



Functions of expert witness in disputes resolution

Disputes between shareholders or business partners may be resolved through negotiation, mediation, arbitration or litigation proceedings.

The outcome of a dispute is often determined by facts and the ability to present facts in a convincing manner.

Therefore, whenever there are disputes, expert consultants (at negotiation or mediation phase) or expert witnesses (at arbitration and litigation phase) are often engaged to assist the legal counsels or the court by providing opinion on matters within their expertise.

What is expert witness or expert consultant

An expert witness or an expert consultant is a person who has specific knowledge, training, education, skills, and/or experience that could help to clarify, explain, and provide opinions on complex matters to the judge or arbitrators.

The primary difference between an expert witness and an expert consultant is that expert witness testifies in court, but a consultant does not, and information sharing and communications between consultant and attorney are not discoverable.

The International Chamber of Commerce (ICC) Commission report “Issues for Arbitrators to Consider Regarding Experts”, published in 2021, listed out the following criteria for arbitral tribunal to select the ‘right’ expert:



Professional qualifications and expert skills;



Personal acceptability and trustworthiness;



Communication skills;



Availability and reliability.

In particular, the report stresses that “professional qualifications and expert skills” should be given the most weight when selecting an expert, as skill and expertise are the main reasons for retaining an expert.

The skills required of an expert depends on the matters under dispute. For example, for an M&A dispute with earnout payments, an expert might be required to explain whether a completion account is prepared properly and according to generally accepted accounting principles; whether fraud or manipulation exists in the preparation of financial statements; whether a warranty is breached; and their implications to purchase price and earn-out payments. In this case, a quantum expert equipped with accounting, investigation and valuation knowledge is preferred.

The Role of Expert

Many dispute cases are settled prior to hearing. A more favourable outcome would normally be obtained when parties have a better understanding of the likely amount of a claim, the challenges encountered, the costs to be incurred to substantiate or to defend a claim, and the pros and cons of a settlement.

Therefore, it is appropriate to engage an expert to assist early in the process to avoid unnecessary costs and to increase the chances of a favourable settlement.

Some of the areas that an expert could help with include:

- Review materials and evidence in a case;
- Assess the strengths and weaknesses of a claim;
- Assess and identify various types of damages and the likely amount of damages;
- Provide professional advice early in the process on the pros and cons of a settlement without litigation or arbitration;
- Assist in settlement negotiations;
- Assist legal counsel to
 - identify documents to be requested;
 - prepare questions for interrogations, depositions, and legal testimony;
 - review and rebut the testimony of the opposing counsels.



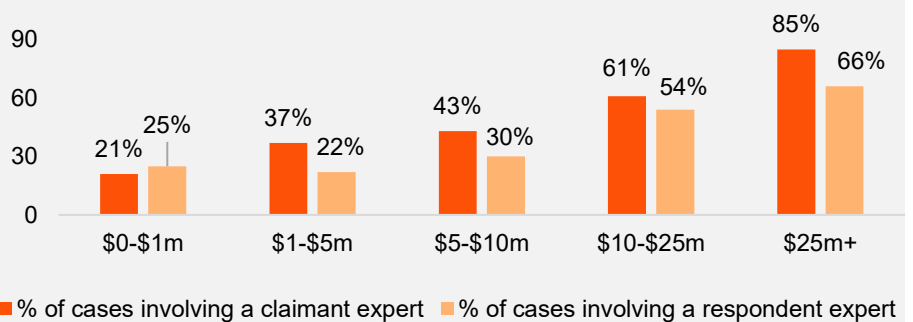
Impacts of Expert Witness

The importance and contribution of expert witness is revealed in the damages award study carried out by PwC and Queen Mary University of London in December 2020. The study examined 180 confidential awards in arbitral proceedings administered by the ICC in Paris and New York between 2014 and 2018.

According to the study:

The larger the claim, the more likely that experts will be appointed

Frequency of the use of experts by claimants and respondents, split by claim size



Tribunals awarded on average

69% of the amount claimed when there was a claimant expert engaged, but no respondent expert (29 cases in the population)

However, Tribunals award on average only

41% of the amount claimed when there are both claimant and respondent experts (64 cases in the population)

As shown above, the function of experts is recognized by the market; and testimonies from expert witnesses can have a meaningful influence on the decision of judges.



Conclusion



Many disputes cases are settled prior to hearing. Cases that enter into formal hearing in an arbitral tribunal or in court are often due to unrealistic claims or gap in expectation of the disputing parties.

The involvement of experts in a dispute could help to bridge the gap in the expectations of disputing parties, shorten the time for a settlement and to avoid a costly formal dispute resolution procedure. Even If a hearing if inevitable, the involvement of an expert could result in a more favourable outcome.

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