



Expert Witness Market Research

ACKNOWLEDGEMENT

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Introduction

The construction and engineering sectors have become hotbeds for dispute. According to the International Chamber of Commerce, 23% of dispute cases in 2017 were generated by businesses in these segments, followed closely by the energy industry with 19%. It's a trend that has held firm for several years, and significantly surpasses the percentage caseload generated by other sectors, which average around 6%.

The reason for the spike can be traced back to the 2014 oil price slump. Almost overnight the price per barrel crashed from well over USD100 to a low of USD30 in 2016. The oil market has been in the doldrums ever since, yet to stabilise.

Changing dynamics in the energy market have also influenced the world of dispute resolution. For example, the decreasing cost of large-scale solar projects and other renewable energy projects have seen some governments reduce or cancel renewable incentive programs, giving rise to a wave of disputes. In Spain 40 investment treaty arbitrations have been filed, nine more in Italy and seven in the Czech Republic².

In the oil and gas industry, projects can by their very nature, projects in oil can trigger disputes: the number of parties involved in an undertaking, coupled with the complexity of drilling, exploration and production can readily cause friction. In a business where delay is costly, it is often impractical or undesirable for those involved to discontinue business activities while seeking resolution.

Research shows³ that in almost 90% of cases, both parties opt to use an alternative dispute resolution (ADR) service, such as adjudication, mediation and expert determination. In some cases, this is a voluntary step, whereas in others contracts specify ADR as a preliminary measure in the event of a dispute. Ordinarily, arbitration is the preferred choice because of its confidential nature and the ease of enforcement of any award.



Cases filed¹ in 2017

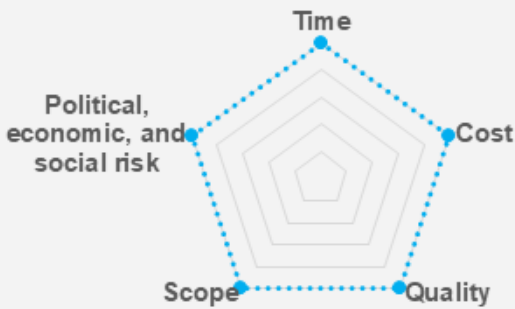
¹source: ICC data 2018, Epeus Analysis

²source: Kaiser, 2019

³source: Rutherford, 2019

Most Oil and Gas arbitration cases involve at least one of the following key themes: time; cost; quality; scope; political, economic and social risk⁴.

KEY THEMES IN CONSTRUCTION ABRITRATIONS INVOLVING ENERGY PROJECTS



Most of these dispute resolution cases require expert witnesses whose primary role is to give independent expert opinion to the tribunal panel, based on information provided by the law firm instructing them.

Expert witnesses play an essential role in shaping and informing every case, even if not always central to the resolution itself. Their evidence will largely contribute to how successful a case will be. Hiring an expert witness who performs poorly, before or during cross-examination can create severe problems that are difficult to recover from. The key to success is to identify the central technical issues early, and to promptly identify and assign relevant and competent experts.

Due to the increasing size and complexity of international disputes, the London Court of International Arbitration (LCIA) stated in 2018:

“experts will be called upon more and more to provide their invaluable expertise”.

As a long-standing and reliable provider of expert services, we have received many calls from law firms looking for oil and gas expert services since the beginning of the current oil and gas industry downturn. We met and continue to meet their needs, but the trend prompted us to explore the challenges law firms face when looking for expert services.

In 2018 we launched exploratory research to investigate some of the challenges and pain points partners and associates encounter while searching for industry expert witnesses. The end goal of this research is to improve legal professionals’ access to expert witnesses and to bolster their confidence in selecting the right ones for their case.

⁴source: 2019 Law Business Research Ltd, Epeus analysis

Research Methodology & Process

We created two online surveys which targeted over 200 law firm partners and associates, specifically commercial dispute lawyers. Our sample population either completed the surveys themselves or we recorded their responses during face-to-face interviews.

The participants are based in Aberdeen, London, Houston, Mexico City, Dubai, and Calgary.

Sixteen law firms participated in our research study. Most of them were international law firms specialising in oil and gas commercial disputes.

