

CONFLICTING ASSUMPTIONS AND EXPECTATIONS ON THE ROLE OF EXPERT EVIDENCE IN ARBITRATION

A Common Law Perspective
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Structure of Presentation

- Preliminary remarks
- The role of experts
- Experts' duties to the parties and the tribunal



Preliminary Remarks

- International arbitration is characterized by a convergence of the “common law” and “civil law” traditions.
- The “common law/civil law” dichotomy overlooks differences in the treatment of expert evidence *within* the common law tradition.



Preliminary Remarks cont...

- Convergence towards a “middle ground”
- Dr Robert Briner (1997):

“[I]t has...often been overlooked that arbitral practice in Continental Europe has become more hybrid and can no longer be defined by the sole reference to the classical conduct of court proceedings on the Continent”.
- Sir Bernard Rix (2014):

“[I]t has nevertheless to be acknowledged, first, that there may well be differences in the case of the civil and common law and in the case of tribunal appointed and party appointed experts; secondly that the last few decades have increasingly shown, I believe, a narrowing of those differences, and thirdly, that this modern trend appears to be seeking to insert...into the common law preference for party appointed experts some of the disciplinary neutrality of the civil law preference of tribunal appointed experts”.





Preliminary Remarks cont...

- Divergence *within* the “common law” tradition.
- “American” outlook tends to embrace the “red-blooded” adversarial approach.
- English and Australian approach changed in 1990s to a process more focused on assisting the judge or tribunal.



The Role of Experts

- Party-Appointed Experts
- ICC Arbitration Rules 2017, Article 25(3): *“The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned”*;
- LCIA Rules 2014, Article 20.3: *“[The Arbitral Tribunal] may allow, refuse or limit the written and oral testimony of witnesses (whether witnesses of fact or expert witnesses)”*;
- UNCITRAL Arbitration Rules 2010 (as amended), Article 27(2): *“Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party”*.



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The Role of Experts

- Party-Appointed Experts cont...
- IBA Rules on the Taking of Evidence, 29 May 2010, Article 5.1:

“A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report”



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The Role of Experts

- Tribunal-Appointed Experts
- UNCITRAL Arbitration Rules 2010 (as amended), Article 29(1): *“After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties”*;
- LCIA Rules 2014, Article 21.1: *“The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal”*.

The Role of Experts

- Party-Appointed *vs.* Tribunal-Appointed
- Party-appointed experts generally preferred to Tribunal-appointed
- Tribunal expert will not replace party-appointeds, but just add cost and complexity
- Tribunal expert usually unnecessary: experienced tribunals are well-equipped to judge between complicated and conflicting expert evidence
- Perceived risk of non-enforceability: *delegatus non potest delegare*



The Role of Experts

- Liberal use of party-appointed experts in the common law world
- Increased costs and inefficiency:
- D Jones (2008): “[T]he use of party-appointed expert witnesses has been contributing to high costs and inefficiency in dispute resolution”
- Controls in English court proceedings – requirement for permission for each expert discipline and expert, and approval of the proposed costs.





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The Role of Experts

- Do we need expert evidence?
- ICC “Techniques for Controlling Time and Costs in Arbitration” (2012) at [62]:
“It is helpful to start with a 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”.
- D Donovan (2017): *“...international arbitrators do not need to rely, in the vast majority of cases, on legal experts testifying as witnesses: the arbitrators and counsel share the expert’s “specialized knowledge”...In short, both the arbitrators and counsel, like the legal expert, are trained to think like lawyers”.*



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The Role of Experts

- Increasing the efficiency of expert evidence:
Joint Meetings and Reports
- ICC “Techniques for Controlling Time and Costs in Arbitration” (2012) at [67]:

“Experts will often be able to narrow the issues in dispute if they can meet and discuss their views after they have exchanged reports. Consideration should therefore be given to providing that experts shall take steps to agree issues in advance of any hearing at which their evidence is to be presented. Time and cost can be saved if the experts draw up a list recording the issues on which they have agreed and those on which they disagree”.



The Role of Experts

- Joint Meetings and Reports cont...
- The IBA Rules on the Taking of Evidence (2010), Article 5.4:

“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 therefor”.





The Role of Experts

- Joint Meetings and Reports cont...
- CIArb Protocol for the Use of Party-Appointed Witnesses in International Arbitration, Article 6(1):

“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:

(a) the experts appointed by the Parties on related expert issues shall hold a discussion for the purpose of:

- (i) Identifying and listing the issues upon which they are to provide an opinion...*
- (iv) 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”.*





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The Role of Experts

- Joint Meetings and Reports cont...
- Expert meetings and joint reports common in English and Australian practice
- But not common practice in US
- In civil law jurisdictions?



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The Role of Experts

- Witness Conferencing
- Experts from the same discipline testifying together under the control of the Tribunal
- With or without cross-examination
- Key is Tribunal which is very well prepared and has experience of witness conferencing



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The Expert's Duties

- The risk – perception of “*hired guns*”
- Difference between subject-matter experts and professional experts?
- Perception compounded by general non-discoverability of experts' communications as regards draft reports and working papers: e.g. CIArb Protocol, Article 5(2) (“Privilege”)
- D Jones (2010): *“It is likely that a court or arbitral tribunal would benefit from greater transparency as to how experts came to develop their opinion. [...] Moreover, ensuring that all communications between him and herself and the party by whom he or she is appointed are made available may be a good way to remind the expert that their overriding duty is to the court or tribunal and not to that party”.*





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The Expert's Duties

- Experts are not advocates for the parties
- Their role is to assist the tribunal on an area of specialist knowledge
- Common key standards:
 - Independence
 - Impartiality
 - Overriding duty to the tribunal?



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The Expert's Duties

- *Locus classicus* in English law – *The Ikarian Reefer* (1993):
- Expert evidence presented to the court should be the independent product of the expert
- Independent assistance should be provided by way of objective unbiased opinion
- Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion
- If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report
- Documents referred to in the expert evidence must be provided to the other side at the same time as the exchange of reports





The Expert's Duties

- IBA Rules on the Taking of Evidence:
- The Expert Report shall contain: (a) *“a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal”* (Article 5(2)(c)) and (b) *“an affirmation of his or her genuine belief in the opinions expressed...”* (Article 5(2)(g));
- The Tribunal-Appointed Expert shall, *before* accepting appointment, submit to the Arbitral Tribunal and to the Parties *“a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal”* (Article 6(2)).



The Expert's Duties

- The CIArb Protocol:
- An expert's opinion *"shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party"* (Article 4(1));
- The expert's declaration shall state that the expert understands that *"[his] duty in giving evidence in this arbitration is to assist the tribunal [to] decide the issues in respect of which expert evidence is adduced"* (Article 8(1));
- The declaration must further confirm that the report is *"[the expert's] 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"* (Article 8(1)).



The Expert's Duties

- It is incumbent upon the tribunal and the parties to make sure that opinions are genuinely held, and that the complete opinion is presented
- But opinions may legitimately differ: E. Birch (2005):

“I believe that it is often forgotten that there is seldom one truth and this applies not only in factual situations, but in relation to expert evidence as well. Equally eminent experts from the same field may hold different opinions, each validly held”





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