

ASA Special Series No. 46

**Expert Evidence: Conflicting
Assumptions and How to
Handle Them in Arbitration**

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Editors



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FOREWORD

This volume of the ASA Special Series is a collection of the papers presented at the ASA 2018 Annual Conference dedicated to the topic “Expert Evidence: Conflicting Assumptions and How to Handle them in Arbitration”.

This topic is not limited to best practices concerning expert evidence in arbitration.

The focus is broader and in fact rather different. The idea for this conference topic has emerged from the observation that international arbitration brings together scholars and practitioners from different legal and educational backgrounds, with different experiences and perspectives as to the role, duties, and powers of experts in the judicial (or arbitral) process.

Depending upon their backgrounds and experience, parties, counsel, and arbitrators may have very different and “conflicting” “assumptions and expectations” regarding the very concept and use of expert evidence.

The ASA Conference and the resulting papers aimed at exploring and discussing these conflicting assumptions and expectations.

This collection of the conference presentations will thus help practitioners from various jurisdictions to identify those conflicting assumptions and expectations, to sharpen awareness of the different perspectives, to address possible misunderstandings as to the role of experts, and to develop views on how to handle related difficulties in practice.

Sébastien Besson and Harold Frey
Co-chairs of the 2018 ASA Annual Conference

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Chapter 1

Conflicting Assumptions and Expectations – the Civil Law Perspective

*Christopher Boog**

The following is the slightly adapted manuscript of a presentation given at the ASA Annual Conference held in Zurich on 2 February 2018 on the issue of “Expert Evidence: Conflicting Assumptions and Expectations and How to Handle them in Arbitration”. The topic of the first panel session, chaired by Michael Schneider, was “Conflicting Assumptions and Expectations on the Role of Expert Evidence in Arbitration” and I was tasked with giving the civil law perspective.

1. INTRODUCTION

I have been asked to give an overview on expert evidence from a civil law perspective focusing on conflicting assumptions and expectations that may exist in an international arbitration setting. My presentation, together with that of Christopher Harris on the common law perspective, intends to set the scene for the rest of the day, so to speak. It is more about raising flags and talking points than giving conclusive answers to specific questions. That will be for the ensuing panels.

When I was dealt this topic by the organisers and started thinking about what I would present to you here today, I immediately asked myself several questions:

1.1. What are we talking about when we refer to “assumptions and expectations”?

What we are talking about is the “baggage” that we all carry with us into any (international) arbitration proceedings. The baggage that we draw from our legal training, our experience, our practice and possibly our cultural background.

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1.2. Whose baggage are we talking about?

Are we talking about the baggage of arbitration counsel? Are we talking about the baggage of arbitrators? Or are we talking about the baggage of the users of arbitration, our clients? Or are we indeed talking about the baggage of experts? All of this baggage may be similar baggage, but it may differ quite considerably depending on the perspective.

As mentioned, I have been tasked with setting the scene with respect to “civil law baggage”, as opposed to what might be perceived as “common law baggage”. When preparing for this presentation, I asked myself though:

1.3. Is it really as easy as drawing, or correct to draw, the popular line between the civil and the common law?

And indeed, I do not believe it is. Of course, legal training can and often will play a decisive role in the type of baggage we carry with us. Someone who practices litigation in a civil law jurisdiction might be used to handling experts differently than someone who practices litigation in a common law jurisdiction. But I do not believe it is as simple as that. I believe that, nowadays, many of us carry much more “personal” or “personalised” baggage. Taking myself as an example: I never practiced litigation, neither in Switzerland nor elsewhere. So, I do not really carry much civil litigation baggage. This applies even more to the younger generation of arbitration practitioners that learns about international arbitration at law school, competes in the Vis moot or other arbitration moot competitions or attends the MIDS in Geneva or other dedicated international arbitration masters programmes. These people will have much less civil law versus common law baggage. They will rather have “arbitration best practice baggage” versus “litigation best practice baggage”.

1.4. What baggage are we talking about?

In the field of expert evidence, there is a whole array of issues regarding which people might carry baggage, and I have time only to address some of them here today, namely (i) the role of experts, (ii) the scope of expert evidence and (iii) the right to expert evidence.

1.5. What “civil law perspective” are we talking about?

In fact, there are quite substantial differences between civil law jurisdictions, especially when it comes to expert evidence. For the purpose of today’s presentation, I have taken Swiss, German and French law as reference points because they lend themselves well to demonstrating some of these differences.

2. THE ROLE OF EXPERTS

Starting with the role of experts, the key distinction, of course, is whether an expert is court-appointed or party-appointed.

It is probably safe to say that civil law court systems normally take a court-appointed approach. When it comes to arbitration in those jurisdictions, however, things are often less clear-cut. From experience, whereas in France and Switzerland party-appointed experts are much more frequent, in Germany or Eastern Europe in particular tribunal-appointed experts are still quite common, especially in more domestic disputes, which can at times be run like court proceedings. This can of course have rather far-reaching consequences as to party expectations, not only in terms of who appoints the expert, but also in terms of the extent of substantiation of claims, and particularly quantum issues.

Another important distinction is whether experts are regarded as a means of evidence or rather an extension of party pleadings. In certain civil law jurisdictions, such as Switzerland or Germany, party-appointed experts are still regarded by courts not as evidence, but as pure “party position” or an extension of a party’s pleading.¹ This can have far-reaching consequences if, for instance, one party adduces expert evidence and the other party underestimates – based on its baggage – the evidentiary value of such expertise. This probably does not happen all too often in practice, but I did have a case some years ago where a party faced with an expert report filed by its opponent kept on claiming the other party was not relying on expert evidence. I realised only later that the reason it was taking this position was that in its jurisdiction party-appointed experts were not considered evidence but only an extension of the party’s pleading. In that party’s view, had its opponent wanted to support its position by expert evidence, it would have had to request the tribunal to appoint an expert. Until that happened, there was no “expert evidence” in the arbitral record.

¹ See, e.g., Swiss Supreme Court Decision 141 III 433, consid. 2 for Swiss law; German Federal Court of Justice, Decision of 2 June 2008 – II ZR 67/07 at ¶3, recently confirmed (albeit indirectly) in German Federal Court of Justice, Decision of 1 February 2017 – VII ZB 18/14 for German law.

It is also not always easy to draw the line – if any – between the role of an expert and that of an expert witness (*sachverständiger Zeuge*), as it is known in certain civil law jurisdictions.² In Switzerland, for example, these are two very different creatures.³ In other jurisdictions, that may not be the case. I should also point out the different use of terminology: an “expert witness” in Switzerland is not necessarily the same as the same term used in certain common law jurisdictions.⁴

A further important distinction pertains to experts on factual issues versus experts on the law. And then of course there is a question of whether foreign law is fact or law, and if it is law, whether it can be established by means of experts, nonetheless. In Swiss court proceedings, for example, legal expertise is the exception.⁵ In arbitration, it is much more common.⁶

Finally, there can be quite significant differences between civil law jurisdictions regarding the role of experts. The role of an expert in Switzerland or Germany for example is quite different from the role of an expert in France. We will get into a bit more detail on this point in a minute.

² See, e.g., Article 175 of the Swiss Code of Civil Procedure (CCP), which provides “If a witness has special expertise, the court may also ask him or her questions about his or her assessment of the facts of the case” and §414 of the German CCP, which stipulates “Insofar as knowledgeable persons are to be examined in order to obtain evidence regarding past facts and circumstances, or situations given in the past, which required special technical competence in order to be perceived, the rules governing the taking of evidence by hearing witnesses shall be applicable”.

³ Compare Article 175 Swiss CCP and Article 183 Swiss CCP: While the person serving as an expert (Article 183 Swiss CCP) is interchangeable so long as she has the required expertise, the expert witness (Article 175 Swiss CCP, *sachverständiger Zeuge*) is not because like any witness, she primarily testifies to her own perception of the facts of the case and only in addition to that, she may draw conclusions regarding those (and only those!) facts based on her expertise, see P. Guyan, Commentary on Article 175 CCP, in *Basler Kommentar Schweizerische Zivilprozessordnung* (3rd edn. 2017) at ¶1.

⁴ While in international arbitration the term “expert witness” is generally used to describe party-appointed experts, the common law understanding may additionally include experts appointed by the court (see, e.g., S. Timmerbeil, The Role of Expert Witnesses in German and U.S. Civil Litigation (2003) 9:1 Annual Survey of International and Comparative Law 163, 165), whereas under Swiss law the term “expert witness” refers to a *sachverständiger Zeuge* within the meaning of Article 175 Swiss CCP. By contrast, the report of a party-appointed expert (*Privatgutachten*) is only regarded as a party submission and not as evidence, see Swiss Supreme Court Decision 141 III 433, consid. 2.

⁵ See S. Rüetschi, Commentary on Article 183 CCP, in *Berner Kommentar* (Vol. II 2012) at ¶12; further T. Weibel, Commentary on Article 183 CCP, in T. Sutter-Somm, F. Hassböhler and C. Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung* (3rd edn. 2016) at ¶5.

⁶ For Switzerland E. Geisinger and P. Ducret, The Arbitral Procedure, in E. Geisinger and N. Voser (eds.), *International Arbitration in Switzerland – A Handbook for Practitioners* (2nd edn. 2013) 97; generally G. Born, *International Commercial Arbitration* (Vol II, 2nd edn. 2014) 2277, 2279.

3. THE SCOPE OF EXPERT EVIDENCE

Moving on to the scope of expert evidence, where the civil law systems show quite significant differences.

In Switzerland, experts answer specific questions put to them by the court after it has heard the parties.⁷ Consideration or appraisal of the evidence and its weight will exclusively be the task of the court,⁸ as will of course be the application of the law, although the judge may be bound to some extent by the expert evidence in that she must justify if she wishes to deviate from the expert's opinion.⁹ Facts, on the other hand, will generally be established by the parties.¹⁰ The expert's power and duties to investigate the facts are limited and require previous authorisation of the court.¹¹

The situation is very similar in Germany.¹²

In France, on the other hand, the expert is given much broader instructions than in Germany or Switzerland. Instructions to an expert in France might include, in very general terms, to look for evidence of damage, to opine on the existence of the damages or defects alleged by

⁷ Article 185 Swiss CCP provides in relevant part:

"1 The court shall instruct the expert and shall submit the relevant questions to him, either in writing or orally at the hearing.

2 The court shall give the parties the opportunity to respond to the questions to be put to the expert and to propose that they be modified or supplemented."

For commentary, see A. Dolge, Commentary on Article 185 CCP, in *Basler Kommentar Schweizerische Zivilprozessordnung* (3rd edn. 2017) at ¶¶1-2.

⁸ Swiss Supreme Court Decision 113 II 429 consid. 3a); S. Rüetschi, Commentary on Article 183 CCP, in *Berner Kommentar* (Vol. II 2012) at ¶4; see also A. Dolge, Commentary on Article 183 CCP, in *Basler Kommentar Schweizerische Zivilprozessordnung* (3rd edn. 2017) at ¶¶6, 15.

⁹ Swiss Supreme Court Decision 130 I 337, consid. 5.4.2; see also S. Rüetschi, Commentary on Article 183 CCP, in *Berner Kommentar* (Vol. II 2012) at ¶41 with further references.

¹⁰ See Article 55(1) Swiss CCP: *"The parties must present the court with the facts in support of their case and submit the related evidence."* For commentary, see M. Gehri, Commentary on Article 55 CCP, in *Basler Kommentar Schweizerische Zivilprozessordnung* (3rd edn. 2017) at ¶1.

¹¹ Article 186(1) Swiss CCP provides: *"With the authorisation of the court, the expert may carry out his or her own enquiries. He or she must disclose the results of the enquiries in the opinion."* For commentary, see A. Dolge, Commentary on Article 186 CCP, in *Basler Kommentar Schweizerische Zivilprozessordnung* (3rd edn. 2017) at ¶1.

¹² See in particular §404a German CCP on directions by the court regarding the expert's activities and for commentary W. Zimmermann, Commentary on §404a CCP, in *Münchener Kommentar zur Zivilprozessordnung* (5th edn. 2016) at ¶¶6-10 with §286 German CCP, providing for the evaluation of evidence at the court's discretion and conviction subject to its duty to give reasons with H. Prütting, Commentary on §286 CCP, in *Münchener Kommentar zur Zivilprozessordnung* (5th edn. 2016) at ¶¶21-22 with further references.

the parties, or to opine on the causes for a loss, damage or other relevant fact or incident.¹³

In other words, the expert's task in France is not (only) to answer specific questions but to provide his opinion. Instructions to French experts often include guidance on how to carry out the task, including that the expert may "*ask to receive all documents and evidence which he considers relevant to his task; interview any "person possessing information" ('sanchant') he thinks might be useful; visit and inspect the premises [and] provide any element from his particular area of competence, to enlighten the court on the origins and technical causes of the alleged facts at issue in the proceedings and the harmful consequences pleaded by the parties*".¹⁴

Another big - or maybe the major - difference lies in the participation of the parties in the preparation of the expert's report. In France, the adversarial principle is fundamental at any stage of the proceedings, including the preparation of the expert report.¹⁵ The parties are in direct contact with the expert, may ask the expert questions, demand the expert to respond to their comments on draft reports and that these comments be reflected in the final expert report.¹⁶ By contrast, in Germany¹⁷ and in Switzerland¹⁸ these steps are postponed to after the submission of the expert report.

¹³ B. Deshayes, *Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany*, Report prepared at the request of the Committee on Legal Affairs of the European Parliament (29 May 2015), available at <europarl.europa.eu/supporting-analyses> (last accessed 23 July 2018) 15 with reference to Cour de cassation (First Civil Chamber), Decision No 80-16.461 of 13 January 1982, Bull. civ. 1982 I No 23.

¹⁴ B. Deshayes, *Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany*, Report prepared at the request of the Committee on Legal Affairs of the European Parliament (29 May 2015), available at <europarl.europa.eu/supporting-analyses> (last accessed 23 July 2018) 15 (internal footnote omitted).

¹⁵ See Article 16(1) of the French CCP, which provides: "*In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle.*" (author's translation).

¹⁶ B. Deshayes, *Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany*, Report prepared at the request of the Committee on Legal Affairs of the European Parliament (29 May 2015), available at <europarl.europa.eu/supporting-analyses> (last accessed 23 July 2018) 19.

¹⁷ See §411(4) German CCP, which stipulates: "*Within a reasonable period of time, the parties are to communicate to the court their objections to the report, any petitions with regard to the preparation of the report, and supplementary questions to the written report. [...]*"

¹⁸ See Article 187(4) Swiss CCP, which provides: "*The court shall give the parties the opportunity to ask for explanations or to put additional questions.*"

4. THE RIGHT TO EXPERT EVIDENCE

There are also differences between civil law jurisdictions with regard to the right to expert evidence.

The issue is less interesting for the present purposes in terms of state court proceedings. There is generally speaking a right to adducing party-appointed expert reports, yet they may not constitute evidence. Under certain circumstances, there is also a right to a court-appointed expert and the court may be obliged to appoint an expert even without a party request.¹⁹

In arbitral proceedings, there is also generally a right to party-appointed experts.²⁰ That said, the tribunal normally has the right to refuse irrelevant or immaterial evidence,²¹ although this is rarely done in practice.²²

Where it becomes really interesting is the question whether there is a right to a tribunal-appointed expert in international arbitration proceedings. In Switzerland, to take an example, it appears to be undisputed that the tribunal has a right to appoint an expert.²³ This is expressly provided for in most regularly applied sets of arbitration rules.²⁴ It is also widely accepted that the tribunal does not require a party request in order to appoint an expert²⁵ but should refrain from doing so where both parties agree that it should not.²⁶

¹⁹ See only S. Rüetschi, Commentary on Article 183 CCP, in *Berner Kommentar* (Vol. II 2012) at ¶¶6-7 and R. Hürlimann, *Bau-Expertisen – Nutzen, Risiken und die Verantwortung des Experten* (2011) BRT 197, 202, each with further references.

²⁰ G. Born, *International Commercial Arbitration* (Vol. II, 2nd edn. 2014) 2278-2279 with further references.

²¹ J. Waicymyer, *Procedure and Evidence in International Arbitration* (2012) 924 at ¶12.8.15; see also Article 9.2(a) of the IBA Rules on the Taking of Evidence.

²² G. Born, *International Commercial Arbitration* (Vol. II, 2nd edn. 2014) 2279.

²³ M. Schneider and M. Scherer, Commentary on Article 184 PILA, in *Basler Kommentar Internationales Privatrecht* (3rd edn. 2013) at ¶34; M. Veit, Commentary on Article 184 PILA, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2013) at ¶48.

²⁴ Article 29(1) UNCITRAL Arbitration Rules; Article 25(4) ICC Rules; Article 21.1 LCIA Rules; Article 27(1) Swiss Rules; Article 28.2 DIS Rules; Article 25 HKIAC Rules; Article 44(1) CIETAC Rules; Article 26.1 SIAC Rules; see also Article 6.1 of the IBA Rules on the Taking of Evidence.

²⁵ Generally G. Born, *International Commercial Arbitration* (Vol. II, 2nd edn. 2014) 2279-2280; for Switzerland M. Veit, Commentary on Article 184 PILA, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2013) at ¶48; for France *Fouchard/Gaillard/Goldman on International Arbitration* (1999) at ¶1290; for Germany J. Münch, Commentary on §1049 CCP, in *Münchener Kommentar zur Zivilprozessordnung* (5th edn. 2017) at ¶20.

²⁶ See only M. Veit, Commentary on Article 184 PILA, in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2013) at ¶14; J. Münch, Commentary on §1049 CCP, in *Münchener Kommentar zur Zivilprozessordnung* (5th edn. 2017) at ¶19.

But is the arbitral tribunal (in certain circumstances) obliged to appoint an expert? And is it possibly even obliged to do so without an express request by one of the parties? That would likely be baggage a common lawyer would find hard to carry.

For arbitrations seated in Switzerland,²⁷ a 2017 Supreme Court decision brought further²⁸ clarification to this issue. According to that decision,²⁹ there may indeed be an obligation for a tribunal to appoint an expert, however under rather strict conditions (which were not met in that case): The party requesting the appointment of an expert from the tribunal needs to make (i) an express request to that effect; (ii) such request must be made in due form, i.e. in accordance with the procedural rules and the procedural timetable and accompanied by an undertaking to advance the costs of the expert. Although the Supreme Court does not expressly state so, it would appear that it now demands that the documents required for the initial instruction of the expert be submitted already with the request for the appointment of an expert by the tribunal.³⁰ Finally, the Supreme Court emphasised that (iii) the requested expertise has to be material in that it might influence the outcome of the case, thereby doing away with any formalistic notions of the right to be heard. The expertise further needs to be capable of proving the alleged fact and be necessary, which in turn presupposes that the underlying facts are of a technical nature or otherwise require specialised knowledge which cannot be established in a different manner and are not known to the tribunal already. The Supreme Court also expressly accepted that an arbitral tribunal may refuse to admit evidence, including appointing an expert, if following an anticipated appreciation of the evidence (*antizipierte Beweiswürdigung*) it is convinced that the evidence would have no impact on its decision.³¹

²⁷ In other jurisdictions, the prevailing opinion appears to be that there is no such obligation to appoint an expert and although such a refusal should be made with caution and be reasoned, it could only come into play as a ground for setting aside the award or non-recognition and enforcement where it amounts to a violation of the right to be heard, see generally G. Born, *International Commercial Arbitration* (Vol. II, 2nd edn. 2014) 2279-2280; for France *Fouchard/Gaillard/Goldman on International Arbitration* (1999) at ¶1290; for Germany OLG Frankfurt a.M., Decision of 17 February 2011 - 26 Sch 13/10 at II. 3.; for Belgium E. Stein, Commentary on Article 1707 of the Belgian Judicial Code, in N. Bassiri and M. Draye (eds.), *Arbitration in Belgium* (2016) 376 at ¶15 with further references.