Miranda Law Firm	Fenwick Elliott LLP	Norton Rose Fulbright	Debevoise & Plimpton LLP
Hicks Thomas	CMS Cameron McKenna Nabarro...	White & Case LLP	Dentons
Haynes and Boone CDG, LLP	Burnet Duckworth & Palmer LLP	Hogan Lovells	Three Crowns LLP
Clyde & Co LLP	Ashurst LLP	Lotham & Watkins LLP	Ince & Co LLP

Expert Witness Recruitment & Selection Process

Early involvement of the expert witnesses

About **75%** of the partners and associates said that they look for an expert at the **early stage** of the dispute work process.

Generally, it is beneficial to seek out expert witnesses at the early stage of the dispute work. According to experienced disputes lawyers, some of the benefits of an early involvement of an expert are⁵:

- It can significantly increase the prospects of success in arbitration.
- It allows for the prospect of the case being determined earlier in the process that the case is likely to turn on matters of expert rather than the factual evidence. Thus, avoiding a more extensive and costly factual evidence gathering process.
- It allows for a 'sense check' to be performed in respect of the factual evidence provided by the witnesses and can be a check against partisan factual witnesses, who would be susceptible to being dis-credited in cross-examination at the final hearing.

⁵source: Brown, Cecil, & Dracoulis, 2019

Clients involvement

Almost all the participants (partners and associates) agreed that their **clients** are **always involved** in the expert witness selection phase.

Though all the participants reported that their clients are always involved in the selection of the experts, they do not necessarily use the suggestions of their clients. **Over 70%** of the participants will prioritise **internal referrals**⁶ over suggestions made by their clients, barristers, or other fellow experts.

Associates Involvement

We asked the partners if they always delegate the responsibility to find expert witnesses to their associates. Less than **20%** agreed that they **delegate** the responsibility to find expert witnesses to **their associates**. The majority of the partners said that experts are crucial for their cases and that they wouldn't delegate the whole process of recruitment and selection of expert witnesses to their associates. However, most (80%) of the participants stated that they ask their associates to help them with the first phase of the process: sourcing and shortlisting the best candidates.

We then asked associates how much time they spend sourcing and shortlisting the best candidates. **63%** said they spend **more than 10 hours** sourcing for the best candidate. Most associates found it difficult to quantify the time they spend sourcing and shortlisting the best candidate. However, what was clear, was that it is a time-consuming exercise.

Reliable source of expert witnesses

Both partner and associates said that their **first and most reliable** source of expert witnesses is **referrals**, followed by **in-house databases**.

However, when asked if they or their firm have an in-house expert witness database, **all associates** said **'yes'** and only **43%** of **partners** agreed. Of those who said that they have some kind of in-house expert witness database, less than **20%** believed it was **regularly updated**.

None of the participants said that their first point of reference was **companies** specialising or offering expert witness services.

Interestingly, **15%** of the associates reported using **online search engines** as their first and most reliable source, but none of the partners use this tool to find their ideal candidates. Their differing responses suggests that there may be a difference between the partners and associates regarding **adoption of digital platforms** for this type of search.

Those who spend more than 10 hours



⁶Internal referral in this paper means an expert witness who has been referred or endorsed by a colleague of the partner or associate.

The ease of finding a relevant expert witness

All participants said that it is **difficult** to find the **right or best expert witness** for their cases. Furthermore, 85% of the partners and 65% of the associates said that the **cost** of the expert witness is **not** the main factor during the selection process.

The skillset of the expert and ease of communication with the legal team appears to matter more.

The most difficult expert witnesses to find

We asked the participants to rank⁷ the **industry segments** in which they find it **difficult** to find experts:

The most difficult segments to find experts in

	Associates	Partners
1	Drilling operations and well construction	Speciality vessels
2	Drilling rigs and offshore platforms	Drilling operations and well construction
3	Speciality vessels	Pipelines and pipe-laying
4	Pipelines and pipe-laying	Drilling rigs and offshore platforms
5	SURF and SPS	Offshore wind
6	Offshore wind	SURF and SPS
7	Civil construction	Civil construction
8	Power generation	Power generation

As the table shows, opinions differ as to which industry segments present the biggest challenge when sourcing experts. However, in general, both partners and associates struggle to find experts in the segments predominantly related to the Upstream Oil and Gas sector, such as drilling operations and well construction and speciality vessels (accommodation, dredging, FPSO, FSO, etc.).

