2023 Evidence in International Arbitration Report

FTI CONSULTING™

ACICA
Australian Centre for International Commercial Arbitration

Contents

Introduction from ACICA

The strong message from the inaugural Australian Arbitration Report was that arbitration in Australia is thriving. That is a great starting point and something that we are proud of as Australian arbitration practitioners. At ACICA though, we are continually striving to provide assistance to our users to improve the practice of arbitration.

To that end, we planned to conduct more surveys to focus on specific areas of the practice of arbitration. The data obtained from survey respondents is a powerful tool for identifying trends and best practice in arbitration as well as areas where improvements can be sought.

Coincidentally, in 2022 a group of experts, John Temple-Cole (KordaMentha), Martin Cairns (Sapere Forensic), and Dawna Wright (FTI Consulting), approached ACICA suggesting that a useful topic for the next survey might be to explore expert evidence in international arbitration.

We have expanded on that idea to explore evidence more generally. While expert evidence is front and centre in the 2023 Evidence in International Arbitration Report, the distinct features of arbitration are also exposed in lay and documentary evidence. It is particularly these latter two areas that allow arbitration hearings to be significantly shorter and the overall proceedings cheaper and more efficient than litigation. In addition, the confidentiality & privacy central to arbitration makes the prospect of giving evidence a much more palatable prospect. It is perhaps for these reasons that 64% of respondents preferred evidence in arbitration over litigation.

We did not want to focus only on how evidence is treated currently, but also how current practice could be improved. We looked at the use of mock arbitrations, the appointment of female experts, how witness statements should be drafted and whether the rules themselves needed to be changed, to name a few areas of focus. What is clear across all areas from respondent feedback is a genuine appreciation for constructive tribunal intervention in the process. 72% of respondents felt this way. This may be derived from parties requesting it, or tribunals offering it. But to make arbitration practice, for example, more sustainable, respondents believe parties need arbitral tribunals to guide the process. This is best achieved by making sure arbitral tribunals are experienced and educated in international arbitration.

Our earlier findings indicated an appetite among practitioners for greater institutional training and education for arbitrators. Many are familiar with CIArb Australia's pathway to fellowship courses for aspiring arbitrators, but also its courses for counsel and advisors.

In addition, ACICA provides a focus on practical guidance, with hands-on support and informal training sessions for arbitrators and tribunal secretaries. ACICA has also published the Practice & Procedures Board toolkit, available here, which provides best practice documents, including a Sample Notice of Arbitration and Answer and checklist for Preliminary Meeting and Procedural Orders. The events ACICA puts on throughout any given year highlight trends within international arbitration and provide capacity building opportunities to help parties and arbitrators grapple with questions of due process, how to best conduct advocacy and witness examination, techniques for dealing with issues that may arise in different sectors and other ways to improve efficiency.

We hope you find this report of use. We once again thank all our survey respondents, without whom our survey would not be possible, and also the insightful editorials from distinguished colleagues.

We will continue to build on this library of knowledge and plan to run similar smaller, focused micro surveys over the next period to respond to identified focus areas. These may include further comparisons between arbitration and other forms of dispute resolution and a review of the use of arbitration in specific sectors such as the renewable energy sector and the data and tech space. Of course, we will also follow up the wider Australia Arbitration Report to assess future developments and progress overall.

FTI Consulting executive summary and report outline

In late 2022 ACICA and FTI Consulting approached international arbitration practitioners, primarily but not exclusively those based in Australia, for their views on the use of evidence in international arbitration. This was done to collate opinions on common issues and potential improvements to the use of evidence, and to present what was found.

It was anticipated that views would differ across the spectrum of arbitration practice – that the views of counsel might not align with those of arbitrators, which might in turn not align with those of expert witnesses. It was the objective of this project to explore the varying evidentiary experiences of those practicing across a variety of industries, with differing dispute values, and with different types of expert witnesses.

It turned out that our respondents have a considerable breadth of experience:

- A quarter of respondents acted as both counsel and arbitrator, with a small number of respondents who acted as both expert witness and arbitrator.
- Most commonly, non-expert respondents had experience engaging or considering the evidence of at least four different types of experts – technical experts, valuation experts, accounting experts, and delay experts.
- Respondents tended to have broad experience in construction, infrastructure, mining, and oil & gas disputes.

The results therefore represent a broad snapshot of the evidentiary experience in arbitration. For some questions, respondents were requested to provide distinct responses in relation to amounts in dispute – as the contents of this report show, attitudes in relation to many issues change depending on the dispute size.

Prominent members of the arbitration and broader legal community were also approached to provide insights on the use of evidence in international arbitration, to bring to life the practical implications of the report.

Following some discussion of the rules and procedures governing evidence generally, this report begins with the editorial 'The Psychology of Evidence in International Arbitration', by Professor Kimberley Wade (Warwick University, UK). She will contextualise the impact of memory on evidence and provide some strategies for assisting with this.

Next, data collected in relation to the procedure and rules of evidence has been set out, and the appetite for tribunal intervention and the attitude toward specific measures, including tribunal appointed experts, bifurcation, mock arbitration, and concurrent expert evidence is explored. In general, it was found that there is a strong appetite for greater tribunal intervention in the proceedings.

That finding is consistent with the findings in the 2020 Australian Arbitration Report* – the practitioners who were approached in the preparation of that report cited a preference for more robust case management and expressed a view that the flexibility afforded by the arbitration process was not always utilised to best effect.

Some respondents considered that the need for parties to have confidence in the arbitration process, and to be satisfied that they had sufficient opportunity to argue their case, outweighed the potential benefits from tribunal intervention. Others considered that more prescriptive rules in relation to the production of evidence would empower arbitrators to enforce limitations without a fear that they might offend due process. Still others preferred that the tribunal retain flexibility. These varying views reflect ongoing tensions among users of international arbitration and create an area of focus on which ACICA and others strive to assist.

Turning to the experience and preference of respondents in utilising expert evidence, it was found that respondents were generally satisfied with their experience, despite having occasionally encountered some common issues with experts, including poor writing skills or poor performance under cross-examination. A lack of independence was not cited as an oft-encountered issue.

ACICA, 2020 Australian Arbitration Report, (9 March 2021), acica.org.au/australian-arbitration-reports

A joint editorial from John Temple-Cole (KordaMentha, Sydney), Martin Cairns (Sapere Forensic, Sydney), and Dawna Wright (FTI Consulting, Melbourne), entitled 'The expert evidence iceberg' helps to illustrate some of these points.

The experience of respondents in preparing and using documentary evidence is then set out. Respondents indicated that documents received because of orders for disclosure are not typically as valuable as those disclosed voluntarily with memorials and witness statements. As orders for document production are nonetheless commonplace, there was strong support for tribunals to take active measures to limit document production.

Lay witness evidence has then been considered. Respondents on average considered lay witness evidence to be the least impactful as between lay witness, expert, and documentary evidence, and on average spent the least amount of money on the production of lay witness testimony. Though support for tribunal intervention in setting limits for lay witness evidence was not as strong as that for limits on document production, respondents were still more likely to be in favour of some limits than not.

Editorials throughout this report from Dr. iur. Clarisse von Wunschheim (Altenburger Ltd, Zurich), Benjamin Hughes (Hughes Arbitration, Singapore), and The Hon. Wayne Martin AC KC (Francis Burt Chambers, Perth) illustrate some of the benefits of, and propose ways forward for, lay and documentary evidence in international arbitration.

The review of the collected data with a short profile of our respondents is then provided.

To conclude the report, remarks from Toby Landau KC (Duxton Hill Chambers, Singapore) draws together the report's key findings, provides useful guidance for practitioners and challenges all involved to strive for better practice.

On rules and procedure

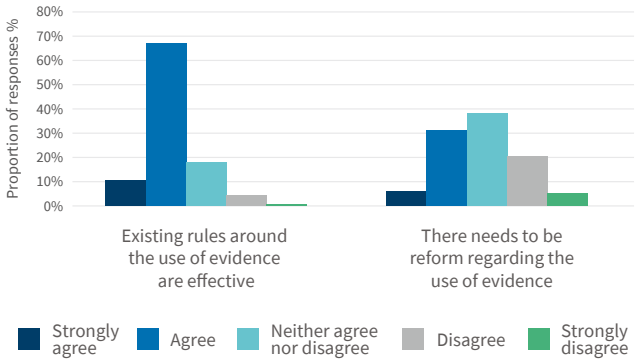
96% of respondents considered that increased tribunal intervention would improve the use of evidence in international arbitration.

Rules of evidence

Respondents were familiar with arbitration rules such as the ACICA, ICC, UNCITRAL and SIAC Rules, as well as the IBA Rules on the Taking of Evidence in International Arbitration. Respondents consider the rules to be generally effective for all evidence types. To the extent that respondents considered reform necessary, the detailed responses indicated that it was often the *lex arbitri*, rather than institutional rules, that were the subject of dissatisfaction. This result reflects the lack of universality between the approaches taken in different jurisdictions. The role of institutional rules in improving the universality of the arbitration process is a worthy topic, though beyond the scope of this report.

"Flexibility around evidence is really important and parties shouldn't be constrained by arbitrary and only partly informed tribunals. I would prefer informed decisions be made about these things, but arbitrators need to be incentivised to get across issues before making limitation directions." [1]

Fig. 1: Existing rules and reform



"More prescriptive rules would hopefully reduce the due process paranoia some arbitrators suffer."

Overall, concerns were expressed by respondents with regard to a common failure of counsel to strictly adhere to applicable rules or established principles – respondents complained of excessive counsel involvement in the preparation of both expert and lay witness evidence and a lack of emphasis on the duty of the expert to the tribunal. Respondents also objected to excessive document requests beyond what was considered to be permitted under the applicable rules.

Tribunal intervention

Most respondents considered that the use of evidence could be improved through the provision of greater direction, generally, from tribunals - this was a sentiment with which 72% agreed and fewer than 7% disagreed (the balance was neutral). This general sentiment carried over when respondents were asked to comment on specific tribunal interventions. In fact, only 4% of respondents considered that none of the suggested interventions were desirable.

The issues that respondents felt could be cured by appropriate tribunal direction included excessive and unfocused evidence production, unhelpful expert evidence and the preparation of expert evidence on the basis of inconsistent instructions. Commentary by respondents revealed a strong desire for tribunal intervention to assist in the early narrowing of issues or settling of questions to be determined by expert witnesses.

Intervention	Agreed
Expert conferences and joint reports	82%
Limitations on document production	78%
Stricter timeframes	71%
Stricter word limits	67%
Bifurcation of jurisdictional questions	64%
Concurrent expert testimony	63%
Directions as to the form of lay witness evidence	57%
Bifurcation of merits and quantum	49%
Limitations on the amount of lay witness evidence	46%
Tribunal appointed experts	20%

In relation to specific interventions, respondents (in the proportions outlined above) considered that tribunals should take certain steps more often.[2]

1. Commentary from respondents has been included throughout the report.

2. We note that, with neutral responses removed, only tribunal appointed experts were the subject of more unfavourable responses than favourable.

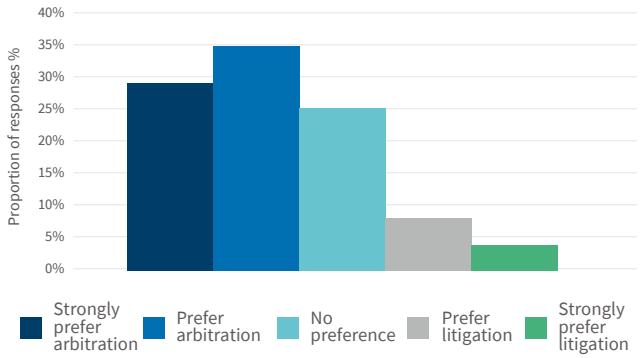
Although the views were not unanimous, respondents overwhelmingly considered that tribunals should play a greater role in guiding the arbitration process. The desire for expert conferrals and joint reports is not surprising, given the number of respondents who made comments in relation to the preparation of responsive expert reports on different bases that were difficult to meaningfully compare or that did not address the same issues.

Many of the interventions that were proposed by respondents were also unrelated to experts and their reports – for example, limitations on document production, lay witness evidence as well as the implementation and adherence to procedural time limits, reflecting a sentiment that arbitration is often more time consuming and expensive than it needs to be. One respondent summarised these commonly held views as follows: *"tribunals should be more robust in keeping document requests narrow and ensuring party compliance. They can also assist in ensuring that expert testimony is addressing consistent questions."*

Satisfaction with evidence in international arbitration

85% of respondents are satisfied with their experience using and/or giving evidence in arbitration, with the remainder neutral. The strong appetite for greater tribunal intervention lights the way for further improving satisfaction.

Fig. 2: Respondent preference regarding the use of evidence in arbitration and litigation



Most respondents (64%) indicated a preference for the treatment of evidence in arbitration to litigation – this was true even for respondents who were neutral toward arbitration generally. Those that preferred the treatment of evidence in arbitration thought that features such as streamlined cross-examination and a more logical approach to admissibility and relevance were desirable. Some of the less favourable comments suggested discontent with arbitration more broadly, rather than on grounds related to evidence – for example in relation to the lack of transparency of process or ability to appeal awards.