²⁸ See regarding earlier case law E. Geisinger and P. Ducret, *The Arbitral Procedure*, in E. Geisinger and N. Voser (eds.), *International Arbitration in Switzerland - A Handbook for Practitioners* (2nd edn. 2013) 98-99 with footnote 118.

²⁹ Swiss Supreme Court Decision 4A_277/2017 of 28 August 2017, consid 3.1.

³⁰ See N. Voser/B. Gottlieb, Swiss Supreme Court rejects challenge and reiterates principles of right to a tribunal appointed expert, Comments on Swiss Supreme Court Decision 4A_277/2017 of 28 August 2017, available at www.swlegal.ch.

³¹ Swiss Supreme Court Decision 4A_277/2017 of 28 August 2017, consid. 3.1, referring to 142 III 360 consid. 4.1.1.

The condition that all documents required for the initial instruction of the expert need to be submitted with the appointment request may again appear rather strange to a French lawyer, who may be more used to the expert undertaking all of the fact-finding relevant to her mission herself. And of course, even stranger to a common lawyer less used to court-appointed experts in the first place, let alone having a right to the appointment of such experts.

5. CONCLUDING REMARKS

In conclusion, I believe it is safe to say that we all have baggage, also when it comes to the way we deal with expert evidence in international arbitration.

What is important is that we are aware of what that baggage is. And that we are aware of who may carry what baggage.

It is equally important that we respect each other's baggage. And that we respect where that baggage comes from.

It is crucial, as it is in arbitral proceedings in general, that we show flexibility in dealing with different actors' baggage regarding expert evidence. The beauty of arbitration is that it generally provides the adequate flexibility to find common ground to accommodate all actors involved in an arbitral proceeding. The same applies specifically with regard to dealing with expert evidence.

Similarly, it is crucial that we have a common understanding from the outset of the proceedings as to how expert evidence will be handled. This includes not only the point in time and the form in which expert evidence will be introduced into the proceedings, it also includes by whom such evidence will be introduced (the parties and/or the arbitral tribunal) and possibly even the weight – in general terms – party-appointed or tribunal-appointed expert evidence will carry in the arbitration in question.

This crucial goal can only be achieved if we have an open discussion about these issues at the outset of the arbitration, be it in a case management conference or a similar meeting involving the tribunal, the parties, and possibly even the respective experts.³²

³² See a proposal I have made elsewhere on how to deal with delay experts in a more efficient manner in construction disputes: C. Boog, Isn't There a Better Way to Handle Delays in Arbitration?, in Y. Atamer, E. Baş Süznel and E. Geisinger (eds.), *Uluslararası İnşaat Sözleşmelerinde Gecikme ve Temerrüt* (2018) 305-326.

Chapter 2

Instructing Experts

*Doug Hall**

1. PART 1: INSTRUCTIONS TO PARTY-APPROVED EXPERTS

1.1. Hired gun or independent expert?

What are the instructing Party's expectations of a Party-appointed expert:

- That the expert is instructed as late as possible to save costs?
- That the expert will and can be pushed to provide an opinion that is as favourable as possible to the instructing party's already pleaded case?
- That the expert will advocate / argue the Party's case?
- That the expert will raise no counter arguments to the Party's case?
- That the expert does not cave in and change their opinions in the face of:
 - New evidence that does not support the Party's case
 - Counter arguments raised by the opposing expert (for example during the conduct of a meeting of experts)
 - Cross examination at the hearing

The points above are deliberately at the extreme end of the expectations that the instructing Party may have of a Party-appointed expert and sophisticated clients, for example large corporates with in-house Counsel, may have none of these expectations and even less sophisticated Parties should have any such expectations removed or at least moderated by the Counsel they instruct. However, could there still be some residual desire for these qualities from a Party-appointed expert?

If there is some element of these expectations by the instructing Party the case of *Van Oord UK Ltd v Allseas UK Ltd EWHC 3074 TCC 2015* should be a reminder of the damage a partisan expert can do to the case of the Party on whose behalf they are instructed. In that case the Judge made 12 criticisms of the Claimant's expert:

* Head of Forensic Services at Smith & Williamson.

- repeatedly took C's claims at face value - did not check the documents that supported or undermined them;
- only based report on C's Witness Statements;
- refused to value C's claims other than on the full basis claimed;
- based assessment of C's claims on made up rates;
- throughout cross-examination caught out repeatedly - many issues already pointed out by D's expert months before;
- said in cross-examination was not happy with his report;
- accepted that parts of his report were confusing / misleading;
- appended documents he had not looked at / checked in any detail;
- made assertions based only on what he had been told by C;
- produced a schedule said to be prepared by him but it was prepared by C's Directors;
- preferred to recite what others had told him even though obviously wrong; and
- never considered valuing C's claims using fair and reasonable rates, even as a cross check.

The expert disappeared during a break in his evidence, never to return, and the Court rejected his evidence completely, accepting that of the Defendant's expert.

This case was widely reported and discussed at the time but we don't know how the instructing Party regarded their expert before it all went wrong at the hearing. Were they happy that the Expert apparently hadn't done anything to challenge their case?

Similarly, in *Hulley Enterprises Limited (Cyprus) - and - The Russian Federation PCA Case No. AA 226 (Yukos)* the Claimant's valuation expert was criticised:

"The Tribunal finds that neither of the other two primary valuation methods put forward by Claimants is sufficiently reliable to ground a determination of damages for this case. On balance, the Tribunal was persuaded by Professor Dow's analysis of Claimants' DCF model, and is compelled to agree that little weight should be given to it. The Tribunal observes that Claimants' expert admitted at the Hearing that his DCF analysis had been influenced by his own pre-determined notions as to what would be an appropriate result. Similarly, the Tribunal can put little stock in Claimants' calculations based on the comparable transactions method, since both Parties agree that, in fact, there were no comparable transactions, and thus no basis that would allow a useful comparison."

Before the expert's evidence was tested at the hearing did the instructing Party derive confidence from their valuation expert having such a strong view on the valuation? When does "strong" become "trenchant", "stubborn" or "pre-determined"?

1.2. Independence

Prof. Thomas Walde, 2 February 2006 to 'Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) Discussion List':

"[T]here is a tradition (English?) that the expert is presented as 'independent' and with only obligations to the court. But that is largely (not completely) a fiction. The expert that is hired by one side and communicates in preparing his or her expertise exclusively with one party cannot be completely independent. Independence is a relative, not an absolute concept. The expert will be pulled between the forces from one party (which can be pretty strong and insistent) and, on the other side, personal/ethical and in particular reputational concerns over appearing 'professional' (and that means also ability to stand up to demands, subtle or not subtle signals from clients). The more business and clients one has, and the less one needs, the greater presumably the forces favoring greater (never absolute) independence. Dr Schuetze, in the Festschrift II for KH Boeckstiegel, has therefore expressed quite reasonable doubts on the independence of the party-appointed experts, though the actual dynamics is more complicated and one cannot use the binary independence/no independence matrix but rather think of concepts such as 'relative independence' and 'professionalism'"

Independence, or lack of it, can be defined as a matter of fact i.e. is there any identifiable relationship between the expert and the parties, which could influence the expert's opinions?

But more importantly it can be perceived either way by the Tribunal from the expert's conduct in the case for example:

- Whether the expert ignores evidence unhelpful to their instructing party's case, or fails to attach sufficient weight to it or places too much weight on evidence helpful to their instructing party's case.
- Whether the expert is prepared to change their opinion when faced with counter arguments or evidence contrary to their expert opinion.

An effective expert will demonstrate their independence to the Tribunal through their conduct. That can include features such as:

- The nuances of the style of language that is used in an expert's report.
- Presenting different scenarios within their report acknowledging that there is no one single right answer (the answer most favourable to the instructing party's case)
- Under cross examination not holding out from giving an answer unfavorable to the instructing party's case.

That could create a tension with the objectives of the instructing party who seeks expert evidence as favourable as possible to their case, which will not change during the exchanges of experts' reports and meetings of experts and during the expert's oral testimony.

Experts have an obligation to disclose relationships and to make a statement of independence – is there danger of such disclosure forming a basis for challenge?

However, there are a range of cases that show that Tribunals and Courts rarely uphold challenges to the admissibility of expert reports or opinions that are presented by the parties based on expert's independence, even where an expert is an employee of a party or otherwise closely affiliated with a party or its legal team:

Helnan Int's Hotels AS v. Arab Repub. Of Egypt, Award in ICSID Case No ArB/05/19 of 3 July 2008 – rejected the argument that expert was unqualified to testify as an independent expert witness because he was former employee of claimant and presently working on respondent's legal team

Jan de Nul NV v. Arab Repub of Egypt Award in ARB/04/13 of 6 November 2008 – rejecting argument that expert witness's report should be excluded on grounds that expert witness was member of board of entity with interest in dispute

Alpha Projektholding GmbH v. Ukraine, Award in ICSID Case No. ARB/07/16 of 8 November 2010 – experts were employees of party

Instead, connections/relationships between an expert and the instructing Party may affect the weight given to the Expert's evidence by the Tribunal.

1.3. Shadow experts

In my experience shadow experts are appointed by the Parties when there are single joint experts/Tribunal appointed experts. In this role the expert can assist with:

- Submissions to the Tribunal on the appointment and instruction of a Tribunal appointed expert
- Submission on the content of reports produced by the Tribunal appointed expert
- Cross-examination of the Tribunal appointed expert

Where a challenge can be put to an opinion of the Tribunal appointed expert the instructing party may rely on the shadow expert to advise on what the Tribunal appointed expert's response may be to that challenge pre-emptively.

If there are inconsistent rules on communications with experts and their privilege, then is there a need for two categories of expert?

- A "dirty expert" (i.e. "shadow expert" / "consultant expert") provides expert assistance under the cover of privilege.
- A "clean expert", prepares the expert report to the Tribunal having regard only to the specific materials which are provided.

There are cost implications to having both experts.

1.4. Legal, technical and quantum experts

I have seen practical challenges to the selection and instruction of technical experts:

- particularly in very specialized fields, may not have acted as an expert before, including academics; and
- categories of experts who tend to specialize as acting as an expert as the primary element of their work, for example Forensic Accountants.

The first category can come over well before the Tribunal as they can display nothing but expertise in their subject matter without any apparent allegiance to their instructing Party's case. However they can be difficult to be brought to focus on the real issues in the case for which the expert evidence is required.

There can be practical issues around the interface between technical experts and quantum experts. E.g. in an IT dispute there may be a technical expert opining on whether an IT system met the specification under the contract alleged to have been breached but the quantum expert will need to develop that opinion and translate it into the effect on quantum. Where does the responsibility for achieving that interface effectively lie?

Depending on Orders made by the Tribunal there may be sequencing challenges where the report of one expert (possibly the technical expert) is relied upon for analysis and conclusions in a quantum report. This can include where the technical expert's opinion changes following a meeting of experts or even during the course of the hearing. The responsibility for addressing any knock-on effects on quantum evidence lies with?

1.5. The authorized level of contacts with counsel and the Party

Inevitably contact and discussion with the instructing Party, instructing Counsel and other experts appointed on behalf of the same party may make the expert feel they are part of the team for that Party in the dispute, with the possibility that they "go native".

This may be reinforced by the expert being asked to advise, for example, on the consequences for their expert evidence when new evidence may come to light and/or when the instructing party is considering amending its pleaded case. i.e. discussions within the instructing Party's team that are of a strategic nature. The solution? - limit or exclude any discussions with the expert that go to the overall strategy for the case.

An expert may have acted as an adviser to a party before acting as an expert on behalf of that party, including for example assisting with the scope of the instructions to that expert or providing a preliminary view. In my experience that does not necessarily cause any obstacle to that expert providing the expert's evidence to the Tribunal that is not seen as partisan, provided the expert is prepared to challenge the instructing Party's case in their preliminary view.

1.6. Disclosure of instructions to experts?

Under The Civil Procedure Rules (CPR 35.10(4) & PD 35.4) in England & Wales, the Court may order that an expert discloses all material instructions to them if the Court has reason to believe that not all instructions have been disclosed by the Expert (which can extend as far as including all communications between the expert and their instructing party/lawyers - an outcome which could have some serious implications).

There is a similar provision in the CIArb Protocol - Art 5(1) - instructions can be ordered to be disclosed, but only if there is a good cause.

But what constitutes "Good cause"?

Arbitrators from Common Law jurisdictions may presumably adopt a similar position as under the CPR in England.

In which case should all communications between the expert and the instructing Party be considered in the light of how they would appear were they to be disclosed to the Tribunal, for example in relation to the Tribunal's perception of the independence of the expert?

Could the possibility of disclosure of communications depend on whether the instructions/communications were referred to / relied upon / or reviewed by the expert?

1.7. How to transmit knowledge of the disputed facts and strategy to the expert

Could the nature of instructions to an expert been seen as constraining their opinion?

*"The Claimant contends that the Respondent gave specific instructions to its expert witness on quantum regarding the valuation dates it considered to be applicable, while the Claimant allowed its expert witness to come to his own conclusions. Hence, according to the Claimant, the evidence from the Respondent's quantum expert can have little or no value."*¹

Chevron Corp. (USA) and Texaco Petroleum Co (USA) v Ecuador UNCITRAL (2010): The Respondent requested the Arbitral Tribunal to disregard the evidence of Claimant's experts because "they were based on assumptions provided by the counsel or where they opined on issues of law and contract interpretation" and therefore "suffered from a lack of independence". However, the Tribunal made no further reference to this request and instead primarily relied on the evidence of the criticised Claimant's expert.

2. PART 2: INSTRUCTION TO TRIBUNAL-APPOINTED EXPERTS

2.1. Tribunal-appointed expert – the expert's view

I have considered this subject under two headings:

- Where a Tribunal-appointed expert is appointed at start of the case
- Where a Tribunal-appointed expert is appointed after the exchange of Party-appointed experts' reports and the hearing

¹ Copper Mesa Mining Corporation v Republic of Ecuador UNCITRAL 2012.

2.2. Tribunal-appointed expert is appointed at start of the case

In the field of quantum expert evidence there cannot be one single “correct” answer to an assessment of damages. Instead, the question is whether an expert opinion falls into a credible range, taking into account both technical and commercial issues, which can be very wide, varying by \$100 million.

Estimates of damages can often involve modelling counterfactuals into the far future. For example, I was instructed as a Party appointed expert which required the modelling of the present value of cash flows relating to a Port Concession in East Africa for up to 50 years. There was a wide range of credible values to:

- The cash flows themselves
- The appropriate discount rate to apply to those cash flows

The combination of and interaction between these and other factors meant that the respective valuation of the experts fell into a very wide range. Does the extent of that range imply that one or both of them was partisan in their opinion?

The following is an example of a well-known case on company valuation in the English Courts where there were experts appointed on behalf of each of the Parties:²

- This was a shareholder dispute over a company running a health food business.
- Using the same data, the same methodology and at the same date two valuation experts valued the company:
 - £2.2 million – the expert for the party for whom a low valuation was helpful
 - £6.3 million – the expert for the party for whom a high valuation was helpful
- The difference between those two figures gives the immediate impression that one or both of the experts was partisan and was only seeking to arrive at a valuation to suit their instructing party?
- However, the Judge said, “Both witnesses [experts] were, I thought, fair and made genuine attempts to be reasonable.” Therefore, the Judge did not see either expert as partisan, and therefore the valuations by both experts were in a credible range.

² Renee Jeanne Elliott v Planet Organic Limited and others (1999).

- The Judgment was for a valuation of £3.1 million, between the two valuations by the experts but not a mid-point. Therefore, having heard the evidence the Judge gave more weight to evidence pointing to a valuation at the lower end of the range set by the two experts.
- How would a Tribunal appointed expert have approached that valuation exercise?
 - Present a range of valuations over a range of £2.2 million to £6.3 million?
 - Present a mid-point valuation of £4.2 million? (not the valuation adopted by the Judge)
 - Present some other value?
- Would the Tribunal Appointed expert effectively be taking over the role of the Tribunal by arriving one valuation and removing the opportunity for the Tribunal to apply its own weight to the variables that drive a valuation?

When considering whether to appoint a Tribunal-appointed expert, is the subject matter of the expert evidence highly judgmental and likely to result in a wide range of opinions from party appointed experts?

“The Tribunal has heard various experts, all knowledgeable, having opposite perceptions of the same reality.”³

“Economics is a complicated science or, better, a complicated art; the mere reading of the analyses of the experts of both Parties show that there is little certainty.”⁴

“The DCF method embodies a wide range of inherently speculative elements, as stated by the International Law Commission (“ILC”) and by arbitral awards”⁵

“...the DCF methodology necessarily involves projecting future cash flows – calling for considerable latitude for creativity and speculation as evidenced by the conflicting views of the experts engaged by the Parties and the Tribunal.”⁶

Comments such as these reinforce the reality that in a range of areas for which expert evidence may be sought there can be a wide range of credible opinions.

³ El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15.

⁴ El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15.

⁵ El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15.

⁶ National Grid plc v. The Argentine Republic UNCITRAL 2008.

Therefore, are the Tribunal and the parties well served by the use of a Tribunal appointed expert where the subject matter is one of a high level of subjectivity (valuation of a company is highly judgmental and can be more of an art than a science, as can be DCF calculations)? The parties would need to appoint shadow experts to protect their interests?

Is the appointment of a Tribunal appointed expert the outsourcing of the Tribunal's task to the expert?

If the Tribunal is reliant on the opinion of a Tribunal appointed expert without the challenge to that opinion that could have arisen between Party-appointed experts has there effectively been outsourcing?

Starrett Housing Corp. v Iran (Chamber One (Lagergren, Ameli, Holtzmann) 16, Iran-US CTR (1987) 112:

"Thus, the Tribunal adopts as its own the conclusion of the Expert on matters within his area of expertise when it is satisfied that sufficient reasons have not been shown that the Expert's view is contrary to the evidence, the governing law, or common sense. On the other hand, the Tribunal does not hesitate to substitute its own judgement of what is reasonable with respect to matters that do not require expertise as to accounting or valuation methodology".

This reaffirms the Tribunal taking its own view, notwithstanding the opinion of the Tribunal appointed expert.

