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ARBITRAL WOMEN

INVITE YOU TO

Expert Evidence in Arbitration

• *programme followed by a drinks reception* •

Tuesday 26 November 2019 | 18:00 – 20:00

at

Pinsent Masons

30 Crown Place, Earl Street, London EC2A 4ES

Short Talks on Important Expert Evidence Topics

TABLE OF CONTENTS

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Saadia Bhatty is an attorney admitted to the New York and Paris bars.

She is Counsel in the International Dispute Resolution team of Gide's London office and advises and represents States and private entities on a wide range of contentious and non-contentious international dispute resolution law matters, in particular in international commercial and investment arbitrations and other public international law matters (including treaty and constitution drafting).

Saadia has acted as counsel in investment and commercial arbitration proceedings conducted under the rules of various arbitral institutions (including those of the ICC, ICSID, LCIA, SCC, the Organization for the Harmonization of Business Law in Africa (OHADA), HKIAC and CAS) as well as ad hoc arbitrations (UNCITRAL), dealing with the laws of both civil law and common law jurisdictions.

Prior to working for Gide in London, Saadia worked for Gide in Paris and global law firms' international arbitration and public international law practices in London and New York.
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Hayley leads Pinsent Masons' in-house forensic accounting team's dispute advisory and consultancy offering. She works closely with the firm's lawyers to provide advice in relation to the financial and commercial aspects of disputes at various stages of international arbitration and litigation matters.

Where the appointment of external accountants as independent experts is necessary, Hayley advises the firm's lawyers on appropriate experts, expert instructions and manages the relationship and work product of the external accountants as required.

Hayley advises clients in relation to a wide range of disputes including breach of contract, post acquisition disputes, breach of warranty, loss of profits and professional negligence claims. She also supports clients in expert determination processes and advises on business valuations.

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Amanda is a Director of ArbitralWomen and an ambassador for the Alliance for Equality in Dispute Resolution. She is a visiting lecturer at the University of Law, UK and the founder of Careers in Arbitration, an initiative designed to support those worldwide seeking to enter and progress in the field of international arbitration. She was the first female Global Chair of the CIArb's Young Members' Group (2017-2018) and until 2018, a member of the Board of Management of the CIArb (2017-2018). She speaks, publishes and tweets (@Amanda_JLee) about dispute resolution and diversity.

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Victor confines his practice to that of a neutral, largely in construction and energy-related disputes. He is currently MENA Chapter Director of the Association of International Petroleum Negotiators (AIPN).
Victor is a Dubai resident who has worked in the Middle East for 12 years. He is Regional Pathway Leader for the CIArb and teaches Award Writing. He lectures frequently on dispute resolution in construction, oil and gas and general dispute resolution matters.

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The Honourable Barry Leon, FCIArb, a Canadian, is an independent arbitrator and mediator with *Arbitrators@33BedfordRow* (London), Arbitration Place (Canada), and Caribbean Arbitrators.

He is an International Mediation Institute Certified Mediator and on AAA's National Roster of Arbitrators.

As Presiding Judge, British Virgin Islands Commercial Court (2015–2018), Barry presided over international commercial and corporate disputes involving parties from around the world.

He was a Partner and International Arbitration Group Head at Perley-Robertson, Hill & McDougall (2009–2015) and until 2009, a Litigation and Dispute Resolution Partner with Torys.

Barry was Chair, ICC Canada Arbitration Committee and is an International Academy of Trial Lawyers Fellow. Involvements include Canadian Bar Association's ICSID Working Group (Chair); IBA's Toronto Arbitration and Litigation Conferences (Co-Chair); RMMLF's "International Energy and Minerals Arbitration" Conference (Program Committee); and Member of CEDR's Settlement in International Arbitration Commission, IBA's Investor-State Mediation Rules Committee, and ILA's International Commercial Arbitration Committee.

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Dr. Tariq Mahmood

Dr. Tariq Mahmood, FCIArb, a British national, is qualified in England and Pakistan.

A member of London based *Arbitrators@33BedfordRow* he works as a barrister, arbitrator, mediator and tribunal secretary with a focus on the UK and Ireland, Pakistan, the Gulf and the Asia-Pacific region.

Dr. Mahmood was called to the bar in 2002. His practice as a neutral, and party representative, has a wide focus but he has a particular interest in sports and commodities arbitration. He has assisted the attorney general of the Pakistan administered jurisdiction of Azad Jammu and Kashmir in drafting amendments to its constitution.

He is a member of the committee of the *Asia-Pacific Forum for International Arbitration* and

has lectured widely in ADR recently working as a consultant to the Council of Europe on their arbitration training.

Dr. Mahmood has co-written a chapter on Guerrilla Tactics in International Arbitration to be published later in 2019.

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Maurice has over 20 years' advocacy experience, having called to the Bar in Scotland in 1995. He has been dual qualified since March 2019 when he also called to the Bar of England and Wales.

Prior to coming to the Bar, Maurice worked in Brussels for three years, initially with the European Commission and then in private practice with Akin Gump Strauss Hauer and Feld. Whilst at Akin Gump, he was initially part of the financial services team and then part of the anti-dumping/international trade team representing international clients such as Morgan Stanley Bank, Ricoh and Samsung.

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Emilia is a Fellow of the Chartered Institute of Arbitrators and sits as arbitrator. She is a member of the court of the Lagos Chamber of Commerce International Arbitration Centre and the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration, and she is the President of the Advisory Council of the Libya Centre for International Commercial Arbitration.

Emilia convenes the "SOAS Arbitration in Africa" conference series and authors the SOAS Arbitration in Africa survey. She (with Stuart Dutson and Kamal Shah) recently published the African Promise.

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Liz Perks

Liz Perks is a partner at Haberman Ilett.

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She has been involved in around 80 cases, including contractual disputes, investment treaty arbitrations, purchase price disputes and other disputes arising out of transactions, accounting irregularities, competition matters and valuations.

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Richard Twomey

Richard Twomey is a partner at DWF Law LLP and co-chair of the international disputes group.

He has represented parties in international arbitration for 15 years and has experience of all the major arbitral centres in addition to challenging and enforcing arbitration awards.

A large part of Richard's practice involves advising parties to long term infrastructure, energy and technology projects. He represented the UK government in a major LCIA arbitration dispute with a US defence contractor concerning the eBorders project. Following a lengthy arbitration and substantial award, the award was set aside and sent for a *de novo* hearing before a new tribunal by the TCC, in part due to a failure to deal with issues raised by quantum and technical experts. He has also represented a number of parties to energy supply agreements, power production agreements, and construction projects.

In addition, Richard frequently advises parties to financial services and investment based disputes. He advises clients from around the world and has dealt with issues concerning European, African, Latin American and Far Eastern entities, in addition to disputes based in the Middle East where he spends much of his time.

Richard is recognised in the 2020 edition of the Legal 500 for international arbitration, civil fraud and commercial litigation.

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Topic 1

PARTY-APPOINTED v. TRIBUNAL-APPOINTED EXPERTS: PROS AND CONS OF EACH

Summary A.

This topic is discussed based on three themes:

Alleged Bias or perception of bias: This view argues that party appointed experts are more inclined to write a report that will favour the submissions of the appointing party. However, this depends on the instructions given to the expert; the integrity and ethics of the individual appointed as expert. So that, it then becomes a function of the particular individual appointed as expert and their understanding of their role or function in the arbitration.