Only 12% of respondents preferred the approach generally taken to evidence in litigation over arbitration. This result explains why practitioners might be dissatisfied when arbitration too closely mirrors litigation. However, it also suggests that the benefits of arbitration are being realised in practice sufficiently to favourably distinguish it from litigation.

Why does a preference for giving evidence in arbitration matter?

Why does it matter that respondents, being themselves a mixture of expert witnesses, counsel, and arbitrators, prefer the treatment of evidence in arbitration rather than litigation? The comfort of someone giving and taking evidence has an impact on the case parties can advance. If a witness, lay or expert, has a bad experience giving evidence in court one time, they may be unwilling to give evidence in the future if needed. Or they may be nervous and as a result, their body language may make them seem less knowledgeable or trustworthy. Ultimately, although there is no guarantee that every arbitration experience will be better than litigation, we can assume that at the very least, due to the confidential nature of arbitration, that a bad day giving evidence will not be part of one's Google profile.

Bifurcation

About 80% of respondents had experience with bifurcation, and overall consider it an effective means of improving the outcome of an arbitration, but not necessarily effective at reducing the cost of expert evidence. Respondents considered bifurcation to be most effective in high value (>$500m AUD) disputes. Note, all dollar values in the report are in AUD.

There are several possible explanations for this result:

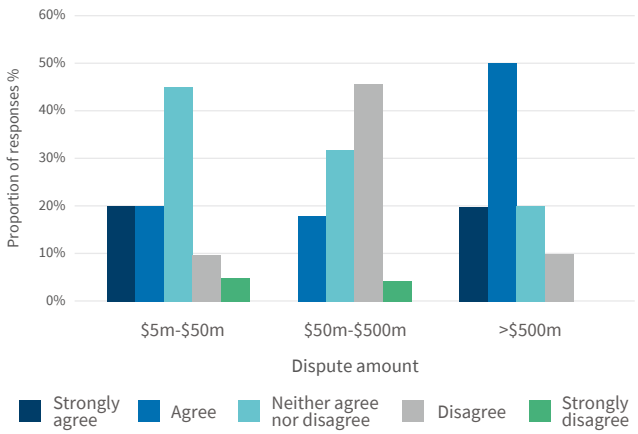
— Depending on which issues are bifurcated, expert evidence may be required in the first instance.

— If the dispute is not resolved at the first stage, the full gamut of expert evidence is still required.

— The early stage at which most respondents engage experts can result in parties incurring costs for expert evidence even if it is not ultimately required.

Unsurprisingly, respondents qualified their enthusiasm for bifurcation by noting that, while the issues in some disputes lend themselves to bifurcation, others do not. Indeed, those respondents who did not view bifurcation favourably provided commentary to the effect that, while theoretically a reasonable tool, in their experience, disputes rarely lend themselves to effective bifurcation and are seldom resolved in the first instance. In those cases, bifurcation can have the opposite effect of what is intended – duplication of effort, increased duration, and increased costs.

Fig. 3: Bifurcation is an effective means of reducing the cost of expert evidence by dispute amount[3]

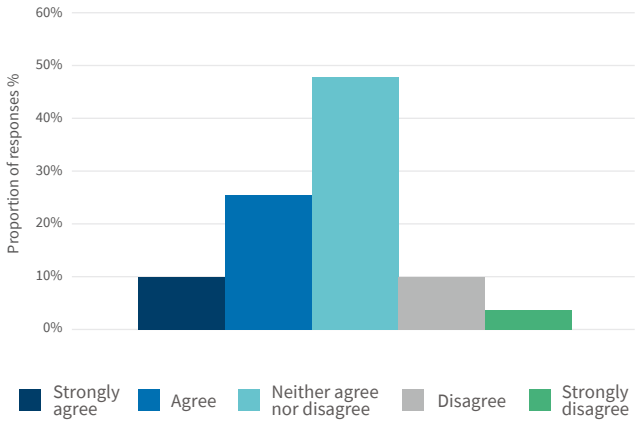


Mock arbitration

A mock arbitration is an abbreviated version of an arbitration hearing held in order to gather feedback and test the case in a hearing setting.

Fewer than half of respondents – only about 35% – have been involved in mock arbitrations. Most commonly, respondents indicated having questioned lay witnesses and testifying expert witnesses in mock arbitration – only a handful of respondents indicated that they had ever undertaken such a process with consulting experts. Of respondents who expressed a view either way, most considered mock arbitrations a useful tool; however, some respondents indicated they had concerns about the ethics of preparing witnesses and, from a practical perspective, about witnesses appearing rehearsed in the hearing.

Fig. 4: Mock arbitration is effective in improving the quality of evidence

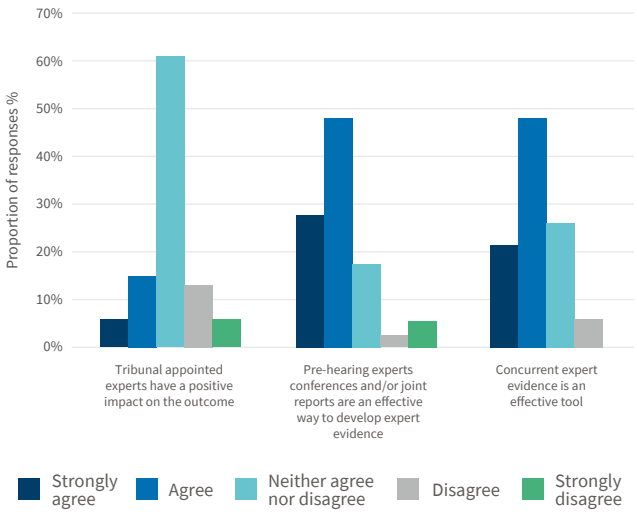


Tribunal appointed experts

Only a small minority of respondents (18%) thought that tribunal appointed experts had a positive impact on outcomes. One respondent provided the following comment, which may be reflective of respondent sentiment more widely: *"Because the parties and their legal counsel have less input into the appointment and instruction of tribunal-appointed experts, this can result in a negative experience because parties have less confidence that the expert can properly understand the issues and therefore can have less confidence in the outcome in any award."*

3. Lower value disputes removed due to low number of responses.

Fig. 5: Expert interventions



Expert conferencing, joint reports, and concurrent evidence

The majority (around 90%) of respondents indicated having had experience with pre-hearing expert conferencing, joint reports, and concurrent expert testimony. Most considered these to be beneficial tools for developing expert evidence.

The few respondents who disagreed cited experiences in which conferrals did not result in meaningful concessions, and where concurrent testimony allowed one party to dominate the giving of evidence in a manner not sufficiently managed by the tribunal, either by virtue of counsel or the nature of an expert's personality. Arbitrators and counsel should be mindful of these concerns and take them into consideration in the planning for conferencing and joint evidence. Indeed, even among those respondents who were favourable toward conferencing and joint evidence, the commentary emphasised the need for all parties to engage with the process genuinely and with sufficient preparation.

The favourable sentiment toward expert conferencing mirrors positive respondent views expressed toward early tribunal intervention to assist with the identification and narrowing of issues to be addressed by the experts on each side. Both procedures operate to focus experts on the key matters at issue and ensure that points of difference are properly addressed and articulated, ultimately increasing the utility of expert evidence for the tribunal. One respondent noted that expert conferencing 'helps to cure asymmetrical instructing of party appointed experts'.

"When experts are experienced and can work constructively to narrow the issues in dispute this is positive. When the experts or counsel are inexperienced the process of trying to agree a joint report is counter-productive."

Culture eats evidentiary rules for breakfast

Picking up on Peter Drucker's famous quote on the prevalence of culture over strategy and transposing it to international arbitration, one could say: **"Culture eats procedure for breakfast".**

This is particularly true when looking at the use of evidence in international arbitration, where - despite increasing reliance on similar sets of rules and guidelines - substantial differences in practice remain among practitioners from different legal, cultural and geographical backgrounds.

Documentary vs witness evidence

In continental Europe, contemporary documentary evidence is traditionally considered more reliable than witness evidence, because 'documents don't lie'. However, witness evidence is heavily relied upon to give context to specific documents or fill in gaps in the documentary record. Thus, both types of evidence go hand in hand, whereby documentary evidence forms the main basis for fact finding, and witness evidence helps bringing life and color to the documentary record.

In contrast, in common law jurisdictions including those in Asia-Pacific, statements from witness statements are sometimes relied upon as evidence in chief independently of any documentary record, or – to the contrary – are used as a mere procedural means to simply introduce a document onto the record.

Expert evidence

In continental Europe, expert evidence is traditionally handled by the judges themselves due to the expected independence of experts. While it has in the meantime become common practice in international arbitration to leave expert evidence in the hands of the parties, a subliminal suspicion remains among civil law practitioners as to the experts' true level of independence and impartiality. Thus, their use is less widespread than among common law practitioners.

Discovery vs document production

One of the cornerstones of continental European civil and commercial litigation is the principle that a party has the burden to prove the allegations and facts it relies upon. Although a party may sometimes request production of evidence from the other party, this will happen only once proceedings have started and restricted to evidence necessary for the requesting party to meet its own burden of proof. Thus, the idea of discovery as known under US law is often seen by civil law practitioners as an alien fiddling with the holy burden of proof. For common law practitioners, discovery is not to be reduced to something technical such as burden of proof. Instead, it bears a much deeper significance and seeks to "discover" the truth wherever it is. Thus, unsurprisingly and despite the reliance on similar rules, the way to handle and decide over the document production process remains in practice very diverse.

So, watch out. The background and experience of the acting lawyers and arbitrators may have a much bigger impact on the way evidence is handled, than any governing set of rules.

Dr. iur. Clarisse von Wunschheim
Partner | Rechtsanwältin | Mediator CEDR
Head of China-Switzerland Business Advisory,
Altenburger Ltd

Other considerations

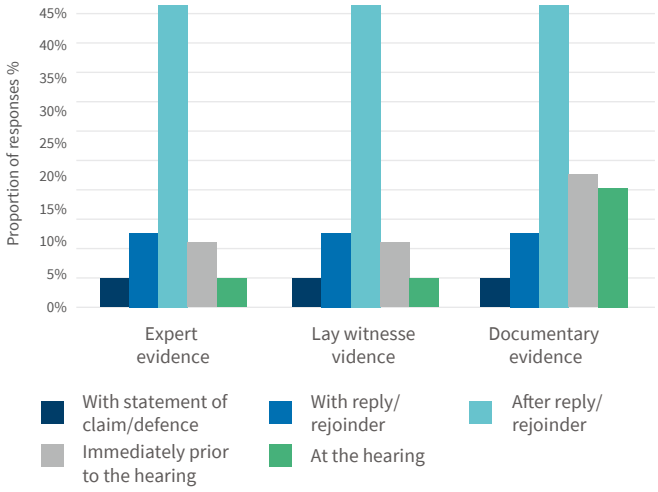
Respondents identified the tension between evidentiary limitations and environmental concerns on the one hand, and case outcomes on the other.

Timing of evidence

Perhaps surprisingly, given respondents' broader attitudes toward the implementation of stricter timelines, word limits, and limits on document production, most respondents (around 75%), considered that some additional evidence of all types should be allowed in the time period after the reply-rejoinder and prior to the hearing.

The commentary provided by respondents reveals the cause of this apparent contradiction – pragmatism. The sentiment was perhaps best distilled in the following respondent comment: *"Although ideally no 'additional evidence' should ever be provided, justice to the parties must recognise that evidence comes to light as matters progress and counsel considers matters."*

Fig. 6: The latest stage at which additional evidence should be allowed



Environmental considerations

Sustainability is at the forefront of many of our minds, but particularly for those practicing in an area of law that contains 'international' in the title. The complex logistics arising from the involvement of multiple jurisdictions, parties, counsel, and witnesses based around the world, hearing bundles laden with expert, lay and documentary evidence, and a hearing to which at least some involved are likely to need to travel, makes sustainability a concern. Respondents were asked to consider issues related to sustainability to explore whether consensus exists as to steps that arbitration users should now be taking.
The steps that respondents indicate are being taken that they plan to take and that are suggested could be taken to limit the environmental impact of arbitration are relatively straightforward:

— An increase in the use of virtual hearings and a reduction in travel, particularly air travel.

— An increase in the use of soft copies of documents, including for internal review, provisions of electronic bundles, and the use of online case management platforms.

The general attitude expressed by respondents with regard to virtual hearings was broadly positive, with respondents citing the convenience, effectiveness, and better cost outcomes as favourable aspects of virtual hearings. However, many respondents did not consider them to be perfect substitutes for in-person hearings or meetings. This sentiment was particularly strong in relation to conferrals between opposing counsel and deliberation among arbitrators.

Notwithstanding a growing understanding of the need for environmentally friendly practices, when tested, more than half of respondents (~52%) reported that they would still provide hard copies of all documents if the tribunal expressed a preference for such. An even higher proportion (~60%) indicated that they would prefer to fly a charismatic witness to an in-person hearing rather than agree to their virtual appearance if that were an option.

Respondents provided some practical advice aimed at overcoming the inertia of old unsustainable practices, including the following suggestions:

— that legal teams should set internal expectations around travel and use of electronic documents.

— that tribunals should set out procedural guidelines early in the arbitration regarding travel and use of documents.

— that institutions should publish guidelines, perhaps even making some measures mandatory.

