ANNUAL ARBITRATION SURVEY 2021

Expert Evidence in International Arbitration

Saving the Party-Appointed Expert

BRYAN CAVE LEIGHTON PAISNER BLP

BCLP'S INTERNATIONAL ARBITRATION GROUP

Over the last 11 years we have conducted a number of surveys on issues affecting the arbitration process:

- Rights of appeal (2020)
- Cyber-security in arbitration proceedings (2019)
- Unilateral arbitrator appointments (2018)
- Increasing diversity on tribunals (2017)
- The use of tribunal secretaries (2015)
- Choice of seat (2014)
- Document production (2013)
- Delay (2012)
- Conflict of interest (2010)

The report on each of those studies can be found on our International Arbitration practice page here.

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EXPERT EVIDENCE IN INTERNATIONAL ARBITRATION

This year's survey considers the role of party-appointed experts in international arbitration: a topic that has been the subject of debate for a number of years.

Party-appointed expert evidence is an established feature of international arbitration practice. The primary role of a party-appointed expert is to assist the tribunal on matters outside the expertise of the tribunal and to do so on an objective and independent basis. However, to meet their obligations, the party-appointed expert must tread a delicate line. On the one hand, they owe contractual duties to the appointing party and, naturally, there is a desire to support that party and potentially secure repeat instructions. On the other hand, they have a duty to remain independent and assist the tribunal with genuinely objective opinions on issues within their field of expertise. Managing such obligations, which often at least appear to be in conflict, can be difficult. Some would say in reality it is impossible, and that party-appointed experts will always in the end be partisan.

Another challenge arises from the scope of an expert's work. Their role can be far broader than testifying before a tribunal. In many cases, experts are retained to provide advice at an early stage, helping to identify the issues that may end up the subject of the dispute and their causes before becoming a testifying expert. On the one hand, there is a risk of such a role ultimately compromising an expert's ability to provide the tribunal with truly objective evidence. On the other hand, being sure they can give truly independent expert testimony is something many regularly appointed experts will work hard to achieve, so as to be sure of maintaining their reputation in the market.

This year, we want to examine the perceived problems with party-appointed experts. To start with, are the problems real or is it an impression derived from a small minority of cases? If the problems are real, are there measures that can be adopted to mitigate them and who should take the lead in implementing them? Are there better alternatives for adducing expert evidence in arbitration?

We have once again canvassed the opinions of the many international arbitration practitioners and users with whom we work. We hope that readers will find the results of the survey and the analysis provided in this report both interesting and useful.

We would like to thank all those who responded to the survey, on whose contribution these surveys depend.

GEORGE BURN Co-Head of International Arbitration
CLAIRE MOREL DE WESTGAVER Partner, International Arbitration
VICTORIA CLARK Knowledge Development Lawyer, International Arbitration

THE ROLE OF THE PARTY-APPOINTED EXPERT

The role of experts is to assist the tribunal with aspects of the dispute that require expertise. Tribunals may choose to appoint their own expert or derive this assistance from party-appointed experts. If appointed by a party rather than the tribunal, the expert has duties towards their appointing party as well as towards the tribunal. The extent of these duties depends on the legal system involved, the circumstances of each engagement including the experts' instructions, terms signed, any applicable arbitration rules and professional rules to which the expert may be subject.

The duty of a party-appointed expert to assist the tribunal overrides competing obligations. However, in light of their relationship with the appointing party, the role of a party-appointed expert may go beyond assisting the tribunal. In particular, testifying experts sometimes act as adviser experts, before or during the arbitral proceedings. There are currently no clear rules or guidance on whether this practice is appropriate or whether it should be disclosed to the other side or the tribunal.

Aside from the role of an expert to assist the tribunal or counsel with issues that require a particular expertise, parties may need the assistance of an expert to prove their case. This leads to the question of the role of the party-appointed expert from an evidentiary perspective. The opinion of a party-appointed expert consists of evidence, to which each party should have access to deploy and meet its burden of proof. Akin to the right to rely on documents or factual evidence to support one's case, is there a right for parties to appoint an expert and rely on their evidence?

A RIGHT TO RELY ON THE EVIDENCE OF A PARTY-APPOINTED EXPERT?

In line with the principle of party autonomy, expert evidence forms part of the matters on which parties may agree. Disputing parties often discuss the areas in which expert evidence will be required, in order to arrive at an agreed view of the scope of the required evidence. Sometimes such matters are put to the tribunal for determination, the point of having the scope of expert evidence set out ahead of time being to avoid the "ships in the night syndrome" (in which the evidence put by the two sides addresses different questions) and ambushes.

Matters to be agreed include the issues in relation to which expert evidence may be adduced, the discipline of the expert and the type of appointment. If the parties are unable to agree, whether the parties may rely on the evidence of party-appointed experts from a particular discipline is at the discretion of the tribunal.

In making a decision on whether the use of party-appointed experts would be appropriate in the circumstances, tribunals must conduct the proceedings in a fair and effective manner, ensuring that each party has a reasonable opportunity to present its case. Such decisions can give rise to important due process considerations, including in terms of its potential impact on the validity or enforcement of the ensuing award. Other factors commonly considered by tribunals include relevance and proportionality as well as the question of whether the evidence of a party-appointed expert is required in light of the tribunal's own expertise.

Indeed, one of the benefits of arbitration lies in the possibility to choose arbitrators with a particular expertise. In practice, the fact that one or more members of a tribunal has expertise in a particular area may not be conclusive. For example, a tribunal may be comfortable making a determination on a foreign law issue based on legal submissions only (without the benefit of expert evidence on this issue) and despite having no relevant expertise. Similarly, parties routinely adduce expert evidence on certain issues in spite of the tribunal having knowledge and experience of these issues.

