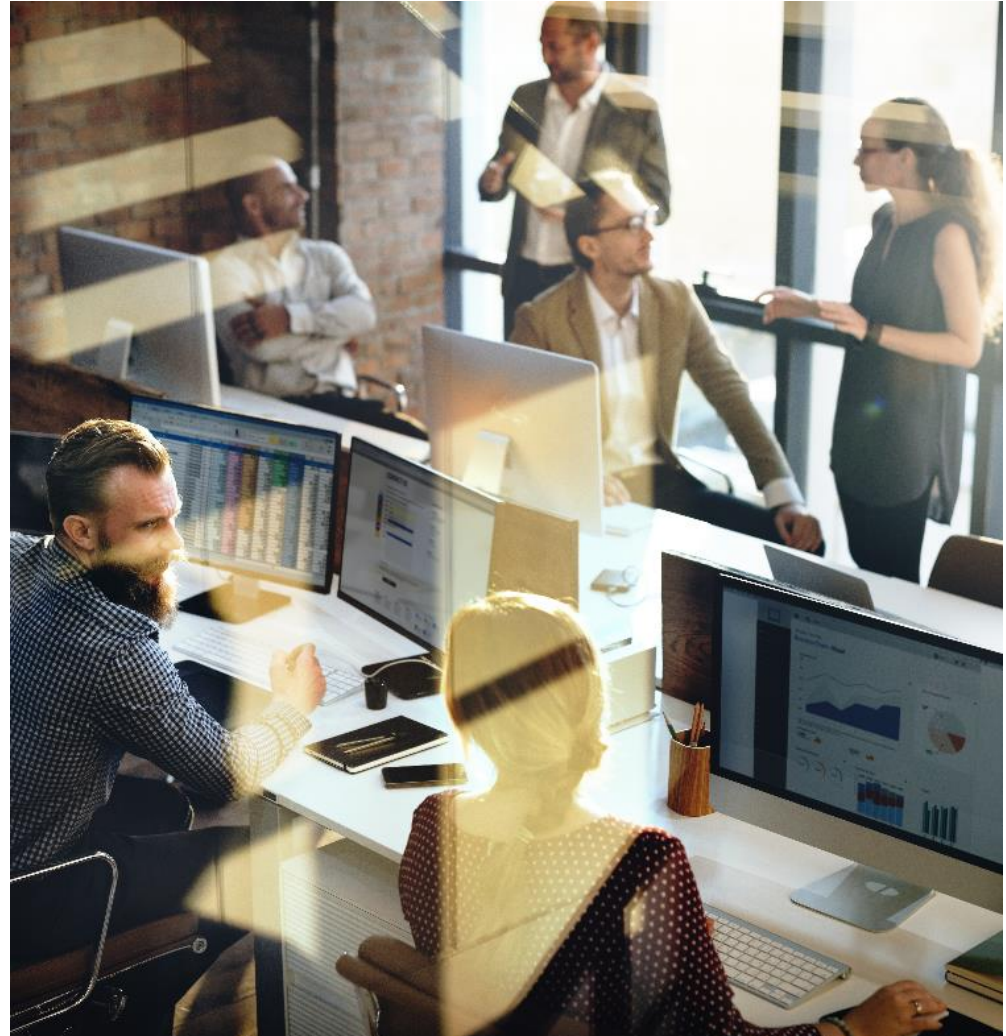
- Report should be bulletproof. Typing, referencing, calculations etc. One mistake can damage credibility.
- Should be easily readable. Keep it simple! Exhaustive reports ultimately are too hard to read and the message gets lost in too much text.
- Should not deal with opinions on matters outside expertise.
- Expert should assist the tribunal. Not advocate.

# Oral testimony

# Oral testimony Preparation

## In preparing for oral examination, the expert usually will have to:

- Be fully prepared for examination
- Be familiar with all evidence provided by the claimant and respondent
- Anticipate cross-examination questions



# Oral testimony Examination

More or less credibility given to evidence presented orally or in writing?