Cost: The argument here is that the appointment of party appointed arbitrators is more expensive because of the numbers while the tribunal appointed experts will be fewer in number. The cost of experts may be quite significant in very complex and highly technical disputes where each party appoints different experts for different issues. The costs accrued by experts may be worthwhile or balanced if the experts are actually relevant and assist the tribunal. But where such experts are 'hired guns' for their appointing parties, the whole process becomes counter-productive and negatively impacts on justice delivery.
The Tribunal appointed experts may save costs as a matter of numbers but this must be balanced against the need for the Tribunal to receive the assistance it needs; in particular, where there are different theories or views which may be equally valid in the field or subject. It will be important for the Tribunal to hear submissions on the different views/theories to enable it determine the relevant issue.

Party autonomy: Deferring to how the parties wish to present their evidence and prosecute their case as a question of party autonomy and the parties having control over their dispute resolution process.

Two interesting questions arise:

1. Whether the parties or the tribunal has control over the issue of the type of experts to appoint in the dispute. Ultimately, the dispute is the parties' and they are presumed to best know their dispute and thus to determine how best to prosecute their case. This may be by using party appointed or tribunal appointed expert witnesses [the party v arbitrator autonomy question].

2. Whether the powers exercised by experts vis-à-vis the tribunal has become excessive. The parties pay for the arbitrator to make the decision (the arbitrator's mandate is personal to the arbitrator) and not the expert [the dependence on experts question].

Sources:

- CIArb Guideline 7: Party Appointed and Tribunal Appointed Expert Witnesses (2016)
- IBA Rules of Taking Evidence in International Arbitration (2010)
- CIArb Protocol for the use of Party Appointed Expert Witnesses in International Arbitration (2007)
- Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018)

Summary B.

a. There is no objective, definitive answer as there are differing points of view.

b. The purpose of expert evidence is to provide assistance on technical or scientific matters, complex mathematical or economic forecasting issues, or legal questions, that are outside the knowledge or expertise of the Tribunal. An expert can provide opinion evidence to the Tribunal whereas fact witness are confined to providing factual evidence out of their own experience, not their opinion.

c. The differing points of view emanate from two major legal systems, civil law and common law, and their differing way of approaching the task of the tribunal obtaining expert evidence.

d. In the civil law system, an expert is seen as an independent advisor to the tribunal to assist in the inquisitorial duties of the tribunal.

e. Historically, in the courts of some civil law countries, experts were more than advisors on discrete questions, but had a more expansive mandate. "*The far-reaching scope of the expert's assignment in some of the materials must be seen against the background of court practice in some civil law countries, especially in the French tradition. In these countries, court appointed experts have wide mandates and powers of investigation. As a practical effect of such expert investigation in the French style, the Parties and the Court obtain from the expert the same type of material as they would in England by discovery. While the appointment of the independent expert by the courts is a feature in the law and practice of proceedings in the courts of most countries on the European continent, there are considerable differences from one country to another with respect to the scope of the investigation and the frequency with which the courts require their intervention*": 'Technical experts in international arbitration, introductory comments to the materials from arbitration practice', Michael E. Schneider, Lalive, ¶ 11 [footnotes not included].

f. The common law developed a strict adversarial tradition: the parties must furnish all of the evidence and advocacy, and the tribunal merely assesses and weighs, does not assist in the evidence-making process. "*In practice, an expert appointed by a party will assist the party primarily like any other professional advisor. If, however, the expert is also to assist as a witness in proceedings, then any written report he issued for the purposes of those proceedings must be an impartial product – in other words, the expert must not act as a party advocate. The common law system relies upon cross-examination to verify whether the expert has acted impartially. Cross-examination has long been considered vital to expose errors and/or bias. Lengthy, probing cross-examination is generally considered to be particularly justified where there are expert witnesses, given the greater likelihood of an expert-witness misleading the court than a witness of fact. And it should be appreciated that there is a long-standing English view that any failure to cross-examine a witness on part of his evidence may be treated by the court as acceptance by the party in question of such evidence.*" David W. Brown, 'Chapter 5. Oral Evidence and Experts in Arbitration', in Laurent Lévy and V.V. Veeder (eds), Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law, Volume 2 (© Kluwer Law International; International Chamber of Commerce (ICC) 2004) pp. 77 – 86 at p. 78

g. Pros and Cons -

   i. Party-appointed:

   "The common law places much emphasis on the role of cross-examination of witnesses to inform a court or tribunal of the relevant issues and to expose the strength of the evidence supporting each side's case. However, this adversarial system is sometimes criticized for encouraging bias in experts. Such bias might come about in a variety of ways. First, party-appointed experts are primarily exposed to the evidence and reasoning supporting the case of the party appointing them. In time, they may be inclined to adopt the assumptions and thinking underpinning that case. Second, criticism from an opposing expert and cross-examination by counsel itself may encourage witnesses to defend their point of view more strongly than they would under a more consensual approach, tending to reinforce a party-appointed expert's perceived partisanship. Third, it is possible that parties will seek to appoint only experts whose views are most likely to support their case, a process known as "expert shopping". Aside from opening the door to evidential bias, expert shopping may also increase the likelihood of a court or tribunal being presented with extreme or irreconcilable evidence from opposing experts." Howard Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; ICCA & Kluwer Law International 2015) pp. 379 – 430 at p. 380

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

ii. Tribunal-appointed:

> *"Court-appointed experts are often drawn from lists, which might be out-of-date or unrepresentative of the consensus of opinion on a given topic. Equally, judges or arbitrators may not be skilled in the selection of appropriate experts for a given issue. A single expert may also be prone to "own theory" bias, a tendency to promote his or her own published views over consensus opinion in their field of expertise – such unrepresentative views might not be exposed if a consensual process suppresses challenges to expert evidence. Finally, parties may also appoint their own experts to review and challenge the evidence of the court-appointed expert, leading to an increase in cost over a system of party-appointed experts alone.*" Howard Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; ICCA & Kluwer Law International 2015) pp. 379 – 430 at p. 381

Tribunal-appointed Pros	**Cons**
Independent technical, scientific or legal assistance to the tribunal	Second or Fourth arbitrator; tribunal rubber-stamps expert report as decision
The Tribunal has inquisitorial duties to guide the evidence-making procedures of the proceeding	Duty of fairness and duty to allow each party to present case, not to guide, assist or substitute its evidence making for parties'

Cheaper and less time-consuming	Doesn't provide the value of two opinions, or the robustness of competition
Can more objectively assist process, more expediently	May result in each Party wanting its own expert to counter the T-appointed expert

Topic 2

DETERMINING WHETHER TO HAVE EXPERT EVIDENCE AND ON WHICH ISSUES

Introduction

Although in many arbitrations expert evidence is necessary, or at least helpful, there seems to be a tendency on the part of arbitration counsel to assume that every arbitration requires expert evidence.[1]

Arbitration counsel's natural inclination may be to seek expert evidence on loss or damage, and almost all international arbitrations involve a claim for damages.[2]

What about other issues in the arbitration?

Disputes in which tribunals often require, or may benefit from, expert assistance include construction, energy / oil and gas, engineering, science, trade practice, technology, accounting, and "foreign" law (i.e., law that is 'foreign' to the members of the tribunal).

Considerations

The first questions that arbitration counsel should consider carefully is whether the case really needs expert evidence, and if so, on which issues in the case.

Would expert evidence on the issue be helpful to the particular tribunal, especially where the tribunal is composed of experienced arbitrators with at least some subject matter expertise? Will expert evidence be helpful to the tribunal to understand and be persuaded on matters that are "beyond common experience"?

Another consideration, and one which should not be taken lightly, is whether and to what extent the amount in dispute justifies the expense of expert evidence.

