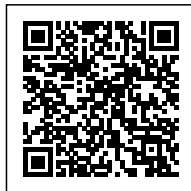


# USING EXPERT WITNESSES MORE EFFICIENTLY - KPMG

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**The growing sophistication of many commercial agreements, often involving multinational companies and assets or parties across often multiple borders, means that the disputes that arise out of them can be alarmingly complex.**

**Spain's new Civil Procedural Law and the creation of dedicated Commercial Courts has helped**

**increase the understanding and awareness of the specificities of litigation and arbitration proceedings, but it has also meant a demand for the better analysis and presentation of cases and the evidence supporting or defending claims. In this respect, the targeted and efficient use of expert witnesses and forensic analysis can prove crucial both in determining the strategy of a case to be followed, the forum in which to pursue it, and the eventual outcome.**

On 28 April the ESADE facilities in Barcelona hosted a breakfast master class entitled “[The effective and efficient use of witnesses and expert witnesses in litigation and arbitration proceedings](#)”.

The event was chaired by Mr. Álvaro de la Haza (Legal Advisory director at Cosentino) and Mr. Enric Olcina (KPMG Forensic partner), and was attended by almost 25 people, mainly lawyers and with representation from the KPMG Forensic team, all of whom are familiar with litigation and arbitration proceedings having acted as counsel, arbitrators, witnesses or expert witnesses on numerous occasions.

The debate focused on five issues, giving rise to various perspectives based on the professional experience of the individuals in question. The most relevant matters brought to light were as follows:

**The growing complexity of contractual relationships and corporate structures (multi-party/multi-contract) and to what extent this situation merits more specialised and detailed analysis when resolving disputes.**

The new Spanish Civil Procedure Act and the creation of commercial courts have narrowed the gap between the country's procedural and arbitration systems. However, depending on the particular nature of the conflict, the selection of one court or another plays a crucial role in determining its outcome. A number of factors are taken into account when making this decision, the most significant of which are:

- *The existence of parties subject to different jurisdictions*
- *The country*
- *Time*

**Relevance of the correct selection of witnesses and experts during litigation proceedings and the differences compared to arbitration proceedings.**

During a business dispute, as in any other conflict, the witnesses are simply the persons who witnessed the events leading to the dispute, and cannot generally be chosen. This is not the case for expert witnesses, however, the selection of whom may prove to be fundamental in resolving the conflict.

It is essential that expert witnesses are experienced, independent, credible, clear when expressing themselves, instructive and can behave correctly in a court environment. Also of value is the knowledge of the particular features of one type of proceedings or another: times involved, formalities, capacity for intervention, etc.

An area to be developed in Spain involves the requirements and controls demanded from the members of a list of expert witnesses. Control is becoming increasingly important in this respect, as there are many expert witnesses who do not have sufficient knowledge of the matters involved or are not qualified to give expert witness evidence for the case at hand.

The advantage of arbitration is that the institution may directly appoint an expert witness, and that there are cases where it is clearly necessary to appoint suitable expert witnesses. Of note in this regard is the current practice in France, whereby expert witnesses are subject to continuous assessment.

### **Involvement of expert witnesses during the early stages and definition of the procedural strategy (early case assessment).**

It is becoming increasingly common to involve expert witnesses from the start of the dispute resolution process, even during the preliminary stages of formulating procedural strategy. This means that the proceedings will have more chances of success.

This practice has always been extremely common in the United States, as has the early case evaluation process, a model which involves assessing the case to analyse the possibilities of a successful outcome. The figure of the expert witness plays an active role in both scenarios.

### **Are discrepancies between expert witness conclusions normally significant? Is it possible that they may lead to the assessment of different assumptions or starting points? Is there more than one suitable methodology for assessing the same technical issue?**

In certain cases discrepancies result from the different methodologies employed by one expert witness or another, or the different approaches used because the lawyers have not established the same parameters. In these situations, due to their increased flexibility, arbitrators can provide more ways in which to bring the parties together, such as confrontation proceedings, joint testimony and even meetings between expert witnesses to determine areas of agreement or disagreement.

### **Outlook: what are the future trends in conflict resolution forms and models?**

In the future economic and corporate conflicts will gradually move towards a process whereby legal proceedings are replaced by methods such as arbitration. France is a good example of this, where a participation proceedings bill has been introduced, the aim of which is to bring the parties involved in a conflict together before commencing legal proceedings.