ICC case No 12131 (2006) (Partial Award), unreported:

"In terms of weighing the evidence, one should bear in mind that the Tribunal is not bound by the Expert's finding. However, should the arbitrators decide to have differing opinions from those of the Expert they ought to provide grounds for their solution in order to preclude any oversight or violation of the right to be heard. In other words, there are no reasons for the Arbitral Tribunal to divert from the Expert's findings, unless there is an objectively justified material and different solution [...]"

This perhaps implies the Tribunal will not divert from the Tribunal appointed expert's opinion, unless it has grounds to do so. How would the Tribunal establish those grounds without expert assistance?

2.3. Tribunal-appointed expert is appointed after the exchange of party-appointed experts' reports and the hearing

These are examples of cases where the Tribunal has appointed its own "independent" expert post hearing:

*"In view of the number and complexity of the accounting issues relating to the damages assessment, as evidenced by the diverging views given on many relevant questions by the Parties' experts, the Tribunal, with the agreement of the Parties, has appointed its own expert ..."*⁷

*"...better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts."*⁸

*"Having determined the liability of Argentina in these cases, the Tribunal decided that, because of the complexity involved in ascertaining damages, a matter extensively argued with widely differing conclusions by each party with the assistance of financial specialists who prepared extensive reports and testified at the hearing on the merits, it was appropriate after issuing its Decision on Liability to create a separate procedural phase devoted to damages and to seek the services of an independent financial expert to assist the Tribunal in the task of valuing the loss, if any, sustained by the Claimants as a result of Argentina's actions."*⁹

*"The issue of damages has proved to be extremely complex in the present case, as indicated by the fact that the Tribunal appointed its own expert in 2011 to assist in determining the appropriate compensation to be paid, if any, resulting from the Respondent's breach."*¹⁰

In these cases the Tribunal had already had the benefit of hearing the opposing views of the Party-appointed experts following which the Tribunal-appointed expert assists with interpretation of that evidence.

However, even at that stage does the Tribunal outsource a degree of its role to the Tribunal-appointed expert in making a finding on the merits of the respective opinions of the Party appointed experts?

⁷ El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15.

⁸ Sempra Energy International v. The Argentine Republic ICSID Case No. ARB.02.16

⁹ Suez and Vivendi v Argentina ICSID 2015.

¹⁰ Hrvatska Elektroprivreda D.D v Republic of Slovenia, ICSID 2015.

2.4. Conversion of previously party-appointed experts into tribunal-appointed experts

I have been instructed as a Party appointed expert in a dispute over the supply of gas to a power station. The quantum issues are complex with the experts' reports making complicated calculations of liquidated damages and loss of profits, partly dependent on evidence from technical experts.

After the exchange of a number of reports and Joint Memoranda following meetings between the experts and the hearing, the Tribunal has requested that the two Party-appointed quantum experts become Tribunal appointed experts to assist the Tribunal with translating its findings of fact into quantum outcomes. Their work on behalf of the Tribunal will be confidential to the Parties.

Although this process is yet to take place, I anticipate that, although the previously Party appointed experts will now become Tribunal appointed experts, the Tribunal will only be seeking their assistance in translating the Tribunals findings of fact into damages figures with no new opinion evidence from the Experts.

Similarly, in *Flemingo v Poland UNCITRAL 2016*:

- The Parties disagreed on the various assumptions adopted by the Parties and the Parties' experts in making their damages calculations.
- In view of the differing approaches to the calculations, the Tribunal requested the Parties' experts to provide additional calculations of Claimants damages under different scenarios, each adopting different assumptions. In one of the three scenarios the assumptions were free for the Parties and their experts to determine.
- The Parties were requested to submit their Scenario Calculations in the form of an Excel spreadsheet that was capable of being manipulated.
- The Tribunal adopted one of the first two scenarios.

However, in *Burlington Resources Inc. v Republic of Ecuador, ICSID 2017*:

"To compute Burlington's lost (past and future) cash flows, the Tribunal has relied on the Joint Valuation Model (the "Model") provided by the Parties' damages experts. The Model was prepared jointly by Compass Lexecon and Fair Links pursuant to the Tribunal's invitation and specifications in PO29. Specifically, the Tribunal requested the experts jointly to prepare a valuation model

allowing it to choose between the different variables proposed by the Parties for the computation of cash flows as specified by the Tribunal."

One of the parties accepted the model the other expressed reservations as to the accuracy and reliability of the model. The Party *"urges the Tribunal to exercise the utmost caution in the reliance it may place on said Model for quantum purposes"*.

This was not accepted by the Tribunal *"By definition, a joint valuation model must contain each side's legal and technical assumptions, regardless of their merit. It is then for the Tribunal to choose the ones which it considers well-founded to carry out its computation."*

The Experts agreed *"with the functionalities, computations and calculations of the Joint Model based on the options that were put to us by the Tribunal, where feasible"*

This implies that the procedure adopted by the Tribunal in both these cases to have the Party appointed experts produce a model/ calculations that the Tribunal could itself use to translate its findings of fact into a finding on damages may not always run that smoothly.

3. DETAIL OF CASES REFERRED TO

3.1. El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15

- *"...the members of the Tribunal had decided to retain an independent expert, who would assist them in the review of the expert reports filed by the parties"* Comment: Does that imply that the party appointed expert lacked independence?
- *"The Tribunal has heard various experts, all knowledgeable, having opposite perceptions of the same reality."* Comment: Reinforces there cannot be one "Reality"
- *"Economics is a complicated science or, better, a complicated art; the mere reading of the analyses of the experts of both Parties show that there is little certainty."* Comment: therefore the subject matter for expert evidence is likely to result in a divergence of opinion between any two experts?
- Tribunal considered the reports and testimonies of the party-appointed experts:

"In view of the number and complexity of the accounting issues relating to the damages assessment, as evidenced by the diverging views given on many relevant questions by the Parties' experts, the

Tribunal, with the agreement of the Parties, has appointed its own expert ..."

- "The Tribunal has analyzed LECCG's DCF model with the Expert's assistance and is satisfied that it conforms to the principles that are to be applied to assess El Paso's damages in the frame of the chosen valuation standard." Comment: presumably the Tribunal would not have been able to make that assessment without the assistance of the Tribunal appointed expert?
- "The DCF method embodies a wide range of inherently speculative elements, as stated by the International Law Commission ("ILC") and by arbitral awards":
 - The Party appointed experts proposed discount rates of 12/13% and 35% - the result from the DCF would inevitably have been highly sensitive to such a range of discount rates
 - Tribunal appointed expert criticised the discount rates proposed by both Party appointed experts and proposed rates of c15%, which the Tribunal agreed with
 - The Party appointed experts proposed widely differing Debt discounts with one proposing a discount of nil
 - Tribunal appointed expert proposed a debt discount of 35% in the actual scenario and c26% in the counterfactual, which the Tribunal agreed with.
 - Of two key quantum issues, the discount rate and the debt discount, the Tribunal appointed expert broadly supported the view of one of the Party-appointed experts on one and the view of the other Party-appointed expert on the other

3.2. Sempra Energy International v. The Argentine Republic ICSID Case No. ARB.02.16

- "Experts are profoundly divided"
- After the hearing and after the parties filing their post hearing briefs the Tribunal informed the parties of its decision to retain independent expert advice so as to:
 - "...better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts."*
- Tribunal appointed expert referred to as *"the independent evaluation expert"*
- Parties given an opportunity to file observations on the Preliminary and Final reports of the Tribunal appointed expert.

3.3. National Grid plc v. The Argentine Republic UNCITRAL 2008

- After the hearing and after the parties filing their post hearing briefs the Tribunal informed the parties of its decision to retain *"...in accordance with Article 27 of the Arbitration Rules, the appointment of one or more experts might be of assistance to the Tribunal to review the expert report of Mr. Wood-Collins and the critical valuation of it done by experts Bello and Molina, inviting the Parties to attempt to reach an agreement on the selection of one or more independent experts."*
- The Parties did not agree on the selection of the Tribunal appointed expert so the Tribunal made its own selection *"The Tribunal has been greatly assisted by the Parties in its study of the compensation issues involved in this case.*
.../...
The Tribunal has studied all of these experts' declarations carefully and has engaged its own expert, Professor A. Louis Calvet, whose Draft Report benefited from the comments of the Parties and the Parties' own experts."
- *"...there is considerable merit in using the Discounted Cash Flow (DCF) method."*
- *"A second potential drawback is that the DCF methodology necessarily involves projecting future cash flows—calling for considerable latitude for creativity and speculation as evidenced by the conflicting views of the experts engaged by the Parties and the Tribunal."*
- *"...the Tribunal, in reaching these conclusions, has carefully studied the reports and declarations of each of the experts as well as the presentations of legal counsel. In lieu of relying directly or solely on the opinion or valuation of any of the experts, we have made use of their opinions and compared them to available market information."*

3.4. Suez and Vivendi v. Argentina ICSID 2015

"Having determined the liability of Argentina in these cases, the Tribunal decided that, because of the complexity involved in ascertaining damages, a matter extensively argued with widely differing conclusions by each party with the assistance of financial specialists who prepared extensive reports and testified at the hearing on the merits, it was appropriate after issuing its Decision on Liability to create a separate procedural phase devoted to damages and to seek the services of an independent financial expert to assist the Tribunal in the task of valuing the loss, if any, sustained by the Claimants as

a result of Argentina's actions. Before undertaking this phase, the Tribunal asked each party for its observations on the wisdom of the Tribunal appointing a financial expert, the process by which such person might be selected, and the procedure to be followed by that person to carry out the tasks assigned by the Tribunal. The Claimants and the Respondent provided their views on these issues in their post-hearing submissions."

**3.5. Hrvatska Elektroprivreda D.D v. Republic of Slovenia,
ICSID 2015**

"The issue of damages has proved to be extremely complex in the present case, as indicated by the fact that the Tribunal appointed its own expert in 2011 to assist in determining the appropriate compensation to be paid, if any, resulting from the Respondent's breach. The Tribunal wishes to thank Mr Jones for his helpful assistance in this difficult case. The Tribunal has benefited significantly from his insights, especially given the vastly differing assessments offered by the party-appointed experts. The Tribunal has found Mr Jones' analysis most useful and has to a significant extent followed his recommendations."

**3.6. Copper Mesa Mining Corporation v. Republic of Ecuador
UNCITRAL 2012**

"The Claimant contends that the Respondent gave specific instructions to its expert witness on quantum regarding the valuation dates it considered to be applicable, while the Claimant allowed its expert witness to come to his own conclusions. Hence, according to the Claimant, the evidence from the Respondent's quantum expert can have little or no value."

"The Parties' Quantum Experts: Save for one method, the Tribunal decides not to accept the several valuation methodologies advanced by the Parties' respective expert witnesses. In the Tribunal's view, applied in this case, those methodologies are too uncertain, subjective and dependent upon contingencies, which cannot fairly be assessed by the Tribunal. For example, wholly extraneous factors significantly affect the different figures resulting from the Parties' different methodologies. These huge differences, with insufficient explanations, suggest that extreme caution is required in assessing compensation in this case. This is hardly surprising, given that the Claimant's concessions remained in an early exploratory stage with no actual mining activities, still less any track record as an actual mining business; and, particularly as regards the Junín concessions, that the Claimant's chances of moving beyond an exploratory stage were, by December 2006, slender.

The Tribunal has therefore experienced difficulties in assessing compensation in this case. These difficulties cannot, however, preclude the Tribunal from making such an assessment on the relevant evidence adduced in this arbitration."

Chapter 3

Instructions to Party-Appointed Experts Should Focus on Impartiality

*Emine Eda Cerrahoglu Balssen**

There is a long-standing debate in international arbitration whether or not party-appointed experts can usefully be independent and how much weight should tribunals give to evidence of party-appointed experts. This paper submits that a discussion focused on the independence of party-appointed experts is misleading and unproductive. Alternatively, the focus of the international arbitration community should be on how to ensure and maintain party-appointed experts' impartiality.

1. PARTY-APPOINTED EXPERTS ARE NOT ONLY A COMMON LAW CONCEPT BUT ARE ALSO USED IN CIVIL LAW JURISDICTIONS

The use of party-appointed experts, which is originally a common law concept, has become the preferred method of presenting expert evidence in modern international arbitration practice.¹

Although civil law jurisdictions may not be as comfortable as common law jurisdictions with the concept, most have a tendency to accept and make use of party-appointed experts.

For example, in Turkey, which is a civil law jurisdiction, although the norm is to use tribunal-appointed experts, there is room for the parties to present evidence through party-appointed experts. Under the Turkish International Arbitration Law, it is set out that;

“The arbitrator or the tribunal may decide to appoint one or more experts to submit a report on issues determined by the Tribunal... Unless otherwise agreed, if requested by one of the parties or deemed necessary by the Tribunal, experts shall attend the hearing upon invitation after they have presented their report in writing or orally. In such hearing, the parties may put questions to the tribunal-appointed experts and present experts that they have appointed in relation to the subject of the dispute.”²

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¹ Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 139 (2012).

² Turkish International Arbitration Law No. 4686 published in the Turkish Official Gazette dated 05.07.2001 and numbered 24453, Article 12(A). Translation provided by the author.

2. DEBATING “INDEPENDENCE” OF PARTY-APPOINTED EXPERTS IS MISLEADING - FOCUS SHOULD BE ON ENSURING THEIR IMPARTIALITY

Even if the use of party-appointed experts has become common in international arbitration, there are often debates and significant literature on the disadvantages of using party-appointed experts compared to the tribunal-appointed experts. The purpose of this paper is neither to go into such a comparison, nor to give an account of the arguments presented.

However, it would not be incorrect to state that the discussion often focuses on whether or not the party-appointed experts can really be considered as “independent” and, in turn, whether or not their evidence should be admissible and what weight it should be given.³

The bias against party-appointed experts comes from the fact that they are retained and instructed by the appointing party, as well as being highly exposed to the evidence, assumptions and arguments of the appointing party.

There is no surprise here. There is an inherent conflict between the concept of “independence” and retainer. No party would agree to pay fees to an expert who does not support its position. Therefore, focusing the discussion on whether or not the party-appointed experts can really be considered as independent is misleading and unproductive.

Instead, the focus should be on how to ensure that the party-appointed experts are impartial. Impartiality, in this context, has been associated with neutrality, fair and just treatment of the parties and transparency. A useful test for impartiality is whether or not the party-appointed expert would be able to reach a conclusion based on the same criteria applied by his/her peer experts or would any external factors (e.g. affiliation with a party/counsel) lead the expert to reach a different conclusion than his/her peers under the same circumstances.⁴ Alternatively, the question is whether or not the party-appointed expert would give the same opinion irrespective of the appointing party.⁵

The Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

³ Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 143 (2012).

⁴ Issues for Experts Acting under the ICC Rules for Expertise or the ICC Rules of Arbitration, ICC International Court of Arbitration Bulletin Vol. 20/1 23, 26 (2009).

⁵ John Molloy, *The Far Reaching Consequences of Expert Evidence*, *Asian Dispute Review*, Vol. 2015/3 150, 155 (2015).

(“CIArb Protocol) has endorsed the idea that “impartiality” rather than “independence” should be the focus when it comes to party-appointed experts:

- In Article 4.1, CIArb Protocol stipulates that “*an expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.*” It is important to note that “independence” is not listed among the requirements.
- In Article 4.2, CIArb Protocol goes one step further and states that “*payment by the appointing Party of the expert’s reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert’s impartiality.*”

The 2010 revisions to the International Bar Association Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) have also taken a major step in this direction. Article 5.2(g) of the IBA Rules requires the report of the party-appointed expert to contain “*an affirmation of his or her genuine belief in the opinions in the expert report.*” The former 1999 IBA Rules required the party-appointed expert to affirm the “truth” of the report. The 2010 revision reflects the principle that the party-appointed expert’s report should be a product of the expert’s genuine professional opinion and that the expert is not unduly influenced/biased by the appointing party.⁶

There is also case law in international arbitration demonstrating that relationships between the expert and the appointing party or the opposing party do not automatically constitute grounds to dismiss the expert evidence. Although the tribunals take such relationships into consideration, they give more weight to the professionalism, credibility and the reliability of the party-appointed experts.⁷

⁶ Christopher Harris, Expert Evidence: The 2010 Revisions to the IBA Rules of Evidence in International Arbitration, *International Arbitration Law Review*, Vol. 13/5 212, 213-214 (2010).

⁷ See, for example, *Sedco Inc. v. Iranian National Oil Co. and the Islamic Republic of Iran* (Award No 309-129-3 para 75 (7 July 1987): the Iran-US Claims Tribunal rejected the respondent’s arguments that the report of the claimant’s expert was per se unreliable because the expert was the claimant’s employee; *Jan de Nul & Dredging International v. the Arab Republic of Egypt* (ICSID Case No ARB/04/13, Final Award, para 28 (2006)): the claimants requested the tribunal to dismiss a report of the respondent’s expert on the ground that the expert had previously been a member of the board of directors of one of the claimants and was, therefore, not impartial. The tribunal rejected claimants’ request. Important factor in the tribunal’s decision was the ability of the claimants to cross examine the expert at the hearing; *Brandeis Brokers Ltd v. Black* (2001 WL 513189 (QB 2001)): The English courts’ view is that there is no rule in arbitration preventing an expert from having connections to a party. The courts stated that parties often use in-house experts to cut costs, which is a procedural matter to be evaluated by the tribunals.

After all, the party-appointed expert is nothing but a witness in arbitration proceedings. Just like any other witness, the party-appointed expert has the fundamental duty to tell the truth, which overrides any duty owed to a party. The tribunal remains the decision maker. The party-appointed expert's role is to ultimately assist the tribunal in their task⁸ as also expressly provided for in the CIArb Protocol;

- In para. 4 of the Preamble, the CIArb Protocol sets out that *"experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them"*.
- Then in Article 4.3, the CIArb Protocol expressly provides that *"an expert's duty, in giving evidence in the arbitration, is to assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced."*
- The CIArb Protocol also includes in Article 8 a form declaration to be signed by each party-appointed expert reconfirming among other issues that the expert's duty is to assist the tribunal and that the expert's report is a product of the expert's objective and impartial opinion not influenced by the appointing party.

Furthermore, players involved in modern international arbitration are sophisticated enough to deal with any disadvantages potentially to arise from any relationships between party-appointed experts and their appointing parties.

Parties and counsel know that undue influence of the expert would most likely damage their case. No doubt, an expert who is not open to alternative explanations, puts undue weight on evidence that is helpful to the appointing party and ignores evidence that is unfavorable to the appointing party will appear to the tribunal to be unreliable.

Experts in modern international arbitration practice are professionals. An expert's reputation is his/her biggest asset. The self-interest of the expert in appointments going forward would guard him/her against incentives to act as the "hired gun" of the appointing party. No expert would intentionally make wrong statements purely to serve the interests of the appointing party.⁹

⁸ Issues for Arbitrators to Consider Regarding Experts, ICC International Court of Arbitration Bulletin, Vol. 21/1 31, 31-32 (2010).