Construction Cases

Expert evidence in international construction arbitration is typical. It is quite "common for several experts with knowledge and experience in quite separate fields to be required for the proper conduct of a complex construction claim".[3]

As the authors of the ICC Construction Arbitration Report found:

> [c]onstruction disputes often raise a variety of technical issues, some of which may be highly specialized and lie beyond the competence of an ordinary expert and others may

[1] International Arbitration Checklists, Grant Hanessian and Lawrence W. Newman, Third Edition, 2016 at p. 132.
[2] The Role of the Expert in Advocacy by Philip Haberman, Global Arbitration Review, The Guide to Advocacy, Second Edition, 2017 at p. 168.
[3] Chapter 9, Preparation and Collection of Evidence, International Construction Arbitration Law, Jane Jenkins and Simon Stebbings, 2006 at p. 204.

necessitate a decision between two different schools of thought, towards one of which a tribunal member may have a leaning, as a result of training or experience.[4]

Oil & Gas / Energy Cases

More often in energy disputes than in other types of disputes, expert evidence can be relevant to the merits of the case.

The financial circumstances of a dispute can aid in understanding the potential motivations behind an alleged contractual breach, and the volatility of energy prices makes the date on which damages are assessed especially important.[5]

In energy arbitrations, "[q]uantum experts that are otherwise well placed to estimate the present value of future cash flows may not be best qualified to give an opinion on specific industry developments affecting cash flows, and industry experts may provide valuable insight when these questions arise." Both of these sets of skills are distinct and necessary, parties in energy arbitrations frequently appoint experts with industry knowledge as well as experts with valuation skills. By way of example, in *ExxonMobil v. Venezuela*, the claimants alone appointed eight experts.[6]

"Foreign" Law (i.e., law that is 'foreign' to the members of the tribunal)

Consideration should be given to how the applicable law will be presented to an arbitral tribunal, particularly where the law is 'foreign' to the members of the tribunal or some of them.

One option is the call experts in the applicable law. If this method is adopted, the role of the expert is to provide evidence, not to argue the case as "supplementary counsel".

A second option is for counsel to argue the applicable law.

Which method to choose may depend on the complexities and uncertainties of the relevant issues in the applicable law.

There is a separate Presentation Summary on this as Topic 3. Determining Whether to Use of Experts on Law, by Arran Dowling-Hussey, FCIArb.

[4] ICC Commission Report, Construction Industry Arbitrations, Recommended Tools and Techniques for Effective Management, 2019 Update at para. 18.7, available online at https://iccwbo.org/content/uploads/sites/3/2019/02/icc-arbitration-adr-commission-report-on-construction-industry-arbitrations.pdf.

[5] Expert Evidence by Howard Rosen and Matthias Cazier-Darmois, Global Arbitration Review, The Guide to Energy Arbitrations, Second Edition, 2017 at p. 250.

[6] *Ibid.* at p. 254.

Topic 3

DETERMING WHETHER TO USE EXPERTS ON LAW

- Important to distinguish between **questions of law** and **questions of fact**

- A a **question of law**, sometimes also referred to as a **point of law**, is a **question** that must be answered by applying the applicable legal principles to interpretation of the **law**. **Question**s of law are distinct from a **question of fact**, which must be answered by reference to facts and evidence as well as appropriate inferences arising from those facts.

- In international arbitration there can be a range of applicable laws which need not be the same but can in sometimes overlap (*for instance*):

    - Law of Contract
    - Law of Seat
    - Law of place of enforcement

- Not all arbitrators will be lawyers indeed in some instances the parties might specifically choose an arbitrator/s because of their expertise in a trade or professional area unconnected to law e.g. architects or engineers with particular knowledge of an area of construction relevant to the dispute.

- Moreover, whilst many lawyers can be qualified in a number of jurisdictions it is common for legally qualified arbitrators to make decisions on questions of law relating to a jurisdiction they are not qualified in.

- To use a hopefully relevant example an international arbitration in Dubai may see a point of law arise that sees a conflict of jurisdictions issue arise as to whether an issue falls to be determine ‘on shore’ or ‘off shore’.

- It is submitted that a tribunal need not include members expert in all the relevant areas of law that arise.

- Each side will offer evidence on points of law as may arise. It will also be open to the Tribunal in certain instances to appoint an expert.

- Where there is conflicting evidence on the correct determination of a point of law there may just be contrasting expert reports from two or more experts.

- It is also possible that the experts can be examined and cross examined at a hearing.

- In determining whether to use experts on points of law the unhelpful advice is that it depends on the circumstances.

- It is not possible to follow a universal approach in each and every instance.

- The nature of the tribunal is relevant and the applicable rules and legislation that governs the tribunal.

- The background and approach of the tribunal will to some degree determine what is an effective strategy.

- In other circumstances this would be described as ‘knowing your judge’

- As with many other areas of international arbitration past arbitrations can guide to the future but each reference needs to be dealt with ‘in real time’ so as to allow for the ongoing matrix of relevant considerations.

- International Arbitration is also not static- developments emerge that can impact on previous approaches e,g recent trend towards ‘witness conferencing’

- Arran Dowling-Hussey & Tony Cole (Arbitrators@33BedfordRow) wrote a note on witness conferencing for WestLaw Middle East in July.

Topic 4

SELECTION OF EXPERTS: CONSIDERATIONS AND BEST PRACTICES (BOTH FOR PARTY-APPOINTED AND TRIBUNAL-APPOINTED)

Selection of Tribunal-appointed experts: from Waincymer, §12.11.6, Procedure and Evidence in International Arbitration, (© Kluwer Law International; Kluwer Law International 2012) [footnotes removed]

"*In selecting an expert, the tribunal, in consultation with the parties should, consider independence; expertise; communication and language skills; ability to undertake any necessary testing and investigation in a timely and efficient manner; availability for the hearing; fees and expenses. Some take the view that, wherever possible, a tribunal-appointed expert should not be a citizen of the country of either party unless that flows as a matter of course from the area of expertise needed. Ideally expert witnesses will be fluent in the language of the arbitration as they are attempting to communicate what will often be difficult concepts to laypersons. This can be particularly problematic where professional jargon is involved as would be the case with legal experts. While the expert will generally be an individual, this may not always be so. CIETAC Rules 2012 Article 42.1 indicates that an expert or appraiser may be either an organisation or citizen.*

The tribunal should consider what would be an appropriate number of experts to appoint. This would depend on the range of matters on which expert opinion is desirable, and the breadth of expertise of the potential candidates for appointment.

Where the tribunal appoints an expert, one question is whether a challenge could be made to the tribunal itself based on bias. In theory at least, if the evidence of bias ought to have been apparent to the tribunal at the time of the appointment, such behaviour would appear to offend against the right to equal treatment."

Arbitrators, when appointing an expert, will consult the parties on both the expert's mandate and identity. After full consultation with the parties, the tribunal makes the appointment, but it is the parties who pay for the tribunal expert. That payment is usually initially in equal shares, subject to any later order as to costs.

Remuneration of tribunal-appointed experts is particularly sensitive in *ad hoc* proceedings, as there is no institution to assess an advance on costs to the parties to cover the cost of the expert. The tribunal must anticipate this cost when setting up the initial agreement with the parties, and ensure the expert fees will be paid.

Selection of Party-appointed experts: from Expert Evidence in Construction Disputes, Nathalie Voser and Katherine Bell - Schellenberg Wittmer Ltd; Copyright © Law Business Research:

"*In technical fields where there are few people sufficiently qualified to give an expert opinion, it may be wise to identify and appoint an expert as soon as possible. Moreover, an early involvement of the expert allows counsel to identify and understand the key technical issues in dispute, assess the client's chances of success, and plead the client's case from the start in the knowledge that the expert's evidence will be fully supportive. …. A number of factors will influence the decision regarding the choice of experts. The expert must have a solid reputation in the relevant field and, ideally, he or she has experience in acting as an expert witness, by giving both written and oral testimony. In order to come across as a reliable and credible expert, the expert should have good communication skills and have the ability to communicate complicated technical issues in a comprehensible way that allows laymen, and in particular the members of the arbitral tribunal, to understand the salient technical points of the case. Another important factor to discuss is the expert's availability. Counsel should ensure that the expert has sufficient capacity to carry out the various steps of his or her mission, namely, fact-finding, compiling the report, assisting during the document production phase, and attending the evidentiary hearing*."

