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THE GUIDE TO SPECIALIST INTERNATIONAL ARBITRATION PRACTICES 2018

FULLY REVISED AND UPDATED 11TH ANNUAL EDITION

INTRODUCTION

London. A group of international arbitration students are about to receive their first lecture. Each year, it's broadly the same.

"This is the White Book," says their teacher – a partner at a London law firm – holding up a copy of the United Kingdom's court rules of procedure. "It's two volumes and takes up this amount of space on your shelves."

He measures a breeze block with his hands. "It tells you everything that can happen in a High Court case.

"And these are the ICC rules," he says, holding up a pamphlet. "The document's about this thick," he says, picking up an imaginary cat in a finger-pinch. "But ICC arbitration is no less complex than High Court litigation.

"The difference between these two thicknesses" – he does the pinch and the breeze block again – "is what international arbitration lawyers know. And it's not written down."

It's that unwritten lore that gives rise to the GAR 100 – a book that helps readers identify those who are privy to it. Because unless you have that sort of person as your guide, you will struggle to navigate a process that is unique within the law. A leading textbook on the subject, *Redfern & Hunter on International Arbitration*, observes that a stranger stumbling into an international arbitral hearing might fail to realise that a legal process was under way. What would that stranger see? Well, for a start it would be taking place in a hotel room or training room somewhere (or, nowadays, possibly a bespoke international arbitration hearing centre). There would be two small groups on one side of the table, of various ages, wearing standard business attire – probably. Facing them, a venerable looking trio, probably all male (though that is changing slowly). Something would clearly be happening, but you wouldn't immediately conclude it was dispensing "justice". The tone would be informal. No audience or usher, and little hint of ceremony. It could simply be a training course or a board meeting – except for the stenographer tapping away.

And yet millions – possibly billions – could be at stake.

As business has globalised, so international arbitration has become the world's commercial court. And even a check on capricious government too. Russia's government has been ordered to pay US$50 billion over the dismemberment of Yukos Oil Company by an arbitral panel in The Hague. Not long ago, arbitrators told Ecuador to pay US$2 billion to Occidental. In the world of telecoms, at least two European players owe their current state of ownership to arbitral rulings about buy-out clauses. So the sums are huge.

But the job itself – being international arbitration counsel – isn't everyone's cup of tea. For a start, as the name suggests, it is international. That necessitates not only enormous amounts of travel, but also a range of legal and cultural issues – ranging from the mindset of the opposing lawyer to working under some other nation's law – that the domestic disputes lawyer never experiences.

A big ICC case from a few years ago helps to illustrate. On one side, a Middle Eastern government with a strong Islamic tradition; on the other, two international oil companies. The arbitrators are French, Belgian and English. Although the hearings physically take place in Europe, the law to be applied is Middle Eastern. One of the law firms finds it must convey all of its advice to the client orally; this is the client's tradition. So, no use of written memorandums.

The tactics being used can be also be a bit unsavoury. The sorts of clients who end up in big international arbitrations are not always nice, listed companies from developed economies. Indeed, many arbitrations have their roots in the cut-throat politics of resource-rich states. So the client may push you in a way you aren't used to being pushed.

The opponent may also be a handful. They may be governed by a different ethical code – which they're using as an excuse to play less nice. Or they may simply be out of their depth in an unfamiliar process. A common quandary arbitration lawyers face is deciding whether to do an opponent's job for them: help them organise their points and generally be less out of their depth. Why would they do that? Well, in part because there is then at least something to rebut.

A lawyer who holds him or herself out as skilled in international arbitration must be at ease with all of these aspects.

It's little wonder, then, that international arbitration isn't for everyone. A GAR reporter once sat next to a mid-level associate at a dinner (a

non-arbitration affair) who went on at some length about how much he'd loathed his stint with the international arbitration group. He said that some of the rough-house tactics he'd seen were appalling.

He isn't alone. Quite a few lawyers who step across from litigation report feeling almost seasick in this world with so few bearings – where the process for each case has to be invented.