Fig. 7: Consider the following scenario: You think your arbitrator may prefer hard copies of your evidence, but you also understand it is more environmentally friendly to provide soft copies. Do you:

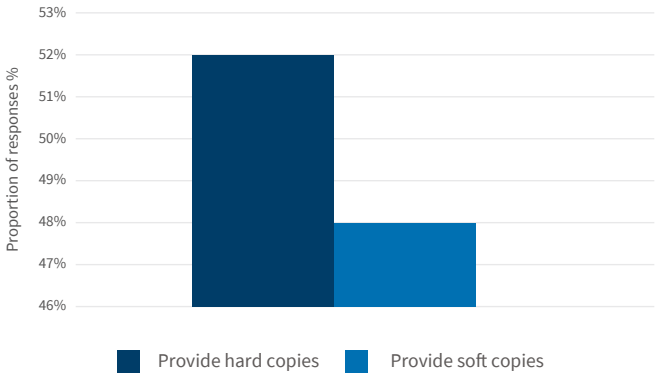
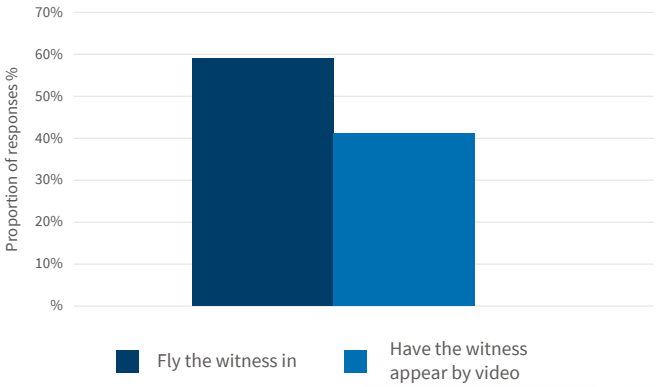


Fig. 8: Consider the following scenario: Your witness is charismatic and draws people in, but lives a 12 hour flight from your hearing venue. Assuming you are trying to work out the procedural order with the other side. Do you try to:



Sustainability put to the test

The survey sought to test whether, within the context of sustainability concerns, users would choose environmentally friendly practices over a perceived benefit to their case. That around half of the respondents would still proceed with environmentally unfriendly options if to do otherwise may be perceived to impact their case, suggests that tribunal and institutional leadership in this area could assist. Tribunals indicating from the outset that they do not want hard copies or physical hearings would be helpful, as would clear rules and protocols from institutions. Ultimately though, should there be a greater push to minimise the quantity of evidence (focussed documents, quality statements) in the first place to create an even smaller footprint? ACICA has responded to this challenge by creating, in 2023, a Sustainability Taskforce.

The psychology of evidence in international arbitration

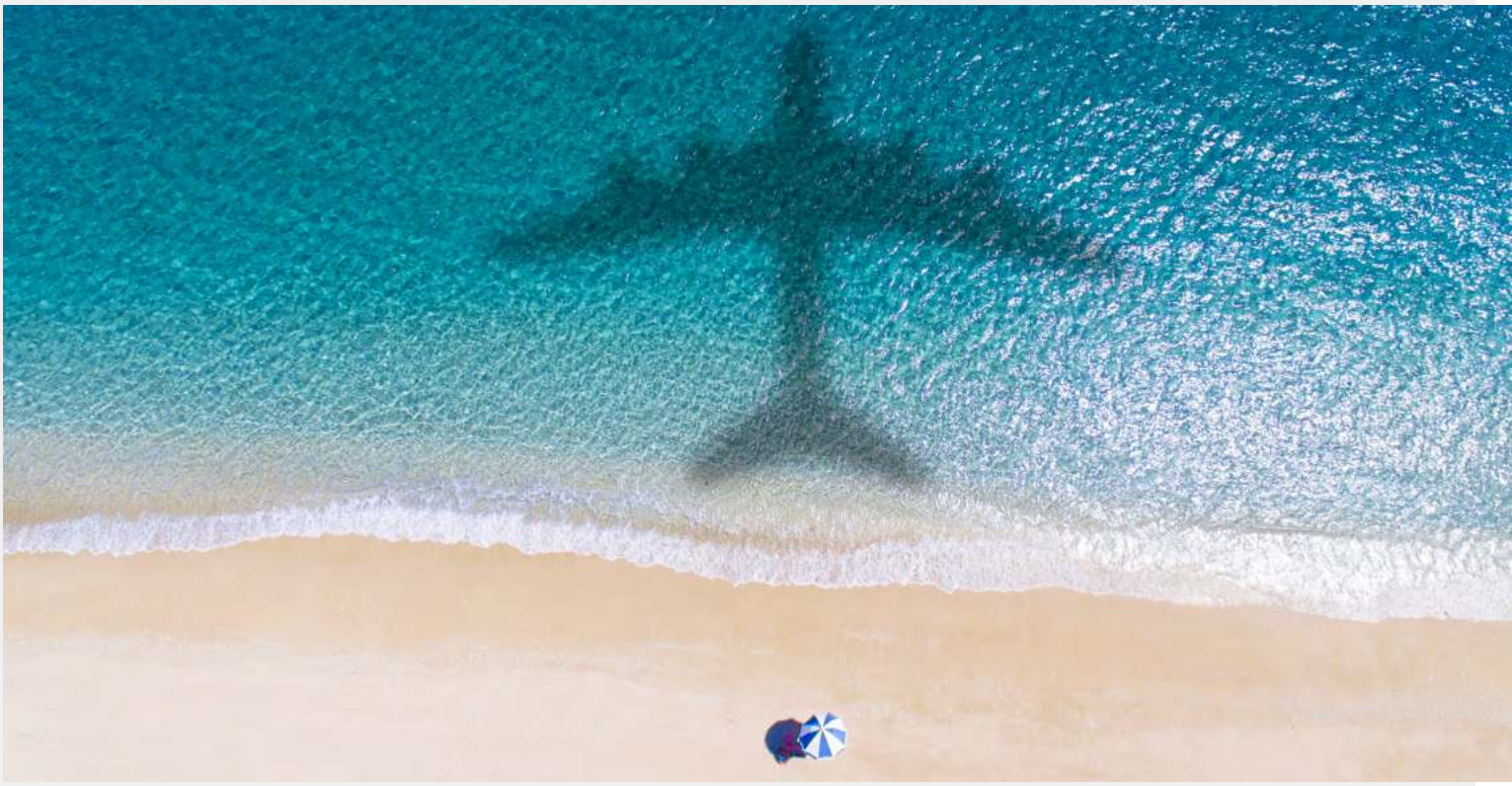
Witness evidence can play a crucial role in international arbitrations. Although civil law jurisdictions typically accord less weight to witness testimony than do common law jurisdictions, common practice in arbitration has converged on the preparation of extensive witness statements alongside the written submissions. Less common among arbitrators and arbitration practitioners is a good understanding of how that preparation can influence a witness's memory and the reliability of the resulting testimony. Moreover, several myths about human memory prevail. Laypeople through to experienced legal practitioners frequently overestimate their memory knowledge and hold misconceptions about how memory works. For instance, people often believe that memory faithfully records all of our experiences and replays them on demand. People are also largely unaware of the various factors that can render memory unreliable. Yet, on a more positive note, awareness of the issues surrounding witness evidence is increasing and many arbitration practitioners are considering how the science of witness memory can enhance policy and practice.

Fig. 9: Three-stage procedure often used to study witness memory

Since the mid-1970s, research psychologists have used a simple, yet powerful, three-stage procedure to investigate the reliability of witness memory in the lab (see Fig. 9). In these studies, people are first shown depictions of scenes or events, usually a crime or some other event that may require eyewitness testimony in real life. In the second phase, participants are exposed to both accurate and inaccurate information about what they have seen, usually in the form of a questionnaire that contains questions about the crime event. Finally, participants complete a memory test, which asks them about critical information for which they may or may not have been misled. Crucially, this research paradigm can be adapted to explore myriad factors that could potentially corrupt a witness's memory and leave them prone to incorporating the misleading information into their testimony.

Hundreds of studies have shown that misleading post-event information—gleaned from documents, other witnesses, newspapers, an interviewer—can impair memory performance by anywhere between 10-50%. The extent to which witness memory is impaired can depend on the type of information being recalled, the nature of the misinformation, and various other factors related to the witness, the witnessed event, the "misinformation messenger", and the way in which the witness is questioned. Misinformation can modify a witness's memory in subtle or dramatic ways, for instance, changing how a witness recalls another person's facial features or actions, or who said what in a discussion. Misinformation can even add new details to a memory. And once that misinformation takes hold it will often continue to influence a witness's report even in the face of correction.

Many findings in the witness memory literature are relevant to international arbitration. Dr Ula Cartwright-Finch and I recently published a paper that highlights some of the most pertinent research. Factors inherent to the witness or the reported situation itself, such as stress, culture, and personal biases or beliefs, can influence the quality and quantity of witnesses' memory reports. Factors inherent to the memory retrieval process, for instance, the questions posed by an interviewer, colleague, or co-witness, can also shape a witness's memory. Many of these factors can also alter the degree of confidence a witness expresses in the accuracy of their memory, and once a witness's memory has been contaminated, they will often report feeling

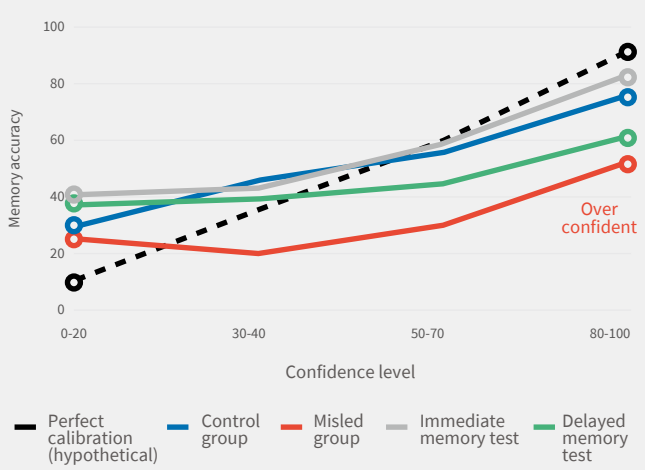


highly confident that their memory is correct even though it may be wildly wrong. We return to this point shortly.

I am often asked whether the research on witness memory can be generalised to international arbitration proceedings. Some scepticism is warranted, as psychological research has almost exclusively focused on memory in criminal law contexts where a witnessed event, such as a burglary or mugging, occurs quickly, without warning, and is likely to elicit a substantial, negative emotional response in those involved. Such eyewitnesses are often neutral with respect to their relationship to the case, in contrast to fact witnesses in international arbitration who are often employees or directors of the party on whose behalf they are testifying. Despite the obvious and important differences between witnesses in criminal versus arbitration contexts, the psychological mechanisms underpinning the research findings on witness memory undoubtedly contribute to memory errors in witnesses in any setting. All witnesses rely on the same cognitive and memorial processes to accurately recall past experiences. Relatedly, I am often asked if expert witnesses, not just fact witnesses, are prone to memory distortions. The simple answer is yes—experts can experience memory errors too. But it is important to note that expert witnesses are usually called upon to provide a specialised opinion about an aspect of a dispute. The type of information that experts recall tends to be less prone to error than the autobiographical information (details about specific events in time) that fact witnesses typically report.

There is now compelling evidence to show that witnesses in commercial disputes, not just those in criminal law settings, can be prone to suggestive influences and memory errors. In 2021, the International Chamber of Commerce launched their report on The Accuracy of Fact Witness Memory in International Arbitration. This report contains the details of an experiment that Dr Cartwright-Finch and I conducted in collaboration with the ICC Task Force on Witness Evidence. We tested over 300 adults working in a broad range of industries and roles using the standard witness memory procedure described above. Our participants learnt about a relatively complex scenario in which two companies entered a contractual agreement that ultimately led to a dispute. After a delay, participants were asked to recall key details that were central to the issues in the dispute. The findings showed that our mock-witnesses were subject to the same distorting effects that research has proven exists in other contexts. When participants were exposed to biased information (in the form of an in-house memo from counsel) they were approximately 20% more likely to provide a witness statement in line with the misleading information they had received. Also, when participants were instructed to imagine that they were the Managing Director of one of the companies involved in the dispute, plus they received a biased memo from in-house counsel, they were 30% more likely to provide responses that better supported their own company's case. These results might seem surprising, but they square perfectly with those found in the witness memory literature.

Fig. 10: Memory-Confidence calibration curves



Although the ICC Report on Witness Memory didn't explore the relationship between a witness's (objective) memory accuracy and their (subjective) confidence in their memory, some of my own research at Warwick University has explored this issue. As mentioned above, legal decision makers often use a witness's confidence to gauge the accuracy of the witness's memory. Figure 10 presents some data that were collected in standard witness memory studies in which we asked participants to rate, on a scale from 0% to 100%, how confident they were in the accuracy of each detail they reported. The x-axis shows the level of confidence participants expressed and the y-axis shows how accurate, on average, participants were at each level of confidence. In an ideal world, we would want to observe perfect calibration (the black dotted line) between witness accuracy and confidence. That would mean that a witness's confidence is diagnostic of their memory accuracy (i.e., witnesses who are highly confident are likely to be highly accurate, and witnesses who are not at all confident are likely to be inaccurate). But we don't see such perfect calibration in our research. What we do see is that when witnesses' memories are corrupted by misinformation, they tend to be overly confident in the accuracy of their memory (the orange line). That is, a witness who is 80-100% confident their memory is accurate, may only be correct around 50% of the time. Our data also shows that when witnesses are interviewed following a delay (even only 1 month), they can become overly confident in the accuracy of their memory (the green line). In short, the amount of confidence a witness expresses can be a useful indicator of how accurate their memory is, but if their memory has been contaminated or elicited after a long delay then expressions of (high) confidence may be misleading.