⁹ John Gaffney and Gillian O'Leary, Tilting at Windmills? The Quest for Independence of Party-Appointed Expert Witnesses in International Arbitration, Asian Dispute Review, Vol. 2011/3 82, 84 (2011).

Arbitrators are well aware that the issues to be addressed by experts are complicated questions which often have more than one answer. Therefore, rather than the conclusion, arbitrators focus on how the expert approaches the question, evaluates the material and reaches his/her conclusions and how convincing he/she is.¹⁰

3. THERE ARE TOOLS AVAILABLE IN INTERNATIONAL ARBITRATION TO TEST PARTY-APPOINTED EXPERT'S IMPARTIALITY

In modern international arbitration practice, there are various tools available to arbitrators to test in different ways the reliability of party-appointed experts.

Most international arbitration rules provide for these tools. This paper will only refer to the most relevant provisions of 2010 IBA Rules and the CI Arb Protocol;¹¹

- party-appointed experts shall include in their report;
 - the instructions they have received (IBA Rules Article 5.2(b), CI Arb Protocol Article 4.4(c)),
 - the facts on which the expert bases his/her conclusions (IBA Rules Article 5.2(d), CI Arb Protocol Article 4.4(e)),
 - matters, documents, assumptions the expert relies on (IBA Rules Article 5.2(e), CI Arb Article 4.4(e) and (f));¹²
 - the expert's opinions and conclusions including the method applied to reach such opinions and conclusions (IBA Rule Article 5.2(e) and CI Arb Protocol Article 4.4(g));
- tribunals can ask opposing party-appointed experts to meet and confer on issues (IBA Rule Article 5.4, CI Arb Article 6.1), whereby the experts shall try to come to an agreement and record on which issues an agreement is reached and on which issues they disagree;¹³

¹⁰ Robert A. de By, A New Focus For The Expert Witness Debate In International Arbitrations, ICDR/CI Arb/LACBA Conference - International Arbitration in the Pacific Rim: The Use of Reliance Documents & Expert Witnesses - Efficiency & Fairness, 5 (2013).

¹¹ As the purpose of this paper is not to set out best practices, this is not an exhaustive list.

¹² CI Arb in Article 4.4(e) expressly requires that the expert includes in the report the facts, matters and documents (including any assumptions) that have been considered by the expert even if the report is not based on the same.

¹³ Also recommended in Issues for Arbitrators to Consider Regarding Experts, ICC International Court of Arbitration Bulletin, Vol. 21/1, 39 (2010).

- party-appointed experts testify orally at the hearings and counsel have the opportunity to cross-examine the expert appointed by the opposing party (IBA Rules Article 8.3);
- tribunals can also decide to hear party-appointed experts together at the hearings (IBA Article 8.3(5))¹⁴
- tribunals can always appoint their own experts to evaluate the evidence of the opposing party-appointed experts.

4. RECOMMENDATIONS FOR COUNSEL WHEN INSTRUCTING PARTY-APPOINTED EXPERTS

From a practical perspective, below is a non-exhaustive list of recommendations to counsel in international arbitration for how to instruct party-appointed experts to ensure that party-appointed experts maintain their impartiality;

- counsel should give the party-appointed expert a comprehensive and non-biased account of the relevant legal and factual issues;
- counsel should make the party-appointed expert aware of disputed and undisputed issues to the extent relevant; it is crucial that the party-appointed expert understands the counter arguments and material facts that are not in favor of the appointing party and has a chance to evaluate them on his/her own;
- the counsel confirms with the party-appointed expert that the particular matter is really within his expertise;
- counsel should ensure that the party-appointed expert diligently formulates his/her opinions, approaches the questions broadly, is prepared for cross examination and questions from tribunal and to explain why expert chooses to apply one methodology over others;
- not be biased towards a party or conclusion (believes in his/her methodology and opinion and at the same time accepts the weaknesses of his/her analysis but offers explanations);
- counsel should make sure that the party-appointed expert's findings are reasonable and relevant to the tribunal's task;
- all of these issues should be addressed in preliminary meetings between counsel and the party-appointed expert; the

¹⁴ Also recommended in Issues for Arbitrators to Consider Regarding Experts, ICC International Court of Arbitration Bulletin, Vol. 21/1, 40 (2010).

expert should be allowed sufficient time to digest the above before accepting appointment.

5. CONCLUSION

There is definitely an inherent tension between concept of independence and party-appointed experts being instructed and paid for by parties in international arbitration. However, this tension alone is not sufficient ground to dismiss party-appointed experts and their contributions to arbitral proceedings. Instead of focusing on the party-appointed expert's independence, the international arbitration community should focus on the party-appointed expert's impartiality by making use of existing tools, as well as developing new tools, that are available to test and maintain the party-appointed expert's reliability and credibility.

Chapter 4

The Management of Experts in the Pre-Hearing Phase: Unpacking Assumptions and Expectations

*Amanda Lees**

1. INTRODUCTION

This article addresses some of the differing assumptions and expectations regarding managing party appointed experts in the pre-hearing phase.

The role that arbitral tribunals play, and the expectation as to what role arbitral tribunals should play, in managing the expert process is changing from the traditional 'hands-off' to a more active 'hands-on' role. This could lead to a mismatch of assumptions and expectations between the arbitral tribunal and counsel.

Traditionally, the arbitral tribunal may have set the timetable and provided some guidance in the procedural order as to the form of the expert report, but it was left to the parties' counsel to manage and present the experts individually. For arbitrators, this was often sub-optimal. They were left to evaluate and synthesise conflicting testimony that, as well as expressing conflicting views, may not even have addressed the same questions, may have been based on different assumptions, and may have used different methodologies.

Similar frustrations were felt with the expert process in court litigation in common law jurisdictions and these have resulted in innovations that have since spread to arbitration. In England, following the report by Lord Woolf, in Australia, in Singapore and in Hong Kong the courts have made it clear that the duty of the party-appointed expert is to the court, not to the parties, and either the court rules and/or specific expert codes of conduct impose a code of conduct on party appointed experts.¹ Judges in England and Australia actively

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¹ Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*, Volume 26, Issue 3, *ARBITRATION INTERNATIONAL* 323, 331 (1 September 2010). See, in England and Wales, Part 35 of the Civil Procedure Rules and associated practice direction, in Australia for example the expert witness code of conduct at the NSW Universal Civil Procedure Rules Schedule 7, in Hong Kong The Rules of

case manage the expert evidence.² Innovations such as expert conclaves, joint expert reports and concurrent evidence have become standard in these jurisdictions.³

While the arbitral process has the inherent flexibility that allows for the introduction of such innovations, in doing so the arbitral tribunal should be conscious of obtaining the consent of the parties,⁴ and this is where differing expectations can come to the fore. While some parties and counsel are uncomfortable with the arbitral tribunal taking on a greater role in the management of the experts, others are expecting the arbitral tribunal to do more.

Parties and their counsel do not necessarily expect that the party appointed expert's duty is to the arbitral tribunal. Those practitioners from common law jurisdictions, such as England, Australia, Singapore and Hong Kong, may see the duty of the party appointed expert as being to the tribunal, but other practitioners may see the witness preparation process as an extension of the advocacy process or see no value in party appointed experts at all.

While some procedural rules require that a tribunal appointed expert be independent and impartial, for example the UNCITRAL Arbitration Rules,⁵ and LCIA Arbitration Rules,⁶ surprisingly many do not.⁷ The independence and/or impartiality and/or duty of party appointed experts are not addressed at all in procedural rules.

There appear to be only two substantive sources of guidance for the arbitral tribunal and counsel to turn to in relation to party appointed experts. First, the IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules") which are widely adopted and were revised in 2010 to cover party-appointed experts.⁸ Secondly, the CIARB Protocol for the Use of Party-Appointed Expert Witnesses

High Court Code of conduct for expert witnesses (Cap 4A, App D) and in Singapore Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A.

² See generally, Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, Volume 24, Issue 1, ARBITRATION INTERNATIONAL 137, 155 (1 March 2008).

³ *Ibid.*, 145. In Singapore the Rules of Court (Cap 322, R 5, 2006 Rev Ed) have also been amended to allow for discussions between experts, joint reports and concurrent expert evidence to be given.

⁴ *Ibid.*, 145.

⁵ See Article 29, UNCITRAL Arbitration Rules 2010.

⁶ See Article 21, LCIA Arbitration Rules 2014.

⁷ See Rule 26 of the SIAC Rules 2016, Article 25 of the Rules of Arbitration of the International Chamber of Commerce 2017, Article 25 of the HKIAC Administered Arbitration Rules 2013, Article 25 of the ICDR International Arbitration Rules 2014

⁸ The IBA Arbitration Committee submitted the revised IBA Rules to the IBA Legal Practice Division and the IBA Council in March 2010, with approval occurring at the end of May 2010.

in International Arbitration,⁹ (“the CIARB Protocol”) and now 2016 Guidelines on Party-appointed Experts and Tribunal-appointed Experts which cover both party and tribunal appointed experts¹⁰ (“the CIARB Guidelines”) and incorporate the CIARB Protocol in Annex 1.

The IBA Rules do require the party appointed expert to be independent,¹¹ but do not state that the party appointed expert has a duty to the arbitral tribunal. The CIARB Protocol goes further. Article 4 of the CIARB Protocol states that an expert’s opinion shall be impartial and objective, and that the expert’s duty is to assist the arbitral tribunal to decide the issue or issues in respect of which expert evidence is adduced. The CIARB Protocol is not as widely adopted as the IBA Rules, reportedly as it is seen as ‘too English’,¹² although in my experience, arbitral tribunals often ask experts to make the declaration set out in Article 8, which reflects the principles in Article 4, that the expert understands that his or her duty in giving evidence is to the tribunal.

In this article I look at three particular aspects of the pre-hearing phase:

- (A) The drafting of the expert report;
- (B) The use of joint expert meetings and reports;
- (C) The procedural order and case management process.

How evidence is given at the hearing is also an aspect upon which expectations and practices can vary greatly but that topic is being addressed by others.

2. THE DRAFTING OF THE EXPERT REPORT

In some common law jurisdictions, such as Australia and England, there is extensive guidance in the form of practice notes, mandatory expert codes of conduct and case law as to how expert reports should be structured and drafted so as to be admissible in court. Both experts and counsel know the rules of the game.

⁹ Chartered Institute of Arbitrators (CIARB), PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION (September 2007).

¹⁰ CIARB, PARTY-APPOINTED AND TRIBUNAL APPOINTED EXPERTS INTERNATIONAL ARBITRATION PRACTICE GUIDELINE (2016).

¹¹ Articles 3(8) and 6(1) of the IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

¹² Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*, Volume 26, Issue 3, *ARBITRATION INTERNATIONAL* 323, 333 (1 September 2010).

In the US, experts are not expected to be impartial but the courts have developed detailed standards as to the admissibility of expert evidence which is tied to whether or not the evidence is demonstrably a product of scientific or technical knowledge.¹³ Again, the rules of the game are clear.

But this is not necessarily the case in all jurisdictions. A report in 2015 on the national rules and practices for civil law expert reports in the European Union identified that in 15 out of 20 jurisdictions there were no mandatory requirements regarding the structure of the expert report.¹⁴ As the author noted, the formal content of the report is not insignificant as it is only possible to debate a report if it contains the facts and supporting evidence upon which it is based, the reasoning, and methodology.¹⁵

In arbitration there is little guidance as to how the expert report should be drafted. While it is for the arbitral tribunal to determine the admissibility and weight to be given to the expert evidence, there is little guidance for arbitral tribunals and parties as to what criteria will be used to assess that evidence. Practitioners coming from different legal backgrounds will have different expectations as to how an expert report should be prepared and how it should be assessed. This is not covered by procedural rules. Particularly when new players in international arbitration come from jurisdictions in which expert evidence is not common or not controlled to the same extent – guidance is required.

Similarly, not all experts have given expert evidence before. As Mark Kantor discusses many experts are members of professional bodies that have their own codes of conduct, for example the United Kingdom Institution of Civil Engineers Code of Professional Conduct, and provide guidance on how expert evidence should be given.¹⁶ However not all experts are members of professional bodies which issue such guidance and as described by Mr Kantor the duties imposed by such bodies vary by profession and jurisdiction.¹⁷ While those from established expert practices know the rules of the game, those that are new to giving expert evidence do not.

¹³ Ibid., 325.

¹⁴ Alain Nuée; *Civil-law expert reports in the EU: national rules and practices, In-depth analysis*, EUROPA (2015) at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA\(2015\)519211_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf)

¹⁵ Ibid., 7.

¹⁶ Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*, Volume 26, Issue 3, *ARBITRATION INTERNATIONAL* 323 (1 September 2010).

¹⁷ Ibid., 375.

As described above there appear to be only two sources of guidance for the arbitral tribunal and counsel to turn to in relation to expert reports for arbitrations: the IBA Rules and the CIARB Protocol.

2.1 Content of the expert report

First, looking at the IBA Rules, the criteria set out for the substantive content of the report can be found in Article 5(2) which requires that the report include:

2. The Expert Report shall contain:
 - (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
 - (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
 - (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
 - (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
 - (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
 - (h) the signature of the Party-Appointed Expert and its date and place; and
 - (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

While the CIARB Protocol is similar to the IBA Rules, as it was designed to align with the IBA Rules, it gives additional guidance as to the contents of the expert report. The requirements for the expert's written report are set out in Article 4.4 of the CIARB Protocol:

4.4 An expert's written opinion should:

- (a) contain the full name and address, background, qualifications, training and experience of the expert;
- (b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;
- (c) contain a statement setting out all the instructions the expert has received from the appointing Party and the basis of remuneration of the expert;
- (d) only address the issue or issues in respect of which the Arbitral Tribunal has provided directions for expert evidence to be adduced;
- (e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;
- (f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;
- (g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);
- (h) state which matters the expert has been unable to reach an opinion on;
- (i) state which matters (if any) are outside the expert's area of expertise;
- (j) adequately reference all documents and sources relied upon;
- (k) contain a declaration in the form set out in Article 8; and
- (l) be signed by the expert and state its date and place.

Importantly, as well as stating the facts upon which the opinion is based, Article 4.4(f) of the CIARB Protocol requires that report should state the assumptions upon which the opinion is based. The UNCITRAL Notes on Organizing Arbitral Proceedings, while not specifying the content of a party appointed expert's report, in relation to tribunal appointed experts state that: "In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report the terms of reference as well as information on the method used in arriving at his or her conclusions, the sources of information relied upon, and the factual assumptions made in

preparing the report.”¹⁸ It is surprising that the IBA Rules do not explicitly require the expert to state his or her assumptions (although assumptions may be regarded as falling within the “information used in arriving at the conclusions”), as if experts are being asked or making different assumptions than their results will be invariably different.

The CIARB Protocol also goes further in requiring the expert to state which facts, matters and documents, including any assumed facts or other assumptions, have been *considered* in reaching the opinion.¹⁹ This addresses the risk, further discussed below, of the expert only selectively including reference to favorable facts and documents in his or her report.

2.2 What documents and material the expert should reference in the report

Another key aspect is what documents and material should be attached to the report or referenced in the report. The IBA Rules only require the party appointed expert to provide the documents on which the expert *relies*.²⁰ This may mean that adverse information is not referred to in the report.

Mr Kantor reviewed the professional codes of conduct which govern many expert witnesses.²¹ While these vary, many require that expert witnesses disclose both favorable and adverse facts and materials. He concluded that it would be appropriate to impose a duty of experts to provide full information even if adverse: to include in any written and oral evidence all material information, whether supportive or adverse to the professional analyses and conclusions found in that expert’s evidence.²² In his words there should be a duty on expert witnesses to tell not only “the truth” but “the whole truth”.²³

However, this point of view is not widely accepted. Paul Friedland and Kate Brown De Vejar argued that while production can be expected of documents that have been relied on by the expert and referenced in the report, as required by the IBA Rules, production

¹⁸ UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS 30 (2016)

¹⁹ Article 4.4(e) of the CIArb, PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION (September 2007).

²⁰ Article 5(e) of the CIArb, PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION (September 2007).

²¹ Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*, Volume 26, Issue 3, *ARBITRATION INTERNATIONAL* 323 (1 September 2010).

²² *Ibid.*, 323.

²³ *Ibid.*, 376

should not be extended to all documents reviewed by an expert.²⁴ Mr Friedland and Ms Brown De Vejar suggest that any concern about the concealment of material can be addressed by cross examination.²⁵

The CIARB Protocol, similarly to the IBA Rules, requires the expert to adequately reference all documents and sources relied upon. However, the Protocol arguably goes further than the IBA Rules given its requirement that the expert states what facts, matters and documents have been considered and the requirement in Article 8 that the expert draw to the attention of the tribunal all matters, of which the expert is aware, which might adversely affect his or her opinion.²⁶ This is closer to the duty that Mr Kantor identifies but which is not yet widely accepted.

2.3 Role of counsel in the report drafting process

As to the role of counsel in the report drafting process, there is no requirement in international arbitration for the disclosure of draft reports and all expert-counsel communications. Mr. Friedland and Ms. Brown De Vejar concluded that the prevailing practice in international arbitration is that disclosure of expert counsel communications is not required,²⁷ reflecting a consensus that these documents are not considered sufficiently relevant nor material to the outcome of the case (in other words that these documents do not satisfy the criteria for disclosure in the IBA Rules).

The CIARB Protocol specifically provides that instructions to the expert are not privileged (which is not surprising as many common law jurisdictions require that these be disclosed) but will not be subject to a disclosure order unless there is good cause. Further the CIARB Protocol provides that drafts and working papers are privileged:

5.1 All instructions to, and any terms of appointment of, an expert shall not be privileged against disclosure in the Arbitration. The Arbitral Tribunal shall not, in relation to the instructions or terms of appointment:

²⁴ Paul Friedland, Kate Brown De Vejar, *Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration*, Volume 28, Issue 1, *ARBITRATION INTERNATIONAL* 1, 12 (1 March 2012).

²⁵ *Ibid.*, 9.

²⁶ Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*, Volume 26, Issue 3, *ARBITRATION INTERNATIONAL* 323, 333 (1 September 2010).

²⁷ Paul Friedland, Kate Brown De Vejar, *Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration*, Volume 28, Issue 1, *ARBITRATION INTERNATIONAL* 1, 3 (1 March 2012).

- (a) order disclosure of the instructions or appointment or any document relating thereto; or
- (b) permit any questioning of the expert about such instructions or appointment unless it is satisfied that there is good cause.

5.2 Drafts, working papers or any other documentation created by an expert for the purposes of providing expert evidence in the Arbitration shall be privileged from production and shall not be disclosable in the Arbitration.

It is widely accepted that counsel may assist an expert in writing his or her report in order to make the report of use to the tribunal. In my experience, this is not necessarily a bad thing: inexperienced technical experts do not know how to write a report that is comprehensive, clear, and comprehensible by a tribunal unfamiliar with the subject matter. Particularly when expert evidence is required in an obscure technical field, it can be very difficult to find someone qualified and willing to give expert evidence and it is likely that that person would not be experienced in giving evidence or writing an expert report for arbitrations.

