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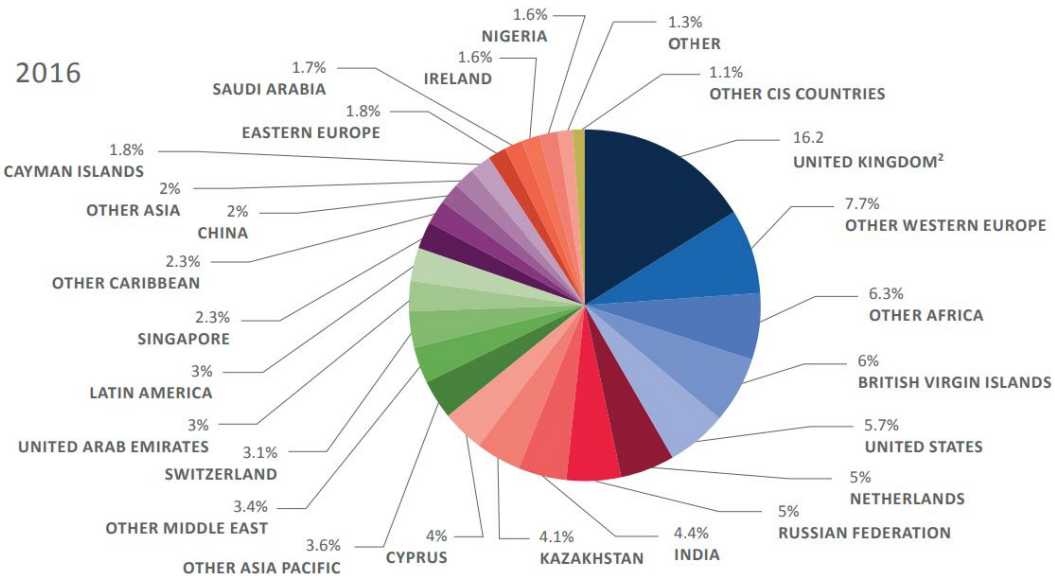
The various ways in which experts are used in international arbitration present opportunities for more effective and efficient decision-making.

1. EXPERTS ARE A FIXTURE OF LCIA ARBITRATION

1. The London Court of International Arbitration (LCIA) registers some 300 new arbitrations each year. Most, if not all, involve the use of experts. These experts play an integral role in the arbitration process.

2. Arbitrations administered at the LCIA vary considerably, covering sectors from finance to shipping. While most are decided in accordance with English law and seated in London, the vast majority of parties to LCIA arbitrations are international, as shown in the chart below.



3. These parties are drawn to English law, a London seat, and the LCIA due to their collective reputation for high-quality dispute resolution. This reputation is in part built on the access to an unrivalled pool of experts.

2. EXPERTS ARE INVOLVED IN ARBITRATION IN A VARIETY OF WAYS

4. As would be expected given the variety of parties and subject matter at the LCIA, experts are used differently from case to case.

5. Experts offer their expertise in a myriad of fields, from agriculture to biotechnology, engineering, and of course economics and accountancy.

6. Even aside from the variety of disciplines represented, experts are used in a variety of ways. The traditional role for experts, in which they draft an expert report for a party and then testify at a hearing, has been joined by a number of different methods to improve the quality and efficiency of decision-making. These methods, while providing opportunities for experts, parties, and arbitrators, do not necessarily result in experts being involved optimally.

7. Set out below are some of the key ways in which experts are involved in arbitration today, along with their associated challenges.

2.1 Advising behind the scenes

8. Exploring and developing a claim or defence to a claim often requires substantial technical or specialist expertise, beyond that which can be provided by counsel. For this reason, experts are often engaged to assist in this process.

9. Such experts are sometimes referred to colloquially as “shadow” or “dirty” experts because they are essentially an extension of the party itself, as opposed to a “clean” expert whose responsibility is to present impartial expert evidence to the tribunal. This somewhat pejorative term, however, belies the invaluable role such experts play at the outset of a case. Behind-the-scenes experts ensure that technical details are not obfuscated or misrepresented in claims and defences, and may prevent an unsupported or immature claim from being submitted in the first place. Such experts also often help to set parameters for the engagement of an expert who will ultimately provide evidence to the tribunal.

10. Experts who advise behind the scenes are rarely visible to other participants in an arbitration. It is therefore important that when these experts perform other roles, in particular when they act as arbitrators (as discussed further below), they bear in mind potential conflict issues arising out of any behind the scenes advice they have given in the past.

2.2 Party-appointed experts

11. Party-appointed experts are the most common form of experts in international arbitration. A party-appointed expert is responsible for providing expert evidence to the tribunal, usually in the form of an expert report prior to a hearing, then testimony at a hearing.

12. This traditional common-law approach, by which each of the parties’ experts works in isolation to produce an expert report, risks one of the most significant difficulties in using expert witnesses: like ships passing in the night, experts can take fundamentally incompatible approaches to answering the same question, or worse, disagree on the question itself. An example of this may be where one expert uses accounting pricing and the other uses economic pricing to determine quantum.