SAVING THE PARTY-APPOINTED EXPERT

TRANSPARENCY OVER THE INSTRUCTION OF PARTY-APPOINTED EXPERTS

Concerns exist regarding the influence that counsel exercise over the instruction of party-appointed experts and the development of the expert's opinion. Experts must comply with their duty to be independent, but the role that counsel play in encouraging less objective opinions should not be underestimated. In particular, the way in which counsel formulate instructions may on its own create a perception that the opinion of party-appointed experts is inappropriately slanted.

The question therefore arises as to whether more transparency on the instruction process could limit lawyer influence over the content of expert testimony and perhaps result in greater independence and objectivity on the part of party-appointed experts. The disclosure of communications between counsel and experts, working papers, draft expert reports and the like could enhance transparency in a way that would bolster the perceived objectivity of the expert and their evidence. However, in many legal systems, such material is typically covered by privilege or confidentiality. The apparent benefit of disclosure of these materials will have to be balanced with any impact on parties' due process rights and any implication on the way in which party-appointed experts would be instructed and prepare their reports (presumably refraining from creating any records). As a minimum however, experts should be required to set out their instructions and the issues they have been asked to address, as well as what materials were made available to them.

INDEPENDENCE OF THE PARTY-APPOINTED EXPERT

Concerns exist around the use of party-appointed experts. Their related duties to the tribunal and the party that instructed them create an inherent tension in their role and does not promote independence. There is a perception among the arbitration community that the opinions of party-appointed experts are not always objective. In the same vein, it has been suggested that party-appointed experts are effectively "hired guns" or "advocates in disguise", which in turn raises the question of efficiency and the legitimacy of the process as a whole.

Some take issue with the current system, which is at risk of producing unreliable evidence and inefficiencies. According to this view, the use of party-appointed experts generates unnecessary costs, including fees incurred not only by the experts themselves but also by the instructing lawyers and arbitrators. Further, there is a perception that parties often rely on the evidence of a particular expert to bolster their case rather than assist the tribunal. This is sometimes achieved through the appointment of an expert who is the leading authority on the issue and who is effectively re-arguing the case of their appointing party under the guise of presenting the expert opinion. Such an approach gives rise to duplication of costs and may unduly influence or force the other party in the arbitration to incur costs to "respond" to the expert evidence relied upon by its counterpart.

One argument in favour of the use of party-appointed experts is that potential abuses form part of the broad range of litigation tactics that do not detract from the efficacy of the system as a whole. Instead, tribunals should simply watch out for improper conduct and draw appropriate conclusions as part of their assessment of the value of the evidence in question and allocation of costs between the parties.

Some point to the safeguards against any failure to comply with the duty to be independent. These include the possibility for opposing counsel to highlight the alleged lack of independence of an expert's opinion through cross-examination and seek to reduce the credibility of the expert and the weight attributed to their opinions by the tribunal. A finding of a lack of independence can have seriously damaging consequences for an expert witness, in particular one looking for regular appointments in contested proceedings.

Independence is inherently subjective in nature. While it may be straightforward to assess the independence of an expert in terms of prior working relationships or other connections, the same cannot be said with respect to an expert's opinions. In most cases, the line between an objective opinion in favour of their instructing party and an opinion influenced by the position taken by the expert's appointing party is blurred. Indeed, even where experts are rigorous in seeking to ensure they act independently, as most are, issues of unconscious bias may influence matters.

Aside from the impact on the weight attributed to the experts' evidence, there is currently no system of formal sanction in the arbitral process. Tribunals are generally reluctant to address any concern they may have over an expert's independence. In litigation, notably in the English courts, judges have openly criticised partisan experts in judgments and in extreme cases made costs orders against experts. Arbitral awards however are generally confidential. As a result, any criticism by the tribunal included in an award would not be public and would therefore have limited effect beyond the dispute and award in question. The trend towards increased transparency in international arbitration and the publication of awards may alter this position in the future.

CONTROL OVER EXPERT EVIDENCE AND ALTERNATIVES TO THE PARTY-APPOINTED EXPERT

Some consider that greater control by tribunals over the use of party-appointed experts could improve the process, both in terms of objectivity and efficiency. Tribunals can exercise control over the taking of expert evidence in many different ways, including by adopting measures at different stages and in relation to different aspects of the arbitration. These include the initial phase of the arbitration, when parties could identify issues that require expert evidence and the tribunal fixes the procedure and the timetable. Measures to give tribunals more control go beyond the initial phase and allow tribunals to intervene at various points of the proceedings and in different ways. These include approving the instructions to party-appointed experts thereby ensuring the questions put to each party's expert are the same, encouraging expert meetings and joint statements and hot-tubbing. We explore these measures in the survey in light of their prior use and feasibility.

One important consideration is the tribunal's knowledge of the issues in the case. Indeed, more tribunal interventions presupposes an understanding of the fault lines. In other words, can the tribunal determine the type and extent of expert evidence required at an early stage, before having the benefit of any expert evidence? It follows that the whole sequence of procedural steps may need to be considered to ensure that the tribunal has the necessary knowledge by the time it makes decisions that will shape the taking of expert evidence.

Another way to provide more control over the process is the possibility of the tribunal appointing its own expert. A tribunal-appointed expert may be agreed by the parties or selected by the tribunal. We explore this in the survey, along with other alternatives to party-appointed experts. Other alternatives include a single expert jointly appointed by the parties, a witness of fact (typically an employee of a party) giving technical evidence, and the tribunal using its own expertise.

