



33 Bedford Row



# EXPERT EVIDENCE IN ARBITRATION

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## **1. PARTY-APPOINTED V. TRIBUNAL-APPOINTED EXPERTS**

<b>Party-appointed Pros</b>	<b>Party-appointed Cons</b>
<b>Two heads better than one</b>	Extra expense and time
<b>The expert of each party can understand that party's case and present the technical support for it to the tribunal</b>	Hired-guns or advocates for the party's position
<b>Decision-making process benefits from robust-cross examination of both experts</b>	Time-consuming lawyers' games, not worth the time and expense
<b>It remains the party's onus to discharge its burden of proof</b>	The Tribunal is in charge of the proceeding

## **PARTY-APPOINTED V. TRIBUNAL-APPOINTED EXPERTS**

<b>Tribunal-Appointed Pros</b>	<b>Cons</b>
<b>Independent technical, scientific or legal assistance to the tribunal</b>	Second or Fourth arbitrator; tribunal rubber-stamps expert report as decision
<b>Tribunal has inquisitorial duties to guide the evidence-making procedures of the proceeding</b>	Duty of fairness and duty to allow each party to present case, not to guide, assist or substitute its evidence making for parties'
<b>Cheaper and less time-consuming</b>	Doesn't provide the value of two opinions, or the robustness of competition
<b>Can more objectively assist process, more expediently</b>	May result in each Party wanting its own expert to counter the T-appointed expert

## **2. DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

- Arbitration counsel may assume every arbitration requires expert evidence
- Inclination to seek expert evidence on loss or damage > almost all international arbitrations involve damage claims

## **DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

- Tribunal may benefit from expert assistance in various types of disputes, including:
  - construction
  - energy / oil and gas
  - engineering
  - science
  - trade practice
  - technology
  - accounting
  - “foreign” law

## **DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

- First consider if case really needs expert evidence, and if so, on which issues:
  - Would expert evidence be helpful to this particular tribunal?
  - Will expert evidence be helpful to tribunal to understand and be persuaded on matters “beyond common experience”?
- If and to what extent amount in dispute justifies expense of expert evidence

## **DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

### **Construction**

- Expert evidence in international construction arbitration common
- Often raise variety of technical issues

## **DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

### **Oil & Gas / Energy**

- More often in energy disputes than other disputes, expert evidence relevant to merits
  - Financial circumstances of dispute can aid understanding potential motivations behind alleged contractual breach
  - Volatility of energy prices makes date on which damages assessed especially important
- Parties frequently appoint experts with industry knowledge as well as experts with valuation skills

## **DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES**

### **“Foreign” Law**

- How will applicable law be presented to tribunal, particularly if ‘foreign’ to some/all tribunal members?
  - Call experts in applicable law or counsel to argue applicable law
- Method chosen may depend on complexities and uncertainties of legal issues

### 3. LEGAL EXPERTS

- Arbitral tribunals normally regard legal issues as questions of law and not fact
- The Tribunal will determine question of their own motion with assistance of the parties
- Parties may where necessary exhibit opinions from professors of law in the relevant jurisdiction and/or senior practitioners
- Tribunals may, depending on nature of the arbitration, have to hear from experts to advise them on one of the applicable laws that they will need to consider

## **4. SELECTION OF EXPERTS: CONSIDERATIONS AND BEST PRACTICES**

### **Tribunal-Appointed**

Following full consultation with Parties:

- remuneration, mandate, identity
- independence
- expertise
- communication and language skills
- timely and efficient in the necessary testing and investigation
- availability for the hearing
- fees and expenses

## **SELECTION OF EXPERTS: CONSIDERATIONS AND BEST PRACTICES**

### **Party-Appointed**

- Party identifies and appoints as soon as possible to assist pleading process
- solid reputation in relevant field
- experience as expert witness, in both written and oral testimony
- good communication skills
- abilities in communication to make complicated technical issues comprehensible to laymen
- availability and capacity