Nevertheless, given the unlikelihood of expert counsel communications being disclosed, unscrupulous counsel in international arbitration may feel freer to influence the expert through the drafting process. Naturally if this is exposed in cross examination or is obvious on the face of the report, this leads to a lack of credibility for the expert and counsel.

3. JOINT EXPERT MEETINGS AND REPORTS

The use of joint expert meetings and joint reports can help to address the concern about counsel's involvement in the expert report drafting process and the independence of experts by exposing overly partisan experts.²⁸ The purpose of the joint expert meeting and subsequent joint report is to bring the experts closer and to more clearly distil the issues for the Tribunal upon which the experts agree and disagree.²⁹

The IBA Rules recognise the power of the Tribunal to order a joint meeting and but it does not always occur. Article 5(4) of the IBA Rules states:

²⁸ Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, Volume 24, Issue 1, ARBITRATION INTERNATIONAL 137, 139 (1 March 2008).

²⁹ *Ibid.*, 143.

The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

Still, the IBA Rules remain silent about many questions, such as how the meeting should be conducted, the timing, who can be present, who determines the agenda, whether the discussion (other than the report) is privileged from disclosure to the parties or whether it can be referred to in the hearing. All of these are questions upon which expectations can vary and practices do vary. As the expert John Temple-Cole notes pre-trial expert conclaves have become the norm and “Where it does occur, the conclave usually results in the production of at least one joint expert report or statement; however, how that occurs, and what the joint report contains, varies considerably.”³⁰

While those from the Anglo-Australian tradition would not expect counsel to be present at the joint meeting, even if it entails a loss of control, as they might consider counsel’s attendance a hindrance to consensus amongst experts; that is not what all practitioners expect. Many new players may not have any experience of this process. It was recounted to me that in one arbitration counsel for one party demanded to be present at the joint meeting of experts in order to refer to the content of the discussions in subsequent litigation. Not surprisingly the opposing party disagreed and this led to the cancellation of the joint meeting.

The CIARB Protocol offers more guidance. It sets out in Article 6 an elaborate process by which the experts first meet (perhaps after preparing draft summary opinions that are privileged from production to the tribunal) to identify issues, tests and methodologies; record what is agreed, perhaps conduct joint testing, and then serve expert reports on areas of disagreement.

This process, however, may not be suitable for all cases and does not appear to be standard. In Mr Temple-Cole’s experience the experts meet in conclave after the production of the quantifying expert’s report

³⁰ John Temple-Cole, *Experts Should Be under Control When Providing Evidence in Arbitration*, ASIAN DISPUTE REVIEW 63, 66 (April 2018).

and responsive report.³¹ This is consistent with the process in litigation in New South Wales, Australia, in which the courts were early adopters of joint reports and concurrent evidence. The conference between the experts takes place, without lawyers, after the filing of the individual expert reports and results in the preparation of a joint report (again without lawyer involvement) that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including short reasons as to why.³²

Neil Kaplan has proposed a slightly different process whereby reports are first served in draft form on a without prejudice basis. Subsequently, a joint without prejudice meeting consisting of experts only is held to reduce or clarify differences; a joint report is served setting out the matters on which they agree and disagree and then the draft reports, with any necessary amendments, are signed and served.³³

Mr Temple-Cole records that some tribunals require experts to produce one joint report on the matters upon which they agree and “to the extent that they disagree, a separate report by each expert setting out those areas of disagreement”.³⁴ This can result in an additional three reports and as noted by Mr Temple-Cole seems unnecessarily complex.

The UNCITRAL Notes on Organizing Arbitral Proceedings offers a number of suggestions, perhaps reflecting the different approaches taken by different tribunals:

95. The arbitral tribunal may subsequently invite the party-appointed experts who are addressing the same topic to submit a joint report identifying the points on which they agree and disagree, which may narrow issues to be dealt with later in the proceedings.³⁵

97. The arbitral tribunal may also request the party-appointed experts to exchange their reports, and then hold an informal meeting where the points on which the experts agree or disagree are discussed. With this approach, the

³¹ Ibid.

³² Justice Rachel Pepper, ‘Hot-tubbing’: the use of concurrent expert evidence in the Land and Environment Court of New South Wales and beyond, paper presented at the 2015 ANNUAL ALASKAN BAR ASSOCIATION CONFERENCE, 15, (14 May 2015).

³³ Neil Kaplan, *Chapter 19: The Use of Experts in International Arbitration*, in THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 187, 190 (Shaughnessy and Tung eds., Jan 2017).

³⁴ John Temple-Cole, *Experts Should Be under Control When Providing Evidence in Arbitration*, ASIAN DISPUTE REVIEW, 63, 67 (April 2018).

³⁵ THE UNCITRAL NOTES OF ORGANIZING ARBITRAL PROCEEDINGS 29 (2016).

experts may respond to each other's questions more effectively, find common ground and/or take the time to discuss any specific issues. The reports of the experts can then be modified accordingly or the outcome of such procedure can be communicated by the experts at the hearing.³⁶

While many prominent arbitrators see joint meetings as very valuable,³⁷ and indeed in many common law courts they are adopted as a standard process, they only work if the experts and parties approach them in the *bona fide* spirit of assisting the arbitral tribunal. If experts see their role as advocates, are too intransigent or are instructed not to concede points – then the process is unlikely to succeed.

In Hong Kong, Hon Lam J made some salient observations on the current expectation of courts in relation to the approach of experts to joint meetings and expert reports:

488. Another acid test on the reliability of an expert witness is the way in which he deals with the arguments of his counterpart. Nowadays, the court expects expert witnesses to act responsibly and professionally in meeting the points raised by the experts on the other side. *The whole point of requiring expert reports to be served or exchanged and directing meetings of experts and the preparation of joint statements/reports is to facilitate independent and frank communications between the experts in order to narrow down their differences through a dialogue on a professional level.* The objective is to focus on the real issues that need to be adjudicated by the court. Unnecessary and unhelpful arguments should be trimmed down through these pre-trial procedures.

...

490. The joint meeting is an opportunity for the experts to narrow their differences. It takes two to tango. It requires both experts to focus on the objective of the meeting and act responsibly and frankly with each other. *At such meeting, an expert should bear in mind his overriding duty to the court to act independently without any fear of compromising his client's position.* Thus if his professional judgment dictates that a

³⁶ Ibid.

³⁷ Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, Volume 24, Issue 1, ARBITRATION INTERNATIONAL 137, 139 (1 March 2008). Also see Jeffrey Waincymer Chapter 12: *General Witness and Expert Evidence*, in PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 885, 936 (2012).

concession should be made in the light of arguments advanced by the other side, he should not feel inhibited from doing so due to conflicting opinion previously expressed by him in favor of his client. On matters within his expertise, an expert needs not seek instructions from his client before reaching an agreement with the other side's expert. A self-respecting expert should not accept instructions that placed limitations on his professional judgment in the performance of his duty as an expert witness. And it is not proper for lawyers to give such instructions on behalf of his clients. *In line with his duty to act independently, an expert should not be dictated by his client in respect of the substance of his expert evidence and the agreement to be reached in joint meeting.*³⁸ (emphasis added)

As the above comments make clear the value of a joint expert meeting and report is in narrowing differences between the experts and this requires experts to act independently. There is less value in having such joint expert meetings and reports in arbitration if experts do not see themselves as having an overriding duty to the tribunal and the necessary independence from their clients.

Further, as noted by Mr Temple-Cole, it is not uncommon for the joint expert report to be ignored at the arbitration hearing with the focus of cross examination being on the original reports.³⁹ Query then whether the parties and the arbitral tribunal are deriving the benefits they could from the joint report and whether the joint report is achieving its stated purpose of narrowing the issues. In this regard it is important that the Tribunal clarify their expectations as to the duties of the experts and procedure for the joint meeting and joint report.

4. PROCEDURAL ORDER AND CASE MANAGEMENT

Given the differing processes and expectations which I have discussed, there is a need for Tribunals to grapple this issue early in the proceedings. Due to the lack of detailed guidance in the IBA rules, some tribunals are developing their own protocols – the contents of which may come as a surprise to some counsel (particularly those not very experienced in International Arbitration) – showing the importance of addressing this issue early in the proceedings.

³⁸ Lam J, *Chinachem Charitable Foundation Ltd v Chan Chun Chuen & Another*, [2010] Hong Kong Court of First Instance 88, paras 488-490.

³⁹ John Temple-Cole, *Experts Should Be under Control When Providing Evidence in Arbitration*, ASIAN DISPUTE REVIEW, 63, 67 (April 2018).

The desirability and need for expert evidence, the Tribunal's expectations as to the expert's duty and procedure for expert evidence should be discussed in the first case management conference and set out in the first procedural order. Particularly as the Tribunal's expectations as to the expert's duty and procedure for expert evidence will influence the choices that parties make as to the appointments of experts.

The CIARB Guidelines suggest that arbitrators should set out the precise procedure for the collection, giving and testing of expert evidence in a procedural order whether it be a party or tribunal appointed expert. Some of the topics which should be considered, following consultation with the parties, are:⁴⁰

- (1) A list of issues on which the expert is requested to express an opinion;
- (2) A protocol for communication with the parties, and with any experts appointed by the parties, and the arbitrators;
- (3) Instructions concerning examinations, tests, experiments and site visits, if any;
- (4) The timeframe within which to complete the expert report;
- (5) The method of exchange of expert reports;
- (6) The procedure following the exchange of the expert report;
- (7) The procedures for testing the expert evidence, including any requirement to attend a meeting and/or a hearing as well as the relevant arrangements for such meetings and/or hearings.

In my view, the procedural order should also cover the following issues:

- a) The expert's duty;
- b) Whether the experts will be expected to make the declaration in Article 8 of the CIARB Protocol or another form of declaration;
- c) The basis upon which the expert report should be prepared (Article 5 of the IBA Rules or Article 4 of the CIARB Protocol);
- d) Disclosure of the documents considered or relied on by the expert (see discussion above as to whether an expert should disclose all the documents considered by him or her or only those upon which he or she has relied);
- e) Whether the instructions from the party to the expert are required to be disclosed (the approach in the CIARB Protocol

⁴⁰ Commentary on Article 4, CIARB, PARTY-APPOINTED AND TRIBUNAL APPOINTED EXPERTS INTERNATIONAL ARBITRATION PRACTICE GUIDELINE (2016).

- and the IBA Rules is to only require a statement of those instructions);
- f) Whether the documents provided to the expert are required to be disclosed or exchanged;
 - g) The standing of drafts and working papers (see Article 5.2 of the CIARB Protocol);
 - h) The sequencing and/or exchange of the expert reports, including any joint report;
 - i) If and when the experts are to meet, who is to attend, how it is to be documented (if at all) and what is to be the outcome of that joint meeting;
 - j) How the experts will be examined at the hearing.⁴¹

In many arbitrations expert evidence on technical and quantum issues is of critical importance to resolving the issues in dispute. It is also a major contributor to the expense of parties. Using experts in the most efficient and most effective way possible is important for both Tribunals and the parties that appoint those experts. Detailed directions from the Tribunal, as early as possible, as to how the expert evidence is to be adduced and what procedures will be used to narrow the differences between the experts will assist Tribunals and parties to best use those experts as well as to help resolve any differences as to expectations.

⁴¹ In this respect, the CIArb has recently issued helpful guidelines on witness conferencing: CIArb, GUIDELINES FOR WITNESS CONFERENCING IN INTERNATIONAL ARBITRATION (April 2019).

Chapter 5

Conflicting Assumptions and Expectations on the Role of Expert Evidence in Arbitration: An Expert Perspective

*James Nicholson**

1. INTRODUCTION AND SUMMARY

International arbitration looks slightly different from the chair in the centre of the hearing room than from the three sides of the typical U-shaped hearing room layout, and a large global team of expert witnesses has collectively a breadth of experience of the assumptions and expectations surrounding the use of experts in international arbitration that may be of interest to practitioners and other actors. It is with these points in mind that I undertook a survey of testifying colleagues around the world to gain insight into the conflicting assumptions and expectations on the role of expert evidence, from the expert perspective.

In summary, our experience is that:

- There is a significant degree of convergence in expectations around many aspects of the way experts are used in international arbitration;
- However, we also see some significant areas of divergence, with the background of tribunal members and counsel often an indicator as to likely approach;
- The use of tribunal-appointed experts in our experience is rare (and with no settled process for using them when they are appointed), but may be more common when more technical expertise is needed and/ or in civil law jurisdictions;
- That the extent of adoption of other process innovations (including meetings of experts/ joint statements, witness conferencing, and slide presentations made by experts) varies by region and individual arbitrator;

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- There is a divergence in expectation as to the role of an expert, especially as to the extent of expert independence and objectivity;
- That guidelines and protocols relating to the nature of expert evidence can be useful in helping bring some alignment of expectations as to the role of experts (and particularly as to the independence and objectivity of experts) in international arbitration;
- In some cases, we see ‘too much’ expert evidence, for a variety of cases, but in others, too little given the sums at stake and difficulty of the issues;
- Expectations as to how experts should behave vary around several tricky situations that experts sometimes face, and expectations also vary around several party and counsel practices relating to the use of experts; and
- There seems to be no settled approach by tribunals as to the approach to quantifying losses (top-down/ judgemental vs bottom-up/ analytic), and the nature of expert evidence in terms of analytic depth and objectivity will vary depending on parties’ and counsels’ beliefs as to how tribunals will approach specific cases.

2. SCOPE AND METHOD

In January 2018 I surveyed 13 FTI Consulting experts (including myself), who had collectively by that month testified in international arbitration disputes on 143 occasions – and a further 263 times in court or other forums. All are general damages experts – typically accountants and Chartered Financial Analysts – and many have been active in international arbitration since the early 2000s or before.

Those surveyed were or had recently been based in London, Paris, Dubai, Delhi, Singapore, Hong Kong, Toronto, and Washington DC. As such, eleven were based in essentially Anglophone common law jurisdictions, and the remaining two in Paris.

Many of those surveyed also have experience of litigation and/ or regulatory disputes procedures in their home jurisdictions. There was no particular specialty by industry.

The survey was qualitative in design.

The views expressed in this article relate to our experiences as general damages experts, and do not cover the experiences of construction expert witnesses or other types of expert who variously appear before tribunals.

The views are those of the individuals surveyed, and not necessarily the views of FTI Consulting or of the author.¹

3. EXTENT OF CONVERGENCE

There is a significant degree of commonality in approach to the use of general damages experts in international arbitration, which typically (but far from universally) involves the following:

- Each party appoints, and pays, its own expert(s);
- Tribunal experts are only rarely appointed;
- Tribunals and counsel expect some degree of independence of experts from their instructing party (although the extent of this can vary);
- Each expert writes two reports addressing her or his instructions, with sequential rather than simultaneous exchange;
- Experts begin their testimony at the hearing with a 15-40-minute slide presentation of their main findings; and
- Experts are cross-examined by opposing counsel, and questioned by the tribunal, following their presentations.

However, we also see significant differences, including notably the following.

Counsel and tribunals with a civil law background seem to take a more restricted approach to disclosure than common lawyers. Common lawyers seem to take a more restricted view as to who qualifies as an expert witness (in terms of professional and/or academic qualifications etc.).

Lawyers from English-influenced jurisdictions appear to place more faith in the need for and ability of expert witnesses to be independent from their instructing parties, than lawyers either from the United States or civil law jurisdictions.

Lawyers from Australia and the Caribbean (and several other jurisdictions) in our experience see a more restrictive scope of privilege of communications with experts and see more of a need to distinguish consulting experts (who advise their clients but do not testify) from testifying experts.

Lawyers from the GCC countries are likely to import practices from construction disputes (in which, for example, there is more extensive use made of joint expert reports than in general damages disputes) into non-construction arbitrations.

¹ This disclaimer covers also the management, affiliates, subsidiaries, and other professionals of FTI Consulting.

More generally, lawyers from jurisdictions that are less well-established in international arbitration appear to us to vary more widely in the degree to which domestic litigation practices are imported to international arbitration, the variety of their views on the role of experts, and their expectation as to the extent of availability of documents and hence the scope and nature of expert work.

Similarly, lawyers from jurisdictions that are less well-established in international arbitration appear to us to vary more widely in their depth of overall experience of damage quantification issues. Recognising many notable exceptions, it seems to us that familiarity with damage quantification issues is higher for lawyers (a) practising mainly in English compared to other languages, (b) with a private practice background rather than an academic background, and (c) who started their careers more recently (i.e., are typically younger).

4. TRIBUNAL-APPOINTED EXPERTS

The desirability of tribunals appointing their own experts has been much discussed over the last ten years.

However, in our experience as general damages experts in largely English-language cases, the actual use of tribunal-appointed experts is very uncommon. Most of my colleagues I surveyed have *never* been involved in a case with a tribunal-appointed expert. Of the few examples we have experienced directly, most are in cases conducted by predominantly German or French arbitrators.

We see no standard process by which tribunals work with, and have counsel interact with, tribunal-appointed experts.

However, our experience is that the appointment of tribunal experts tends to add to the complexity and length of proceedings – in at least one case, by many years. Our experience may not be representative, however, since the cases we see necessarily also involve party-appointed experts and therefore may already be more complex.

It is similarly rare in our experience for parties to decide to appoint jointly a single expert, other than in cases where this is stipulated by contract.

The absence of tribunal-appointed experts and jointly-appointed experts suggests to us that parties value highly the feature of international arbitration that it allows them a degree of control over and access to the dispute resolution process, in part by appointing their ‘own’ expert with the associated ability to present and discuss damages issues with that expert in a legally privileged environment.

5. PROCESS OF TAKING OF EXPERT EVIDENCE

5.1. Meetings of experts/joint expert reports

There is wide variety in views on the desirability of meetings of experts, and the joint expert reports that often result from these meetings.

These meetings generally take place after experts have filed their reports (other than the joint report) but before the hearing. It is sometimes hoped that such meetings will help experts find common ground; and tribunals generally ask that following such meetings the experts prepare a joint report laying out the matters on which they agree and disagree, with reasons for the disagreement.

We see such meetings commonly in Asia and the GCC region; also, in English litigation. In such geographies, such meetings seem to be more common in construction-related disputes than general damages disputes. Meetings of experts are in our experience rare otherwise.

Such a process can in our view be effective in the intellectual spadework of laying out for the tribunal the precise differences between the experts, the reasons for those differences, and where applicable the implication for the overall loss assessment of each point of disagreement.

However, in our experience there is rarely any additional agreement between the experts generated by a meeting process, at least in general damages cases. In the author's view this is at least partly because each expert has already by the time of such meetings written two expert reports describing his or her views and considering further the views of the other expert, a process which generally exhausts the scope for further agreement between the experts.