Although legal professionals are increasingly alive to these issues, there is still a great deal to be done in educating arbitration practitioners on the nuances of witness evidence. The ICC Report on Witness Memory is a step in the right direction and contains numerous simple measures that parties, counsel and arbitrators can readily adopt to enhance the reliability of witness evidence. These measures are an open list that practitioners can choose from, as appropriate, on a case-by-case basis. Some measures serve to reduce the influence of suggestive factors on witness memory. For example, the report suggests that in-house counsel should establish procedures for keeping contemporaneous written or oral notes of issues being discussed at the time relevant events unfold. In-house counsel should also, where possible, meet with likely witnesses individually rather than in groups, to minimise that chance of co-witness memory contamination. Counsel should avoid setting out the "party line" to witnesses as this may also serve to modify a witness's recollection. Outside counsel should strive to interview witnesses at the earliest opportunity to minimise memory decay and distortion. Keeping accurate records of interviews, of course, is key—having a primary interviewer plus a note-taker may be useful. Counsel should always aim to put the witness at ease as ample research has shown that building rapport enhances both the quality and quantity of the information a witness recalls. Reminding witnesses that it is normal to forget details and that it is OK to admit they do not recall certain events is important too, as is encouraging witnesses to distinguish between what they genuinely recall versus information they may have gleaned from other sources (e.g., meeting minutes, a colleague). Counsel should strive to use neutral, open-ended questions and avoid giving witnesses feedback or steering them towards a particular version of the facts.

Unfortunately, these measures and the scientific findings on witness memory are not typically taught to arbitration practitioners either at law schools or in continuing professional development training. This may soon change. Whatever shape developments take in future, education is likely to be key to enhancing arbitration practice and, in turn, the probative value of witness evidence in arbitration proceedings.

Professor Kimberley Wade
University of Warwick

On the use of experts

Expert evidence is used in more than half of all disputes over $50 million AUD, where respondents consider it to be “crucial” to the outcome of cases.

The frequent use of experts

More than 90% of respondents (other than expert respondents) have experience in engaging experts, most with multiple types of experts.

Respondents provided data relating to the proportion of disputes in which they have been involved where expert evidence has been used. Predictably, the greater the value of the dispute, the more likely that expert evidence was involved. While the overall tendency was the same for all expert types, there was a marked difference in the frequency of expert involvement depending on expert type, with technical experts and quantity surveying experts involved more frequently than other expert types. This is even more pronounced in high value (>$500m AUD) disputes.

Fig. 11: Average proportion of cases in which respondents use expert evidence, by dispute value

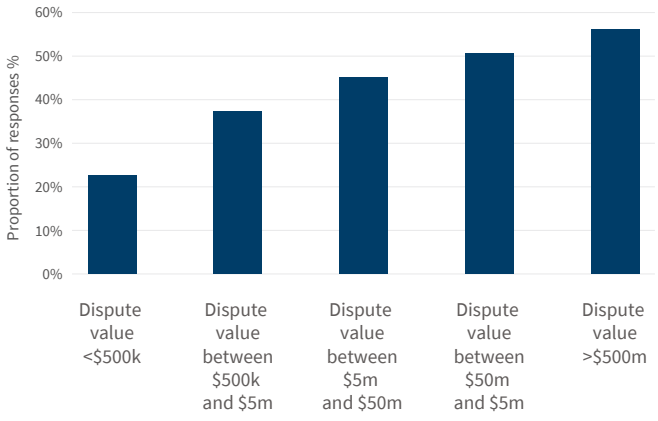


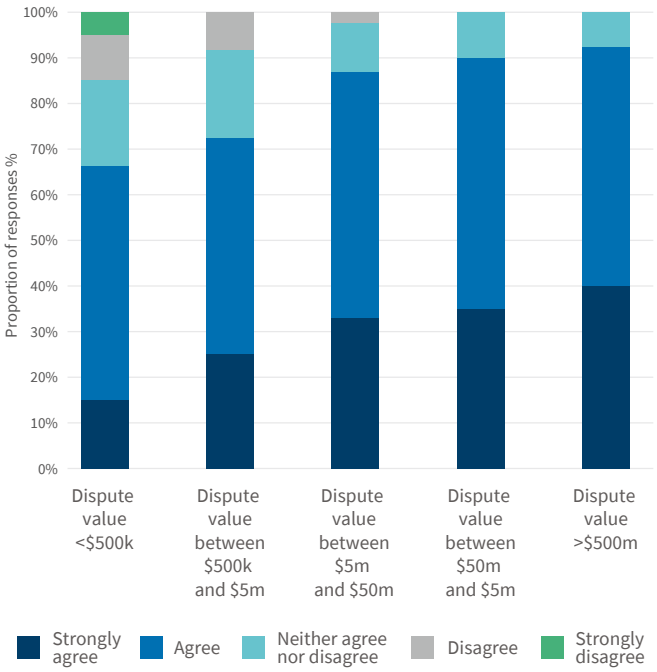
Fig. 12: Average proportion of cases in which respondents use expert evidence, by expert type

On experts having significant impact

Respondents overwhelmingly (82%) considered the involvement of experts to have a significant impact on case outcomes. This view was more strongly held when considering medium to high value disputes (>$5m AUD), where almost 90% of respondents agreed. Respondents commented that in large value disputes, expert evidence is crucial, and the tribunal will often be reliant on the experts, particularly as the complexity of issues in dispute increases.

Disagreement was most pronounced in relation to low value disputes (<$500k AUD) – but even then, over 65% agreed that expert evidence had a significant impact. Perhaps unsurprisingly, then, respondents reported significant expenditure on the preparation and production of expert evidence.

Fig. 13: The use of expert evidence has a significant impact on case outcomes



“It depends on the matter, but expert evidence is often crucial to both liability and quantum, for example in construction matters.”

Fig. 14: Proportion of value in dispute spent on expert evidence

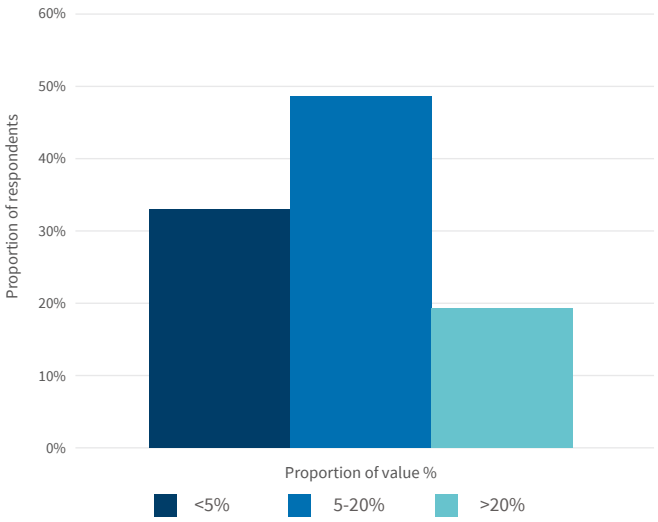
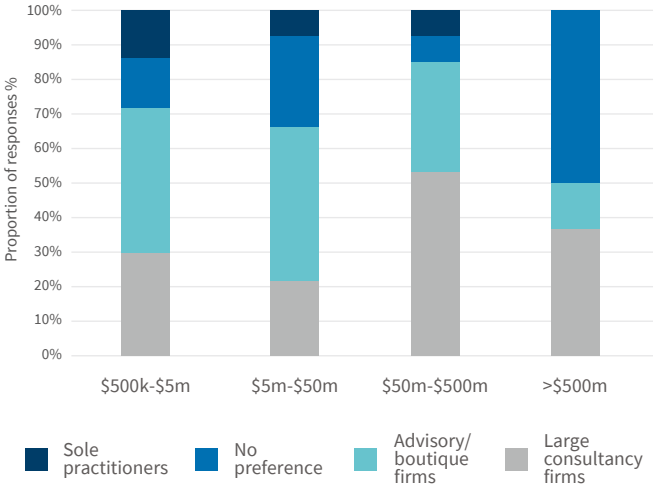


Fig. 15: Preferred practice* type of experts engaged by respondents, by dispute value



Expert practice type

The survey enquired as to whether respondents gave though to what type of practice (sole practitioner, boutique, or large firm) an expert was employed when considering an engagement.

Respondents did not express any preference for the type of practice in which experts they engaged were typically employed – large consultancy firms and smaller boutique firms were almost equally preferred, with many respondents citing no preference at all. For respondents who did indicate a preference, large consulting firms were more favoured in high value disputes and smaller firms in smaller disputes.

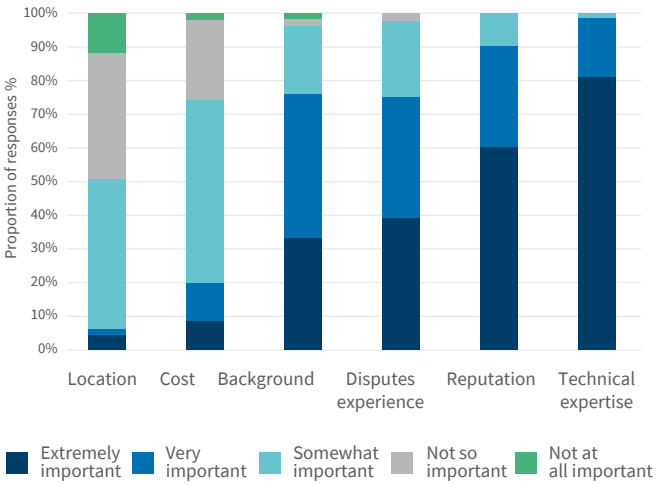
While sole practitioners were more rarely engaged, respondents indicated that the form of practice was expert type dependent – quantity surveying and valuation experts tended to be from large consulting firms, while subject matter/legal experts tended to be from boutique firms or were sole practitioners.

Respondents, most of whom were from Australia, typically engaged experts from Australia or the Asia-Pacific region. European and US experts were also engaged though less frequently.

Important factors in selecting an expert

Respondents overwhelmingly held technical expertise to be the most important factor in the selection of experts, followed by reputation and disputes experience. While cost and location were considered important, they were comparatively less important than the other considerations. The relative importance of factors did not change substantially depending on the size of dispute in which respondents were typically experienced.

Fig. 16: Importance of several factors in selecting an expert



"Identifying with the Tribunal what questions are proposed for experts has proved very useful in avoiding irrelevant and expensive expert evidence, and to avoid the issue of ships passing in the night between competing experts."

Equal Representation for Expert Witnesses Pledge (ERE Pledge)

The lack of gender diversity among testifying experts in arbitration has been recognised as a serious issue. In response, the ERE Pledge was launched in 2022 by joint founders and co-chairs, Kathryn Britten and Isabel Santos Kunsman of AlixPartners as a call to action for all parties involved in dispute resolution to improve the visibility and representation of women as expert witnesses, with the ultimate goal of full parity. ACICA and FTI Consulting are signatories to the ERE Pledge.

Expert gender

Further demonstrating the need for progress in this area, respondents overwhelmingly reported having engaged male experts. Only one respondent reported having engaged female experts for most of the engagements in which they were involved. That respondent was from the government sector and the engagements were of legal experts.

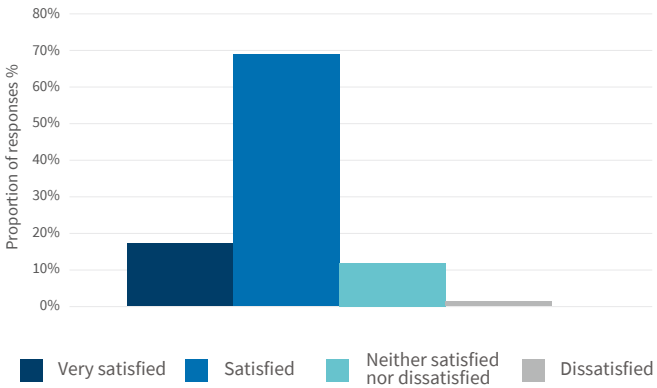
Satisfaction with experts

Respondents were asked whether, across their experience, they had identified any areas of improvement for experts. Across all expert types, sectors, and dispute values, the difficulty that most respondents indicated having experienced at some time was an expert's poor writing skills. Nearly half of respondents also reported having experienced an expert performing poorly under cross-examination. Only a small portion of respondents experienced experts that lacked independence. It was uncommon for respondents to have never experienced any difficulties.

"Bringing the experts for the two sides together at an early stage of the process will maximise the likelihood of the experts dealing with the same issues. This is a good starting point and avoids wasted time and fees in having to produce responsive reports on issues that do not deal with the key issues."

Nonetheless, respondents indicated an overall satisfaction with their experience dealing with experts on most occasions (85%). This holds true for all expert types and values in dispute. The only 'dissatisfied' response was for low dispute values (<$500k AUD) – but even in that value bracket most respondents indicated satisfaction with their experience in 72% of occasions (the balance being neutral).