## 5. FOCUSING PARTY-APPOINTED EXPERT EVIDENCE

- Focusing experts can start with a procedural order
- CIArb's *Guideline 7, Art. 4 – Party Appointed and Tribunal Appointed Expert Witnesses 2016:*

Framework for tribunal's guidance to parties on eight aspects of expert's assignment, including list of issues requiring opinion evidence and instructions experts may need

## **FOCUSING PARTY-APPOINTED EXPERT EVIDENCE**

Three other techniques to help focus expert evidence:

1. Pre-hearing meeting of experts
2. List of agreed/disagreed points
3. Joint statement by experts

## **FOCUSING PARTY-APPOINTED EXPERT EVIDENCE**

### **1. Pre-Hearing Meeting of Experts**

- Purpose: to identify and, if possible, agree on issues and on tests/analyses to be conducted
- ***IBA Rules on the Taking of Evidence in International Arbitration (2010)***, Art. 5.4
- May not be appropriate if several experts do not line up on similar issues
- Consider if discussions are “without prejudice” and if they are to result in the production of a joint statement

## **FOCUSING PARTY-APPOINTED EXPERT EVIDENCE**

### **2. List of Agreed/Disagreed Points**

- Following a pre-hearing meeting, it may be productive for the experts to produce a list of agreed/disagreed points
- If experts are too far apart, they may list irrelevant issues in order to find areas of agreement

## **FOCUSING PARTY-APPOINTED EXPERT EVIDENCE**

### **3. Joint Statements by Experts**

- Takes list of agreed/disagreed points further
- Purpose: encourage/enable experts to narrow/clarify areas of disagreement by explaining basis of disagreements
- Gives tribunal a ‘checklist’ of matters affecting differences in expert evidence, such as:
  - whether experts are relying on different facts
  - Whether experts are using different assumptions
  - whether there are genuine differences in opinion

## **FOCUSING PARTY-APPOINTED EXPERT EVIDENCE**

### **Bonus techniques – Prague Rules:**

1. *Prague Rules (2018)*, Art. 6.6
  
2. *Prague Rules (2018)*, Art. 6.7

## **6. PREPARING EXPERT REPORTS AND WITNESS STATEMENTS**

**IBA Rules on the Taking of Evidence in International Arbitrations 2010: Art 5(2)(a)-(i)**

**CIArb Guideline 7 Party-Appointed and Tribunal-Appointed Experts in International Arbitration: Art 3:**

“The experts should be instructed by the parties that their overriding duty is owed to the Tribunal and not to the instructing party.”

## **PREPARING EXPERT REPORTS AND WITNESS STATEMENTS**

**CIArb Protocol on the Use of Party-Appointed Experts in  
International Arbitration**

**Art 8 – Expert Declaration**

**Uncitral Notes on Organizing Arbitration Proceedings**

**Note 10**

## **PREPARING EXPERT REPORTS AND WITNESS STATEMENTS: DUTIES**

### **CIArb Protocol on the Use of Party-Appointed Experts in International Arbitration – preamble**

“Experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them”

**Central focus is on independence and not being a “hired gun” tailoring evidence to suit the appointing party**

Cf. Bond Solon Expert survey



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## **PREPARING EXPERT REPORTS AND WITNESS STATEMENTS: DUTIES**

### **➤ Ikarian Reefer – 7 Criteria of Guidance**

“Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, it is likely not only to be incorrect but self-defeating”

per Lord Wilberforce in *Whitehouse v Jordan*

### **➤ CIArb Protocol: Art 4**

### **➤ Example to avoid: *R v Alex Julian Pabon***

## 7. METHODS OF PRESENTING EXPERT EVIDENCE

- Traditional witness testimony (expert reports or witness statements, with cross-examination at an oral hearing) –

