



# Expert Engagement and The Future of Disputes

A Point of View

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Over the last couple of years, commercial disputes in India have witnessed significant transformation. With diversity in dispute resolution platforms, highly-skilled legal expertise and high-quality arbitrators focused on time-bound resolution, effective dispute resolution has come of age and demonstrated commercial success for parties involved.

The competence of the experts, their ability to lend help to tribunals and their objectivity have contributed immensely to high-quality awards based on sound commercial determinations.

What we have witnessed so far is just a start to the future of expert-assisted dispute resolution. As contracts get more complex and technical, the skill and expertise demanded by tribunals will significantly increase. Our forecast is that this will drive the next level of transformation around identifying, engaging and using the work of qualified experts.

This paper lays out our top six views on how effective dispute resolution can draw strategic and tactical advantages from engagement of experts in the near future.

## 01

### Winning “commercially” and not just “legally”

We have seen several cases where a party may have won a “favorable” award, but commercial outcomes were significantly lower than anticipated. Our experience tells us the reasons primarily relate to tribunals not being convinced on commercial determinations or quantifications, unrealistic or unsubstantiated claims, experts with questionable credibility, insufficient evidence or incomplete documentation.

In our view, this is an area where we can expect experts to start playing a much broader role that is not just limited to the time of providing evidence. We are already seeing increasing instances of “preliminary” expert-led evaluations when parties are first contemplating formal action (before actual filing). We expect such preliminary assessments to become a norm in the future when matters involved are substantial or of strategic importance. We expect that these assessments will not only impact internal decisions but add significantly to the overall strategy around obtaining satisfactory financial outcomes.

## 02

### Adding value in emergency and expedited arbitrations

Emergency and expedited arbitrations are designed for speed. These require effective articulation of the subject matter in dispute and concise analysis of crucial items for consideration by the tribunal. Whether or not expert evidence is tendered as a part of these proceedings, there is an important strategic advantage in ensuring that matters are effectively communicated and/or explained for the benefit of the tribunal in the pleadings or arguments.

Increasingly, experts will be expected to play a larger role. Even if not engaged to provide testimony, they will be called upon to review submissions or pleadings (under legal privilege) to ensure that the tribunal not only receives the information needed but is able to understand and adjudicate aspects that are technical or complex on underlying commercial principles. Experts will be expected to play a larger role in ensuring simplification and translation of matters for the benefit of the tribunal in such circumstances.

## 03

### Anticipating regulatory and accounting issues

Globalization/expansion of business and commercial interests have an interesting implication from a commercial dispute’s perspective. Several times, commercial disputes become embroiled in or connected with regulatory compliance matters or have accounting implications that become impediments to enforcement of awards. Tribunals are increasingly becoming wary on accounting or regulatory matters especially if they foresee challenges on technical grounds.

Our recent experience is that pre-empting regulatory challenges and explaining how awards would be compliant from a technical perspective (if the tribunal were to award these in a certain manner) upfront and proactively can add tremendous strategic advantage to the case pleaded. Using an expert effectively, whether to explain accounting or tax implications (in conjunction with legal analysis), can add significantly to the quality of pleadings. We do expect that such analysis and assistance from experts will not only be helpful to tribunals in understanding the implications better but will also provide them a baseline from which further analysis could be requested.

## 04 Monetizing through litigation funding

Disputes carry a cost, and a very common concern is losing more “good” money after “bad”. Stakeholders for parties in dispute often question the return on litigation/arbitration costs and when and how these would be monetized. Recent developments in global litigation and arbitration funding have created opportunities to effectively address this previously unanswered question of cost-value trade off and returns.

There are important aspects to consider in determining the quantum of funding and expected returns to funders. To get their respective positions secured, both litigation funders as well as fund seekers want to assess commercial viability. Both also want to understand their chances of securing favorable awards.

Financial experts have already started to step in and help in these determinations. Parties seeking funding will increasingly require expert reports in conducting negotiations and discussions with funders. Conversely, funders will seek their own expert's view on the commercial aspects to determine their own position or support their decision to fund. This will be a significant area where we will see heightened expert involvement at various places in the future.

## 05 Navigating innovative and evolving technology

Technology continues to disrupt and challenge norms. The last couple of years, where business and interpersonal interactions were online/virtual, significantly changed the way data and information is gathered and processed. The advent of the metaverse, its use in business as well as virtual interactions, is transforming our professional and personal lives. Virtual currencies, digital payments, data lakes, online document repositories, process automation and artificial intelligence are all examples of the impact technology is having on the conduct of business.

Today, tribunals are looking at experts to help them navigate the digital world. We expect this to be a significant area for expert involvement that will take centerstage soon. We expect more disputes to involve expert evidence and testimony on technology

matters that include (but are not limited to) discovery of documents, storage, and processing of digital information as well as interactions in the virtual world.

## 06 Managing asset tracing and recovery

Sudden disappearance of assets is often seen around the time for attachment post an award, a rude situation that parties winning a dispute often face. Dissipation through surreptitious means to keep them from attachment is rampant and common. However, our recent experience shows that a well-timed asset identification exercise coupled with swift enforcement (legal team and experts together) can secure assets in question successfully.

We expect experts to play a more prominent role on asset tracing and recovery. Performing the leg work to identify assets is a critical part and experts will continue to provide services on this aspect. However, as against a limited role on asset tracing, written reports on provenance of assets or other related aspects for court purposes will be expected from experts in the future, particularly for assisting legal teams on enforcement aspects.

## Conclusion

From a “good to have” to a “must have”, the role of an expert in dispute resolution has been transforming over the past few years in India. However, the increasing complexity of matters in disputes, pervasiveness of technology, accounting and regulatory implications require continued evolution and a deeper engagement and involvement of experts. The success of a dispute lies in both a legal and a commercial win. A calculated and regimented strategy to engage and the use of an expert can thus be a tremendous advantage on the commercial front. While, historically, experts have only been involved with certain aspects, there is tremendous commercial value that can be unlocked through their enhanced involvement. Thus, we expect experts to provide broader support to legal teams as well as play a pivotal role in their responsibilities and obligations towards tribunals for an effective dispute resolution.



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