Fig. 17: Respondent satisfaction with experts (all dispute values)



Timing of expert engagements

Respondents generally engaged experts either before commencement of proceedings or around the time when the first submissions were being prepared, for all expert types. Delay experts were the most likely to be engaged by respondents prior to the commencement of proceedings.

The amount of time that respondents indicated experts were allowed for the preparation of their reports is broadly proportionate to the timeframe of their engagement. That is, those experts who were engaged for longer time periods were also usually given longer to write their reports. However, for all expert types, the most common duration afforded for the preparation of reports was 1-3 months, though it was not uncommon (about 40% of the time) for delay, technical, and quantity surveying experts in particular to be afforded more than 3 months. The durations allowed are also likely to be related to the amount in dispute in the relevant matter.

Fig. 18: Stage of proceedings during which respondents typically engage experts

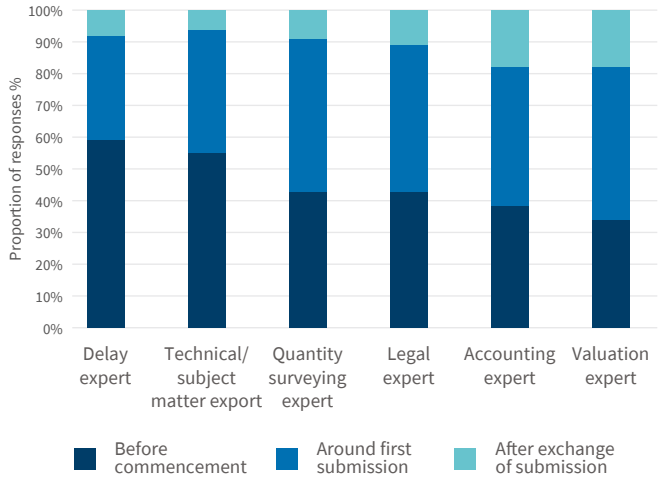
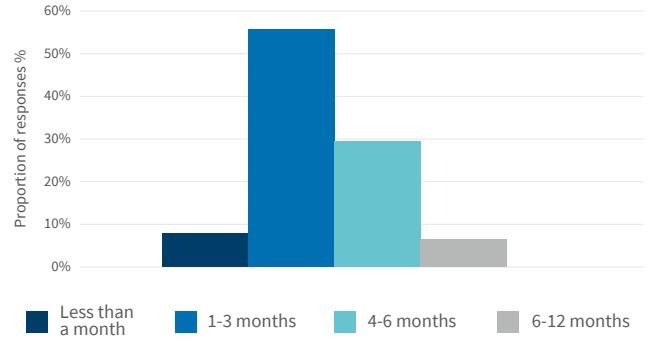


Fig. 19: Time afforded to experts for the preparation of reports



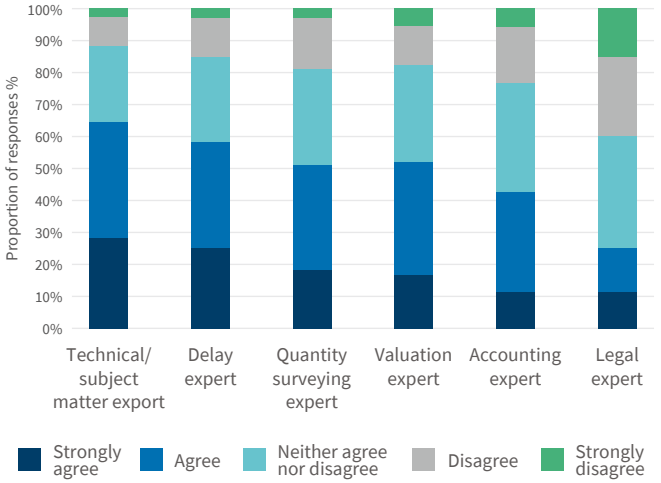
Use of consulting experts

In Australia it is common to distinguish between an independent expert and a consulting expert. A consulting expert is typically involved in assisting a party in the preparation of its claims against the other party, whereas an independent expert is usually engaged later in the process and provides an independent view and expert testimony. Consulting experts are not typically bound by an expert witness code of conduct or a duty to the tribunal in the manner that an independent expert is, nor do they give any evidence or directly influence the tribunal decision.

This type of approach is not the norm in all jurisdictions. In many jurisdictions, a single expert fulfills both the consulting and testifying role. In such cases, the expert still has an independent duty of impartiality to the tribunal, but has more access to information from, and discussions with, instructing counsel and, often, party representatives. Some respondents objected to the distinction between independent and consulting experts and considered adherence to the separation of these to have a negative time and cost impact on arbitration.

In general, however, in jurisdictions such as Australia where the distinction is common, respondents considered the use of consulting experts to improve the overall quality of evidence by allowing parties to identify issues and test assumptions at an early stage. However, this applied more to technical/subject matter experts and delay experts than to other types.

Fig. 20: The use of consulting experts in addition to testifying experts improves overal evidence



"Greater emphasis needed upon the expert's primary duty being to assist the tribunal. Lay experts often pay, at best, lip service to the principle."

The expert evidence iceberg

Introduction

It is often said that only ten percent of an iceberg is visible above the ocean's surface. A useful analogy perhaps when it comes to viewing the entirety of the expert evidence process. An analogy which hopefully does not bring to mind the type of iceberg which sunk the Titanic, but rather one which emphasises that a great deal of preparatory work is involved in ensuring a beneficial expert evidence end product is produced, over an extended period of time, and which to a great extent lies hidden beneath the surface. The 2023 Evidence in International Arbitration Report highlights the important interactions between experts, those briefing them and the tribunal throughout that process.

This effort typically far outweighs that part of the experts' work which ultimately becomes visible to those present at the hearing, the oral testimony. And so the lesson is that the work involved in selecting, briefing and managing an expert can be equally as important as the ultimate delivery of that evidence at hearing.

Our contributors[4] speak about their experience in being briefed as experts across a broad range of arbitration matters, and techniques to maximise the impact of their evidence, as well as some thoughts about what's to come.

What information do you require in your brief relating to applicable rules and processes?

[John] Put simply, the more information around the applicable arbitral expert rules, and the earlier this is provided, the better. In my experience, experts are often directed to Court based rules, rather than to any specific arbitration rules. These rules provide the foundation for the form and content of any report, the use of and references to material relied on, and interactions with other experts via joint conferences and statements, so self-evidently, being given these rules early on helps us to work more efficiently. The need for ground rules is likely more acute amongst inexperienced or 'non-professional' experts, by contrast to experienced professional experts who should have a better sense of the applicable requirements.

[Martin] Applicable arbitral expert rules are fundamental to the work of experts and, therefore, should be communicated and provided as soon as possible after any engagement. It might be argued that without applicable rules, there may not be a level playing field for experts, particularly inexperienced experts. The rules not only emphasise that an expert is not to be an advocate for a party and that his or her opinions should be impartial, objective, unbiased and uninfluenced by any party, but state that the expert's overriding duty is to the Tribunal. This perhaps obvious requirement may be 'lost' when instructions and fees are received from an instructing party. In addition, they serve as a 'roadmap' for the experts' written reports and often prescribe where supplemental reports are required, meetings of the experts and any joint statements. It goes without saying that if the applicable rules are not adhered to, an expert's report may be deemed inadmissible.

[Dawna] I'm going to start off as the 'contrarian' here! I actually think that if you are instructing experienced experts, the rules and process are less important to the expert's brief. They don't go to the substance of the expert's work. They shouldn't impact the analysis or opinions given, and they would generally be following those rules in any event. Of course, the expert needs to understand their role (e.g. whether testifying or consulting expert), and they need to know the process and timetable (e.g. timing of a conclave or joint report). But otherwise, I wouldn't expect the way in which experienced experts work to be impacted by the rules per se. If you are instructing an expert who is not familiar with the dispute resolution process, then it would be much more important to make sure they have not only received and read, but have also fully understood, the rules and processes and importantly, their role in the process.

What are some of the common topics and issues you typically require instructions on?

[Martin] Central to an expert report is the expertise of the expert. In conjunction with the applicable rules, expert reports must state the expert's background, qualifications, training and experience. However, in addition, the rules may set out that the expert states and specifies where a matter is outside the expert's expertise or where an opinion has been reached involving the acceptance of another person's opinion. Accordingly, where an expert's work requires details and/or inputs, which falls outside of his or her expertise, instructions are required. The details and/or inputs may be sourced from another subject matter expert's report or set out in the instruction letter. Common topics include the determination of future commodity prices, foreign exchange rates or forecast costs to complete or production levels.

4. The authors are grateful to Victor Ageev for providing input from the quantum and delay expert perspective.

Notwithstanding any instructions provided, experts may have a duty to consider whether any instruction or instructed assumption may be misleading. Although it is unlikely that an expert report would be served including statements referring to misleading information, care should be taken as to whether an instruction is reasonable, particularly given knowledge obtained during an engagement.

[John] When considering questions concerning cost, profit or cashflow quantum, for example in project or construction cases, a set of very precise instructions is required as to the source of particular amounts, the basis or reason for those amounts, as well as links to relevant contract and project documentation to establish the nexus between accounting information and project records. This process is almost always an iterative one, and the expert and their team can really show their value by carefully and methodically assisting in the identification of the links between these records, or where gaps require filling. In addition, the foundation of instructions relating to the counter-factual or hypothetical scenario requires ongoing development through the engagement period.

[Victor] In relation to quantum in a construction related dispute, it is not unusual for major points of disagreement to arise due to asymmetric instructions – that is, experts' instructions may be opposed on the question of whether certain works are variations, or whether there is a prescribed quantification methodology in the contract, or applicable tender clarifications and other agreements between the parties. One might receive instructions to quantify changes in scope, counterfactual costs for performing works under different contractual arrangements, lost time owing to disruption to the works (impacting productivity), or costs incurred due to delay, the quantification of each of which can be approached in several different ways, giving rise to unique challenges. In relation to delay, the extent and quality of contemporaneous records is a key factor in determining the type of analysis that can be performed. Instructions are often used to cure gaps in records, but the issues still ultimately need to be addressed substantially. Instructions can vary from consideration of the time impact of changes to scope or other events, to the preparation of counterfactual programs based on different assumptions.

In your experience, what makes for effective expert conferencing and joint statements?

[Dawna] In my experience, the most effective joint statements are produced when both experts approach the

task with a genuine interest in assisting the Tribunal. They can then agree on which topics are important and avoid lengthy statements about differences that aren't material to the overall opinion. They also can avoid bringing in new arguments (other than when necessary, such as in response to new information). It is also helpful when they have sufficient confidence in the process to avoid re-writing their report in the joint statement, but rather focus on concisely summarising the key issues. If they approach the task collaboratively, they can focus on narrowing (without backing away from their opinion) and summarising, rather than 'expanding' on, what is written in their reports.

[John] As the name implies, production of a joint statement by experts is not an exercise that should be undertaken, or dominated by one expert in isolation. Co-operation is the key to success. This does not mean that each expert must resile from their genuinely held opinions. But it does mean that for success and efficiency to be achieved, experts need to be jointly committed to the process of producing a statement which achieves the twin aims of, first, setting out their opinions clearly and the reasons for any differences, and secondly producing a statement which is ultimately of utility to the tribunal. Setting a clear purpose in advance can assist, whether by way of issuing joint instructions, or setting parameters for the style or length of the statement. Where multiple experts, or highly contested issues are in play, it may also be useful to build in a 'release valve' – a facilitator to address process issues or resolve potential conflict amongst experts, or an avenue for collectively seeking clarification of instructions. Managed properly, the joint expert statement should become a highly effective communication tool in the tribunal's consideration of the relative merits of each expert's evidence.

[Martin] Collaboration between the experts is key to an effective expert conference and meaningful joint statement. Often, the initial conference is brief as one of the experts may still be due to respond to another expert's report in reply or supplementary report. However, it is during the initial conference that instructions (or specific questions), format and structure, and process of the preparation of a joint report are discussed. In my experience, the Tribunal is seeking to narrow the issues in dispute. It follows that they are not expecting to receive a regurgitation of the experts' respective reports. Should expert reports need referencing, they can be done so with footnotes. Expectations as to timing for the finalisation of the joint statement is key and all parties should adhere to deadlines in order to ensure the process is effective. Preparation for aspects of a joint report can be undertaken in advance of the initial conference and this is advisable so as to identify areas of agreement and disagreement.

Do you approach expert testimony in a virtual world differently to traditional in-person evidence?

[John] To a certain degree, yes, although I still try to prepare very much as I would if there in person. As evidence is delivered from a remote location, and notwithstanding the availability of typically excellent technology, this remoteness can change the panel's perception of the expert, and how evidence is received. I have found that having very succinct summaries in the written report and/or joint report can assist in getting the point across. More importantly though, I have needed to be even more mindful of ensuring that I have been seen, heard and understood, as giving evidence remotely can mean that it is far harder to 'read the room' and pick up on signals when, for example, expansion or clarification is required.

[Dawna] Often when preparing the expert report the ultimate format of the hearing is not known, so I wouldn't approach the report any differently. Other than making sure we are comfortable with the technology (and it is working well!), I don't approach virtual testimony any differently to in-person evidence.