Moreover, any joint expert process adds workload and hence cost to proceedings, and this is compounded when one expert attempts to use the joint expert report either (a) as a way of re-arguing her or his position on losses by commenting very extensively on each point of difference (rather than commenting high-level and cross-referring to the existing expert reports), or (b) as an opportunity to introduce new arguments etc.²

² Other than perhaps the claimant's expert introducing limited new points in response to the respondent's expert's second report, on which the claimant's expert had not previously had an opportunity to comment.

5.2. Witness conferencing

The practice of witness conferencing – by which both experts are examined simultaneously by counsel and/ or the tribunal and invited to comment immediately on each other’s answers – has (also) been extensively discussed over the last ten years. As with expert meetings, in our experience this practice is common in Asia and the GCC countries, and not systematically used elsewhere. We do not see evidence that this practice is becoming more common over the last five years or so.

We have seen a wide variety of implementations of witness conferencing. Some tribunals organise highly structured sessions, with pre-agreed questions to be put by counsel (perhaps following the order of points in any joint expert statement) and follow-up questions from counsel and/ or the tribunal. At the other end of the spectrum, we have seen witness conferencing sessions with several experts on each side appearing simultaneously, limited structure to the questions, and no guidelines as to which expert is to address which question or in which order.

Our view on witness conferencing is that, although there can be circumstances in which tribunals prefer to avoid witness conferencing, it can be an effective and efficient way for a tribunal to understand the differences between experts. This is especially so when the process is well-structured and led by a tribunal with a good overview of the issues.

5.3. Presentations on direct

The stealth change in the process of taking of expert evidence over the last ten years in our experience is the use of slide presentations by experts at the beginning of their evidence. As noted above, this is now near universal.

Once again, there is a variety of practice around presentations on direct, which vary in allowed length of time, the extent (if any) to which points or demonstratives not included in the expert reports can be used in the presentations, and how long before the hearing presentations must be shown to the other side. Tribunals further vary in the extent and nature of questions that they put to the presenting experts.

We certainly welcome the opportunity to put our views to the tribunal via a presentation on direct in a succinct and (we hope) very clear way, especially given that cross-examination is often (and deliberately) not designed to give the tribunal a global appreciation of an expert’s views.

6. DUTIES AND PROTOCOLS

Many experts are bound to a certain extent in the nature of their evidence by ethical codes of the professional bodies of which they are members. For example, a 'Fundamental Principle' of the Handbook of the Code of Ethics for Professional Accountants, produced by the International Ethics Standards Board for Accountants, is 'Objectivity – to not allow bias, conflict of interest or undue influence of others to override professional or business judgments'.³

However, there are several additional protocols and codes relating to individuals acting as experts in international arbitration, including the IBA's Rules on the Taking of Evidence in International Arbitration, the LCIA's note on Experts in International Arbitration, and the CI Arb's Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

The CI Arb Protocol provides for a number of procedural steps including that the tribunal shall identify the issues on which expert evidence is to be given, meetings of experts before the finalising of first expert reports, simultaneous exchange of expert reports, and the inclusion in the experts' declarations that: "*I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.*" These features are rarely seen in relation to expert evidence on general damages issues at least, however, and since the CI Arb Protocol was introduced in 2007, we might not expect to see these practices soon become widespread.

In addition to the CI Arb's Protocol, the other guidelines and protocols relating to expert evidence of which we are aware are in our experience sometimes helpful (a) in helping experts explain the importance of independence and objectivity to instructing parties that are not familiar with the role of an expert in international arbitration, and (b) in helping less experienced experts to understand the expectations of them in the international arbitration process.

However, experienced experts do not typically make regular reference to these guidelines, for two reasons. First, they feel they already have a good understanding of what is expected from them by tribunals, and secondly, because it is difficult to capture in a set of guidelines the principles behind being an independent and objective expert witness.

All that said, there does not seem to be settled practice in the expectations of counsel and tribunals as to expert independence. The

³ 2016 edition, Article 100.5(b).

provision in the CIArb Protocol, that experts declare that: *"I confirm that this... opinion... has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration"* is at one end of a continuum of views as to expert independence. Civil lawyers in our experience often place less weight on the necessity of a declaration of independence, and even across common law counsel and arbitrators, who are used to declarations of expert independence and place more weight on that possibility, there seems to be a variety of degrees of expectation from counsel as to the extent to which experts should lean in the direction of their instructing party on difficult judgement calls.

7. HOW MUCH EXPERT EVIDENCE?

My fellow-panellists put to me the question – is there too much expert evidence?

My colleagues and I saw several possible sources for a perception that there might be too much expert evidence:

- Experts are sometimes appointed to undertake mechanical tasks that do not require expert judgement;
- Experts are sometimes appointed that do not have the most appropriate expertise for the task they are given;
- Opposing experts are sometimes given differing instructions, leading to the oft-cited problem of the tribunal having expert evidence on certain points from only one expert ('ships passing in the night');
- Wide differences can exist between experts in the loss assessments they produce, even on the same questions and based on the same instructions.

There are several possible remedies to these problems:

- If parties consulted experts earlier in the dispute process, they may get an earlier sense of the key issues and of which arguments are unlikely to be sustainable before a tribunal (although this may have an implication for cost and management time);
- If tribunals could intervene early in a dispute process to guide the instructions given to experts, that would help produce only the more helpful expert evidence (but potentially raises other difficulties for tribunals);
- If experts met before filing their first reports to discuss and potentially narrow the issues between them, that again may help produce more focused expert evidence (although

potentially at the expense of party control, which may not be acceptable to their instructing parties).

8. TRICKY SITUATIONS

There are several difficult issues relating to the use of experts on which those surveyed saw no standardised practice. Such topics include:

- Should experts accept instructions that seem implausible to them, without commenting on this in their reports?
- How should experts deal with situations where they are not instructed to opine on points they consider relevant to their overall opinion?
- Should experts accept without comment evidence from witnesses that they consider implausible?
- What are the obligations of experts in relation to documents they have seen, that are or may be relevant, but their instructing party has chosen not to disclose?

In each of the above cases, a truly independent expert might find her- or himself acting in ways that run counter to the expectations of counsel or even tribunals in international arbitration.

Moreover, difficult questions also arise in relation to the way in which counsel and parties work with experts. Issues include:

- To what extent is it acceptable to ask several experts for preliminary views on key issues and then select the expert who has the most apparently favourable views ('expert shopping')?
- Is it acceptable to contact and share information with experts about a possible appointment with the objective of preventing that expert being appointed by the other side of a dispute?
- Is it appropriate to give experts implausible instructions as to facts?
- To what extent should counsel comment and/ or suggest alternative drafting of draft expert reports?
- How far should a party or counsel go in challenging any of their appointed expert's draft conclusions with which they disagree?

9. THE PHILOSOPHY OF TAKING OF EXPERT EVIDENCE

A wider theme emerged from the survey, around the nature of expert evidence and tribunal decisions on loss quantification.

Some awards give the impression that the loss quantification was decided by a careful analysis of the evidence and by building up the final loss figure from the underlying evidence (typically following the

evidence of one or other of the experts to a greater or lesser degree). Others however give more of an impression of having been derived with an approximate final loss figure in mind, with the underlying reasoning retrofitted to justify that figure. We speculate that this may happen either because tribunals decide on a 'fair' damages figure and then seek to explain that figure, and/ or because of some process of negotiation between members of the tribunal over what final loss figure is appropriate.

Some of the survey respondents considered it was not clear to all involved which approach a particular tribunal either should or would take.

Moreover, a party's belief as to the approach that a tribunal will take to assessing damages is likely to affect the kind of expert evidence it puts forward. If a party expects a form of 'rough justice' of a loss quantification that is seen by the tribunal as fair and essentially decided in a judgemental top-down manner, then a party may seek to put forward higher-level evidence that is perhaps less analytically robust, and emphasise the powers of the selected expert to persuade the tribunal of his or her views. However, if a party expects a more analytically led bottom-up loss assessment, it may seek an expert who will give careful detailed expert evidence and explain and defend that evidence in an authoritative way before the tribunal.

If the above is correct, the parties' beliefs about how a tribunal will decide damages issues will affect the type of expert selected and the nature and extent of the expert evidence which the tribunal will use to decide on loss quantification. Over the long run, the parties' decisions as to who to appoint as an arbitrator, and the awards rendered by arbitrators, will guide the nature of expert evidence in international arbitration.

Chapter 6

The Use of Experts in International Arbitration – Specific Issues Relating to Legal Experts

*Bernhard Berger**

1. INTRODUCTION

The topic of the 2018 ASA Annual Conference was “The Use of Experts in International Arbitration – Conflicting Assumptions and Expectations”. The purpose of the conference was to explore various aspects relating to the presentation of expert evidence and specifically address the issue of conflicting assumptions and expectations that parties may have and how an arbitral tribunal could deal with them.

My task was to deal with specific issues relating to legal experts.

As many arbitration practitioners will have experienced, parties from different cultural and legal backgrounds may indeed have different ideas of the use and purpose of legal experts in international arbitration.

This article is structured in three parts as follows:

- Different ways of presenting the law before courts (I. below)
- Legal expert testimony in international arbitration (II. below)
- Recommendations (III. below)

2. DIFFERENT WAYS OF PRESENTING THE LAW BEFORE COURTS

Before exploring the use of legal expert testimony in international arbitration, it is useful to step back and look at how legal issues are commonly presented before courts. In essence, it seems that two different approaches or traditions exist as set out below.

2.1. (Foreign) law as a factual issue

In some jurisdictions the court has a duty to apply the domestic law (the *lex fori*) *ex officio* and thus a duty to decide the law itself independent of the parties’ submissions (*da mihi facta, dabo tibi jus*).

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Yet, if the law of these jurisdictions requires the court to apply foreign law to the merits, that foreign law is treated as a factual issue that the parties must prove through appropriate means.

In these jurisdictions, counsel will usually present issues of domestic law through argument in their written and oral submissions, by reference to statutes and regulations, case law and legal writing.

By contrast, when it comes to issues of foreign law, the courts in these jurisdictions, in particular in the English tradition, will often not accept that foreign law can be “proved” simply by presenting legal argument, supported by reference to sources of law such as statutes, case law and legal commentary. Instead, they often require the parties to “prove” the relevant foreign law issue through expert witness testimony from legal practitioners or law professors from the foreign jurisdiction at issue.¹

If so, these legal experts will be treated much like any other witnesses of fact or expert witnesses on specific issues such as technical, commercial or financial matters. It will thus be for the parties to present their respective positions in the form of expert testimony, first by way of a legal opinion (legal expert report), followed by the possibility of cross-examination at a hearing before the court that is called to apply foreign law.

In the absence of sufficient evidence of foreign law, the courts may decide the legal issue at stake by applying domestic law instead.

In these jurisdictions, the role of legal experts is to serve as a means of evidence. With their testimony, the parties aim to prove a fact.

2.2. Law as a question of law

In many other jurisdictions, in particular in the civil law tradition, the approach is different. These jurisdictions treat both domestic and foreign law the same way, in that they require the court to decide issues of law *ex officio*, requiring them to follow the principle of *jura novit curia*,² whatever the law applicable to the merits of the case.³

¹ See, e.g. Pierre A. Karrer, *Legal Experts’ Report – When Academic Theory meets Arbitral Practice*, in *Festschrift Elsing*, Deutscher Fachverlag, 2015, p. 211. Donald Francis Donovan, *Reexamining the Legal Expert in International Arbitration*, Kaplan Lecture, Hong Kong, 15 November 2017, Publication draft – 28 December 2017, p. 4. See also Julian D.M. Lew QC, *Jura Novit Curia and Due Process*, in *Liber amicorum en l’honneur de Serge Lazareff*, 2011, p. 400 ss. Audley Shepard, *Applicable Substantive Law*, in Lew et al. (ed.), *Arbitration in England, with Chapters on Scotland and Ireland*, 2013, §12.07.

² On this principle in general, see e.g. Wolfgang Wiegand, *Jura novit curia vs. ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts*, in: *Rechtsetzung und Rechtsdurchsetzung*,

In these jurisdictions foreign law is thus treated as a question of law rather than as an issue of fact, such that the court is not confined to the (foreign) law presented by the parties, and the presentation of the (foreign) law is not restricted to any particular form. Instead, the court is deemed to know the law not only with respect to domestic law but also as to foreign law, except that with regard to foreign law the court may generally require the assistance of the parties and, in specific circumstances, may require them to prove the content of the foreign law at issue.⁴ In addition, the courts may restrict themselves to apply foreign law in accordance with certain guidelines and principles, as is the case, for example, before Swiss courts:⁵

“It is in the nature of law that many legal questions are discussed controversially in both case law and legal writing. For this reason, it cannot be the task of a Swiss court to apply any aspect of a foreign substantive law autonomously and in accordance with principles of interpretation that it has established itself. Instead, it shall take guidance from the current state of discussion in such other country on the legal issues in dispute. Accordingly, the Supreme Court follows the prevailing opinion and, in case of controversies between case law and doctrine, the case law of the highest authority in order to take account of legal certainty and coherence of case law.”

In the absence of sufficient evidence on the content of the foreign law, the courts may still decide the legal issue at stake by applying domestic law instead.⁶

Festschrift für Franz Kellerhals zum 65. Geburtstag, hrsg. von Monique Jametti Greiner, Bernhard Berger, Andreas Güngerich, Bern 2005, pp. 128–131. On the use of the principle in international arbitration, cf. e.g. Gabrielle Kaufmann-Kohler, «Jura novit arbiter» – Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l’arbitre international, in: De lege ferenda, Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch, éd. par Anne Héritier Lachat et Laurent Hirsch, Genève 2004, pp. 71–78. See also Manuel Arroyo, Which is the better approach to Jura Novit Arbiter – the Swiss or English? in Müller / Rigozzi (ed.), New Developments in International Commercial Arbitration, 2011, 27 ss.

³ Cf. Karrer, op. cit., pp. 211–212. Donovan, op. cit., pp. 2–3.

⁴ See, e.g. Article 16(1) of the Swiss Private International Law Act on the “Establishment of foreign law”, which states as follows: “(1) The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.”

⁵ Swiss Supreme Court Decision 4P.137/2002 of 4 July 2003 E.7.2.1; Swiss Supreme Court Decision 4A_428/2008 of 31 March 2009 E.3.1.

⁶ See, e.g. Article 16(2) of the Swiss Private International Law Act, which states as follows: “Swiss law shall apply if the content of the foreign law cannot be established.”

In these jurisdictions, the parties will usually present issues of law, whether domestic or foreign law, through briefing and argument from their counsel with citations to relevant legal authority such as statutes, case law and scholarly writing. Yet they still sometimes submit legal opinions established by professors of law or eminent legal practitioners on issues of domestic law. For foreign law, even in these jurisdictions the presentation of legal opinions is fairly common, probably rather the rule than the exception.

In these jurisdictions, however, legal experts do not serve to prove a fact. Their role is limited to bolster the legal positions advocated by the parties on how the case should be decided on the merits. In these jurisdictions, legal experts are not necessarily subjected to cross-examination, unless the legal expert report (legal opinion) is relied on to prove the content of foreign law where the burden to prove that content has been imposed on the parties.

3. LEGAL EXPERT TESTIMONY IN INTERNATIONAL ARBITRATION

International arbitration is “international” by definition. It involves parties, counsel and arbitrators from different jurisdictions and cultural backgrounds, and as such is a transnational process, even though by the choice of the seat it is tied to a particular *lex arbitri*, and by the choice of a governing law it is tied to the body of law of a particular jurisdiction. It is just obvious that, as often claimed, there is no “foreign” law in international arbitration, just as little as there is any “domestic” law. Instead, the bottom line is that “all laws are just law”.⁷

Therefore, the approach to legal issues before international arbitral tribunals is fairly like the one prevailing in the jurisdictions presented under 2.2 above. International arbitral tribunals will normally regard legal issues as questions of law, not fact.⁸ And they will normally take the view that the arbitrators should determine the content of the applicable law to the best extent possible of their own motion (*ex officio*),⁹ with the assistance of the parties but without any general rules to guide them.¹⁰ For obvious reasons, unlike courts,

⁷ Cf. Karrer, *op. cit.*, p. 212. See also Lew, *op. cit.*, p. 399.

⁸ Cf. Shepard, *op. cit.*, §12.07.

⁹ Lew, *op. cit.*, p. 399, pp. 410-411. In similar terms see, e.g. International Law Association, Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Resolution No. 6/2008, which state that “arbitrators are not confined to the parties’ submissions about the contents of applicable law” (Recommendation 7).

¹⁰ Similarly, Julian D.M. Lew QC, *Jura Novit Curia and Due Process*, in *Liber amicorum en l’honneur de Serge Lazareff*, 2011, p. 399. In this spirit, the ILA Recommendations (*op.*

international arbitral tribunals may not decide the case by applying “domestic” law if the relevant “foreign” law cannot be established.¹¹

Yet, it is quite striking to see that the two different ways of presenting issues of (foreign) law before courts have somehow also spilled over into international arbitration.¹²

In some cases, the parties prefer that their counsel plead the relevant issues of law directly to the arbitral tribunal by relying on legal authority such as statutes, case law and legal commentary. If their counsel is not trained in the law applicable to the merits, these parties would simply expect their counsel to associate with a law firm that has the required (local) legal expertise.¹³

In other cases, however, the parties prefer to present their legal position in the form of legal expert testimony, first in the form of one or more expert reports (legal opinions), and then subject to cross-examination at an evidentiary hearing.¹⁴

Under the first approach, the law is presented to the arbitral tribunal much like issues of law are advocated before local courts in jurisdictions where (foreign) law is always regarded as law, not fact.

Under the second approach, however, the way the parties plead the law rather resembles the manner in which issues of law are presented to local courts in jurisdictions where foreign law is treated as a question of fact. Indeed, by relying on legal expert testimony, the parties deal with the law as if it was a fact subject to proof, and they offer “evidence” in support of their legal position essentially in the same way as they do in relation to other factual allegations that require particular expertise, such as e.g. a construction defect through expert testimony of an engineer or architect, or market evaluations and financial analysis in support of a damages claim through expert testimony of a forensic accountant.

Which approach is preferable?

cit.) confirm that in ascertaining “the contents of a potentially applicable law or rule, arbitrators may consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties’ advocates, opinions and cross-examination of experts, scholarly writings and the like” (Recommendation 9).

¹¹ At best, they could, as proposed by the ILA Recommendations (op. cit.) in a well-meant but doubtful effort to close that gap, suggest to the parties to “apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard” (Recommendation 15).

¹² Cf. Judith Gill, *The Development of Legal Argument in Arbitration: Law as an Afterthought – Is It Time to Recalibrate Our Approach?* Caron et al. (ed.), *Practising Virtue – Inside International Arbitration*, 2015, pp. 401-403.

¹³ Gill, op. cit., p. 403.

¹⁴ Gill, op. cit., p. 402.

I take the view that the question cannot be answered in the abstract, and the answer will quite often depend on subjective preferences.