13. To bridge the gaps between reports provided by different experts, English courts and some international tribunals ask experts to work together, whether it be by meeting prior to a hearing to identify and narrow down the points on which there is disagreement, or even by producing a joint report for presentation to the tribunal. However, requesting experts to write joint reports will not resolve fundamental incompatibilities, not in the least as these are typically the result of instructions from the lawyers involved in the case.

14. Even the technique of witness conferencing (or "hot-tubbing" as it is more evocatively known) will not necessarily resolve these fundamental differences. Hot-tubbing involves tribunals questioning multiple experts on their evidence simultaneously. In theory, hot-tubbing allows tribunals to identify precisely where experts diverge in approach, assumptions, and conclusions. This should, in turn, allow tribunals to attempt to reconcile or at least understand these differences with the help of the experts themselves. Hot-tubbing, however, depends on tribunals having enough comfort with the underlying issues to probe the experts critically – something which is far from guaranteed.

2.3 Tribunal-appointed experts

15. Another way to obtain expert evidence, one that is potentially more effective when it comes to bridging incompatible approaches, is for the tribunal itself to appoint an expert. This may be done either instead of, or in addition to, the parties appointing experts.

16. This traditionally civil law system of having a court- or tribunal-appointed expert has been embedded in the LCIA system: Article 21 of the LCIA Arbitration Rules expressly provides for tribunal-appointed experts. By appointing an expert itself, a tribunal can ensure that it is receiving a truly non-partisan view of the evidence. It does, however, require the tribunal to have analysed the case and the issues at hand at a sufficient level of detail to be able to determine the profile of the required expert.

17. Where experts are also appointed by the parties, a tribunal-appointed expert is able to guide the tribunal in reconciling any differences between approaches, allowing the tribunal to take a firmer hand and ensuring that the technical elements of a final determination are of a high standard.

2.4 Expert determination and split clauses

18. While expert determination is often spoken about in the context of arbitration, it is not actually arbitration at all, but an entirely different form of dispute resolution. Expert determination is a purely contractual form of dispute resolution. It involves an expert, rather than an arbitrator, deciding a dispute, and the result is not an arbitration award enforceable on the basis of national and international standards.

19. Expert determination is commonly used where the subject matter of a dispute is or is thought to be technical rather than legal, such as determining the closing accounts in the context of a share purchase agreement.

20. A split clause is a clause that refers some disputes arising out of a particular agreement to one method of dispute resolution, such as arbitration or court litigation, and other types of disputes to another method of dispute resolution, such as expert determination. Split clauses are often seen as a more efficient method of dispute resolution than referring all disputes to arbitration or litigation.

21. Whether these clauses are indeed effective very much depends on the types of dispute which arise. Expert determination is not the optimal dispute resolution mechanism if disputes arise in which the (underlying) issues are legal rather than technical. An example is where an inability to agree on closing accounts is not the result of a difference of opinion in the application of accounting standards, but rather a difference of opinion as to which standards apply.

22. These complications are compounded in split clauses, which require a clear delineation between the two categories of disputes. Split clauses require careful drafting to ensure that carving out certain disputes for expert determination works. In particular, it is important to ensure that a party is not left with either no remedy or conflicting remedies where a dispute arises about the scope and effect of the carve-out clause, and the hierarchy of the elements contained therein.

2.5 Experts as tribunal members

23. A natural extension of having a tribunal-appointed expert is to have an expert as a member of the tribunal. Having an expert as a tribunal member overcomes one of the potential limitations of tribunal-appointed experts: a tribunal that relies too heavily on its appointed expert may be said to have delegated its fundamental decision-making responsibility, which could impact the enforceability of any award rendered. If the expert is a member of the tribunal, no such issue arises.

24. The main difficulty with having an expert on a tribunal is actually getting the expert appointed, which requires determining the most appropriate area of expertise. Parties will often disagree on what type of expert to appoint, as well as how and by whom the expert will be appointed. Debates over these issues can often devolve into mini-arbitrations in themselves.

25. Institutional appointment sidesteps some of these issues, but still requires a degree of consensus about the profile of the expert to enable the institution to constitute a balanced tribunal with the necessary legal and technical expertise to decide the dispute.

3 IMPROVING THE USE OF EXPERTS IN INTERNATIONAL ARBITRATION

26. As set out above, there are a considerable variety of ways in which experts become involved in international arbitration. While each method presents opportunities and unique benefits, it is important to recognise their respective shortcomings.

27. Aside from using and developing these methods, there are other steps that can be taken to make better use of experts in international arbitration:

a) lawyers and arbitrators should develop their familiarity and comfort dealing with the issues on which experts are often asked to contribute, particularly quantum, which is significant to the vast majority of cases; and

b) experts themselves must ensure that if asked to co-operate, they are flexible enough to facilitate a discussion with the tribunal and with the other experts.

28. With the increasing size and complexity of international disputes, experts will be called upon more and more to provide their invaluable expertise, and in a wider variety of capacities. All involved should work to ensure that this expertise is utilised to the fullest extent.