[Martin] In terms of the preparation, no. However, when in the virtual world, communication between the parties is different and, I suggest, extra care and time should be taken in order to ensure any question is fully understood and the response heard. It is important to be familiar and comfortable with your virtual world set up (i.e. the number of screens, headset, home or office etc).

Which types of issue are more likely to lead to disagreement amongst experts?

[Martin] The instructed assumptions, counterfactual scenario or future expectations are often areas of disagreement. Care should also be taken if a disagreement actually stems from an area outside of an expert's expertise. In these circumstances a sensitivity or scenario based analysis may be beneficial to demonstrate what the impact is on damages. It may also identify whether a disagreement is material to the claim and what issues are key to differences of opinion.

[Dawna] The areas of disagreement are the subjective and judgemental parts of the opinion. I don't find that the experts generally 'disagree' on their instructed assumptions or counterfactual scenario. They will result in a different answer, but I don't see those as matters of disagreement as such. But there are plenty of subjective areas when it comes to accounting and valuation opinions. Experts will usually agree on the high level methodology to apply, but disagree on the application of that methodology. Although there are 'generally accepted' accounting and

valuation standards, both are high level and 'principles-based', leaving room for interpretation. Accounting experts would often agree on the accounting standard that should apply, but may disagree on the interpretation of the relevant fact pattern (for example by placing different weight on contradictory documents). For valuers, the most common areas of disagreement are the relative weighting to be given to comparable companies and transactions, the reliability of forecasts, and the discount rate or earnings multiple to apply.

[Victor] In relation to quantum in a construction dispute, not only can experts be in disagreement as to the appropriate methodology, but even when methodologies have been agreed, disagreements can arise regarding the detail of how that methodology should be applied. These types of issues can often be resolved by way of expert conferral. Disagreements concerning methodology might include circumstances in which one expert considers it appropriate to quantify the value of additional work using contractual rates and prices, while another expert might seek to quantify the same based on cost actually incurred (plus an amount of overheads and profit). However, even in circumstances where the experts might agree that the valuation should be based on actual costs plus overheads and profit, there may still be disagreement as to the amounts that should be quantified in respect of overheads and profit. These types of disagreements, if not resolved by way of conferral, can often be discretely quantified and presented to the tribunal as alternatives.

In relation to delay analysis, expert evidence typically involves two processes that, while guided by principles, are ultimately subjective: (i) the selection of an appropriate delay methodology; and (ii) the application of that methodology. Disagreements often arise in relation to either one or both processes. What is particularly challenging to tribunals is that there is no methodology that is best to apply in all circumstances. It is exceedingly rare for opposing experts to be instructed to employ the same delay analysis methodology, but there is a reasonable chance of reaching at least some agreement in joint expert meetings.

Why is it important to promote diversity in arbitration and amongst experts?

[Dawna] Particularly in International Arbitration, each of the parties and each of the members of a tribunal will come to the process with different lived and professional experiences, which naturally have an impact on their respective expectations and assumptions about their positions, the process and the outcome. The more diverse the tribunal members, the more likely they are to understand the perspectives of the parties and to achieve an effective, efficient and accepted outcome. The more diverse the pool of experts to choose from, the more likely to find one with the most suitable expertise, experience, perspective and communication skills to resonate with each member of the tribunal.

[John] I have a genuinely held view that both the professional services firms which operate in the arbitration field, as well as the arbitral institutions themselves, should fairly represent the societies in which they operate. Whilst much progress of late is evident, we cannot yet declare that equality has been achieved in terms of gender, ethnicity and other forms of diversity. So those efforts must continue.

[Martin] As in life, promoting diversity in arbitration and amongst experts is important for a healthy, progressive and developing environment. It is clear that the world of arbitration is cognisant of the need to improve diversity in all aspects of the process. I understand that measures are in place to promote diversity. However, it will require the 'buy in' from clients to implement change.

Tell us about some emerging trends you expect to feature in future arbitration matters

[Martin] The impacts of COVID will no doubt lead to an increase in disputes relating to global supply chain distribution, earn-out clauses, covenant breaches and insolvencies. In addition, as governments and populations become more focussed on and conscious of environmental and social issues, the number of arbitrations with regards to renewable energy contracts, climate change, and environmental, social and governance will increase. In terms of arbitral processes, an increase in third-party funding can be expected along with the 'pandemic procedures' continuing to drive efficiency (i.e. paperless and virtual hearings).

[Dawna] I agree with Martin's comments, and would add that global economic volatility can also lead to increases in investor-state disputes or disputes between states – or at least to the more 'developed' states being the subject of those claims more often. In relation to the arbitration process, lately I have seen tribunals asking experts to confer earlier in the process, even before they have written their reports. Traditionally they didn't need to communicate with each other until they had arrived at a 'finalised' and fully reasoned opinion. While there can be benefits to this new approach, it does require experts to work in (and therefore potentially be instructed in) a different way.

[John] As both Martin and Dawna say, the likely areas of future (and indeed present) dispute seem quite clear. Business and economic challenges arising from ESG driven change, and the legislative and policy responses introduced alongside them, are a key driving force behind cases likely to require resolution via arbitration. Add to this geo-political tensions, and we can easily foresee a greater number of investor state disputes around cross-border investments and trade.

Uniquely Australian aspects of arbitration evidence

[John] Australia continues to be a nation driven by the development and trade of energy resources (including increasingly renewables), and the construction of infrastructure which, at least in part, supports that development. Australia is also blessed with global leading human resources and intellectual capital which has developed alongside these sectors, including arbitrators, counsel and experts. This makes Australia a strong candidate as a seat for energy, renewables, mining, construction and major project disputes, and helps elevate these Australian based experts to a global stage.

[Dawna] Here in Australia we have multiple viable locations for hearings, and suffer the tyranny of distance, and time zones, even within our own country. I think the increasing use of virtual hearings can really 'level the playing field' by facilitating the participation of parties in arbitration hearings both within Australia and overseas.

[Martin] Australia's main uniqueness is perhaps its main disadvantage: distance from the rest of the world. However, as John refers, Australia possesses highly skilled and experienced arbitrators, lawyers and experts. It is, therefore, a 'known' quantity with ever improving choices for arbitration venues. I agree with Dawna that the advent and continuation of virtual hearings will undoubtably counter the distance, but perhaps not the time zone issue. Nevertheless, I am convinced that Australia's excellent arbitration facilities and facilitators will lead to an increase in its arbitration hearings and, ultimately, it will become less unique.

John Temple-Cole
Partner | KordaMentha

Martin Cairns
Managing Director | Sapere Forensic

Dawna Wright
Senior Managing Director | FTI Consulting

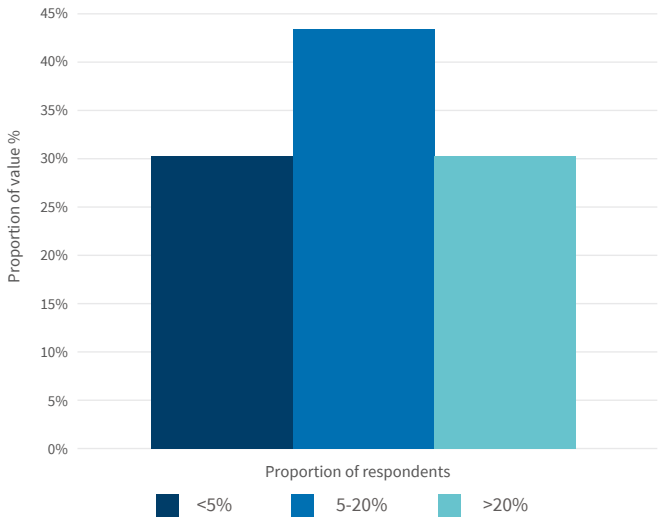
Documentary evidence

Unsurprisingly, the higher the amount in dispute, the longer respondents reported spending on document production. Regardless of the amount in dispute, however, respondents reported spending fewer than 6 months in most cases. More than expert evidence and witness evidence, respondents were likely to spend greater than 20% of the value in dispute for the preparation of documentary evidence.

Impact of documentary evidence

Across the board respondents considered documentary evidence to have a significant impact on case outcomes. However, respondent commentary suggested that this is less the case in relation to documents produced as a result of document production orders. Several respondents clarified that contemporaneous documents available to parties and submitted with memorials and statements are crucial, while those discovered via the disclosure process are generally not, although they can assist in providing more context.

Fig. 21: Proportion of value in dispute spent on documentary evidence

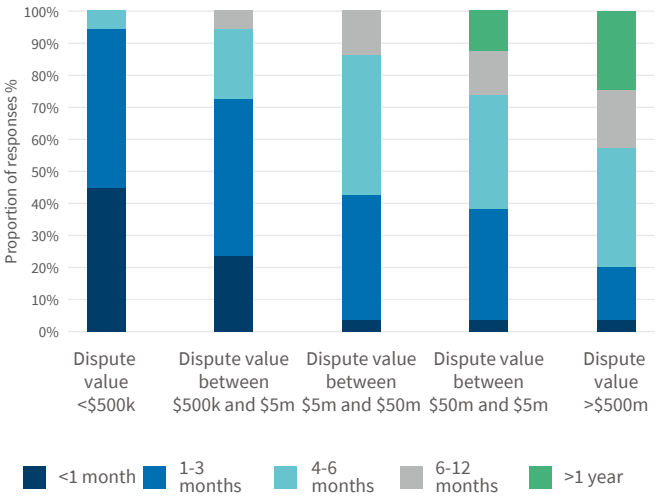


"Tribunals should be more robust in keeping document requests narrow and ensuring party compliance. They can also assist in ensuring that expert testimony is addressing consistent questions."

Document schedules

Redfern schedules are by far the most common (88% of the time) document schedule used by respondents and were reported as being used by respondents almost exclusively, with only a handful reporting the use of bespoke or Stern schedules.

Fig. 22: Time spent on the preparation of documentary evidence, by amount in dispute



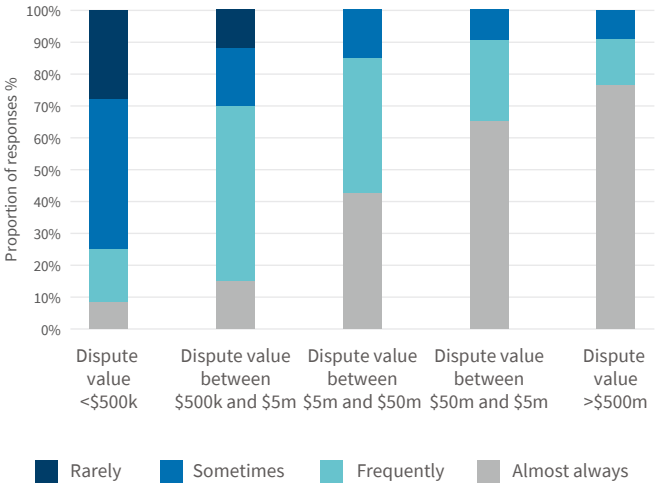
Orders for production

The reported occurrence of tribunal orders for document production increased as the value in dispute increased:

— orders issued less than half the time when dispute values were <$500k AUD

— orders almost always when dispute values were >$500m AUD.

Fig. 23: Frequency with which tribunals make orders for document production, by amount in dispute

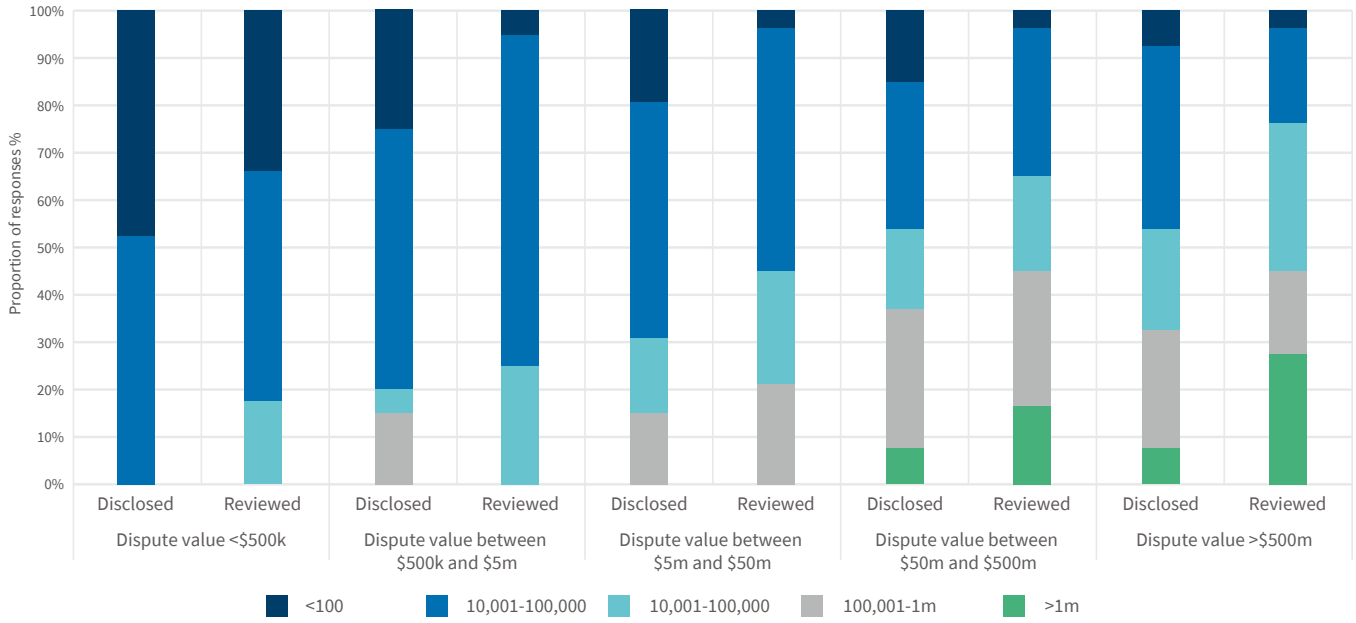


Disclosure and review volumes

As with the time spent on the production of documents, the reported volume of documents reviewed and disclosed increased with the amount in dispute. Respondents reported reviewing a greater number of documents than were disclosed.