Personally, I tend to share the views of those who submit that in the majority of cases, the method of advocacy by counsel is more productive, expeditious and cost-effective than that of testimony by legal experts.¹⁵

What is key, in my view, is to see that whenever the relevant sources on the applicable law (statutes, case law, commentary, etc.) are available, there is in principle no compelling reason to introduce expert testimony. This is so because in international arbitration the arbitrators, at least if they are lawyers, are supposed to be the “legal experts” themselves. They have been selected by the parties to decide their case in accordance with the legal system that governs the dispute, no matter whether they are qualified to practice in that jurisdiction. In particular, they are expected to have the capacity to read and understand sources of law, and to assess, weigh and evaluate legal argument, whatever the law applicable. Indeed, international arbitrators are expected to “think like lawyers”,¹⁶ such that there is in principle no need to present legal expert testimony to help them understand the law, whether or not they are trained in that law.

With these considerations in mind, it is suggested here that the parties should carefully evaluate in each case whether presenting legal issues through legal expert testimony makes good sense. In fact, in many cases to do without legal experts may save considerable effort, time and costs, without causing any harm to the strength of one's own legal position.

4. RECOMMENDATIONS

The above *tour d'horizon* shows that there may well exist conflicting assumptions and expectations between the parties (and arbitrators) in relation to the use and usefulness of legal experts in international arbitration.

This leads to conclude this presentation with a (non-conclusive) list of recommendations that parties, counsel and arbitrators may consider helpful when dealing with the issue of how legal questions should be presented to the arbitral tribunal.

¹⁵ Donovan, *op. cit.*, p. 2. Gill, *op. cit.*, p. 403.

¹⁶ Donovan, *op. cit.*, p. 9.

Recommendation 1: *Address the possible ways of presenting the law at an early stage of the proceedings.*

It is advisable for the arbitral tribunal to raise from the beginning, e.g. in the first case management meeting, how it expects the parties to present the relevant legal issues, and in particular to discuss with them the pros and contras of presenting legal argument through legal expert testimony.¹⁷ That may help avoiding unpleasant surprises with potential adverse effects on the procedural calendar at later stages of the arbitration, e.g. if the party that has the “last word” in the exchange of pre-hearing submissions, all of a sudden supplies a legal opinion at the last minute.

If it is determined that the parties may, if they so wish, rely on legal expert testimony, the tribunal may wish to further clarify at the outset that any such legal expert will be treated like any other party-appointed expert, e.g. in accordance with Article 5 of the IBA Rules on the Taking of Evidence in International Arbitration, if these Rules have been adopted. That may help the parties to understand that the engagement of legal experts will not necessarily stop with the submission of their written reports, but that they may be subjected to cross-examination, with all the associated burden, including time and costs for preparation, travel and appearance of the legal experts.¹⁸

Recommendation 2: *Determine at the outset that legal opinions will not be considered as “sources of law” and do not constitute “evidence” in the strict sense.*

Again, in order to avoid subsequent surprises, it is suggested that the arbitral tribunal should make clear from the start that it will apply the law ex officio, while at the same time making the parties aware that they are required to assist the tribunal in establishing the content of the applicable law. In particular, the arbitral tribunal should be transparent with the parties to the effect that it will consider legal issues, whatever the law applicable, as questions of law, not fact. That

¹⁷ See, e.g. also ILA Recommendations (op. cit.), according to which “arbitrators should promptly [...] establish appropriate procedures as to how the contents of the law will be ascertained” (Recommendation 3).

¹⁸ The author recalls a case where one party had submitted a legal opinion by a law professor. When the other party called the professor to appear, the tribunal was informed that the professor could not attend the hearing as he was on vacation, the party purporting to have been unaware that a legal expert could be called to testify. The other party then requested that the legal opinion be removed from the record. The Tribunal decided to leave the legal opinion on file, noting that it would regard the opinion as part of the party’s legal argument, and noting that its decision was without prejudice to the opinion’s relevance, materiality and weight.

may help avoiding the parties to think that legal argument would be treated the same way as factual allegations, i.e. by applying rules of evidence or legal standards of proof, such as e.g. the standard of “preponderance of the evidence” or the standard of “beyond reasonable doubt”. As the case may be, it may also help the parties to better assess whether legal expert testimony may be useful and add value to their case at all.

Recommendation 3: *Make sure that the legal opinion of your expert is concise and short.*¹⁹

Parties should be aware that engaging legal experts will necessarily result in certain overlaps and duplications, as the (same) legal issues will not only be pleaded and briefed by counsel, but in addition through separate expert reports. With this in mind, legal opinions should be kept as short as possible and succinctly focussed on the relevant legal problem(s). Otherwise, they risk being counter-productive, in that the arbitrators might see them as a nuisance rather than as a useful tool.²⁰

Recommendation 4: *If possible, legal expert reports should try to avoid opining on how the tribunal should decide the case.*

The most important and challenging task of the arbitral tribunal is to render a decision on the merits of the dispute in accordance with the applicable law. This is what the arbitrators have ultimately been chosen for to do by the parties. In my experience, it is therefore neither beneficial for the credibility nor for the overall appearance of a legal expert if his or her legal opinion goes well beyond to explain what the law is, by suggesting in no uncertain terms how the law should be applied to the case at issue and thus trying to convey to the arbitral tribunal how it should decide the dispute.

Here is a telling example, which I witnessed a few years ago in a case where the tribunal had to determine, among other things, whether a joint-venture partner had acted in bad faith in dealing with certain matters at the level of the joint-venture company. One of the legal opinions was peppered with statements such as the following:

¹⁹ This is indeed a general recommendation that applies to any written expert evidence. See Neil Kaplan, *The Use of Experts in International Arbitration*, in Shaughnessy & Tung (ed.), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, 2017, p. 190.

²⁰ The author remembers a case where the various legal opinions of two law professors were together almost twice as long as the parties’ written pleadings. As one can imagine, that was not only rather boring, but also quite exhausting and to some extent annoying.

“In the case of the JV-Company, the directors of A. had acted in bad faith because the board of directors (including the A. directors) unanimously resolved to comply with the JV-Agreement.

[...]

However, in the present arbitration case, it is obvious that the Respondents have acted in bad faith by failing to comply with their obligations under the JV-Agreement and the A. directors had failed to comply with the board resolution (for which they have themselves voted in favour).”

These types of statements pleading the appointing party's case in a legal opinion are, to put it mildly, just wasting the arbitrators' time. What I did not miss from the appearance of the law professor who had written this opinion is the following conversation with opposing counsel in cross-examination:

Counsel: “Then I would like to move on. Do you know how many references to good or bad faith your opinions include?”

Professor X: “Many times, but I don't remember how many.”

Counsel: “I stopped counting at 30.”

If legal experts nevertheless consider it fit to express views on how to apply the law to the case (sometimes they are urged to do so by “their” parties), he or she should do so with *souplesse* and in deference to the fact that this task is ultimately reserved for the arbitral tribunal.

Recommendation 5: *Sometimes less is more!*

Listening to an oral examination of legal experts after having read their written reports is in my experience rather often not much further enlightening, no matter whether the legal experts are subjected to cross-examination or heard sitting together at the witness stand in a so-called “witness conferencing” (or “hot tubing”). This is so in part because legal experts are lawyers, such that they – like counsel and the arbitrators – think like lawyers. They normally have adopted the legal position advocated by their appointing party²¹ and, like lawyers do, carefully avoid making any “mistakes” or unnecessary concessions.

Bearing this in mind, the parties are in my view well advised to consider that, in practically any international arbitration, cross-

²¹ Gill, op. cit., p. 403.

examining the other party's expert witnesses is a right, not an obligation. The parties are free to exercise that right as they see fit. If the appearance of an expert witness has not been requested, none of the parties is deemed to have submitted to the correctness of the content of the expert report, as aptly stated, e.g. in Article 5(6) of the IBA Rules on the Taking of Evidence in International Arbitration. In other words, no adverse inference may be drawn by the tribunal from a decision not to cross-examine a legal expert. Instead, the tribunal remains free to assess the content of any such report, including legal expert reports, largely as it considers appropriate.

Chapter 7

The Assessment of Expert Evidence: The Case of Tribunal-Appointed Experts

*Pierre Tercier**

1. INTRODUCTION

The role of experts has become a fundamental one in dispute resolution proceedings, and arbitral proceedings in particular. This is because arbitration proceedings are increasingly complex, calling for expertise that arbitrators, still traditionally chosen from the legal world, do not necessarily master. Experts' appointment to opine on specialized aspects of a case is, therefore, almost inevitable. The final decision, nonetheless, is not in their hands; instead, through their conclusions, experts largely contribute to the decisions that arbitrators themselves have to take.

With this being said, it becomes more necessary to choose the most appropriate method in the presentation and assessment of expert evidence. But what is appropriate in this respect varies, as international arbitration is exposed to more than one legal cultures. That which is accepted by one legal culture is not necessarily recognized by another. Specifically, the common law culture prefers the party-appointed expert solution, as opposed to the civil law one which views tribunal-appointed expert evidence more proper. There is, therefore, no standard solution. Indeed, an arbitral tribunal enjoys the discretion, usually after consulting with the parties, to choose the method that is the most appropriate for a case and that assists it in the best way to render an optimal decision.

It is, nonetheless, the case, that the proponents of the common law approach defend it in strong terms without always objectively looking at the case of other approaches, the tribunal-appointed expert in particular.¹ Therefore, and in line with the spirit of international

* I would like to thank very warmly my associate, Ms Maria Athanasiou, who has assisted me in the preparation and the drafting of this note.

¹ During his presentation, Mr Michael Young QC set out the contrasting "activist" and "remotest" views of the roles of experts, arguing that the latter - which reflects the practice from the civil law culture and considers that experts should respond to specific instructions - may have a less comprehensive view of the case than ones who are working more actively alongside counsel.

arbitration and the need to safeguard a balance between all differing cultures, I will look, with the present contribution, at the case of tribunal-appointed experts. I will begin by recalling the principle itself (section 1 below), continue with the presentation of its main applications (section 2 below) and end by offering a brief assessment of the situation (section 3 below).

1.1. The principle

1.1.1. The problem

As mentioned above, in a system as it is today widely practiced, arbitrators are not necessarily specialized in the area in which a dispute arises. The tradition is to appoint lawyers who are in principle able to master the procedure and substantive law; in this respect, the solution is largely comparable to that which prevails before national courts and pursuant to national law. As such, it is inevitable that arbitrators often need additional information on some of the issues that will form the basis of their decision. Such information may be provided to them primarily by counsel, through their submissions, or by the examination of witnesses. However, when the difficulty of certain questions exceeds a certain level of knowledge, recourse to experts becomes indispensable.

The most common questions subject to expertise are the following:²

- *Questions of technical nature.* This constitutes the classical field where it may be necessary to call for an expert. Expertise on technical aspects of a case may assist in the understanding of certain industry practices and standards for example that are relevant to the overall understanding of the facts of a specific case.
- *Questions of financial nature.* Questions in relation to this relate primarily to the fixing of damages. Accountants are usually called upon to provide evidence as to the quantum of the claims, which usually comprises asset valuations, as well as profit projections.
- *Questions of legal nature.* In principle, questions of legal nature fall under the competence of the arbitrators themselves. This is particularly the case when a member of the arbitral tribunal is specialized in the national law to which the dispute is subject. Nonetheless, expertise on such questions becomes necessary

² It is also the case that counsel resort to experts solely for the purposes of reinforcing their already reached conclusions on such difficult questions.

when the arbitrators are faced with legal issues that they do not master (such as any “foreign” to them law), as well as on controversial or highly debated legal issues which are usually subject to “two schools of thought”.³

- *Questions of arbitral procedure.* Again, these questions are principally for the arbitral tribunal to determine. There may, however, be circumstances where an expert may assist an arbitral tribunal in certain delicate procedural issues, such as issues in relation to document production and confidentiality.
- *Questions on other issues that may affect the resolution of a dispute.* Questions on other issues requiring expertise are rare but not absent. For example, the resolution of a dispute may require a forensic scientist to testify on the authenticity of a document that is challenged.

This need to resort to expert evidence is felt without regard to the choice of the solution that will eventually be applied to respond to the difficult question. Specifically, it is felt without regard to whether the expertise comes from party-appointed or from tribunal-appointed experts. It is true that the decision on the choice is for counsel to be made in a first step. Nothing prevents counsel from submitting expert evidence in support of their position or even for tactical purposes. This is in contrast to expert evidence that originates from the directions of the tribunal itself, whether at the beginning or in addition to party-appointed experts.

Now: “which is the best solution”? The only possible answer can only be that “it depends”. The choice is indeed based on many factors: the nature of the dispute and the issues it comprises, the consideration of the costs that are implicated and the qualifications of the arbitrators; but experience teaches us that it depends also largely on the legal culture to which the people involved in the arbitration belong.

In this respect, the question on the choice becomes a “problem” when, as mentioned before, one solution is dismissed as inappropriate without any persuasive justification. Two possible solutions will, therefore, be explored.

1.1.2. The method of the expert appointed by the parties

It has been stated already that the practice in the Anglo-American legal culture – the common law culture – is to favor the method of the expert appointed by the parties. Through this culture, the method tends to impose itself in the field of arbitration, at least in Western

³ This is usually the case with legal issues that arise in international investment law.

countries and as such, for some, any other method is often impracticable and thus undesirable.

Its main benefits are not disputed. Each of the parties uses one or more specialists who prepare with their assistance and that of their counsel a report or reports intended to support the positions presented in their submissions; the parties and counsel themselves actively assist in their preparation and production; these reports are produced as testimony; and they are analyzed and discussed during the hearing through cross-examinations and questions by the arbitral tribunal. The advantage of relying on such expert advice is obvious, since it can have the effect of being the most authoritative information available in support of the parties' /counsel's specific positions.

In all of its steps, the party-appointed expert method, typical of an adversarial system, often permits the parties and their counsel to keep control on the study and analysis of the questions submitted to the experts. With this in mind, one must ask the question of whether its objective is more to prove useful to counsel's case than to enlighten the arbitral tribunal and *it alone*. Naturally, expert testimony should serve the latter. This is obviously also in the interest of the parties, insofar as the decision of the arbitral tribunal will be pronounced totally or partially in favor of one or the other position.

As such, while I do not deny that the method has its qualities and that I have, in my experience as arbitrator, frequently benefited from it, I cannot at the same time hide that it has not always proven convincing or helpful. Far from it, and I know that this reservation is shared by many of my colleagues.⁴ The positions taken by party-appointed experts are often extremely distant from each other, making a reconciliation difficult; this is because they often start from different and sometimes irreconcilable premises. It is also rare to witness an expert fundamentally modify the position he or she has supported during a hearing. What is more, the system of cross-examination does not always make it possible to clarify matters, increases the length of the hearings and risks bypassing the development of the relevant issues that would benefit of the arbitral tribunal.⁵ The primary role of the latter is to understand the different positions taken, particularly during the hearing, before seeking to compare the offered solutions and assessing the respective relevance during its deliberations. Lastly,

⁴ See for example, K. Sachs, *Experts: Neutrals or Advocates*, presented at the 2010 ICCA Conference in Rio de Janeiro.

⁵ The difficulties emerging with the system of cross-examination do not, however, dismiss the assets that such system may possess. Indeed, as mentioned below, the system offers certain dynamics during the hearing in a case that may prove very useful for the decision of the arbitral tribunal.

it cannot be denied that the costs associated with such assessment may in some cases increase the costs of proceedings.

1.1.3. The method of the expert appointed by the arbitral tribunal

Contrary to what is sometimes asserted, the method of the expert appointed by the arbitral tribunal is indeed used in many arbitration proceedings, particularly, as mentioned above, by those with a civil law background.

This method is indeed traditional in the civil law culture, where it is recognized by the codes of procedure and is often used in practice.⁶ The civil law culture views that the role of the judge is to establish the truth, as opposed to understanding the parties' arguments and determining which is the best position.⁷ In addition, this method is expressly recognized by most arbitration laws⁸ and arbitration rules.⁹ The right to use it has, moreover, been sanctioned by new judicial decisions, most recently, in particular, by the Swiss Federal Court which views it as part of a party's right to be heard.¹⁰

It seems, therefore, difficult to categorically assert that this system is simply ineffective and contrary to the rights of the parties, or those of counsel, to be more specific. If this were the case, one would have to conclude that the systems in which the method has prevailed for decades have been taking an undesirable direction.

The characteristics of this method in brief are as follows: an arbitral tribunal may, on its own initiative or at the request of one or all parties, mandate an independent expert – sometimes a team of experts¹¹ – to respond to a number of questions that have been

⁶ See for example, Zivilprozessordnung (ZPO), Sect. 144, authorising the Court to appoint, on its own motion, an expert.

⁷ J-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (Thomson 2007) 662.

⁸ Article 26 of the UNCITRAL Model Law expressly contemplates the possibility for a tribunal-appointed expert as follows: "(1) Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."

⁹ See for example, UNCITRAL Rules, Art. 29, ICC Rules, Art. 25(4), Swiss Rules, Art. 27, SCC Rules, Art. 29, ICDR Rules, Art. 22, SIAC Rules, Art. 23, HKIAC Rules, Art. 25 and LCIA Rules, Art. 21.

¹⁰ Decision 4A_277/2017, 28 August 2017.

¹¹ While we may be discussing of an "expert" in the singular form, such expert usually comprises more than one individual, i.e., a team of experts.

previously formulated; the expert submits his or her report usually towards the end of a set procedure and presents him or herself at the hearing where he or she is called upon to answer the questions of counsel and the arbitral tribunal.

Personally, I am of the view that, like the party-appointed expert one, this method has its advantages, especially in that it provides the opportunity to the arbitral tribunal to have control over the premise and scope of the requested expertise and, therefore, to direct the expert on the specific questions which it considers necessary in rendering its decision. Contrary to what is asserted – and sometimes in strong terms – the parties and their counsel are in no way excluded from the process; they can intervene in the solicitation of the expertise, particularly in the choice of the expert and the drafting of the terms of reference; they may submit any comments on the expert's report they deem relevant; more importantly, they have the opportunity to question the expert's analysis and conclusions during the hearing. The discussion and assessment of the expert testimony is not one that is focused on two different (and often irreconcilable) reports of expert conclusions that have to be compared and weighed, but on a single report, which may be completed and modified if necessary.

Despite these benefits, the method of the expert appointed by the arbitral tribunal has been criticized for creating additional costs, as it opens the door for supplementary or, sometimes, rebuttal expert opinions.¹² These criticisms should be viewed with caution. The answer to whether this is true, depends on how the procedure itself is agreed to by all participants and how it develops.

1.2. The application

1.2.1. The main hypotheses

I have already briefly mentioned the main steps concerning the process in relation to a tribunal-appointed expert; they have often been described and can vary from one case to another. It seems, nonetheless, useful to distinguish two central figures of tribunal-appointed experts, even though there are naturally a number of variations.

(i) *The "exclusive expert"*. The "exclusive expert" scenario is a simplified scenario in which the arbitral tribunal decides to appoint an expert without the parties having already submitted reports through their experts. In this case, the role of the expert is to answer "exclusively" to the questions submitted to him or her.

¹² J-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (Thomson 2007) 662.