WHAT WE ASKED

We wanted to explore the role of the party-appointed experts in international arbitration and its inherent implications when it comes to the arbitral process. We were interested in finding out how important respondents thought the ability to rely on the evidence of a party-appointed expert is. We sought their views on whether such ability amounts to a basic right and how common are instances where a tribunal refuses to grant permission to adduce or exclude the evidence of a party-appointed expert. We asked respondents to share their views on whether foreign law issues are better handled by way of expert evidence or legal submissions.

As regards independence, we wanted to find out if respondents considered that party-appointed experts are in reality independent or in fact "hired guns" or "advocates in disguise" and, assuming the latter, whether they see this as problem. We explored the possibility for party-appointed experts to have a dual role of advisory and testifying expert, and the prospect of addressing the apparent lack of independence through disclosure of documents relating to the instructions of the experts and the preparation of their reports.

We looked into reasons for keeping the system, reasons for getting rid of the party-appointed experts, and alternatives to introducing expertise in the arbitral process. Lastly, we asked respondents to share their views on the need for more control over the use of party-appointed experts, and measures that tribunals may (and already) adopt – including the use of sanctions – to address issues of independence and to improve efficiency.

WHO WE ASKED

- Arbitrators
- Corporate counsel
- External lawyers
- Those working at arbitral institutions
- Academics
- Expert witnesses

The geographical regions in which our 289 respondents work include Central and South America, North Africa, Western Europe, East and South East Asia, Australasia, the Middle East, Latin America and the Caribbean, Eastern Europe (including Russia and CIS), West and East Africa and North America. The majority (75%) of respondents were from a common law background and 44% of respondents were expert witnesses. The respondents were involved in disputes across a wide range of sectors including construction and engineering (67%), energy and natural resources (53%), international trade and commodities (27%), maritime and shipping[1] (24%)*.

Respondents had been involved in arbitrations involving party-appointed experts across a wide range of disciplines including: quantum (79%), delay programming (59%), forensic accounting, foreign law (47%) and forensic accounting (40%)*. Areas of technical expertise included: maritime and shipping; mechanical, electrical, civil and structural engineering; banking and finance and oil and gas.

[1] One issue, highlighted by 69 respondents, was our failure to include maritime and shipping as a separate industry sector distinct from International trade and commodities. We have taken that point on board. The report identifies the percentage response rate received from those working in this sector and we will ensure that maritime and shipping is included as a separate sector in future surveys.

* Multiple responses were permitted.

KEY FINDINGS

PARTY-APPOINTED EXPERTS MAY NOT NEED SAVING

96% of respondents thought that it was important that parties should have the right to rely on the evidence of a party-appointed expert.

84% of respondents thought that it was a basic right of each party to rely on a party-appointed expert as a means of putting forward evidence on specific issues.

12% of respondents thought that, if expert evidence is required, the tribunal should appoint an expert.

HIRED GUNS OR ADVOCATES IN DISGUISE AND IS THAT A PROBLEM

51% of respondents agreed that party-appointed are "hired guns" or "advocates in disguise" but, of that 51%, **24%** did not think that this was a problem.

THE NEED FOR GREATER CONTROL

52% of respondents did not think there should be greater control over the use of party-appointed experts.

47% of respondents felt that the tribunal should have primary responsibility for controlling the use of party-appointed experts.

SANCTIONS FOR BIASED EXPERT EVIDENCE

93% of respondents thought that a tribunal should give limited weight to the evidence of a party-appointed expert who breaches his/her duty to remain independent and assist the tribunal.

62% of respondents thought that a tribunal should impose cost sanctions in respect of a party-appointed expert who breaches his/her duty to remain independent and assist the tribunal.

36% of respondents thought that a tribunal should publicly censure a party-appointed expert who breaches his/her duty to remain independent and assist the tribunal.

INDEPENDENCE, OBJECTIVITY AND DISCLOSURE

21% of respondents felt that rules allowing the disclosure of counsel-expert communications would promote greater independence and objectivity on the part of party-appointed experts.

84% of respondents felt that rules allowing disclosure of counsel-expert communication were unnecessary as tribunals are generally capable of determining when a party-appointed expert is not being objective in their testimony.

61% of respondents felt that rules allowing disclosure of counsel-expert communication would adversely affect the quality of expert evidence.

81% felt that rules allowing disclosure of counsel-expert communication would result in increased costs and inefficiency by increasing the use of "shadow experts".

51% thought that, in the majority of arbitrations the requirement of independence of experts is sufficient safeguard against the potential risks associated with partisan experts.

35% thought that standards set out in soft law instruments like the IBA Rules on the Taking of Evidence in International Arbitration provide sufficient protection against party-appointed experts not being objective in their testimony.

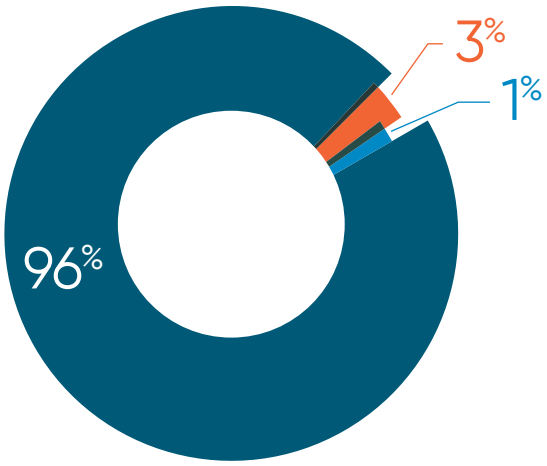
ALTERNATIVES TO THE PARTY-APPOINTED EXPERT

The most favoured (and least unpopular) alternative to the party-appointed expert was a tribunal-appointed expert selected by the parties (**58%/19%**), followed by a single joint expert selected and appointed by the parties (**53%/19%**). A tribunal-appointed expert selected by the tribunal was a less favoured (and more unpopular) option (**41%/32%**).