"Documentary evidence is usually critical to resolving factual disputes, but often that is documents parties already had access to, not documents only obtained through document production."

Fig. 24: Document disclosure and review by dispute value



Document production: problems and proposed solutions

Although document production is an important aspect of international arbitration procedure, parties often rightly complain that it has become overly costly and time-consuming in recent years, often with very little perceived benefit or effect on the outcome of the case.

There are two main reasons for this, in my view. First, counsel, eager to leave no stone unturned, submit too many (and overly broad) requests to produce documents, even where the documents sought may be of questionable or only tangential relevance to the case. Second, Tribunals are sometimes reluctant to deny or limit requests for documents which may later turn out to be relevant and material to the outcome of the case, especially if they are not yet sufficiently informed about the issues to be resolved. Tribunals often find it more expedient (and safer) to simply grant dubious requests. This places a heavy burden of time and costs on the parties, who must then trawl through a large volume of materials, compile and review relevant documents for production, and redact such documents for legal or other privilege.

There are also problems of compliance, leading parties to complain that there are insufficient sanctions for failure to comply with document production orders. While a Tribunal may in theory draw an adverse inference against a party for failure to produce documents, in practice Tribunals are often reluctant to do so as they fear this could be used against them in a challenge to the award.

For all of these reasons, document production has become fodder for procedural bickering between the parties, adding additional cost and delay with little if any benefit to either side.

I propose two simple procedural interventions which I have found extremely useful in focusing the document requests on those documents which are truly relevant and material to the outcome of the case, reducing the number and scope of disputed document requests which the Tribunal must resolve, and enabling the Tribunal to make more robust and informed decisions on disputed document requests.

First, following the first round of submissions and prior to the document production exercise, the parties should confer and agree upon a list of issues which are necessary to be resolved in order to decide the case (a "Memorandum of Issues" or "MOI"). If the parties cannot agree upon the formulation of the MOI, it will be settled by the Tribunal. This forces the parties and (importantly) the Tribunal to engage at a relatively early stage with the issues which are truly relevant and material to the outcome of the case. The MOI will serve as a guide for the parties in formulating their requests and for the Tribunal in determining any disputed requests. The MOI is also useful as an outline for the further submissions of the Parties and for the Tribunal's award.

Second, the document production exercise itself is altered from the current standard procedure in several ways, viz: (i) the dreaded horizontal Redfern Schedule is replaced by a simpler vertical schedule; (ii) when making a request, a party is required to show the relevance and materiality of the narrow and specific category of documents requested by reference to, inter alia, an issue to be resolved as set forth in the MOI; (iii) when objecting to a request on the basis of scope, burden or cost, a party is required to propose an alternative (i.e., less broad, burdensome or costly) formulation of the request with which it would be willing to comply and which would allow the production of relevant and material documents; (iv) the parties are required to confer in good faith in respect of any disputed requests to attempt to reach a mutually acceptable solution before coming to the Tribunal; (v) if the parties are unable to reach agreement on a disputed request, the Tribunal will decide the request with reference to, inter alia, the issues to be resolved as set forth in the MOI.

These procedural adjustments have resulted in more focused document requests, fewer disputed document requests, better and more robust decisions on disputed document requests by the Tribunal, better compliance with orders for production, and more willingness on the part of Tribunals to impose consequences for failure to comply with its orders for production.

Naturally, some additional time and cost is incurred in drawing up the MOI, but this investment is repaid several times over by savings of time and costs in the document discovery phase, as well as in the drafting of subsequent submissions of the parties and the award.

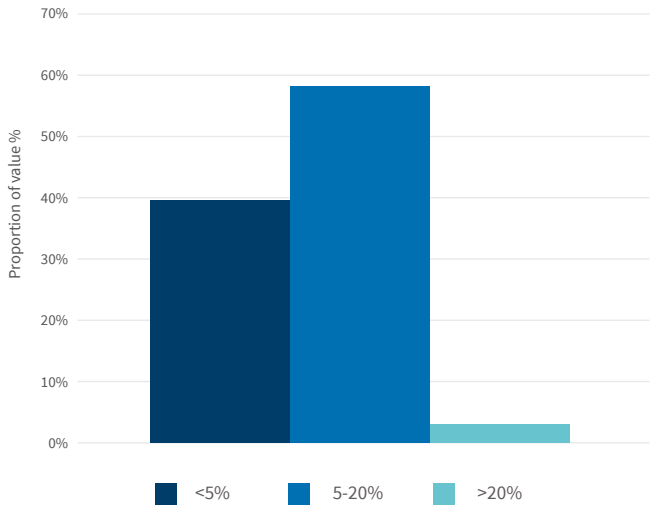
Benjamin Hughes
Independent Arbitrator | Hughes Arbitration

Lay witness evidence

Impact

Respondents considered lay witness evidence to have a significant impact on case outcomes regardless of the value in dispute. Nevertheless, lay witness evidence was considered by respondents to have the least impact compared with expert evidence and documentary evidence. This might be in part due to the role of lay witness evidence in introducing or explaining documentary evidence, which itself is considered by respondents to be the most crucial form of evidence. In fact, respondent comments regarding lay witness evidence were often framed by reference to documentary evidence. A positive aspect of lay witness evidence identified by respondents was that it can add useful context and narrative to documentary evidence. However, other respondents expressed the clear view that lay witness evidence will often add little to documentary evidence.

Fig. 25: Proportion of value in dispute spent on lay evidence

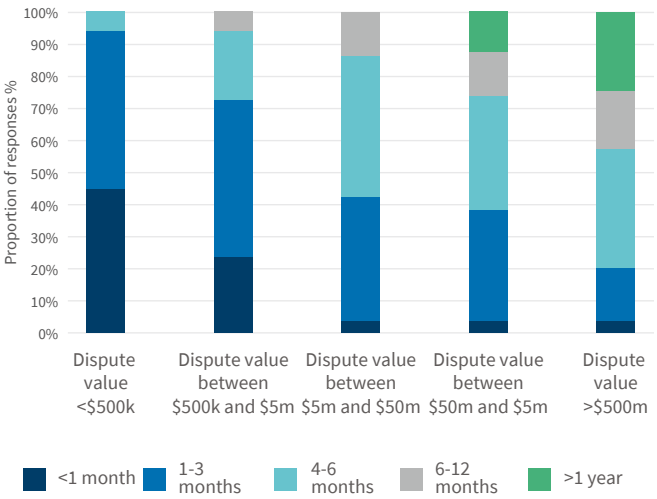


"Witness evidence provides necessary context for documentary evidence. My experience is that it is rarer for witness evidence itself to 'win' or 'lose' the case, but it is filling the evidentiary gaps necessary for the case theory or narrative."

Time spent

As with documentary evidence, the greater the amount in dispute, the more time respondents reported spending on the preparation of lay witness evidence. In any event, this was reported as generally taking 6 months or less.

Fig. 26: Time spent on the preparation of documentary lay evidence, by amount in dispute



Statement types

Around 78% of respondents considered the most compelling lay witness statements to be those that addressed both contemporaneous documents and witness experiences, rather than those that only dealt with witness experiences (the latter being preferred by only about 17% of respondents) or those that only serve as a touchpoint for the introduction of documentary evidence (which were preferred by only about 5% of respondents).

Issues

Almost all respondents reported having experienced some issues with lay witnesses. Negative experiences commonly reported by respondents included witness evidence that did not contribute to the case, witness evidence that was not supported by documentary evidence, hearsay evidence, inconsistent written and oral evidence, and unavailability of witnesses during hearings.

The ongoing controversy on the utility of disclosure and witness testimony

Documents

As electric typewriters replaced manual typewriters, telexes replaced telegrams, faxes replaced letters and then computers, emails and texts replaced everything, digital communication has become the dominant medium of commerce. The globalisation of commerce has depended heavily upon digitisation, and globalisation and digitisation have accelerated each other.

Many transactions, from large share trades to on-line retail purchases, are conducted entirely through digital means. Programmes have been developed for specific industries, so that any significant construction project will have its own communications system for all project communications, which will send and store literally millions of communications during the project. Accounting and banking systems are digitised. Blockchain contracts and AI are well established and will take this trend into dimensions we can only speculate about.

This has profound implications for international arbitration. There will invariably be an indelible digital record of all significant communications and events relating to any dispute. However, the records that really matter will be a tiny fraction of all the records retained by the parties to the dispute. The challenge is to filter out those records from the many that don't matter for two purposes – disclosure and tender.

At the point of disclosure, different filtration systems are evolving. Many Australian courts have adopted a criterion of "direct relevance". The IBA Rules commonly applied in international arbitration have gone further and require documents to be "material to the outcome". The Prague Rules, which draw on Civil law traditions, expressly discourage document production, specifically e-discovery.

None of these systems work very well. The ubiquitous Redfern/Stern schedule is the bane of arbitration practice. Such schedules presume and encourage disputation when conferral between sensible practitioners is a much better way of dealing with disclosure issues.

Evaluation of the processes pertaining to document disclosure should take account of its limited utility. Long experience shows that the production of a document which turns the tide of a case (a "smoking gun") pursuant to disclosure obligations is extremely rare – perhaps a few instances per legal career, at most. Yet vast amounts of time and money are routinely invested in the pursuit of this Holy Grail, in almost all cases to no avail.

In the absence of significant asymmetry of access to information, in almost all cases the documents that are most material are those which have passed between the parties, and which will be in the possession of both, without the need to invoke disclosure. Documents in the possession of one party only which are produced on disclosure may round out and complete the documentary record, but it is difficult to justify the time and cost of adversarial disclosure processes for that limited benefit, which could be achieved by sensible co-operation between the parties and their legal representatives.

Testimony

The advent of the complete digital record significantly reduces the value and utility of witness testimony. Witness statements are written by lawyers and are invariably self-serving. Cross-examination of an inevitably partisan witness on documents which speak for themselves years after the event is seldom helpful. The oral traditions of the common law are inhibiting practitioners and tribunals from recognising that careful analysis of the documentary record is a much more reliable guide to the truth than witness testimony. Testimony can however provide useful context for the analysis and interpretation of the documentary evidence, provided that it is not presented in an argumentative or tendentious manner, as it commonly is.

The Hon. Wayne Martin AC KC
Independent Arbitrator | Francis Burt Chambers

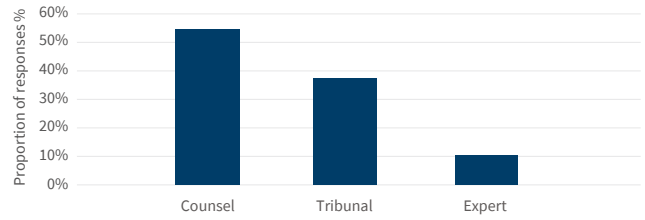
On the respondents

The survey received over 100 responses, of which 64 provided sufficient data to contribute to the overall results. The responses were overwhelmingly from legal professionals and arbitrators, with a handful of respondents identifying as experts. Sixteen of the respondents were employed at a firm that employs more than 1,000 people.

Respondent type

The totals shown below include respondents who fit into more than one description (the most common combination is counsel and arbitrator, which applies to sixteen respondents).

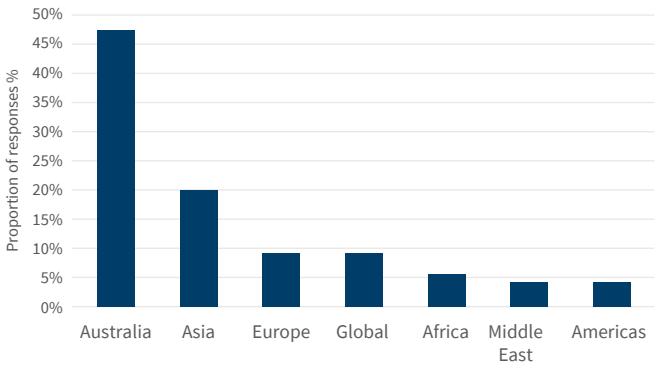
Fig. 27: Respondent type



Respondent location

Respondents overwhelmingly practice in Australia and Asia, with a small number practising in Europe, Africa, and the Americas – only three respondents had a practice with no connection to Australia. 80% of respondents were from a firm that operates in multiple jurisdictions.