Because of its unusualness, over the years, more and more big commercial law firms have come to regard international arbitration as a unique skill set. That trend began in the early 1990s when firms such as Freshfields, Clifford Chance and Shearman & Sterling began to centralise their international arbitration work. Other firms resisted the fashion. They assumed that if one could do litigation, one could do arbitration. Indeed, one leading arbitration figure of his era says that he tried for years to get his managing partner to see the value of following suit (to no avail). Then one day, the managing partner heard one of his favourite clients describe a rival (Freshfields) as a "specialist arbitration firm" and realised his mistake. He "changed his tune overnight".

So these days, many law firms can supply a client with a lawyer or two who has spent most of his or her career in international arbitration. And their clients are the better for it. As you will have worked out by now, international arbitration is a game unto itself. And when someone who plays a game at a high level takes on someone who's only dabbled, it's like watching any other lopsided contest: not very pretty.

It's not just because the skilled arbitration counsel knows the protocol – how to address the chairman of the tribunal (although there is that, and indeed funny stories do the rounds about arbitrators being addressed as "your excellency" and "your Holiness" by the uninitiated, particularly from the US). Novices make poorer decisions. For example, when cross-examining, they may come out of the blocks "at 100 miles per hour" against a witness who everyone else in the room feels merits a little more respect – an elderly Swiss professor, say, as happened to one GAR source in a treaty case: "That may be appropriate in a courtroom, but will play badly in front of arbitrators, especially if they are also Swiss professors!"

Or they might accidentally prick the curiosity of the arbitrators when in fact they're trying to shield a particular area of their client's position. For example, hotly protesting that a topic is off-limits can be the worst approach as arbitrators have broader powers than most judges to be inquisitive and explore whatever aspect of the case they wish. Or they may simply come across as rather condescending to lawyers from other legal traditions. Common law lawyers especially are prone to this hauteur.

Or it may be that they're just less skilled in picking tribunals. So much of the art is in creating a panel that is predisposed to "fall your way", while still ticking the box for full independence, in the words of one source who understands international arbitration ringcraft.

Matthew Weiniger QC – a partner with Linklaters in London (and the visiting professor whose students get the breeze-block/cat-pinch comparison) – has had a number of cases against less experienced opposition. He recalls one occasion where he was gifted a case by an opponent's naivety.

That opponent – a reasonable UK corporate firm ("you'd immediately know them") and a QC ("who was brilliant but doing his first arbitration") – misconstrued a key procedural order. That led them to hand over more documents than they needed to: "the good and bad documents – everything, including internal client memos." Weiniger romped through the cross-examination as he was better prepared. The arbitrator's order, he recalls, "was a fairly standard" formulation.

Does Weiniger get gifts of that type often? "I'm used to it," he says, although "usually it's more subtle things."

Another public example from not so long ago: in 2011, a US$16 billion joint venture proposal between BP and Rosneft imploded after BP lost an arbitration. It was noted by the cognoscenti in London that BP's chosen law firm was (then) not particularly renowned for international arbitration, whereas the opponent's was.

In the end, a lot of what the international arbitration specialist brings comes down to the old adage, "know your judge" – or its even more important variation, "make sure your judge knows you". The longer an advocate spends in the presence of his or her adjudicators, the better they tend to do. This advantage arises for two reasons: improved intuition and the fact that the advocate arrives in front of them with personal capital.

"QCs, in the High Court, are brilliant because they know those panels inside out and that style of advocacy," says one London international arbitration specialist, who asked to speak on condition of anonymity.

"Laurence Rabinowitz QC [a well-known UK advocate for commercial cases from One Essex Court] can appear before any judge and they know him. 'Ah, Mr Rabinowitz – very interesting and nice to see you!' The same thing applies in international arbitration. For example, I've got a case right now in front of [a leading international arbitrator]. Every time I go to a conference, he's there ... we read each other's books. My opponent, in comparison ... he hasn't got a clue."

Rabinowitz, it should be said at this point, is undertaking an increasing amount of arbitration and gets many glowing reports. But the source's point – that everybody has their milieu – remains.

