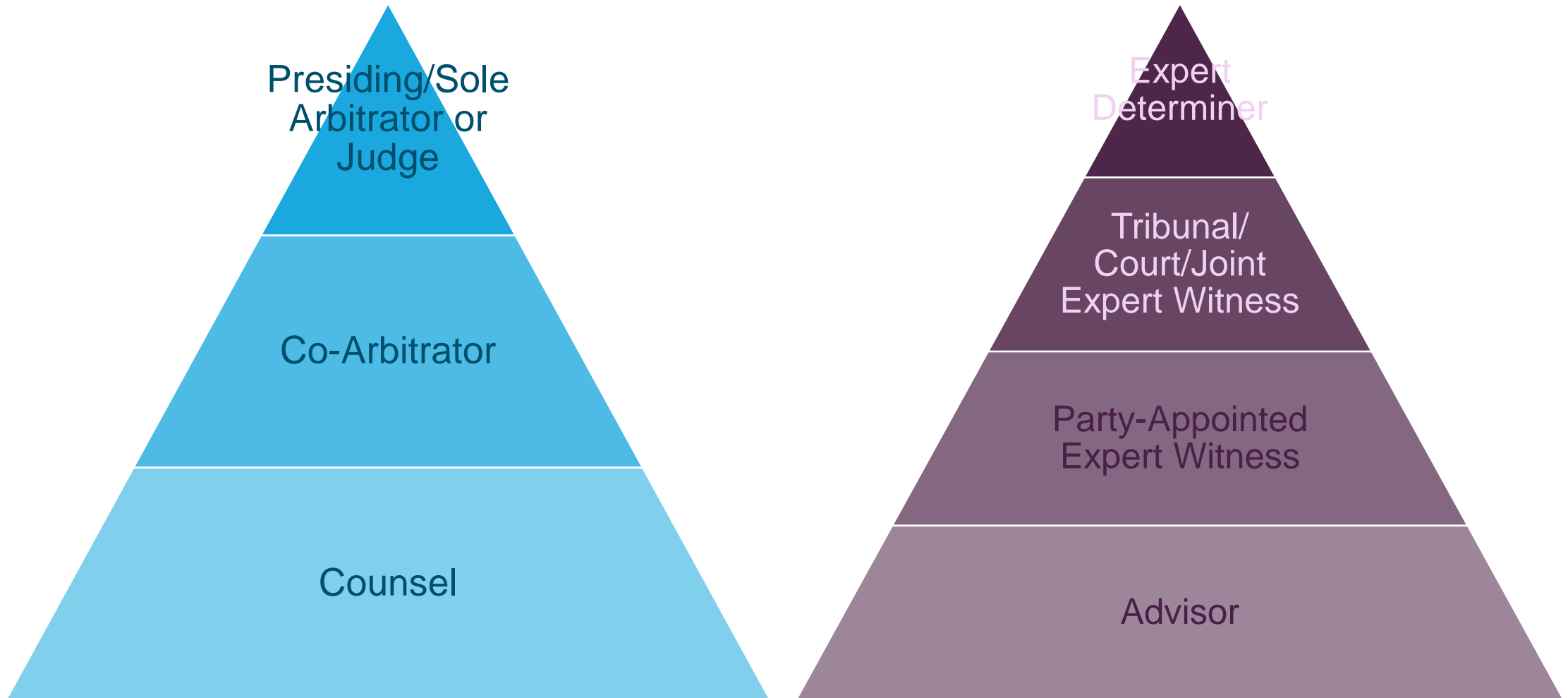




**Who serves best to help resolve a post-M&A dispute:  
an advisor, an expert determiner or an expert witness?**

Adam Markiewicz, 27 May 2022

# Who serves in M&A cases?



# Case 1: Expert determiner?



## Target

- Apparel retail stores, 100% share deal

## SPA

- Minority call option exercisable at a multiple of adjusted net income
- Binding expert determination, litigation in case of manifest error

## Business

- Purchases in USD, historical gains due to strong PLN
- PLN/USD trend reversed post-Transaction = significant FX losses

## Work done

- Determined the adjusted net income per SPA, FX losses included

## Outcome

- Buyer approved
- Sellers challenged: FX losses extraordinary, value of minority to be determined outside of the SPA formula

## Issues

- Bypassing the expert determination
- SPA interpretation by the expert determiner

# Case 2: Expert witness?



## Target

- Specialised door manufacturer, asset deal

## SPA

- Non-compete warranties by the Seller, lump-sum penalties for breaches
- VIAC arbitration, lost profits excluded

## Business

- Key managers left after the Transaction and secretly started a competing business
- Target's performance below expectations

## Work done

- Assessed loss of business and costs for litigation against the former managers
- Assessed loss of value of the Target for arbitration

## Outcome

- Loss of value inferior to penalties claimed = expert report not submitted in the arbitration

## Issues

- Cost-savings with advisory compared to expert witness
- Advisor's conversion to an expert witness

# Case 3: Advisor?



## Target

- Chemical manufacturer, 51% + 34% share deal

## SPA

- Earn-out on minority as a multiple of EBITDA, complex definition and formula
- Structured and binding expert determination

## Business

- The Seller remained at 15%
- Declining performance in the earn-out period, restructuring and capital investments

## Work done

- Advised the Buyer, prepared submissions on 25 disputed items to the expert determiner
- Represented the Buyer at a hearing

## Outcome

- Expert determiner relied on the Parties submissions with little initiative
- Final determination mid-way between the Parties

## Issues

- Dispute led by transactional advisors
- Active/passive expert determiner

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