PARTY-APPOINTED EXPERTS MAY NOT NEED SAVING

QUESTION

How important is it that that parties should have the right to rely on the evidence of a party-appointed expert in arbitration?

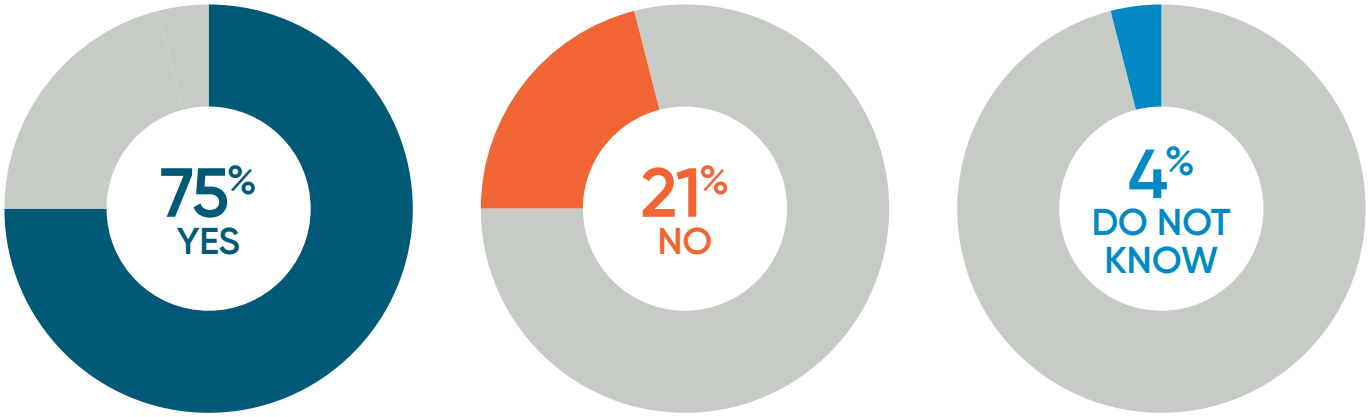


- Important: **96%**
- Not very important: **3%**
- Not important at all: **1%**

84% of respondents thought that it was a basic right of each party to rely on a party-appointed expert as a means of putting forward evidence on specific issues.

QUESTION

It is increasingly common for experts to be retained to provide advisory and arbitration support at an early stage, before becoming a testifying independent expert. Is it appropriate for a party-appointed expert to have a dual role as an expert advisor at an early stage and as a testifying expert at a later stage?



Although only a minority, that 21% of respondents did not consider it appropriate for a party-appointed expert to have a dual role is significant, not least in light of general paucity of transparency on this issue.

I see no issue with a party engaging an expert who was involved prior to the dispute or the proceedings. However, I do believe that this should be taken into consideration when considering the weight of the party-appointed expert's evidence. It may be advisable to engage a new expert for the arbitration. That way, if both the original expert and the expert later engaged for the arbitration reach the same conclusion then their aggregate weight could be considered more substantial.

Nuna Lerner
Partner, Gornitzky & Co.

I think it is desirable and will save costs overall for a party to be able to instruct one expert both to advise on which claims are justified and need to be settled and which need to be fought, and to give evidence in relation to the claims which need to be fought.

Robert Gay
LMAA arbitrator (Supporting Member)

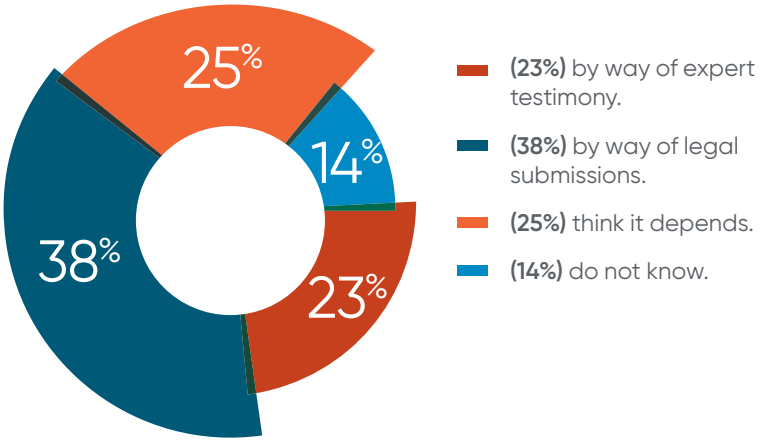
Early engagement of experts can be useful in highlighting the strengths and weaknesses of a case. Where the same expert gives evidence in an arbitration, it is important that their initial instructions make clear that they are to remain independent and impartial: this is almost always understood and respected by experts and clients alike.

Richard Dupay
Senior Associate
Bryan Cave Leighton Paisner

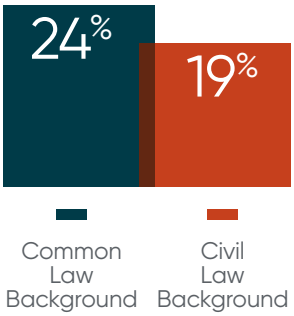
ISSUES OF FOREIGN LAW

QUESTION

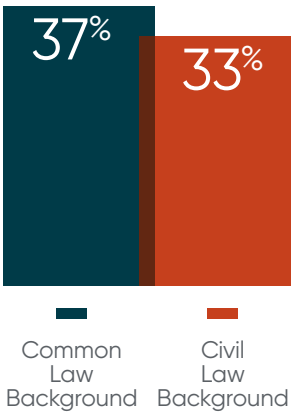
Should issues of foreign law be dealt with by way of expert testimony or legal submissions?