The party-appointed expert must be able to demonstrate independence and impartiality, be articulate and knowledgeable enough to stand up to robust cross-examination, and have sufficient standing, either due to their own reputation or that of their firm, to present credible evidence to be relied upon by the tribunal.

Topic 5

FOCUSSING PARTY-APPOINTED EXPERT EVIDENCE

Introduction

It is particularly frustrating for an arbitral tribunal to hear expert evidence from both sides that does not deal with the same issues or assumes away the issues in dispute.

How can counsel focus party-appointed expert evidence so that both/all experts on the same subject are addressing the same issues, with the same set of assumptions (or a common set of conflicting assumptions reflecting the positions of the different parties)?

What are the respective roles of the tribunal and counsel to the parties to achieve this common focus of expert evidence?

All concerned should have an interest in ensuring that the experts are not talking past each other, dealing with different issues and/or working with unrelated assumptions.

The second subject is how to arrange for the experts of both sides to meet and confer on their respective opinions in order to agree or narrow the areas of difference, and determine the materiality of the difference.

The difference may be because of a different assumption, a different view on a matter such as the discount rate to be applied, or a different understanding of an undisputed or disputed factual matter. It may be that there are five areas of difference but the outcome is affected materially only by one or two of them.

The roles of the tribunal and counsel are intertwined when it comes to ensuring that experts address the same issues with the same set of assumptions.

Procedural Order

Focusing experts can start with a procedural order. Article 4 of the CIArb's *Guideline 7: Party Appointed and Tribunal Appointed Expert Witnesses—2016* sets out a framework to accomplish this at an early stage of the arbitration.[7] In short, it provides for procedural directions for experts ("Depending on the method chosen, arbitrators should set out the precise procedure for the collection, giving and testing of expert evidence in a procedural order.") and outlines matters to be included in the order (including a list of issues on which the expert is requested to express an opinion; a protocol for communication with the parties, and with any experts appointed by the parties, and the arbitrators; instructions concerning

[7] CIArb, *Guideline 7: Party Appointed and Tribunal Appointed Expert Witnesses—2016*, online: Chartered Institute of Arbitrators https://www.ciarb.org/resources/guidelines-ethics/international-arbitration.

examinations, tests, experiments and site visits, if any; the timeframe within which to complete the expert report; the method of exchange of expert reports; the procedure following the exchange of the expert report; 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; and any other relevant matters).

Other Techniques

Three other techniques can also help to provide focus for expert evidence:

(1) pre-hearing meeting of experts;
(2) lists of agreed/disagreed points; and
(3) joint statements (reports).

These are listed in order, because each subsequent step requires the first to succeed.

With all the steps, it is necessary to consider whether the step is likely to productive and cost efficient, or whether the step will distract from other responsibilities—such as hearing preparation.

(1) Pre-Hearing Meeting of Experts

The purpose of a pre-hearing meeting of experts is to identify issues and tests or analyses that are to be conducted and, where possible, agree on those issues, tests, or analyses.[8] The experts may then prepare and exchange a draft 'without prejudice' outlines of their opinions for the purpose of the meeting. Pre-hearing meeting of experts is permitted under article 5.4 of the *IBA Rules on the Taking of Evidence in International Arbitration* (2010).[9]

Article 6 of the CIArb's *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* provides a detailed framework for how pre-hearing meetings are to be managed.[10]

There are three key points for pre-hearing meetings:

[8] ICC Commission Report, *Controlling Time and Cost in Arbitration*, online: International Chamber of Commerce <https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/>.

[9] See also, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* at 20, online: International Bar Association <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>.

[10] CIArb, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2007) online: Chartered Institute of Arbitrators <https://www.ciarb.org/media/1273/partyappointedexpertsinternationalarbitration.pdf>.

1. Experts should be instructed that the purpose of their meeting is agreement. Consideration should be given to the preparation of joint minutes of the meeting which record the areas of disagreement and the reasons for them.

2. The experts should be given instructions not to try to negotiate a resolution of the dispute or make concessions.

3. It must be established whether the content of the meeting will be admissible as evidence before the tribunal or whether it will be "without prejudice". Experts may make more progress in arriving at agreed joint minutes if their discussions are "without prejudice" and the only matter that is put before the tribunal is the joint minutes which they ultimately produce.[11]

Often lawyers are nervous about expert meetings, primarily because they cannot control the meeting. Thought must be given to whether counsel should attend the meeting.[12] Arguably, their presence may impede fruitful discussion and consensus building.

A pre-hearing meeting may not be appropriate in a case where there are several experts for one or both parties, and the experts do not necessarily line up on similar issues. One solution in such a case is for all experts to attend, but that is expensive and time consuming.[13]

(2) List of Agreed/Disagreed Points

Following a pre-hearing meeting it may be productive to produce a list of agreed/disagreed points.

Whether the discussions are "without prejudice" or result in a joint document demands careful consideration. If experts are to produce documents as a result of their meeting, the CIArb's approach boils down to the following steps:

1. The experts prepare a joint statement outlining the findings of the discussion, which is circulated to the parties and tribunal.

2. Each expert prepares a report outlining his/her opinion on the agreed-upon issues, and these opinions are exchanged simultaneously.

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[11] Eugenio Hernádez-Bretón, "Expert Evidence" in Grant Hanessian & Lawrence W Newman, *International Arbitrations Checklist*, 3d ed (Huntington, NY: JurisNet LLC, 2016) 131 at 145.

[12] *Ibid*; John A Trenor, "Strategic Issues in Employing and Deploying Damages Experts" in Global Arbitration Review *Guide to Damages in International Arbitration* (London: Law Business Research Ltd, 2016) 123 at 137–38.

[13] John A Trenor, "Strategic Issues in Employing and Deploying Damages Experts" in John A Trenor, *Global Arbitration Review: Guide to Damages in International Arbitration* (London: Law Business Research Ltd, 2016) 123 at 137.

3. Each expert may then provide a further written opinion focussing only on the issues in the other expert's written opinion and these are exchanged simultaneously.[14]

This technique can be effective if the parties, counsel, and experts believe that there is enough room for further agreement on key issues or if the scope of disagreement is not yet clearly identified in the expert reports.

It is not an appropriate method if the experts are far apart or have contrasting approaches. If experts are too far apart, for example, they may list irrelevant issues in order to find areas of agreement.[15]

(3) Joint Statements

A joint statement takes the idea of a list of agreed/disagreed points one step further.[16]

Sometimes a joint statement is submitted to the tribunal before the hearing, and other times after.[17] The goal is to encourage or enable the experts to narrow or clarify their disagreements by explaining how the disagreements arise.

Joint statements are supposed to give the tribunal a checklist of matters that affect expert evidence such as whether the experts rely on different facts; whether they are using different assumptions; and/or whether there are genuine differences in opinion.[18]

Outlining the materiality of the differences is significant. Sometimes experts will differ on an issue but when all is said and done, the issue will not have a material effect on the outcome

These reports can either be in columns or textual. Columnar statements are like Scott Schedules; they list topics with each expert's view on a particular point. Textual statements summarize agreed point and explain areas of disagreement.[19]

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[14] Neal Mizrahi, "The Use of Experts and the Assessment of Economic Damages in Commercial Arbitration" in Marvin J Huberman, ed, *A Practitioner's Guide to Commercial Arbitration* (Toronto: Irwin Law Inc, 2017) 361 at 370.