*Tried and true, but time consuming and predictable?*

- Hot-tubbing / expert witness conferencing –

*Efficient, but is it fair?*

- Panels / team of experts –

*Innovative, but too much tribunal control?*

## **METHODS OF PRESENTING EXPERT EVIDENCE – IBA RULES**

- Expert report is the default mechanism – meeting optional and after expert report; expert treated like other witnesses in a procedural sense
- The definition of an expert in the IBA Evidence Rules refers to “a person or organisation” - see applicable law
- More traditional approach; decide early, with parties, the approach to follow

## **METHODS OF PRESENTING EXPERT EVIDENCE – CIARB GUIDELINES ON EXPERTS 2016**

- Comprehensive review of the practicalities of the appointment of experts by a 13-member panel
- Innovative procedures used regardless of rules/ law
- Emphasis on fairness to parties, independence of experts and time-and-cost effectiveness
- Appendix I is the “*CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*” a detailed regime on use of party-appointed experts in efficient and economic manner

## **METHODS OF PRESENTING EXPERT EVIDENCE – CIARB GUIDELINES ON EXPERTS 2016**

- First step is a discussion for the purpose of:
  - (i) identifying and listing issues
  - (ii) identifying and listing any tests or analyses which need to be conducted; and
  - (iii) where possible, reaching agreement on those issues, the tests and analyses ... manner in which they shall be conducted.
  - (iv) if Tribunal directs, experts prepare and exchange draft outline opinions for these meetings, without prejudice to Parties' respective positions in Arbitration and privileged from production to the Tribunal.

## **8. SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

### **1. Party-Driven ‘Teaching’ or ‘Tutorial’ Sessions**

- On consent, teaching or tutorial session with tribunal
  - conducted by experts
  - authorized under procedural order
- Best time: earliest point in arbitration that technical issues are focused

## **SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

- Usually off-the-record, with no transcript
- Whatever said remains in tutorial: Cannot be referred in hearing
- Not evidence
- Not to argue the case informally

**SPECIALIZED EXPERTISE:  
TUTORIAL SESSIONS, ASSESSORS, AND  
TECHNICAL ADVISORS**

## **2. Tribunal-Appointed Assessors**

- English *Arbitration Act, 1996* (s.37(1)(a)(ii))  
and  
*Hong Kong Arbitration Ordinance* (s. 54)  
permit appointment of ‘assessors’

## **SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

- Assessor (with expertise) adjudicates issue(s) assigned and then reports to tribunal
  - Review and assess substantial detailed data; investigate and interview parties; site visits; equipment tests
  - Time and expense saved by expert reviewing data
  - E.g.: quantity surveyor; engineer
- Report is ‘proposed decision’ that tribunal can adopt
- Parties may review report and question assessor before tribunal decides

## **SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

### **3. Technical Advisor to Tribunal**

- Innovation that tribunals and parties might consider where appropriate
- U.S. courts permit ‘technical advisors’, particularly in patent cases, although rare
- Act as ‘sounding board’ for judge > help educate on jargon and theory & help think through technical problems
- Provide judge with one-to-one technical advice

## **SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

- Not a witness
- May not contribute evidence
- May not advocate for any party
- May not advise on legal issues
- May not seek information outside record of case

## **SPECIALIZED EXPERTISE: TUTORIAL SESSIONS, ASSESSORS, AND TECHNICAL ADVISORS**

- Chosen by fair and open procedure in which counsel participate
- Role clearly defined
- Nature/content of tutelage disclosed through report or on the record

## **9. TIPS FROM AN EXPERT WITNESS**

- Remember your role as Expert
- Be independent
- Be well prepared
- Present results on the other side's case

## **TIPS FROM AN IN-HOUSE FORENSIC ACCOUNTANT**

- Help make life easy for the Tribunal
- Ensure reports link into pleaded case/legal issues
- Consider best applicable format for the expert report
- Ensure calculations/financial models are readily accessible and understandable

## **10. WHAT ARBITRATORS LIKE AND DON'T LIKE IN EXPERT EVIDENCE**