It is little surprise that both partners and associates ranked civil construction and power generation, as the least difficult segment in which to find expert witnesses. For instance, civil construction is a more “usual” expertise because this form of expertise is more commonplace due to its cross-industry existence.

⁷1 being *very difficult* and 8 being *very easy*

We also asked both the partners and associates to rank⁸ the **skills** or **disciplines** they find **difficult** to find experts in:

The most difficult skills/disciplines to find experts in

	Associates	Partners
1	Equipment experts	Equipment experts
2	Marine	Project management
3	Delay and disruption	Construction
4	Design engineering	Quantum and estimating
5	Construction	Marine
6	Project management	Design engineering
7	Quantum and estimating	Discipline engineers
8	Discipline engineers	Delay and disruption

Similarly the respondent groups haven't ranked the skills/ disciplines exactly the same; however both ranked **equipment experts** (cranes, pumps, BOPs, etc.) as the most difficult discipline to find experts in.

Participants generally reported finding it hard to identify experts in niche areas where choice is limited. We have grouped their responses into the following expert descriptions (in no particular order):

- Females
- Workover
- Deepwater
- Decommissioning
- Aerial field valuation
- Overall value analysis
- Reservoir analysis
- Refining analysis

⁸1 being *very difficult* and 8 being *very easy*

Conclusion

Ideal Candidate Profile

Our research found that the ideal expert witness candidate is not only an individual who is an expert on the subject matter with several years of experience, but he or she must have wider industry knowledge. Preferably, the candidate will have prior knowledge of mediation, litigation and arbitration proceedings, and have previously been cross-examined and given testimony. When witnesses have experience of cross examination in formal proceedings, it increases the likelihood of their testimony being understood by the arbitration panel.

One partner stated that ideal candidates should be:

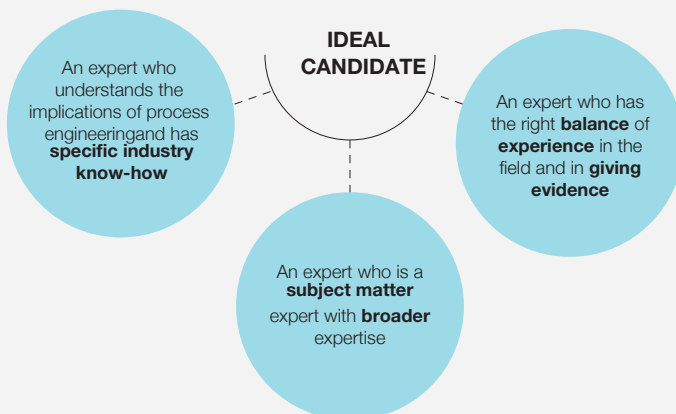
'experts who work in a team, flexible, and [have] testified in the past at a tribunal/arbitration. Whom you don't have to give too much training. Who are able to write expert reports.'

The purpose of this qualitative research was to explore the way the partners and associates go about selecting and recruiting expert witnesses for their cases.

The results suggest that there is a difference between partners and associates in the way they use technology in sourcing and selecting expert witness candidates. Most partners still prefer to use referrals and face-to-face interviews, whereas, some associates are comfortable using online search engines to find experts. Since most associates are either millennials (generation Y) or generation Z, they exhibit similar characteristics to their cohort in other professions and are more tech-savvy than previous generations, or at least more willing to explore digital platforms to meet their needs. More targeted research would need to be carried out to validate this hypothesis and to quantify if the differences.

Our findings reveal that as generation Z enters the workforce as associates and more millennials progress to partner roles, expert services providers will be under pressure to digitalise their offerings to secure their future relevance and survival.

The prime challenge for law firms is to recognise and prepare for the impact technology will have on their operations, specifically in this area of sourcing and recruiting expert witnesses. Changes are already underway, and those who best respond to the changing needs of the market will be best placed for future success.



Contacts



Mark Thompson
+44 7734 874749
mthompson@epeusconsulting.com



Andrea Petrone
+44 7702 518339
apetrone@epeusconsulting.com



Claudette Gaius
+44 7519 116339
cgaius@epeusconsulting.com

For more details visit our website at
www.epeusconsulting.com

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