[15] John A Trenor, "Strategic Issues in Employing and Deploying Damages Experts" in John A Trenor, *Global Arbitration Review: Guide to Damages in International Arbitration* (London: Law Business Research Ltd, 2016) 123 at 138.

[16] *Ibid* at 138.

[17] *Ibid* at 138.

[18] Philip Haberman, "The Role of the Expert in Advocacy" in Stephen Jagusch QC, Philippe Pinsolle & Timothy L Foden, eds, *Global Arbitration Review: The Guide to Advocacy* (London: Law Business Research Ltd, 2017) 167 at 175.

[19] *Ibid*.

Joint statements may result in counsel losing control of the expert, and risk the expert's views being poorly expressed. However, some tribunals have found that joint statements are helpful by giving clear explanations about the reasons for disagreement, free from legal jargon.[20]

CHECKLISTS & RESOURCES

PROCEDURAL ORDER—EXPERT WITNESSES

CIArb, *Guideline 7:*
Party Appointed and Tribunal Appointed Expert Witnesses—2016

Article 4—Procedural directions for experts

Depending on the method chosen, arbitrators should set out the precise procedure for the collection, giving and testing of expert evidence in a procedural order.

Commentary on Article 4

Matters to include

Arbitrators should provide clear directions, following consultation with the parties, as to the expert's assignment. Matters to consider including are: (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; (8) and any other relevant matters.

In the case of tribunal-appointed experts, the assignment should also include the terms of remuneration of that expert.

PROCEDURAL ORDER—PRE-HEARING EXPERT MEETING

CIArb, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2007).

[20] *Ibid*.

Article 6—Expert Evidence

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:

   (b) Following such discussion, the experts shall prepare and send to the Parties and to the Arbitral Tribunal a statement setting out:

      (i) identifying and listing the issues upon which they are to provide an opinion;

      (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 which need to be conducted and the manner in which they shall be conducted.

      (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.

   (c) Following such statement:

      (i) any agreed tests and analyses shall be conducted in the agreed manner;

      (ii) 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

      (iii) 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).

   (d) 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.

   (e) Such written opinions shall be exchanged simultaneously.

(f) 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).

(g) Such further written opinions shall be exchanged simultaneously.

(h) 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.

(i) 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.

2. 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.

3. 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.

IBA RULES AND ICC COMMISSION REPORT COMMENTARY

IBA, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* at 20.

Pre-hearing Conference among Experts

Article 5.4 permits the arbitral tribunal to order the party-appointed experts to meet and to discuss the issues considered or to be considered in their expert reports either in advance of their preparation or in advance of the hearing. Article 8.3(f) provides for conferencing of experts or fact witnesses during an evidentiary hearing. If they can reach agreement on any issues, they shall record that agreement in writing as well as any remaining areas of disagreement and the reasons therefor.

The practices suggested here, when deemed appropriate by the arbitral tribunal, can make the proceeding more economical. Experts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement. The revised Rules provide additionally for consultation before the reports are drafted, which may be an effective means to produce reports that

identify the areas where the experts agree and are narrowly focused on the remaining areas of disagreement. Where the experts succeed in reaching agreement on their findings, the parties and the arbitral tribunal will likely accept those findings, so that the hearing may focus on the truly disputed aspects of the case.

ICC Commission Report, *Controlling Time and Cost in Arbitration* at 13

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 on 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.

Topic 6

PREPARATION OF EXPERT REPORTS AND WITNESS STATEMENTS OF EXPERTS

This summary mainly discusses the considerations applicable to the paradigm case of an expert report produced by a party-appointed expert but the general principles hold true for tribunal-appointed expert witnesses also.

1. Guidance on the drafting of the report

The most helpful and also most prosaic of guidance in the preparation of expert reports and witness statements is provided by the **IBA Rules on the Taking of Evidence in International Arbitrations 2010**.

Article 5(2) provides as follows:

'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.'

CIArb Guideline 7 on Party-Appointed and Tribunal Appointed Experts in International Arbitration states in the notes to Art 3 that:

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

The **CIArb Protocol on the Use of Party-Appointed Expert Witnesses in International Arbitration** provides standard wording for use by expert witnesses in their statements as follows:

Article 8 – Expert Declaration

The expert declaration referred to in Article 4.4(k) shall be in the following form:

a) **"**I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal decide the issue or issues in respect of which expert evidence is adduced. I have complied with, and will continue to comply with, that duty.

b) I confirm that this is my own, impartial and objective, opinion.

c) I confirm that all matters upon which I have expressed an opinion are within my area of expertise.

d) 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 affect my opinion.

e) 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.

f) I confirm that if in the course of this arbitration I consider that this opinion requires any correction or modification I will notify the parties and the arbitral tribunal forthwith."

Note 10 of the **Uncitral Notes on Organizing Arbitral Proceedings** is also worth bearing in mind. It is likely that there will have been a Procedure Order stipulating the protocol for matters such as the form of documents to be submitted; whether electronic and/or in hard copy; the programme(s) to be used; hyperlinks to documents or legal authorities referred to, perhaps even the font type, spacing and numbering to be used. Obviously, these stipulations if made by the Arbitral Tribunal, must be followed.

2. <u>Best practice in the production of expert reports and statements</u>

The Preamble to the **CIArb Protocol on the Use of Party-Appointed Expert Witnesses in International Arbitration** cites the following principle:

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

In other words, the central focus at all times is on independence. There is clear need to avoid being seen as a "hired gun" tailoring their evidence to suit the party who has appointed them.

According to the recent survey of Expert Witnesses carried out by Bond Solon, this cardinal rule would appear to be more honoured in the breach. It should be noted that the survey did not, however refer to experts in International Arbitration, so we may assume that the present audience adopts much higher standards than are attained in other national forums.

In the very recent case of *Baynton-Williams v Baynton-Williams*[21], the question of the duties and responsibilities of experts was considered. The classic dictum of Cresswell J in the *Ikarian Reefer* case[22] was cited as follows:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.[23]

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise An expert witness in the High Court should never assume the role of an advocate.[24]

3. An expert witness should state the facts or assumptions on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside their expertise.

5. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report.[25]

6. If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.

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[21] [2019] EWHC 2179 (Ch).
[22] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer") [1993] 2 Lloyd's Rep. 68 (Comm Ct) at pages 81-82.*
[23] *Whitehouse v Jordan [1981] 1W.L.R. 246* , HL, at 256, per Lord Wilberforce.
[24] *Pollivitte Ltd v Commercial Union Assurance Company Plc [1987] 1 Lloyd's Rep. 379* at 386, per Garland J, and *Re J [1991] F.C.R.193* , per Cazalet J.
[25] *Derby & Co Ltd v Weldon (No.9),* The Times, 9 November 1990, CA, per Staughton LJ.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

Master Clark then went on to add:

To this should be added principles identified in *Anglo Group plc v Winther Browne & Co*[26] as necessary extensions to the *Ikarian Reefer* principles (using the numbering in that case):

"7. Where an expert is of the opinion that his conclusions are based on inadequate factual information, he should say so explicitly.

8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity."

All of the above is reflected and underscored in **Article 4 of the CIArb Protocol.**

Clearly an expert witness does not produce his report in a vacuum. He will have consulted with clients and with counsel and will be aware of what is sought to be achieved in terms of outcome. If he or she follows the first of the *Ikarian Reefer* guidelines then there will be no problem. The temptation to be resisted at all costs is to suggest or provide wording for inclusion in an expert witness's report – even if the aim is merely to save time. Only the expert or experts may insert words into the expert report.