"If you take all the partners in our group," the source explains, "then we've appeared before every single arbitrator worth knowing. Not just once, but multiple times in the past few years. We have inside knowledge as a result of that. So that means if I pick up the phone to [a leading arbitrator] because I want to appoint them, I know they're going to phone back. QCs in the High Court are brilliant, because what they have is ringcraft. But when it comes to international arbitration, I have the ringcraft."

He and his colleagues have also sent work to some of those arbitrators on several occasions. Which never hurts when you want to be taken seriously.

Another specialist, who also asked for anonymity, agrees that international arbitration purists are the way to go. He notes that it immediately introduces efficiency. "In fact, I would love to do more cases against, say, Freshfields," the source says. "I tell clients: 'If this were against Freshfields, I'd get you a deal in two days. It would be over. But because we've got these idiots, we're probably going to have to fight for years.'"

Sophisticated clients now know this. They value specialism on the part of international arbitration counsel. A survey★ published in 2006, since updated, found that three-quarters of in-house counsel interviewees would seek a lawyer they regarded as an international arbitration advocate rather than a litigator. (They defined "specialisation" as a mix of reputation, amount of work undertaken and experience. In the interim, more law firms have found religion and created their own international arbitration groups.)

So the challenge has become separating the wheat from the chaff – finding the true specialist counsel.

The book you are holding may help. Eleven years ago, Global Arbitration Review conceived the GAR 100 as a vehicle to identify at least 100 firms one can consider "approved" in this discipline. To gain inclusion, a firm would have to open its books to our researchers and allow us to "audit" exactly what they'd been up to. Broadly, we've used the criteria identified in that survey: reputation, amount of work undertaken and experience.

With this edition – our eleventh – 165 firms are profiled, representing around 45 countries. We've added 12 firms and dropped others (they're welcome to reapply). The new entrants include firms from Egypt and Brazil, as well as France and the US.

Once again, the GAR 100 comprises large and small practices – sometimes as small as one person (if that person is sufficiently well known).

With all those firms, we strive every edition to improve our descriptions. Many of our profiles now tell you about the history of the practice (where we have it) and its lineage (ie, how it ties in with some of the influential figures who pioneered this area).

Each profile also begins with stats that provide a snapshot of the firm's practice. These include the value of the firm's pending counsel work and how many lawyers are sitting as arbitrator, as well as how many are recognised in our sister publication, *Who's Who Legal: International Arbitration*.

This year, we have also included the number of arbitration lawyers from a firm that have been recognised as Future Leaders by Who's Who Legal. These are practitioners aged 45 or under.

Similarly, we're doing our best, where possible, to put greater weight on success. Not just undertaking work – but winning (though winning is at times a tricky and relative concept – a smaller than expected loss may in fact be a "win", and vice versa). But we don't think it's an unreasonable idea that an arbitration group should achieve good results for clients.

The book also includes a report on expert witnesses. We've applied a similar methodology to them as to law firms – asking to be shown proof of work on cases.

The research period for the statistics in the book is 1 August 2015 to 1 August 2017. All other information is correct as of 1 January 2018.

As ever, we are indebted to the firms who every year supply us with a large amount of information, including some who ultimately don't get into the guide. In nearly all cases, we're sure that it is only a matter of time from what we've seen, and if they persist their time will come.

Within Law Business Research, we are indebted to Tom Barnes, Helen Barnes and Stuart McMillan from Who's Who Legal for their labour on our behalf.

On a personal note, I'd like to thank the many international arbitration lawyers – young and old – who have taken time over the years to explain the nuances of their craft to me. And the whole GAR editorial team who undertake this annual marathon task – particularly Sebastian Perry and Lacey Yong, as well as Alison Ross as editor, for their energy and good humour, and managing to fit it in while also doing the day job.

David Samuels
March 2018

* *International Arbitration: a study into corporate attitudes*, by PricewaterhouseCoopers and the School of International Arbitration, London.

EXPERT WITNESS PROVIDERS
WHICH ARE THE MOST ACTIVE?