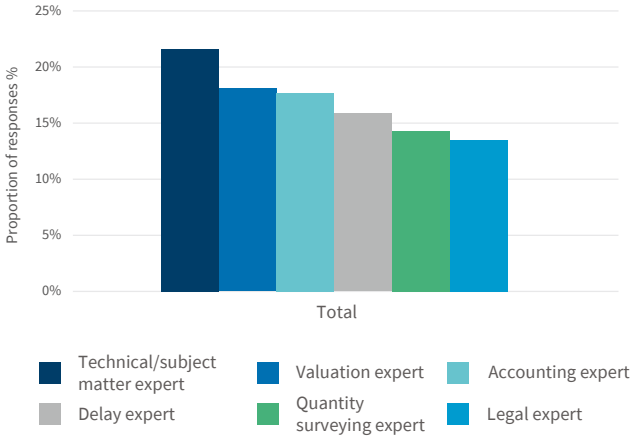
Fig. 28: Respondent location



Expert respondents and expert engagements

Most expert respondents were valuation and accounting experts, with a small number of quantity surveying, delay, and technical experts also responding. However, a large variety of experts have been engaged by or appeared before other respondents.

Fig. 29: Types of expert engaged by, or appearing before, respondents

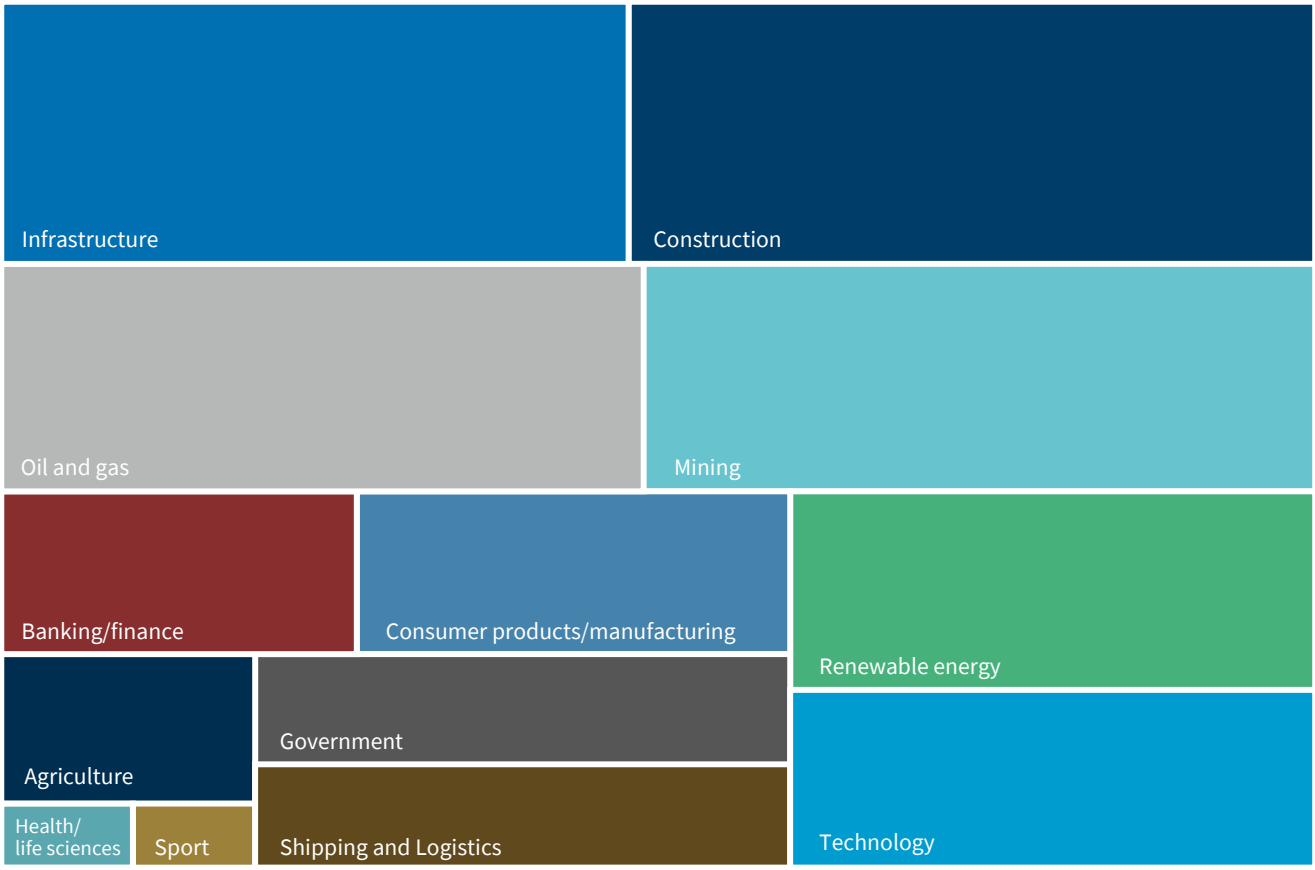


In addition to those in the legend above, respondents also had experience with medical experts, geopolitical experts, economic experts, and forensic experts.

Respondent sectors

Respondents overwhelmingly (and unsurprisingly given the use of arbitration in these industries in Australia) practice in construction, mining, infrastructure, and oil & gas. Only four respondents did not practice in at least one of those sectors. However, most respondents practice across several sectors - other well represented industry sectors include technology, banking and finance, government, manufacturing, shipping, and agriculture. A full table is shown on the next page.

Fig. 30: Respondent sector



Respondent dispute values

Most respondents are involved in high value (>$50m AUD) disputes. Predictably, large firms are generally involved in more disputes than are small firms or sole practitioners.

Fig. 31: Dispute value ($AUD)

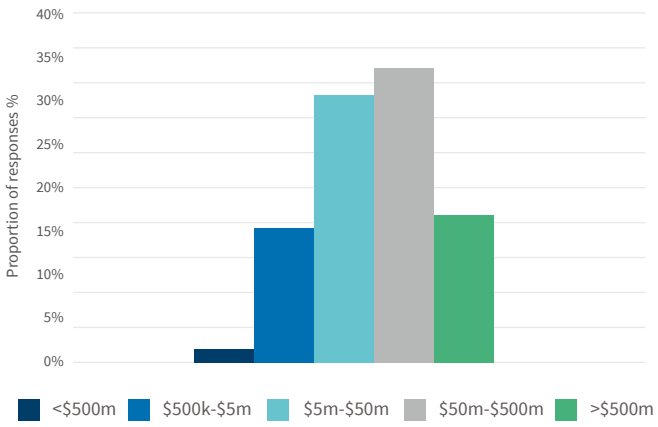
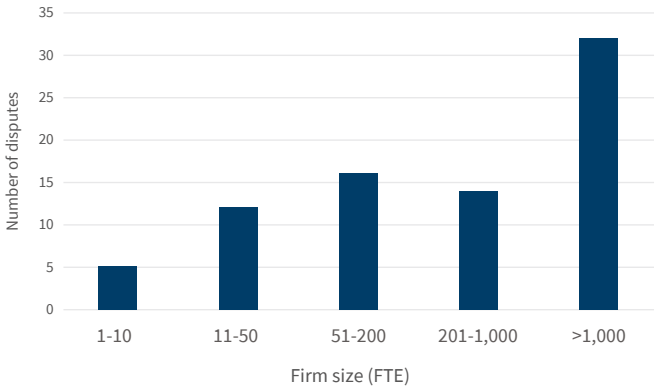


Fig. 32: Number of disputes in which respondents' firms are involved annually



Concluding remarks

This second Australian Arbitration Report presents a fascinating slice of current perceptions and practice in the field of international arbitration. The 64 responses, across a wide range of sectors, including construction, mining, infrastructure, oil & gas, technology, banking & finance, government, manufacturing, shipping, and agriculture, reveal a notable consensus amongst legal professionals and arbitrators as to the best practices that are required to ensure arbitration attains its potential as a speedy, efficient, effective means of dispute resolution.

But the results of this report also tread directly on what is perhaps the single most important tension that now lies at the heart of international arbitration practice: the tension between the widespread agreement that arbitral tribunals need to take proactive steps in managing and intervening in arbitral proceedings, and the widespread reluctance on the part of international tribunals to do so.

Dr. iur. Clarisse von Wunschheim in her commentary has observed that despite increasing reliance on similar sets of rules and guidelines, substantial differences in practice remain among practitioners from different legal, cultural and geographical backgrounds. In particular, she notes variations in emphasis between civil law and common law trained professionals with respect to documentary as opposed to witness evidence; party-appointed as opposed to tribunal-appointed experts; and discovery as opposed to document production. But whilst these differences certainly exist, one of the triumphs of international arbitration has been the reduction of cultural divergences, and the convergence of systems into a single, harmonised, accepted, practice. That practice is now reflected in a near-standard form "Procedural Order No 1" that is now routinely produced in international arbitrations, whatever the characteristics and particular needs of the dispute at hand. This standardised procedure combines aspects of both the civil law and common law traditions, and comprises a written phase, followed by an oral phase, followed by a written phase.

The initial written phase generally consists of the exchange of comprehensive, all-encompassing written memorials, instead of common law court-style pleadings. These tend to be less disciplined documents, written in free-flowing prose, that may easily extend to hundreds of pages. And they often reflect the (positively unhelpful) intention of leaving all options open as opposed to narrowing the case to specific points in issue. The bigger the case, the more likely the memorials will be mammoth in scale, produced by an army of associates, and the more likely there will be a fundamental inequality of arms as between, on the one hand, the legal teams required to compile the submissions, and, on the other hand, the members of the tribunal who, in the absence of any support, are required to read and somehow digest the same. The memorials will routinely attach multiple volumes of documents; extensive and frequently over-lawyered witness statements (perfectly crafted, and often indistinguishable from the written submissions), and expert reports produced by party-appointed experts (who, curiously, always seem to be available to support the case being advanced, whatever it happens to be). This phase of the standard procedure will also include an opportunity for the exchange of document production requests, now routinely squeezed into Redfern Schedules of increasingly eye-watering length.

The oral phase routinely comprises one or more oral hearings at which each party will demand, and will be afforded, an opportunity to make opening submissions which may focus the tribunal on the points in issue, but may equally repeat vast chunks of the written briefs over which the tribunal has already laboured. There will follow – and most hearings are then dominated by – the examination and cross-examination of fact witnesses and experts, a process demanded and led by counsel, and covering ground counsel consider important, whether or not of actual assistance to the tribunal.

There will ordinarily then follow a further written phase, comprising the exchange of (usually lengthy) written post-hearing briefs, which provide an opportunity for the armies of lawyers assembled before the tribunal to distil the oral evidence, and re-state, once again, much of what has already been set out (repeatedly) in prior phases of the standardised procedure.

This has become an exhaustive (not to mention exhausting) process. In major and complex cases it can be effective, in affording all parties the fullest opportunity to present their cases, and in providing every conceivable assistance to tribunals. But the truth is that in many cases, it actually entails too much procedure. The combination of written and oral steps includes redundancy; requires the investment of excessive and disproportionate time and costs; and is simply not needed in order for the particular dispute in question to be resolved. And the process results in a major mismatch between the volume of material presented to the tribunal, and the volume of material that actually motivates the tribunal's determinations. And yet,

the standardised procedure is frequently deployed, come what may, as if tribunals are operating on some form of auto-pilot.

It is against this background that this Report presents a very clear and critically important overall message: that tribunals need to be alert to the dangers of "procedural auto-pilot". Rather than assume that the standardised procedure maybe applied in every case, they need to adopt a proactive stance. They must use all tools at their disposal actively and robustly to case-manage and tailor their procedures, so as to meet the particular characteristics and needs of the particular dispute they are to resolve. One size, or one Procedural Order No 1, most certainly does not fit all. And in many cases, less procedure is needed.

Hence, a remarkable 72% of respondents noted the need and benefits of constructive tribunal intervention in the process, and an even more remarkable 96% of respondents considered that increased tribunal use or encouragement of at least one suggested procedural intervention would improve the evidential process in arbitration (e.g. the use of expert conferences and joint reports; limitations on document production; stricter timeframes; word limits; bifurcation of discrete issues; concurrent expert testimony instead of serial cross-examination; control of lay evidence).

But for these critically important steps to be taken, one central hurdle must be overcome: the now common reluctance by tribunals to act decisively and depart from the standardised model, for fear of challenges to the award, or challenges to them. This is now termed "due process paranoia", and it is now widespread. It is a fear stoked by counsel, who will readily deploy due process threats if procedural decisions are taken against their client's interests, and hoist the Sword of Damocles over the tribunal's heads by reserving their position. It is a fear that chills tribunals' appetite to intervene and innovate, given the perceived risks of undermining their award, or their own positions and reputations. And it is a fear that generally remains at large, given a lack of information as to the likely prospects of any threatened procedural challenge.

It is suggested that the lessons of this Report must most definitely be learned by tribunals, whether within Australia or anywhere else. But if tribunals are actually to implement the proactive stance that users have urged, concrete steps are needed to calm the collective fear of doing so. And for this, more information is needed as to the likely poor prospects of threatened challenges; a more robust approach is needed on the part of national court judges to disable parties from improperly deploying procedural reservations and challenges; and more "spine" is needed on the part of tribunals in disregarding threats, rolling up arbitral sleeves, and actively shaping their procedures in each case.

These are perfectly realisable steps. And if taken, one can imagine a Third Australian Arbitration Report that documents greater procedural control by tribunals, and the demise of standard-form Procedural Order No 1.

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