As observed in *Anglo Group v Winther*, above:

Lord Wilberforce [in *Whitehouse v Jordan*] concluded his speech by saying that 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 was not, it was likely to be not only incorrect but self-defeating.

See the excellent guidance in GAR Guide to Advocacy in the chapter authored by Philip Haberman. It demonstrates how experts can persuade Arbitral Tribunals without falling foul of the rule against being advocates.

3. <u>An example of what not to do</u>

In SFO Libor rigging trial of *R v Alex Julian Pabon*,[27] Gross J stated the following in relation to "expert" testimony of Saul Haydon Rowe:

"Put bluntly, Rowe signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O'Kane had played in preparing his report. On the material available to us, he did not inform the SFO, or the Court, of the limits of his expertise.

[26] *(2000) 72 Con LR 118 (TCC)*.

[27] [2018] EWCA Crim 420 at paragraph 58. A similar issue arose in the case of a serious fraud trial which collapsed due to the testimony of the inexpert "expert" Andrew Ager.

He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ's words) an "enthusiastic amateur". He flouted the Judge's admonition not to discuss his evidence while he was still in the witness box. We take a grave view of Rowe's conduct; questions of sanction are not for us, so we say no more of sanction but highlight his failings here for the consideration of others…

…There is no room for complacency and this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre."

Topic 7

METHODS OF PRESENTING EXPERT EVIDENCE

a. Traditional witness testimony (expert reports or witness statements, with cross-examination at an oral hearing) – pros and cons

   i. Pros:

      A. "Tried and true" – familiar to most (especially common-law) counsel and tribunal members, and the subject of court decisions for certainly of procedure;

      B. Relatively effective depending on the quality of the expert, and the quality of the cross-examination.

   ii. Cons:

      A. May be less familiar to civilian tribunal members, counsel and parties;

      B. Can be time consuming and thus expensive.

b. Panels of experts / hot-tubbing / expert witness conferencing: how it works; pros and cons; best practices:

   i. Hot-tubbing is a frequently used procedure to winnow down the claimed areas of dispute between or amongst experts until you are left with the real areas of disagreement. This allows the tribunal to compare the answers of experts of like-specialty to those disputed areas. It is important to alert the parties early in the proceeding that this technique will be used. "*Beyond the guidelines provided by the IBA Rules and the CIArb Protocol for Party Appointed Experts, there are several methods that can be adopted to streamline contentious issues, such as hot-tubbing, or witness conferencing, and the exchange of draft reports. ... While there is no standardised definition of exactly what "witness hot-tubbing" or "witness conferencing" entails in the context of arbitration, generally, they refer to the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other to test the accuracy of their opinions. Frequently, the term "hot-tubbing" is used in relation to expert witnesses and 'conferencing' to refer to both lay and expert witnesses, but this distinction is not universal. ... Hot-tubbing and witness conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual issues involving number of expert witnesses. The efficiency derives from the fact that witnesses "in conference" can effectively confront each other's evidence on the spot.*

Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness' counterpart is heard. Further, it is possible that due to the highly technical nature of the evidence, opposing counsel will not be able to develop fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing. The other way of limiting the differences between experts, namely the early exchange of draft reports, allows for the early clarification of contentious issues. From my experience, by being exposed to the views of other experts, this method can prompt experts to consider things differently, potentially reaching a consensus on some issues at the outset. The CIArb Protocol for Party Appointed Experts provides a mechanism for this exchange of drafts, when so directed by the arbitral tribunal. As far as is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence." - Doug Jones, 'Chapter 11: Improving Arbitral Procedure: Perspectives from the Coalface', in Bernd Ehle and Domitille Baizeau (eds), Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider), (© Kluwer Law International; Kluwer Law International 2015) pp. 91 – 102 at pp. 97, 98

ii. An innovative concept is that of the "expert team" or "panel of experts": "*Instead of relying exclusively on party-appointed experts or appointing its own expert of choice, the tribunal could consult with the parties at an early stage in the proceedings and invite them to each provide the tribunal and the opposing party with a short list of candidates who they consider could serve as an expert to give evidence on the issues at stake. The tribunal should then invite the parties to briefly comment on the experts proposed by the other party, in particular as to whether there are any conflicts of interest. Then the tribunal chooses two experts, one from each list, and appoints these experts jointly as an "expert team". Following such appointment, the tribunal will meet with the expert team and the parties in order to establish a protocol on the expert team's mission. Based on the terms of the protocol, the expert team prepares a preliminary joint report which is circulated to the tribunal and the parties. The parties and the tribunal are given the opportunity to comment on this preliminary report. The experts then review these comments and take them into consideration in preparing their final joint report which will be submitted to the parties and the tribunal. Finally, upon request by one of the parties or the tribunal, the members of the expert team shall be present at the evidentiary hearing and they may be questioned by the tribunal, the parties or any party-appointed expert on issues raised in the experts' report*." … "*The principal advantage compared to party-appointed experts lies in the general status of*

the experts. Although the experts have been proposed by the parties, they are appointed by the tribunal and, thus, under the applicable laws and regulations, qualify as tribunal-appointed. Consequently, they are subject to special duties of independence and impartiality. Probably, even more important, the experts themselves regard themselves as facilitators to the tribunal and not as assistants to the party appointing them. In addition, the experts are not paid by the party who proposed the expert. Instead, the fees of each expert are shared by the parties and are subject to the final determination of costs by the tribunal in its final award." Klaus Sachs and NilsSchmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in Albert Jan Van den Berg (ed), Arbitration Advocacy in Changing Times, ICCA Congress Series, Volume 15 (© Kluwer Law International; ICCA & Kluwer Law International 2011) pp. 135 – 148 at pp. 145-146

c. The CIArb Guidelines: "Party-appointed and Tribunal-appointed Experts 2016"

i. Contents:

Article 1 — Powers to appoint an expert: *Arbitrators should satisfy themselves, at the outset, that expert evidence is admissible pursuant to the arbitration agreement, including any applicable rules and/or the lex arbitri.*

Article 2 — Assessing the need for expert evidence: *Arbitrators should, in consultation with the parties, consider at the outset of the arbitration, and keep under review during the course of the arbitration, whether expert evidence is needed to resolve any specific issues in dispute.*

Article 3 — Methods of adducing expert evidence: *Having determined that expert evidence will be adduced, arbitrators should discuss with the parties the precise manner in which such evidence should be adduced, bearing in mind the need to conduct the arbitral proceedings in an efficient and cost-effective manner.*