Are professional expert witnesses a 'good thing'? If you are a hired gun, is it not tempting to say whatever helps your client?

In fact, there's good evidence that the opposite occurs. Those who testify become more scrupulous in their views.

A leading arbitrator, Doug Jones AO, put it this way, a few years ago, speaking at at GAR Live Dubai: "Repeat experts [...] are a good thing," he said, explaining that his experience of experts who do it repeatedly is that they get to realise that their own personal reputations depend on avoiding extreme positions which are unsustainable.

Further, "they get to understand that they will be far more effective if they put forward fair propositions that they can themselves intellectually justify," Jones explained.

He recalled his days as counsel, where "having a view from a battle-hardened expert" was useful with clients. "It could help to impart a more realistic view of the case to a client. You could talk them down from an extreme position. It's a very positive thing for the process."

Of course, there are exceptions – from time to time, stories circulate of an expert who appeared to give diametrically opposite evidence on the same point in different cases (and discussions about the attendant problem of "how to police" such behaviour also take place). But for the most part, giving evidence repeatedly appears to forge a more principled expert.

So, if "repeat" experts are better for the process, how does one find such people? The report you are reading – the expert witnesses section of the GAR 100 and the tables in it – should help.

We apply the same method to expert witness firms that we use in the GAR 30. We use "the hearing" as a lens through which to see how active different organisations are (as with this publication's survey of law firms, we used a research period of 1 August 2015 to 1 August 2017).

We collected information on these hearings from both law firms and expert witness firms and determined a total for hearings per expert firm over our two-year research period. We also determined the average and median value of claims for each arbitration. From the data submitted by expert witness firms separated out different types of arbitration: commercial, investor-state and industry-specific.

This year, we include 28 firms, up from 18 last year. The results are presented in several tables.

- Table 1 is the GAR 100 Expert Witness Firms' Power Index. This is a new table. It's a smaller version of the GAR 30 – about experts.

Other tables draw comparisons between aspects of a firm, or drill into one particular quality:

- Table 2 shows the total number of hearings accumulated by members of a firm in those two years.
- Table 3 shows the (mean) average and the median value of claim sought in arbitration.
- Table 4 shows the number of cross-examinations members faced by members of a firm in the same time frame.
- Table 5 shows the total number of investor-state arbitrations versus commercial arbitrations a firm undertook.
- Table 6 shows the total number of energy arbitrations and the number of that were oil and gas.
- Table 7 shows the total number of construction arbitrations a firm undertook.

Where does our data come from?

We generated tables 2 and 3 from data supplied by law firms (as part of our annual GAR 100 project). This data is therefore third-party validated, rather than self-certified. As with the main GAR 100 project, we imposed a maximum of two hearings per arbitration to ensure that our results were not skewed by cases with non-standard numbers of hearings. (But note, unlike the GAR 100, in table 3 we assessed "value" using only the claim into consideration, not the counterclaim. We may amend this in the future.)

Some other tables – chiefly table 4 – is generated using data supplied by the expert witness firms themselves. In table 2, we use our sister publication, *Who's Who Legal: Arbitration 2018* as a proxy for market recognition enjoyed by a team.

