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PERSPECTIVES

USE OF EXPERT WITNESSES IN INTERNATIONAL ARBITRATION: EXPERIENCES AND PREFERENCES

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There is a wealth of information about international arbitration (IA) for practitioners and parties considering this form of dispute resolution. Regular surveys provide insight into developing trends in IA, preferred locations for hearings and the factors that support IA as a method of dispute resolution. However, one aspect of the IA process that has received less attention is the role of expert witnesses and preferences for their use.

We fielded market research to address the use of experts in IA. This article describes the results to five main questions about the use of expert witnesses: On what types of disputes are expert witnesses used? What are the most important factors to take into account in selecting an expert? What factors affected the experience of working with an expert? In what settings are experts most useful? How can experts be more effective?

An invitation to participate in the survey was emailed to 1280 potential respondents, of which 148 (11.6 percent) started and 110 completed the survey. Potential respondents were identified via a number of sources, including through established arbitration centres and organisations, as well as through

personal contacts and snowball sampling (names provided by those completing the survey). Before completing the survey, all participating respondents were given appropriate information to provide informed consent and agreed to a privacy notice to comply with the EU General Data Protection Regulation (GDPR).

Most participants identified themselves as external counsel or arbitrators. By descending order, participants focused on the industry areas of energy (oil & gas, power and renewables), construction, banking and finance, mining, life sciences and insurance. Other reported industries included M&A, telecoms, real estate and intellectual property (IP). The main arbitrated issues cited by survey respondents included commercial breach of contract, joint ventures, mergers and acquisitions, investment treaties and IP disputes. European venues were most commonly used by participants, followed by those in the US, Canada and Asia.

On what types of disputes are experts most used?

According to survey results, the use of expert witnesses varies by industry. In construction, 80 percent of respondents noted that they often or sometimes used expert witnesses. Energy and banking and finance followed, with experts often or sometimes used by 66 percent of respondents. For life sciences and insurance, however, only slightly more than half of the respondents noted that experts were often or sometimes used (53 percent).

> **"Survey respondents had the opportunity to define the characteristics that led to both positive and negative experiences with using experts in IA."**

For the experts themselves, most (26 percent each) were described as being technical or quantum (i.e., damages) experts. Industry and legal experts followed at 20 and 17 percent, respectively, followed by market analysis experts at 9 percent. Respondents identified a few other types, including regulatory, accounting and delay experts (as well as noting coverage of overlapping categories).

What are the most important factors to take into account in selecting an expert?

Respondents were asked to rate on a five-point scale the importance of certain factors in considering expert witnesses in IA. The three most important factors, in descending order, were: industry

expertise, credentials or special qualifications and recommendations or an established reputation. Interestingly, the expert's location was viewed as the least important factor and cost was the second-least important factor. Also of note was that while prior testifying experience was of middling importance, there was no meaningful difference based on whether that experience was gained in arbitration or other venues.

Some participants wrote additional factors that they considered important. These included objectivity, user-friendliness, communication skills, and cultural and regional expertise.

What factors affected the experience of working with an expert?

Survey respondents had the opportunity to define the characteristics that led to both positive and negative experiences with using experts in IA. Four positive attributes were identified by at least 10 percent of the responses: "experienced and knowledgeable" (24 percent), "articulate" (17 percent), "collaborative" (14 percent) and "prepared" (11 percent). Notably, "independent," "unbiased" and "flexible" ranked lowest on the list (6 percent each).

The results for negative experiences with experts largely mirrored the positive attributes. Respondents noted most negative experiences with experts who were "not prepared" (21 percent of responses), "not technical and experienced" or "not articulate" (18 percent each), or "uncollaborative" (14 percent). The lowest factors contributing to a negative experience were "partisan" and "poor time management" (8 percent each).

In what settings are experts most useful?

Respondents had the opportunity to assess the settings in which expert witnesses in IA are most useful. Again utilising a five-point scale (from "not at all useful" to "extremely useful"), respondents were asked to rate the utility of: (i) a joint report authored by experts from both claimant and respondent prior to a hearing; (ii) witness conferencing at the hearing (sometimes known as 'hot-tubbing'); (iii) independent experts retained by a tribunal; and (iv) experts retained by the parties but instructed by a tribunal.

The results of this assessment were notable more for the number of respondents who had no experience with these situations: most respondents (83 percent) had experience with witness conferencing, but fewer than

half (37 percent) had experience with independent experts retained by the tribunal.

Of those who had experience with these settings, the resounding result was that all were "somewhat useful". A joint report or witness conferencing were slightly more useful (by average score) than were experts retained or instructed by the tribunal.

The "open answer" section of this portion of the survey instrument provided interesting additional comments. Several respondents noted utility in having experts confer to narrow the issues on which they disagree. A similar suggestion was a set of topics assigned to experts to ensure that they addressed the same issues. On the topic of witness conferencing, one respondent noted these situations are more useful when they are preceded by cross-examination while another noted that hot tubbing only works if the tribunal has invested in understanding the expert issues.

How can experts be more effective?

Survey participants were invited to offer suggestions on what would increase the effectiveness of experts. The dominant answer (with twice as much support as the next leading answer) was to have clear identification of the issues to be addressed by the expert at the outset of the engagement. "Early involvement" and "more independent arguments" shared the next most common response. The least common responses were "more use" and "less use", suggesting some differing perspectives on the role of experts.

Again, many respondents took the opportunity to include other advice, including less bias, more training in how to be an expert, and more concise use of language.

Conclusion

From our perspective, the results were instructive but not surprising. As might be expected, experts are used in a variety of contexts and are selected on the basis of factors that are indicative of their degree of expertise. Good experts are those who are well prepared, work collaboratively with counsel and are capable of expressing their opinions in a compelling manner. Practitioners recognise that they share the responsibility in ensuring that effective expert testimony is delivered by narrowing the issues and clarifying the expert's mandate. CD

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