Conflicting assumptions and expectations on the role of expert evidence in arbitration: An expert perspective

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I surveyed a dozen FTI damages experts on the conference theme

- Survey of 13 FTI Consulting experts (including myself)…
- … who have together testified in IA disputes on 143 occasions – and a further 263 times in court or other forums
  - All are general damages experts – accountants and Chartered Financial Analysts
  - Many have been active in IA since the early 2000s or before – many hundreds of cases between us
  - Now or recently been based in London, Paris, Dubai, Delhi, Singapore, Hong Kong, Toronto, and Washington DC

    → 11 based in essentially Anglophone common law jurisdictions; 2 in Paris
  - No particular industry specialty
  - Many also have experience of litigation and/ or regulatory disputes procedures in their home jurisdictions

- Survey is qualitative
- 'Disclaimer' – views are those of individuals, not of FTI or necessarily of me

We see convergence but significant remaining differences

- A general convergence – party-appointed experts, no tribunal expert, presumption of some degree of independence, two sequential report exchanges, presentation on direct, cross-examination
- But also differences:

Distinction	Issue
Civil law *vs* common law	Disclosure Who qualifies as a (party-appointed) expert
English-influenced jurisdictions *vs* rest of world	Expectation of expert independence *vs* suspected hired gun
More-established *vs* less-established IA jurisdictions	Depth of overall experience, degree to which domestic practices are imported Variety of views of role of experts Expectation of extent of availability of documents and hence scope and nature of expert work
Australia/ Caribbean (and certain others) *vs* rest of world	Privilege of communications with experts – and need to distinguish consulting and testifying experts
GCC *vs* other regions	Construction dispute practices imported to use of other experts

Familiarity with damages expert issues tends to vary with background of individual

- Our perception of general tendencies – although many striking exceptions to each of these

Less familiarity with damages issues		**More familiarity with damages issues**
Practice in a less established IA centre	⟷	Practice in a more established IA centre
Practice mainly *not* in English	⟷	Practice mainly in English
Academic background	⟷	Private practice background
'Older'	⟷	'Younger'

Tribunal-appointed experts are rarely-seen (by us) despite being much-discussed

- Most of my colleagues have *never* been involved in a case with a tribunal-appointed expert
- Of the few examples we have experienced directly, most are in French or German cases
- We have seen a variety of processes for using tribunal experts
- Tends to add procedural complexity and length
- Experience may be different in other disciplines, smaller-stakes cases
- Do parties in IA ever agree to appoint a single joint expert? (Also very rare in our experience)

Is there too much expert evidence? Or of the wrong kind…?

- Possible sources of a perception of too much expert evidence:
  - Experts appointed for mechanical tasks that do not require expert judgment
  - Experts appointed may not have the most-appropriate expertise
  - Experts given differing instructions
  - Wide gaps between experts in damage valuations
- Possible remedies:
  - Parties consulting experts earlier in the dispute process?
  - Can tribunals intervene early to set expert instructions?
  - Can parties relinquish some control to promote early expert dialogue?
- Wider issues:
  - Do parties in fact want rough justice or principled reasoned awards?
  - Are parties willing to give up some control to make the expert process more efficient?
  - Should a *greater* part of hearings be devoted to damages issues? Would this improve outcomes?
  - Would greater reasoning on damages in awards and comment on expert evidence help curb extreme expert evidence?

We see variation in extent of joint meetings and reports and witness conferencing, and no standard approach to witness conferencing

- Joint meetings and reports
  - Seemingly common in Asia and MENA, also in English litigation – not systematically used otherwise – seldom used in India
  - Generally, take place after reports and before hearing
  - Helpful when
    - Neither side has ulterior objectives
    - Focus is on clarifying issues and implications for the tribunal
  - Not likely to promote *rapprochement* (of experienced experts)
- Witness conferencing
  - Again, common in Asia and MENA – not systematically used otherwise (and perhaps less often now?) – seldom used in India
  - Very helpful to understanding expert differences when
    - Structured
    - Led by a tribunal with good command of the issues
  - Can also be much *quicker* than cross-examination, if well-implemented
  - However, a wide variety of implementations

Expert protocols/ codes (ICC/ LCIA/ UNCITRAL etc) used to date are useful but struggle to capture the essence of good expert evidence

- Experienced experts think they have a good understanding of expectations
- For such experienced individuals, the various codes on use of experts do not affect behaviour: “It’s a principles-based game not a rules-based game”
- We do see these protocols as useful for:
  - Responding to over-reaching clients
  - Less experienced experts
- The CIArb Protocol may be an exception to this

In practice, expectations around expert duties seem to be influenced by the background of the lawyer

- A standard Expert Declaration:

"I confirm that I understand my overriding duty is to the Tribunal and that I must help the Tribunal on matters within my expertise. I believe that I have complied with this duty.

"This report must not be construed as expressing opinions on matters of law, which are outside my expertise. I reserve the right to reconsider any opinions given in this report in light of additional information that may be made available to me in the future.

"The assumptions upon which my opinions are based are not, in my opinion, unreasonable or unlikely assumptions. I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

"I have no present or past relationship with any of the Parties or the Arbitral Tribunal. I am independent from the Parties, their legal advisors and the Arbitral Tribunal.

"I declare the foregoing report to be true to the best of my knowledge and belief."

- Does this run counter to:
  - Practice and expectations in some jurisdictions?
  - Expectations of some arbitrators?

Is there a consensus on how to deal with the following somewhat tricky situations?

- Potentially tricky situations:
  - Implausible instructions
  - Incomplete instructions
  - Implausible evidence from instructing party witnesses
  - Undisclosed documents that seem relevant

And do parties and counsel have a common understanding of their duties?

- Practices we have experienced recently that may not be universally acceptable:
  - Expert shopping
  - Holding potentially-relevant documents back from disclosure (after the expert has seen them)
  - Implausible and/ or incomplete instructions
  - Extensive comment on draft joint expert reports
  - Vigorous challenges to expert's draft conclusions

To summarise

- A high degree of convergence in use of experts in IA…
- … but differences remain across multiple dimensions
- Tribunal-appointed experts remain rare in our (selective) experience…
- There can be ‘too much’ expert evidence on some occasions – but too little on others?
- Adoption of process innovations varies by region and individual arbitrator
- Protocols can be useful in aligning expectations regardless of background, and the CIArb protocol may go further than others
- Wide differences remain in understanding of the meaning of expert ‘independence’ – and how parties and counsel should work with experts

I welcome all comment and correction on this presentation

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