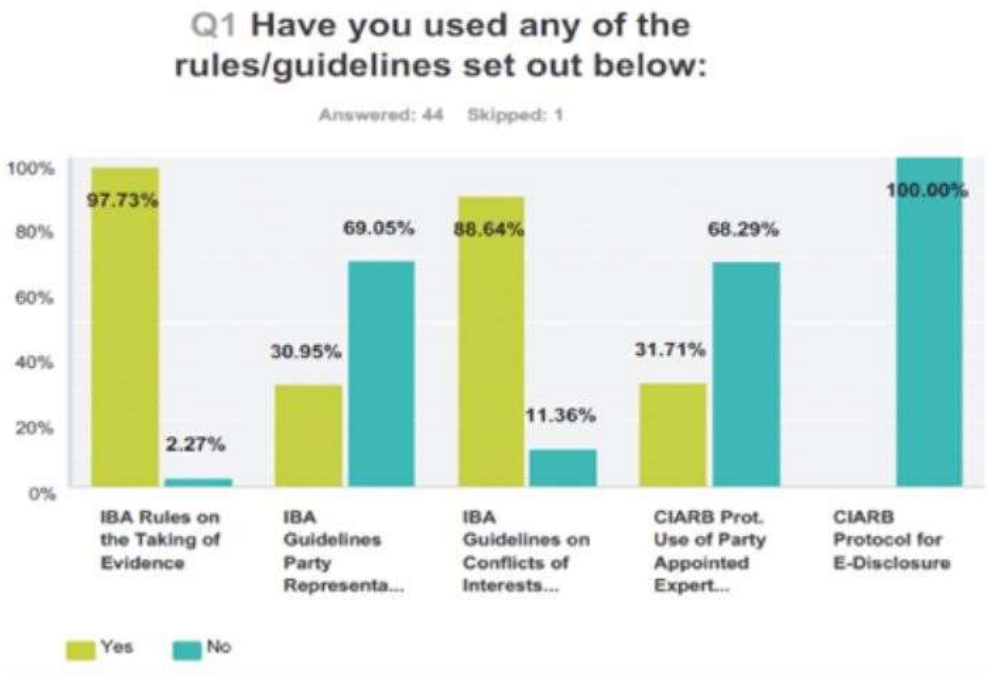
Article 4 — Procedural directions for the expert(s): *Depending on the method chosen, arbitrators should set out the precise procedure for the collection, giving and testing of expert evidence in a procedural order.*

Article 5 — Testing of the experts' opinions: 5.1 *Arbitrators should give directions as to how expert opinions should be tested. Some directions in relation to this are usually given in anticipation of receiving the expert report, but arbitrators may also give further directions as to the testing of expert's opinion once the reports have been exchanged.* 5.2 *When drafting their final award, arbitrators should provide reasons for relying on and/or preferring an expert's opinion or specific aspects of it in order to show that they have given*

proper consideration to any opinions proffered.

Conclusion: *The selection and appointment of expert(s) may have significant impact on the cost and duration of an arbitration. Therefore, careful consideration should be given when determining the most appropriate method for appointing experts. This Guideline seeks to highlight the factors that need to be taken into account when selecting and appointing an expert and summarises the matters that arbitrators should consider including when issuing instructions to the appointed expert(s). Arbitrators should be mindful of the dangers of private communications and/or private conversations and/or any form of deliberation with an expert as they may all provide grounds for a challenge on the grounds of lack of due process and/or lack of independence and impartiality. Accordingly, it is considered best practice to conduct all communications in a transparent manner by copying to all of the parties all communications concerning the arbitration with the expert and to conduct all conversations with the expert in the presence of all parties. The risk of a challenge associated with an expert being involved in deliberations is most likely to arise with Arbitrator appointed experts, so particularly care should be taken in that situation*.

ii. Use of the Guidelines from a 2017 survey with 45 arbitrator responses:



Christopher Lau, 'Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – An Arbitrator's Perspective', in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19 (© Kluwer Law International; ICCA & Kluwer Law International 2017) pp. 559 - 598

TOPIC 8

SPECIALIZED EXPERTISE: TUTORIALS, ASSESSORS, AND TECHNICAL ADVISORS

One of the much-touted advantages of arbitration is the ability of parties to choose a decision-maker who has expertise in the subject matter of the dispute.

In highly specialized and technical areas such as, for example, nuclear physics, microbiology, or subsea oil and gas drilling technology, there are, however, limits to the ability of parties to locate qualified, experienced and conflict-free arbitrators, suitable for the case, who also are knowledgeable in the highly specialized and technical area in issue.

Further, it is not uncommon in highly specialized and technical areas that leading arbitrator candidates will have had ordinary course business or professional involvement with one of the parties, resulting in at least a perceived, or actual, lack of impartiality.

Certainly it would be unusual to wind up with a three-member tribunal composed of persons who are knowledgeable in a highly specialized and technical area.

There are various ways to overcome a tribunal's gap in technical expertise beyond, or in addition to, the use of party-appointed and tribunal-appointed experts, including:

(1) tutorial sessions;
(2) assessors; and
(3) technical advisors.

Party-Driven 'Tutorial' or 'Teaching' Sessions

Basic educating of an arbitral tribunal in a highly specialized and technical area can be done by way of a teaching or tutorial session with the tribunal, conducted by experts, and authorized under a procedural order. Such a procedural order would require consent of the parties, since the process is based on party consent and the participation of its expert(s).[28]

Usually the best time to hold a tutorial session may be at the earliest point in an arbitration that the specialized and technical issues are focused.

[28] Klaus Peter Berger, "A Teaching Session for the Efficient Management of Technical Evidence in International Arbitration" (18 January 2019), Kluwer Arbitration Blog, online: http://arbitrationblog.kluwerarbitration.com/2019/01/18/a-teaching-session-for-the-efficient-management-of-technical-evidence-in-international-arbitration/.

The parties could propose experts (whether testifying experts or non-testifying experts) whom the parties believe to be best suited to conducting the tutorial session.

Usually tutorial sessions are best held off the record, with no transcript. This is logical as what the tribunal hears in these sessions is not evidence. Being off the record allows for collaborative discussions between the 'tutors' and tribunal members, and among the tribunal members. The sessions being off the record allows the parties' counsel, who may be present, to relax and not feel that they must monitor everything that the tutor who is an expert witness will say.[29]

Whatever is said by anyone during a tutorial session should remain in the tutorial session and not be referred to during the hearing or as part of the record.

Likewise, the tribunal must highlight that the parties may not use the session to argue the case informally.[30]

Tribunal-Appointed Assessors

Under some arbitration regimes, an assessor may handles the adjudication of issue(s) assigned and then issues a report to the tribunal, which is in effect a proposed decision that the tribunal can adopt, after some process involving the parties having a say on whether that should happen. Assessors can also assist a arbitrator with the review and assessment of substantial amounts of detailed data.

The Commentary to Article 2 of the CIArb's Guideline 7: Party Appointed and Tribunal Appointed Expert Witnesses—2016 provides insight as to the use of assessors.

The English Arbitration Act, 1996 (*s. 37(1)(a)(ii))* and the Hong Kong Arbitration Ordinance (*s. 54)* permit the appointment of 'assessors.'

Under the English statute, an assessor may investigate and interview parties, provided that the parties can review the report and question the assessor before the tribunal decides the case. The assessor may perform tests and site inspections. For example, a multi-week hearing was punctuated to allow the assessor and the parties to go the site and test equipment. Yet it must be stressed that an assessor must appreciate natural justice and procedure.[31]

[29] Ibid.

[30] Ibid.

[31] Eur Ing Geoffrey M. Beresford Hartwell, "The Relevance of Expertise in Commercial Arbitration", (1998) at 8, online:https://www.academia.edu/6331364/The_Relevance_of_Expertise_in_Commercial_Arbitration_1_Arbitration_Procedures_Achieving_Efficiency_Without_Sacrificing_Due_Process_I_-Introduction_and_Background.

Technical Advisor to Tribunal

An innovation that arbitral tribunals and parties might consider in an appropriate case, is a form of the "technical advisor" model occasionally used in U.S. courts, particularly in patent cases.

In rare situations,[32] U.S. courts permit a technical advisor to assist a trial court. The case law emphasizes that appointment of a technical advisor is a "near-to-last resort"[33] and "[trial] courts should use this inherent authority sparingly and then only in exceptionally technically complicated cases."[34] For example, in a pharmaceutical patent case involving the manufacture of a recombinant DNA product, the trial court appointed an MIT professor to assist it.[35] This may be unlike arbitration where an arbitral tribunal may chosen specifically because of the tribunal's subject-matter expertise.