## **Think of context:**

Written testimony – witness statement

Oral examination – witness is led by the counsel

**However, oral examination has the emotional context which the expert report lacks. It is effectively personal. You are there, present. Not distant or 'far from eyes' as is the case with expert report.**

This emotional context can be very powerful in the context of tribunal and it can be managed in several ways:

- Experts attitude
- Experts tone of voice
- Avoiding provocations
- Speak the language that can be understandable for lawyers and arbitrators

# Oral testimony

## Challenges & Remedies

### **Challenges to effective oral testimony:**

Opposing counsel's provocations:

- Legal questions
- Out of scope questions
- Irrelevant questions with intent to confuse the expert

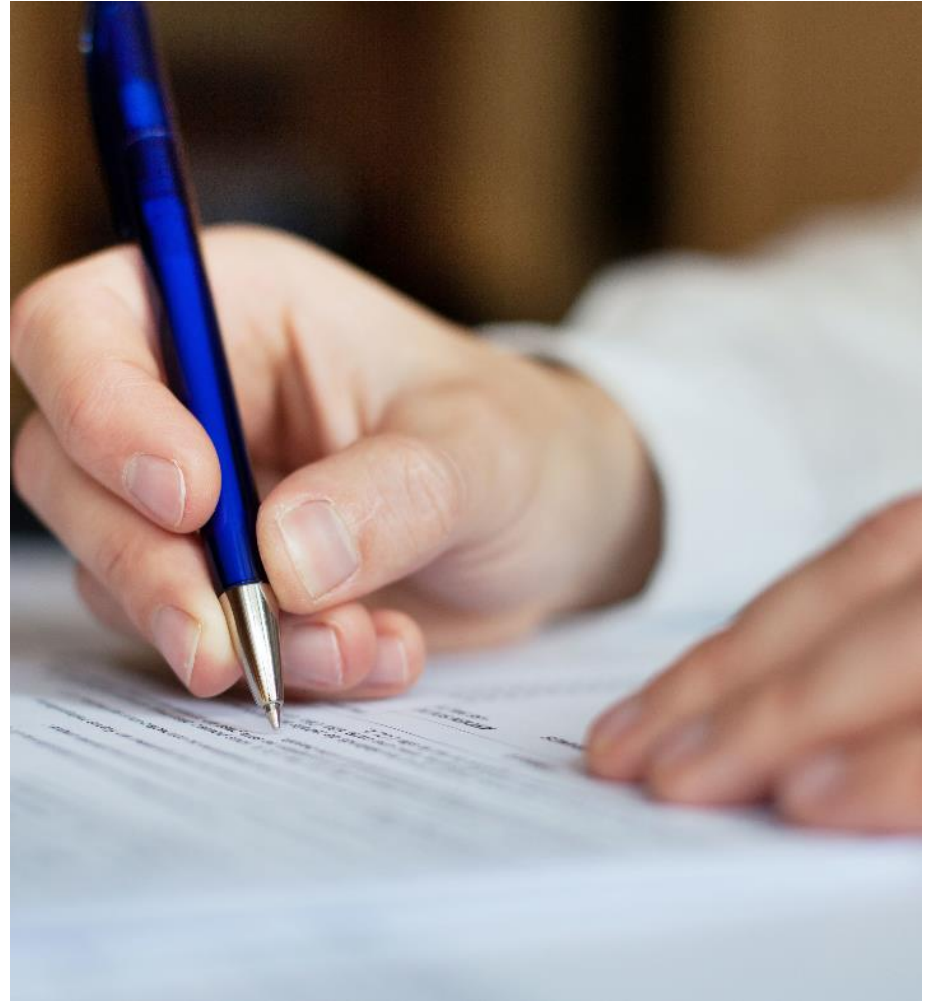
### **Remedies to challenges:**

- Keep cool
- DO NOT wonder into legal territory ("I am not a legal expert")
- DO NOT wonder outside your scope ("This question is beyond my scope")

# Summary

Building and delivering a successful expert report depends on

- ✓ Independent, objective and methodological approach to economic damage calculation
- ✓ Reliable, credible and efficient written testimony
- ✓ Professional and effective oral testimony



# Contact

## Aleksandra Petrović, ASA

---

**Director, Deloitte Serbia**



**Tel:** +381 11 381 2127

**Mob:** +381 222 89 09

**Email:** [alpetrovic@deloittece.com](mailto:alpetrovic@deloittece.com)

## Ljubinko Atanasov, MBA

---

**Senior Associate, Deloitte Serbia**



**Tel:** +381 11 381 2247

**Mob:** +381 65 222 41 57

**Email:** [latanasov@deloittece.com](mailto:latanasov@deloittece.com)





Deloitte provides audit, tax, consulting, financial advisory and legal services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte's approximately 286,200 professionals are committed to making an impact that matters.

In Serbia, the services are provided by Deloitte d.o.o. Beograd (jointly referred to as "Deloitte Serbia") which is an affiliate of Deloitte Central Europe Holdings Limited. Deloitte Serbia is one of the leading professional services organizations in the country providing services in five professional areas - audit, consulting, financial advisory, risk management and tax services through over 180 national and specialized expatriate professionals.