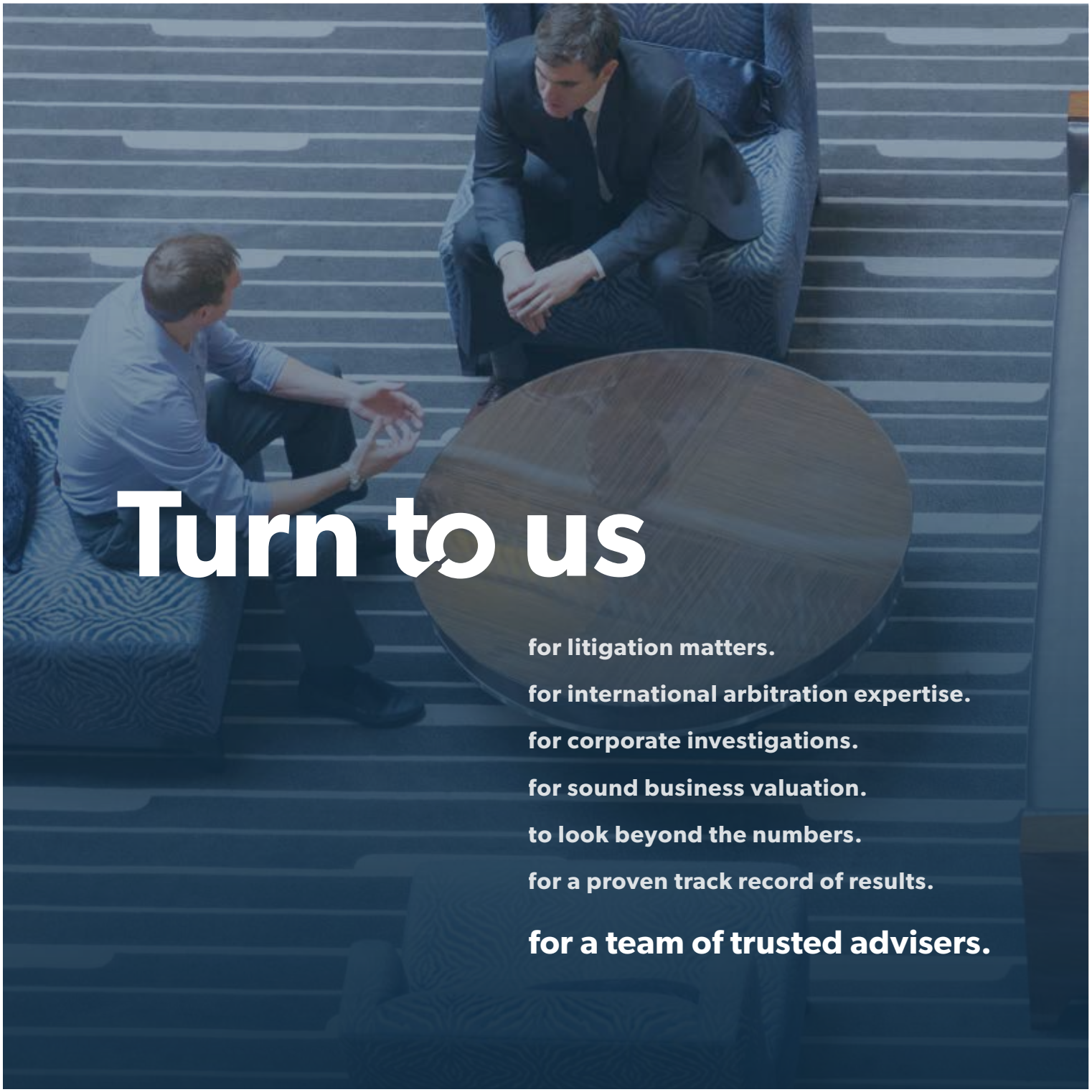
For the first time, we've combined some of this data to create an overall GAR Expert Witness Firms' Power Index. The Power Index uses quantitative data from law firms from the first two tables (ie, the number of hearings (table 2) and the average and median value of claims (table 3)). This generates a score and ranking that blends volume and value.

Table 1

Expert Witness Firms' Power Index

Rank	Firm	Average value of claims (US$million)	Median value of claims (US$million)	No. of hearings
8	StoneTurn	412	412	4

StoneTurn, in eighth, provides an interesting result. It could be thought of as newer name in international arbitration, as reflected by its lower figure for overall hearings (table 1). But it achieves its eighth position on the back of four hearings that were all around the half a billion mark. Indeed the firm's performance in the research was notable for its consistency. StoneTurn was the only firm to have the same figure for median and average hearing size. Based in Boston, Massachusetts, StoneTurn was founded in 2004 and has since built up a team with particular experience in quantification of damages. Its five senior-most experts have together given expert testimony over 50 times in their careers.



Leaving no stone unturned.

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