EXPERT TESTIMONY



LEGAL SUBMISSIONS



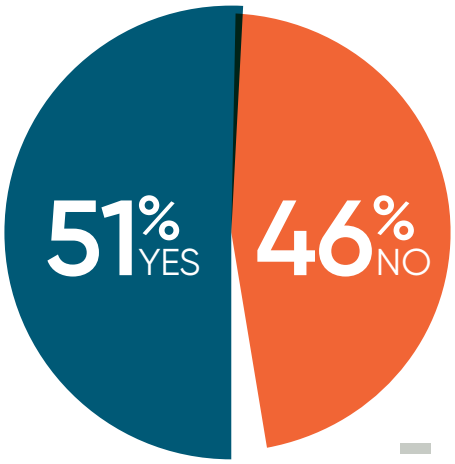
24% of respondents from a common law background thought issues of foreign law should be dealt with in expert testimony compared to 19% of respondents from a civil law background. 37% of respondents from a common law background thought that issues of foreign law should be dealt with in legal submissions compared to 33% of respondents from a civil law background.

That more than half of respondents (63%) thought that dealing with foreign law issues by way of legal submissions is preferable or at least is appropriate in certain cases indicates that tribunals generally have sufficient expertise to make determinations on foreign law issues. Given that arbitrators tend to be lawyers, it is perhaps not surprising that foreign law issues are treated differently from other type of issues on which expert evidence is typically relied in international arbitration.

HIRED GUNS OR ADVOCATES IN DISGUISE

QUESTION

Are party-appointed experts essentially "hired guns" or "advocates in disguise"?



(3%) do not know.

Of interest was the extent to which respondents perceived this to be a problem. Of the 51% of respondents who agreed that party-appointed experts are "hired guns" or "advocates in disguise", 27% thought that this was a problem whilst 24% did not.

Analysis of response rates by reference to the role played by the respondent in the arbitration process

RESPONDENT	YES, AND I THINK IT'S A PROBLEM	YES, BUT I DO NOT THINK IT'S A PROBLEM	NO	DO NOT KNOW
Law Firm	29%	31%	38%	2%
In-house Counsel	30%	50%	20%	-
Arbitrator	34%	23%	40%	3%
Expert	23%	10%	65%	2%

Several respondents commented that one way to address the "hired gun" problem would be to ensure that at least one member of the tribunal had relevant technical expertise, so as to be in a position to test and give appropriate weight to the opinion of the expert.

> In my experience, the best experts entirely recognise that their duty is to the tribunal and often the most difficult part of an expert's role is managing instructing lawyers' and clients' expectations as a result of this.

Liam Holder
Secretariat

> Determining whether an expert has been independent or not is often very difficult and the failures to remain independent are typically subtle and arguable.

Roula Harfouche
HKA

> Independent experts help the tribunal, but it is also important to recognise that a genuinely independent expert will be a more effective and credible witness. Tribunals prefer evidence from experts who can demonstrate their independence by being open, identifying areas where they do not have the full information or anything else that may affect their opinion. Tribunals will be more sceptical of experts who come across as partisan and argue their client's case unquestionably.

Shy Jackson
Partner
Bryan Cave Leighton Paisner

THE ROLE OF TRANSPARENCY IN PROMOTING INDEPENDENCE

As a starting point, we took Article 5(2)(b) of the IBA Rules on the Taking of Evidence in International Arbitration, which provides that an expert report should include a description of the instructions given to expert. 97% of respondents agreed that this was an appropriate level of disclosure.

72% of all respondents agreed that a copy of the instructions given to the expert should be annexed to the report. The response rate was consistent across different legal backgrounds. 67% of respondents from a civil law background and 73% of respondents from both a dual background agreed that a copy of the instructions given to the expert should be annexed to the report.

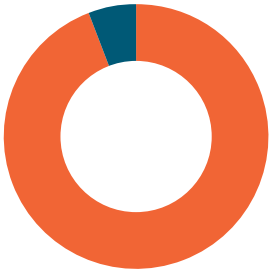
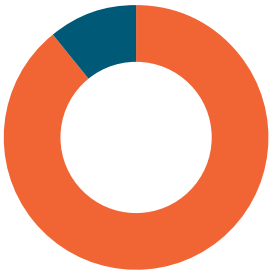
The vast majority of respondents were not in favour of any broader disclosure beyond the instruction given to the expert. Just over a third (38%) were in favour of disclosure of the financial terms of the expert's engagement; only 11% were in favour of disclosure of working papers; and just 6% were in favour of disclosure of draft reports.

With regard to the potential disclosure of counsel-expert communications, only 21% of respondents agreed that rules allowing disclosure of counsel-expert communications would promote greater independence and objectivity on the part of party-appointed experts. 84% of respondents felt that such rules were unnecessary as tribunals are generally capable of determining when a party-appointed expert is not being objective in their testimony. 61% of respondents felt that rules allowing disclosure of counsel-expert communication would adversely affect the quality of expert evidence and 81% felt that it would result in increased costs and inefficiency by increasing the use of "shadow experts".

QUESTION

What level of disclosure is appropriate?

