

LCIA RELEASES GUIDANCE ON EXPERTS IN INTERNATIONAL ARBITRATION

- ▶ The London Court of International Arbitration (LCIA) released a note (Note) in January 2018 providing guidance on the ways experts could be used in international arbitration to enable more effective and efficient decision-making.
- ▶ The Note provides guidance about the different methods in which experts are engaged. It also provides recommendations as to other steps that can be taken by parties to make better use of experts in international arbitration.

What is it about?

Arbitrations administered by the LCIA cover a wide range of sectors, but many are from the construction and infrastructure sector. International parties are increasingly drawn towards English Law, the London Seat and the LCIA's reputation for high-quality dispute resolution; a main attraction being the ability to access to an unrivalled pool of experts. Experts are now used in the majority of the approximately 300 arbitrations which the LCIA registers each year.

The Note provides a brief summary of the ways experts are used and the challenges each method entails. One of these methods is the use of experts to advise behind the scenes in a consultative fashion. These consultative experts provide an invaluable service in ensuring that technical details are "not obfuscated or misrepresented in claims and defences". As they are not visible to the other participants in the arbitration, the expert must bear in mind potential conflict issues if they perform other roles. Other ways to use experts include: party-appointed experts, tribunal-appointed experts and experts as tribunal members. The Note also refers to expert determination and the importance of properly drafting a split clause, which assigns particular forms of dispute resolution to different disputes. The Note points out that expert determination may not always be the most effective dispute mechanism if the dispute's underlying issues are legal rather than technical.

The LCIA then provides some suggestions to improve the use of experts in international arbitration. Lawyers and arbitrators should develop their familiarity with the issues on which experts are often asked to contribute (in particular, quantum as it is often a significant section of a dispute); and experts must ensure they are flexible enough to facilitate discussion with the tribunal and other experts.

Why does it matter?

Nowadays, experts are used across a range of construction and infrastructure disputes. In addition, there are a multitude of ways to use experts that are far removed from the traditional method in which they draft an expert report and then testify to it at a hearing. Whilst these new methods were intended to improve the quality and efficiency of decision making, they do not necessarily result in the optimal use of experts.

Now what?

To get the best out of experts, it is important to bear in mind the benefits and shortcomings of each method of engagement. Be sure to consider: engaging the expert early in the process; whether the expert is a testifying expert or consultative; how the expert is to be instructed; and whether the parties' experts should work together by producing a joint report.

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