This is the classic hypothesis in civil law systems. The expert can be appointed at the beginning of the procedure and it appears to be a good solution, capable of saving time and effort, and indirectly, costs also. The expert may also be appointed later, for example, after the first exchange of writings and on the basis of the questions raised therein.

(ii) *The “complementary expert”*. The “complementary expert” scenario is also a simplified one, in which the arbitral tribunal decides to appoint an expert in addition to the experts already appointed by the parties, for the purposes of assisting it in understanding the (often irreconcilable) positions taken by such experts and deciding between them.

In practice, this scenario, while not rare, is seen in less frequency than the “exclusive expert” one.

1.2.2. The probative value of the expertise

There is no doubt that, as in national court proceedings, expertise is in international arbitration a form of evidence. As mentioned above, it can cover various issues ranging from technical and financial to legal issues. It is required to support the factual elements of a case and to assist the arbitral tribunal in reaching the best decision possible,¹³ whether this is characterized by a search for the truth and the ability to find it (cf. civil law tradition) or by a decision on which position as presented by the parties is the best, i.e., best reflects the truth (cf. common law tradition).

Therefore, as with any other form of evidence, i.e., documentary evidence and fact witness testimony, the arbitral tribunal has the final say in relation to their admissibility and weight. Put differently, so long as expert evidence in the form of a report by a tribunal-appointed expert is subject to the same scrutiny as other evidence is, such expert evidence, and its probative value in particular, should not be met with skepticism.

What we need to bear in mind is that counsel has the right to be involved in the entire process of a tribunal-appointed expert, whether such expert is an “exclusive” or a “complementary” one. This includes an involvement in the preparation of the report, on which counsel has an opportunity to review, comment and/or contest where appropriate. During the hearing, in particular, counsel has, separate to the arbitral tribunal, the opportunity to test the expert’s assessments and conclusions. This not only makes the entire process more transparent

¹³ Note that the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, p. 13 states that: “It is helpful to start with the presumption that expert evidence will not be required. Depart from this presumption only if expert evidence is needed in order to inform the arbitral tribunal on key issues in dispute”.

and straightforward, but also assists in the assessment of the probative value of such expert testimony.

What is also important is the uncontested fact that the tribunal-appointed expert is not a fourth arbitrator. Indeed this method, whether in the form of an “exclusive” or a “complementary” expert scenario, must be distinguished from expert determination proceedings. In the latter case an expert is retained to decide him or herself the case, not to assist the arbitral tribunal. A tribunal-appointed expert, and his or her findings specifically, do not and should not assume the tribunal’s role as a decision-maker and the arbitral tribunal must justify any adherence to the expert’s analysis and conclusions.

Relevant to this, is the difficult question of whether such expert may “participate” in the arbitral tribunal’s deliberations. Whatever position one adopts in this respect, two things must be kept in mind: first, the roles as described must be made clear and kept separate and second, the balance between the secrecy of the deliberations and the right of the parties to remain part of the process that audits the execution of the expert’s mandate, must be maintained. This applies to both the “exclusive” and “complementary” expert scenarios.

1.3. The general assessment

1.3.1. The question

Having looked at the main hypotheses of tribunal-appointed expert evidence, including the fact that its probative value is to be measured like any other evidence, one must ask the most important question in relation thereto: whether, and if so, in what cases the arbitrators may or must call upon an independent expert?

1.3.2. The necessity

(i) *Need for assistance.* There is no doubt that it is necessary to have experts in international arbitration, because the preference, if not the rule, is to nominate jurists as arbitrators, and not necessarily technical or commercial, among others, specialists. This is because modern cases involve a mixture of issues and a jurist serving as an arbitrator is better fitted to understand the bigger picture of the case. It is, therefore, more practicable to present expert evidence before an arbitral tribunal comprising jurists than having lawyers explaining a panel of experts how the procedure works or how to apply the law to the facts. This is why there is a preference for this avenue for most international arbitrations as opposed for expert determination proceedings. To

clarify, this is to be separated from other specialized tribunals, such as maritime or sports tribunals which are specific for the relevant cases.

To be clear, the need for assistance remains regardless of the method of expert testimony that applies, i.e., party-appointed or tribunal appointed experts.

(ii) Need for neutrality. As seen, assistance can come generally in two forms, depending on the legal background of those implicated in a case. The possibility for arbitrators to appoint their own experts to render such assistance is known and widely available under most arbitration *fora*. For me, it is in some cases the better option when considering what the purpose of the expertise is: to assist the arbitral tribunal in the best possible manner. I am not suggesting that it is taken for granted that party-appointed experts operate more as advocates for the party that appointed them, than assistants. However, when faced with diametrically opposite solutions with no flexibility for reaching a middle solution, one cannot help but wonder whether the assistance provided is as neutral as it should be. It is on this instance that I consider tribunal-appointed experts to be the more appropriate solution.

(iii) Need for efficiency. In general, the idea is that any form of expert testimony makes the proceedings more efficient in terms of time and costs. As correctly noted by the *ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in International Arbitration*, to require arbitrators to possess certain expertise will reduce the pool of available arbitrators and may also increase the time taken to select a tribunal.¹⁴ This is of course in relation to cases where the parties choose a tribunal which is not specialized in the form mentioned above (i.e., expert determination proceedings or maritime or sports or other specialized tribunals).

In specific, when it comes to party-appointed experts, it is important to understand that any disruption in terms of time and cost in this respect is primarily due to the choices made by the parties themselves. This is because we witness, more often than not, that parties appoint more than one experts on one issue to reinforce their position and require several rounds of exchange of expert reports.

When it comes to tribunal-appointed experts, naturally this will depend on whether such expert is an “exclusive” or a “complementary” one, as well as the time one needs to make his or her assessment and findings.

To the extent that he or she is “complementary” the aforementioned concern in regard to the choices of the parties when it comes to party-

¹⁴ ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, p. 7. However, we may be witnessing a change in the future.

appointed experts applies here as well. In fact, one would not exclude the possibility that following a report from the “complementary” expert, the parties would like to rebut any of his or her conclusions with further reports made by their appointed experts.

To the extent that he or she is “exclusive” the idea is that he or she shall be more efficient, provided, however, that the parties show trust both to the arbitral tribunal and such expert. It is also important that the parties, together with the arbitral tribunal are active in the briefing of the expert from the outset, in the establishing of his or her terms of reference and in the setting of time-limits to produce a final report which will in any event be subject to examination during a hearing.¹⁵

1.3.3. The cases

So when the issue is confronted with an objective state of mind, the tribunal-appointed expert is a good – if not the better – option; if the applicable law and rules permit such appointment, there is necessity for expert assistance and transparency and efficiency reasons militate in its favor, an arbitrator is very much entitled to follow this method. The answer to which cases he or she may do so is that it depends on several additional factors.

I suppose that the most certain factor as seen will be the legal culture that represents counsel or a member of the arbitral tribunal. Whether one’s choice is a reflection of his or her common law or civil law or other legal culture is entirely acceptable. What is important is the respect of a culture that is different to the one that we are accustomed to as the appropriate choice in a specific case, as well as the harmonization of different cultures when there is a need to do so.

Related to this is the specific request of a party and such party’s specific objective concerning expert evidence. It may be that parties wish for tribunal-appointed experts. It may however be that parties view the dynamic that is provided by party-appointed expert testimony more appropriate. The latter is particularly true on account of the possibility for cross-examination. Indeed, expert testimony can really be tested by the means of cross-examination in a productive way

¹⁵ In fact, the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration states the following on p. 13: “Consider whether a single expert appointed either by the arbitral tribunal or jointly by the parties might be more efficient than experts appointed by each party. A single, tribunal appointed expert may be more efficient in some circumstances. An expert appointed by the arbitral tribunal or jointly by the parties should be given a clear brief and the expert’s report should be required by a specified date consistent with the timetable for the arbitration.” The possibility for the parties themselves jointly appointing a single expert will be discussed further below.

that is not necessarily available by the means of simple questioning of a tribunal-appointed expert.¹⁶

Another important factor is linked with the aim of expert testimony as I think it should be and as I have recalled several times: assisting the arbitral tribunal reaching the best possible result in the specific case. This would be the case when the party-appointed experts do not agree in their conclusions and where the knowledge of the tribunal is, in comparison to that of counsel, far more limited and needs to fill in the gaps.

1.4. Conclusion

To sum up, unless we are speaking of a specialized tribunal, arbitrators are found, in relation to counsel, in a more delicate position with respect to certain issues. Assistance on such issues is therefore required. The fact that this may take place via “experts” is not contested. Whether this can be achieved better through party-appointed experts or tribunal-appointed experts depends and is often a choice that is, I recall, measured against the legal background of those involved. The benefits of each method are for the users to assess depending on the specific case and circumstances. What is certain, nonetheless is that the end result – which is the *assistance* of the arbitral tribunal in its understanding and ultimate decision on a matter that requires certain expertise – can be achieved through both avenues.

Personally, so long as the parties are involved in the process, the tribunal-appointed expert scenario seems the best fitting one for some cases. In the event that skepticism towards this scenario continues to persist, perhaps a balance may be found in the joint party-appointment of an expert. This is suggested by the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in International Arbitration¹⁷ and resembles also the solution offered by Klaus Sachs.¹⁸

Alternatively, users may be looking for “future” arbitrators to becoming specialized and dispensing with the need for experts. I cannot but wonder whether this can be achieved with respect to all possible issues so that the need for additional or external expertise is eliminated entirely.

¹⁶ This is to be contrasted with certain problems caused by cross-examination as mentioned above.

¹⁷ ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, p. 13.

¹⁸ See K. Sachs, *Experts: Neutrals or Advocates*, presented at the 2010 ICCA Conference in Rio de Janeiro.



**Chartered
Institute of
Arbitrators
CIArb**

**Protocol for the
Use of Party-Appointed
Expert Witnesses in
International Arbitration**

Foreword

The Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the "CIARB Protocol") has been prepared by the Practice and Standards Committee of the CIARB.

The CIARB has issued this Protocol so that parties and arbitrators can use it when party-appointed experts are needed to give evidence in arbitration proceedings.

It provides a complete regime for the giving of such evidence and provides a procedure for identifying the issues to be dealt with by way of expert evidence, the number of experts, their identity, what tests or analyses are required, the independence of the experts, the contents of the experts' opinions, privilege, meetings of experts and the manner of expert testimony.

The CIARB Protocol applies only to party-appointed experts. It is not intended to cover tribunal-appointed experts or single-joint experts. It has been structured along similar lines to the IBA Rules of Evidence (which are gaining increasingly wide acceptance internationally) and has been aligned with those parts of the IBA Rules which deal with party-appointed experts.

The CIARB Protocol expands upon the IBA Rules in that, amongst other things, it caters for tests and analyses to be conducted, it gives more detailed guidance as to what should (and should not) be in an expert's written opinion and it deals with independence and privilege. It only differs from the IBA Rules in providing for an experts' meeting before reports are produced.

The CIARB Protocol can be used in its entirety by the arbitral tribunal directing (or the parties agreeing):

"Expert Evidence shall be adduced in accordance with the CIARB Protocol".

Alternatively, the CIARB Protocol can be used in part or as a guideline for developing procedures to be adopted.

Peter J. Rees
Debevoise & Plimpton LLP
Chairman of the Practice & Standards Committee of the CIARB

September 2007

Preamble

This Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the Protocol) is intended to govern in an efficient and economical manner the preparation and giving of expert evidence in international arbitrations, particularly those between Parties from different legal traditions. It is designed to supplement the legal provisions and the institutional or ad-hoc rules according to which the Parties are conducting the Arbitration.

Parties and Arbitral Tribunals may adopt the Protocol in whole or in part or may use it as a guideline in developing their own procedures for the preparation and giving of expert evidence. The Protocol is not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt it to the particular circumstances of each arbitration.

Each Arbitral Tribunal is encouraged to identify and establish with the Parties, as soon as it is appropriate in the Arbitration, the issues in respect of which it considers expert evidence to be appropriate.

The preparation and giving of expert evidence in accordance with this Protocol is intended to give effect to the following principles

- each Party is entitled to know, reasonably in advance of any Evidentiary Hearing, the expert evidence upon which the other Parties rely;
- experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them;
- there should be established before any hearing the greatest possible degree of agreement between experts.

Article 1 - Definitions

In the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

“Arbitral Tribunal” means a sole arbitrator or a panel of arbitrators validly deciding by majority or otherwise.

“Arbitration” means the arbitration in respect of which the Arbitral Tribunal has been appointed.

“Evidentiary Hearing” means any hearing in the Arbitration whether or not held on consecutive days, at which the Arbitral Tribunal receives oral evidence.

“General Rules” means the institutional or ad-hoc rules according to which the Arbitration is being conducted.

“Party” means a party to the Arbitration, and “Parties” shall be construed accordingly.

“Protocol” means this Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

Article 2 - Use of Protocol

The Protocol shall govern the preparation and giving of expert evidence.

- whenever the Parties agree that it shall do so; or
- upon application by one or more Parties for party-appointed expert evidence to be adduced in the Arbitration, and the Arbitral Tribunal, after consultation with the Parties, directs that the Protocol shall apply.

In the event of a conflict between any provision of the Protocol and any mandatory provision of law agreed by the Parties or determined by the Arbitral Tribunal to be applicable to the Arbitration, the mandatory provision of law shall prevail.

In the event:

- of a conflict between the Protocol and the General Rules;
- that the Protocol and the General Rules are silent on anything concerning the preparation and giving of expert evidence; or
- that there is a dispute as to the meaning of the Protocol.

the Arbitral Tribunal shall, after consultation with the Parties, make any necessary interpretations and shall make any directions appropriate for the preparation and giving of expert evidence in the Arbitration.

Article 3 – Permission to Adduce Expert Evidence

Where the Protocol is to apply, the Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, direct:

- the issue evidence shall be adduced in the Arbitration;
- the number of experts in respect of each issue that shall be permitted to give evidence in the Arbitration;
- what tests or analyses shall be required.

Expert evidence shall be adduced in the manner provided for in Articles 6 and 7.

Article 4 – Independence, Duty and Opinion

An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.

Payment by the appointing Party of the expert's reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert's impartiality.

An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced.

An expert's written opinion should:

- contain the full name and address, background, qualifications, training and experience of the expert;
- state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;
- contain a statement setting out all instructions the expert has received from the appointing Party and the basis of remuneration of the expert;
- only address the issue or issues in respect of which the Arbitral Tribunal has given permission for expert evidence to be adduced;
- state which facts, matters and documents, including any

assumed facts or other assumptions, have been considered in reaching the opinion;

- state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;
- state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);
- state which matters the expert has been unable to reach an opinion on;
- state which matters (if any) are outside the expert's area of expertise;
- adequately reference all documents and sources relied upon;
- contain a declaration in the form set out in Article 8; and
- be signed by the expert and state its date and place.

Article 5 – Privilege

All instructions to, and any terms of appointment of, an expert shall not be privileged against disclosure in the Arbitration, but the Arbitral Tribunal shall not, in relation to the instructions or terms of appointment:

- order disclosure of the instructions or appointment or any document relating thereto; or
- permit any questioning of the expert about such instructions or appointment

unless it is satisfied that there is good cause.

Drafts, working papers or any other documentation created by an expert for the purposes of providing expert evidence in the Arbitration shall be privileged from production and shall not be discloseable in the Arbitration.

Article 6 – Expert Evidence

Within the time ordered by the Arbitral Tribunal, and save where the Arbitral Tribunal directs to the contrary, expert evidence shall be adduced in the Arbitration using the following procedure:

- The experts appointed by the Parties on related expert issues shall hold a discussion for the purpose of:
 - identifying and listing the issues upon which they are to provide an opinion;
 - identifying and listing any tests or analyses which need to be conducted; and
 - where possible, reaching agreement on those issues, the tests and analyses which need to be conducted and the manner in which they shall be conducted.
 - if the Arbitral Tribunal so directs, the experts shall prepare and exchange draft outline opinions for the purposes of these meetings, which opinions shall be without prejudice to the Parties’ respective positions in the Arbitration and privileged from production to the Tribunal.
- Following such discussion, the experts shall prepare and send to the Parties and to the Arbitral Tribunal a statement setting out:
 - those issues upon which they agree and the agreed opinions they have reached on those issues;
 - those tests and analyses which they agree need to be conducted and the agreed manner for conducting them;
 - those issues upon which they disagree and a summary of their reasons for disagreement; and
 - the tests and analyses in respect of which agreement has not been reached as to whether they shall be conducted and/or the manner in which they should be conducted, and a summary of their reasons for disagreement.
- Following such statement:
 - any agreed tests and analyses shall be conducted in the agreed manner;
 - any agreed tests and analyses in respect of which the manner of conduct has not been agreed shall be conducted

in such manner as each expert considers appropriate in the presence of the other expert(s); and

- any test and analyses which have not been agreed shall be conducted in such manner as the expert requiring them to be conducted considers appropriate in the presence of the other expert(s).
- Following such statement, and such tests and analyses (if any), each expert shall produce a written opinion in accordance with the provisions of Article 4 dealing only with those issues upon which there is disagreement.
- Such written opinions shall be exchanged simultaneously.
- Following such exchange, each expert shall be entitled, should the expert so wish, to produce a further written opinion dealing only with such matters as are raised in the written opinion(s) of the other expert(s).
- Such further written opinions shall be exchanged simultaneously.
- Each expert who has provided a written opinion in the Arbitration shall give oral testimony at an Evidentiary Hearing unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement.
- If an expert who has provided an opinion in the Arbitration does not appear to give testimony at an Evidentiary Hearing without a valid reason, unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement, the Arbitral Tribunal shall disregard the expert's written opinion unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

The contents of the discussion referred to at Article 6.1(a) shall be without prejudice to the Parties' respective positions in the Arbitration and, unless all the Parties agree otherwise, and save as provided in Article 6.1(b), the content of that discussion shall not be communicated to the Arbitral Tribunal.

Any agreement by the Parties pursuant to Article 6.1(h) that an expert need not give oral testimony at an Evidentiary Hearing shall not constitute agreement with, or acceptance by a Party of, the content of the expert's written opinion.

Article 7 – Testimony by Experts

The manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence.

The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.

The Arbitral Tribunal may at any time hold preliminary meetings with the experts.

If the Arbitral Tribunal is satisfied that either written opinion or testimony of an expert is not in accordance with the expert declaration contained in Article 8 of the Protocol, the Arbitral Tribunal shall disregard the expert's written opinion and testimony either in whole or in part, as it considers appropriate in all the circumstances.

Article 8 – Expert Declaration

The expert declaration referred to in Article 4.5(n) shall be in the following form:

- “• I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal decide the issues in respect of which expert evidence is adduced. I have complied with, and will continue to comply with, that duty.
- I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.
- I confirm that all matters upon which I have expressed an opinion are within my area of expertise.
- I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal all matters, of which I am aware, which might adversely effect my opinion;
- I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion.
- I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify the parties to this arbitration and the arbitral tribunal forthwith.”



The Chartered Institute of Arbitrators, September 2007

Setting global standards for dispute management

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