		AGREE	DISAGREE
An expert report should include a description of the instructions given to the expert.		97%	3%
A copy of the instructions given to the expert should be annexed to the expert report.		72%	28%
An expert report should include a statement setting out the financial terms of the expert's engagement.		38%	62%

		AGREE	DISAGREE
Party-appointed experts should be required to disclose draft reports.		6%	94%
Party-appointed experts should be required to disclose working papers.		11%	89%
Rules allowing disclosure of counsel-expert communications would promote greater independence and objectivity on the part of party-appointed experts.		21%	79%
Rules allowing disclosure of counsel-expert communications are unnecessary as tribunals are generally capable of determining when a party-appointed expert is not being objective in their testimony.		84%	16%
Rules allowing disclosure of counsel-expert communications would have an adverse effect on the quality of expert evidence.		61%	39%
Rules allowing disclosure of counsel-expert communications would result in increased costs and inefficiency by increasing the use of "shadow" experts.		81%	19%

ALTERNATIVES TO THE PARTY-APPOINTED EXPERT

QUESTION

How would you rank alternatives to party-appointed experts?

	RATING (1 = very desirable 5 = not desirable at all)		
ALTERNATIVE	1-2	3	4-5
Tribunal-appointed expert selected by the tribunal.	41%	27%	32%
Tribunal-appointed expert selected by the parties.	58%	23%	19%
Single joint expert selected and appointed by parties.	53%	28%	19%
No expert evidence – employees of parties to give technical evidence.	14%	9%	77%
No expert evidence – tribunal to use own expertise.	12%	8%	80%
No expert evidence – party-appointed arbitrators to provide technical expertise.	16%	9%	75%

The most favoured (and least unpopular) alternative to the party-appointed expert was a tribunal-appointed expert selected by the parties (58%/19%), followed by a single joint expert selected and appointed by the parties (53%/19%). A tribunal-appointed expert selected by the tribunal was a less favoured (and more unpopular) option (41%/32%).

Options involving no expert evidence at all did not prove popular with respondents. Only 16% favoured the option of only the tribunal providing technical expertise as opposed to 75% who thought this was undesirable; 12% favoured party-appointed arbitrators providing technical expertise compared to 80% who thought this was undesirable; and just 14% favoured the employees of the parties giving technical evidence as opposed to 77% who thought this was undesirable.

The responses to this question indicate the importance of party autonomy when it comes to deciding how to put forward evidence on technical issues. This point also came across very clearly in the responses to question 12 – reasons for keeping party appointed experts – with 84% of respondents agreeing with the proposition that it is a basic right of each party to rely on a party-appointed expert as a means of putting forward evidence on specific issues.

With respect to the option of replacing party-appointed experts by appointing arbitrators with the relevant expertise, 80% of respondents thought that this was undesirable. This finding might be viewed as surprising, given the traditional view that one of the benefits of arbitration lies in the possibility to nominate arbitrators with the expertise required for the resolution of the dispute at hand. It also suggests that expertise within the tribunal will only replace the need for expert evidence in very few cases. However, there clearly remains a role for expertise on tribunals. Several respondents commented that expertise within the tribunal is helpful to assess the evidence of party-appointed experts and attribute appropriate weight to it.

> A great evolution would be to have mainly tribunal-appointed expert selected by the parties or tribunal-appointed expert selected by the tribunal when no agreement is reached by the Parties.
>
> Lauréanne Delmas
> General Counsel - Disputes Resolution & Litigation
> Thales

SAVING THE PARTY-APPOINTED EXPERT

QUESTION

Why keep or get rid of party-appointed experts?

REASON FOR KEEPING	AGREE
It is a basic right of each party to rely on a party-appointed expert as a means of putting forward evidence on specific issues.	84%
Parties and their lawyers know more about the dispute and are better placed to select experts with the appropriate expertise to assist the tribunal on technical issues.	82%
If each party has a right to rely on a party-appointed expert, and the right to cross-examine the other side's expert, any potential bias is cancelled out.	69%
Standards set out in soft law instruments like the IBA Rules on the Taking of Evidence in International Arbitration provide sufficient protection against party-appointed experts not being objective in their testimony.	35%
In the majority of arbitrations the requirement of independence of experts is sufficient safeguard against the potential risks associated with partisan experts.	51%
It is more cost-effective because, in cases in which a tribunal appoints an expert, the parties will appoint shadow experts to help them anyway.	63%
Tribunal-appointed experts often become fourth arbitrators, who decides the case instead of the tribunal.	46%
I do not agree with any of the reasons stated.	1%

REASON FOR LOSING	AGREE
Parties appoint experts that they think can help them win rather than assist the tribunal.	45%
In cases where there is a limited pool of experts in a particular field, it gives one party an unfair advantage.	26%
The use of party-appointed experts increases the costs of arbitration.	25%
If expert evidence is required, the tribunal should appoint an expert.	12%
A party-appointed expert can never be truly independent of the party appointing him/her.	29%
Tribunals give limited weight to the evidence of party-appointed experts.	14%
I do not agree with any of the reasons stated.	32%

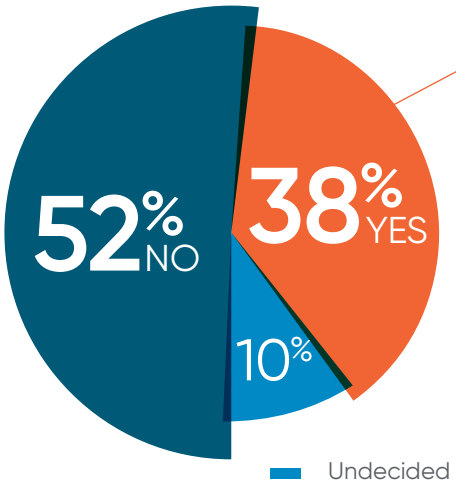
> "Arbitrators can usually handle problems that arise with experts. There is sometimes a waste of costs when experts give evidence which the tribunal finds irrelevant, but it is hard to see how to prevent this from occasionally happening."
>
> Lord Hoffmann
> Brick Court Chambers

> "The deep level of engagement we have seen for this year's survey shows how important the role of an expert is, underlined by 84% of respondents thinking it is a basic right of each party to rely on party-appointed expert evidence."
>
> Jane Parsons
> Senior Associate
> Bryan Cave Leighton Paisner

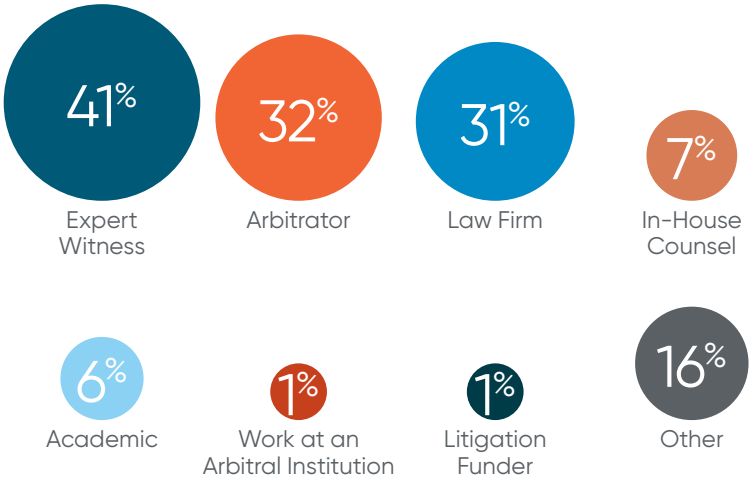
THE NEED FOR GREATER CONTROL

QUESTION

Should there be greater control over the use of party-appointed experts in international arbitration?



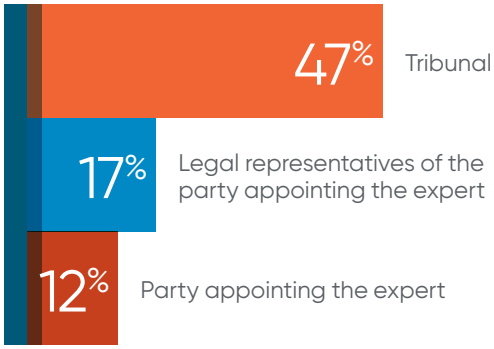
BREAKDOWN OF THE 38% WHO THOUGHT THERE WAS A NEED FOR GREATER CONTROL*



* Multiple responses were permitted

QUESTION

Who should have primary responsibility for controlling the party-appointed experts?



> Good expert evidence depends on the state of mind of the expert, but can be contrary to what the instructing lawyers want (or think they want). Not enough experts are willing to tell lawyers and clients that they have got it wrong.

Philip Haberman
Kroll Advisory Limited

> Experts should attempt to agree the issues between the parties when those issues have crystallised. After approval by the tribunal the expert evidence should then be addressed directly to each of those issues.

Carol Mulcahy
Thomson Reuters, Practical Law Arbitration

QUESTION

What measures would be desirable for a tribunal to adopt in relation to the use of party-appointed experts and have you seen them used in practice?

MEASURE	DO YOU CONSIDER THIS MEASURE DESIRABLE?		HAVE YOU SEEN THIS MEASURE USED IN PRACTICE?	
	YES	NO	YES	NO
A tribunal should refuse to allow parties to rely on the evidence of party-appointed experts if it considers expert evidence is unnecessary.	68%	32%	34%	66%
A tribunal should only allow parties to rely on the evidence of party-appointed experts if both parties agree.	20%	80%	22%	78%
A tribunal should approve the instructions given to party-appointed experts.	33%	67%	14%	86%
A tribunal should determine the scope of work of party-appointed experts and specify the issues they should address	58%	42%	42%	58%
If there is a limited pool of experts in a particular field, a tribunal should direct the parties to retain a single joint expert.	55%	45%	9%	91%
A tribunal should streamline expert evidence on issues of liability and quantum to avoid evidence being prepared on issues which may fall away if liability is not made out.	69%	31%	40%	60%
A tribunal should schedule expert evidence earlier in the procedural timetable to allow party-appointed experts more time to narrow and agree issues.	70%	30%	40%	60%
A tribunal should require party-appointed experts to report directly to the tribunal on progress made to reach agreement on the issues within the scope of their reports.	63%	37%	28%	72%
A tribunal should direct that the parties bear their own costs of retaining party-appointed experts.	36%	64%	27%	73%
A tribunal should place a cap on the recoverable costs of party-appointed experts.	37%	63%	16%	84%

In a separate question, we asked respondents whether they have had direct experience of a tribunal refusing to allow a party's request to appoint an expert. 73% had no experience of this. 24% had in fewer than five cases, 2% in between five and ten cases and just 1% in more than ten cases. These numbers indicate that concerns exist over potential due process implications from a tribunal's refusal to grant permission to adduce party-appointed expert evidence.

Responses lead to question of whether tribunals could and should be more proactive when it comes to using their powers to direct the focus of party-appointed experts. Several respondents commented that more control and guidance from the tribunal could improve the cost effectiveness of party-appointed experts and avoid the problem of the partisan expert. There was, however, a recognition that this would require tribunals to have a clear understanding of the technical issues at an early stage of the process that is not always possible.

HOT-TUBBING WITNESS CONFERENCING

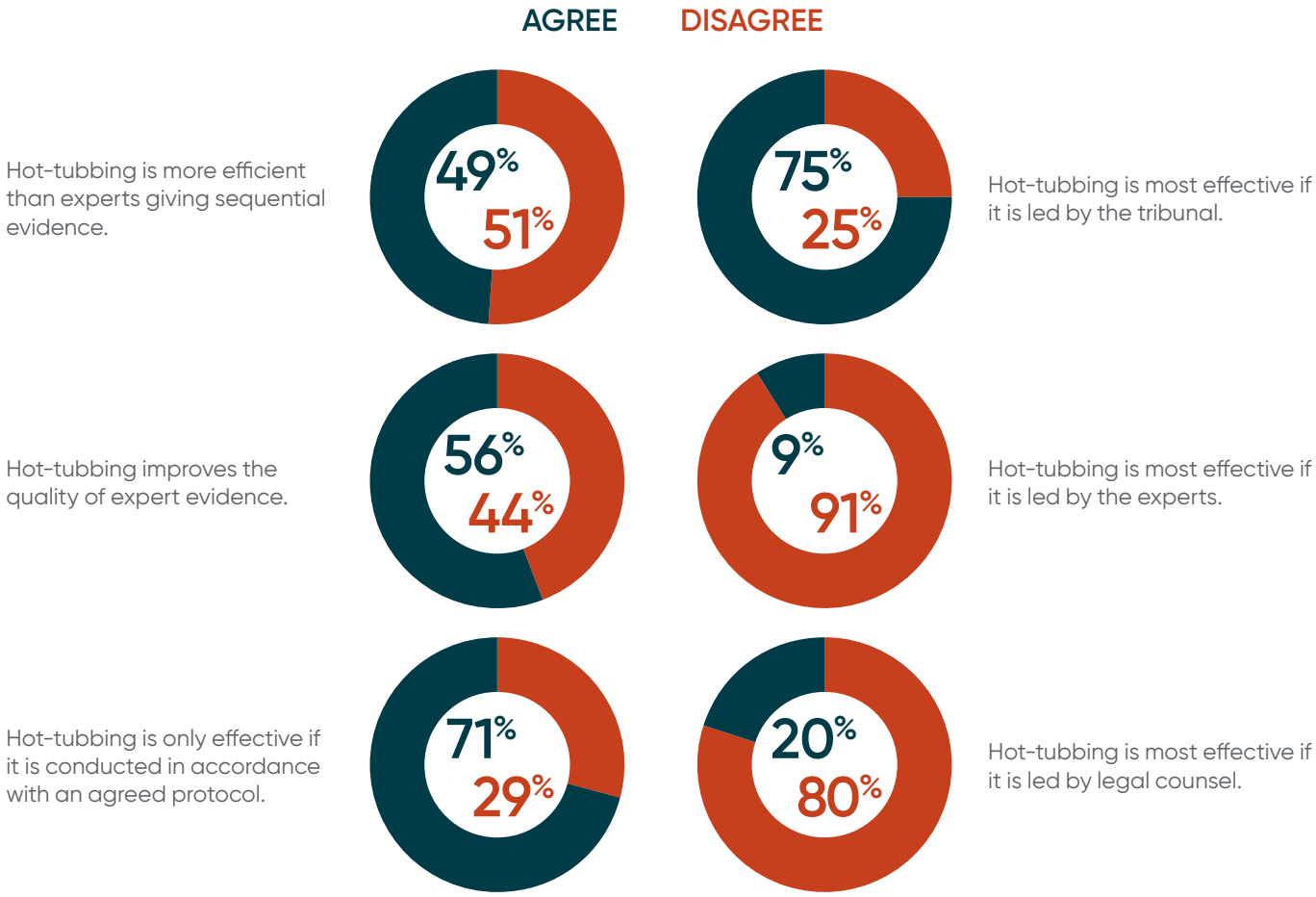
One way for tribunals to have more control over the taking of expert evidence through party-appointed experts is the practice by which experts from the same discipline give evidence concurrently, sometimes called hot-tubbing or witness conferencing. Hot-tubbing often implies that the tribunal will be able to ask questions to party-appointed experts from the same discipline, the purpose being that the questioning will generate a debate between the experts. Hot-tubbing can replace cross-examination completely or take place before or after the cross-examination of the party-appointed experts by opposite counsel.

We were interested in finding out how regularly hot-tubbing is adopted in international arbitration and in the views of respondents as to its efficacy and efficiency.

We asked whether they had any direct experience of a tribunal directing that party-appointed experts give evidence concurrently (hot-tubbing or witness conferencing). More than half (65%) of respondents had direct experience of hot-tubbing. 48% in fewer than five cases, 15% in between five and ten cases and 3% in more than ten cases.

QUESTION

What do you think about the efficacy and efficiency of hot-tubbing?



SANCTIONS FOR BIASED EXPERT EVIDENCE

QUESTION

What sanctions, if any, should a tribunal adopt in cases where a party-appointed expert fails in their duty to remain independent and assist the tribunal, and have you seen them used in practice?

SANCTION	DO YOU CONSIDER THIS SANCTION DESIRABLE?		HAVE YOU SEEN THIS SANCTION USED IN PRACTICE?	
	YES	NO	YES	NO
A tribunal should refuse to admit the evidence of a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal.	58%	42%	11%	89%
A tribunal should disregard the evidence of a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal.	75%	25%	37%	63%
A tribunal should give limited weight to the evidence of a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal.	93%	7%	67%	33%
A tribunal should impose cost sanctions in respect of a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal.	62%	38%	10%	90%
A tribunal should publicly censure a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal.	36%	64%	11%	89%

Several respondents commented on the question of whether a tribunal should publicly censure a party-appointed expert who fails in his/her duty to remain independent and assist the tribunal. The question highlighted the tension between the confidentiality of the arbitral process and addressing the issue of partisan experts. Some respondents took the view that there is no place for public censure in arbitration; others thought that there is scope for the tribunal to make any concerns clear in the award and that this might be desirable in cases where an expert has fundamentally failed to comply with their duty to remain independent.

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GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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