The use of technical advisors is also intertwined with the prevalence of civil juries in the United States. Thus, a technical advisor may assist a trial judge in preforming his or her 'gatekeeper' function in the admission of expert evidence thereby helping to determine "whether particular expert testimony is reliable and 'will assist the trier of fact,' Fed. Rule Evid. 702, or whether the 'probative value' of testimony is substantially outweighed by risks of prejudice, confusion or waste of time, Fed. Rule Evid. 403."[36]

Appointment of technical advisors most often occurs in patent cases, which in the U.S. are regularly decided by juries, though they may be appointed in other types of cases as well.[37]

One leading case defined a technical advisor's role as follows: "In fine, the advisor's role is to act as a sounding board for the judge—helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems."[38]

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[32] *Reilly* v. *U.S.*, 863 F.2d 149 (1st Cir. 1988) at 156–57 ("Appropriate instances, we suspect, will be hen's-teeth rare.").

[33] *Ibid*. at 157.

[34] *TechSearch L.L.C.* v. *Intel Corp.*, 286 F. 3d 1360 (Fed. Cir. 2002) at 1378; *Reilly* v. *U.S.*, 863 F.2d 149 (1st Cir.
1988) at 157.

[35] *Amgen, Inc.* v. *Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69 (D. Mass., 2001) at 78, *vacated in part on other grounds*, 314 F.3d 1313 (Fed. Cir. 2003).

[36] *General Electric Co.* v. *Joiner*, 522 U.S. 136 (Breyer, J. concurring) at 148; *TechSearch L.L.C.* v. *Intel Corp.*, 2086 F. 3d 1360 (Fed. Cir. 2002) at 1377 ("Because this function is critical, the district court must have the authority to appoint a technical advisor in such instances so that the court can better understand scientific and technical evidence in order to properly discharge its gatekeeper role of determining the admissibility of such evidence."); Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence,* 110 Harv. L. Rev. 941 (1997).

[37] *Supra*, note 5 (compromised birth medical malpractice case involving economic theories regarding future-care expenditures and income loss over a 70-year period).

[38] *Ibid*. at 158; *Assoc. of Mexican-American Educators* v. *State of California*, 231 F.3d 572 (9th Cir. 2000) (Tashima J. dissenting) at 612 ("[T]he advisor's role should be that of 'sounding board' and tutor who aids the court in understanding the 'jargon and theory' relevant to the technical aspects of the evidence.").

Put differently, "the very purpose of the appointment [is] to provide the judge with one-to-one technical advice."[39]

Technical advisors are often defined by what they are *not*. For example, in contrast to tribunal-appointed experts, technical advisors "are not witnesses, and may not contribute evidence."[40] They may not advocate on behalf of either party.[41] It has also been held that "[a] judge may not appoint a technical advisor to brief him on legal issues, or to find facts outside the record of the case …."[42] Likewise, despite being called 'sounding boards', a technical advisor's role has been contrasted to that of a judicial law clerk:

> In some important respects, a technical advisor is quite unlike a law clerk. A law clerk's function is to aid the judge in researching legal issues in cases pending before the court. Because the judge is an expert in the law and fully understands legal theory and analyses, it is unlikely, to say the least, that a law clerk will impermissibly usurp the judicial function. On the other hand, a technical advisor is brought in precisely because the judge is not familiar with the complex, technical issues presented in the case. [A]ppointment of a technical advisor must arise out of some cognizable judicial need for specialized skills. Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. In short, a judge can filter out "bad" legal advice or research from a law clerk; he or she is ill-equipped, however, to do the same with "bad" technical advice. Moreover, resolution of legal issues is committed to the judge *qua* judge and is subject to de novo review. On the other hand, factual issues, no matter how technical, are committed to the factfinder and, to be reviewed properly, must be based on the record made in the trial court.[43]

U.S. case law has developed criteria and procedures for the appointment and use of technical advisors: (1) the technical advisor must be chosen using a fair and open procedure in which counsel participate; (2) the technical advisor's role must be clearly defined in writing, which is provided to the parties either by pre- or post-appointment affidavit; (3) the technical advisor's information sources are restricted to the record; and (4) the nature and content of the technical advisor's tutelage is disclosed either through a report or on the record.[44]

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[39] Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence,* 110 Harv. L. Rev. 941 (1997) at 957.

[40] *Supra*, note 7 at 1368.

[41] *Assoc. of Mexican-American Educators* v. *State of California*, 231 F.3d 572 (9th Cir. 2000) (Tashima J. dissenting) at 612–13 ("This 'job description' should make explicit that the technical advisor is not to contribute evidence (unless called as a witness) or to be an advocate for either party.").

[42] *Supra*, note 13 at 1368.

[43] *Supra*, note 14 at 613–14 (internal quotations and citations omitted).

[44] Jeffrey L. Snow & Andrea B. Reed, "Technical Advisors and Tutorials: Educating Judges", ABA Intellectual Property Litigation, vol. 21, No. 1, Fall 2009 1 at 21.

Unlike the procedures for party-appointed or tribunal-appointed experts, it is important to note *that, "[s]*ince an advisor, by definition, is called upon to make no findings and to supply no evidence provisions for depositions, cross-questioning, and the like are inapposite."[45]

CHECKLISTS & RESOURCES

Sample Basic Procedural Order – Tutorials

With the consent of the Parties, the Arbitral Tribunal may reserve time in advance of the evidentiary hearing, all or a portion of the first day of the evidentiary hearing or some other convenient time during the arbitral proceedings for an off-the-record, non-transcribed "tutorial session" with the Parties' experts and key technical witnesses to understand [specify the technical matter(s)] that relate to the subject matter of the dispute. The "tutorial session" shall not be used to advance or defend any of the requests in the arbitration, but merely to aid the Arbitral Tribunal in its ability to understand the above noted technical issues in dispute. Nothing said in the tutorial session is evidence in the arbitration. Neither the Parties nor the Tribunal shall refer on the record to the tutorial session or statements made during or in connection with it, whether during the hearing or in subsequent submissions.[46]

CIArb, *Guideline 7: Party Appointed and Tribunal Appointed Expert Witnesses—2016*. Article 2—Assessing the need for expert evidence

Arbitrators should, in consultation with the parties, consider at the outset of the arbitration, and keep under review during the course of the arbitration, whether expert evidence is needed to resolve any specific issues in dispute.

Commentary on Article 2

…

Assessors

In certain jurisdictions, arbitrators may appoint assessors to assist them with the review and assessment of substantial amounts of very detailed data as, for example, in certain arbitrations arising out of construction and/or engineering contracts. The advantage is that considerable time and expense can be saved by employing an industry expert, such as a quantity surveyor, an engineer or a programmer, to review and assess such data. Even though assessors are engaged to evaluate and/or interpret evidence rather than provide expert evidence themselves, it is considered good practice that their appointment and remuneration basis be approved by

[45] *Supra*, note 5 at 156 (internal citations omitted).
[46] Klaus Peter Berger, "A Teaching Session for the Efficient Management of Technical Evidence in International Arbitration" (18 January 2019), Kluwer Arbitration Blog, online: http://arbitrationblog.kluwerarbitration.com/2019/01/18/a-teaching-session-for-the-efficient-management-of-technical-evidence-in-international-arbitration/

the parties. However, unless decided otherwise by the arbitrators, the work of an appointed assessor is not disclosable to the parties unlike the report and evidence of any expert appointed. In any event, arbitrators considering appointing an assessor should always check whether they have the power to do so under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*.

Topic 9

TIPS FROM AN EXPERT WITNESS ON EFFECTIVE EXPERT EVIDENCE

A. Tips from an Expert Witness
Liz Perks

Remember your role as Expert:

- Expert is there to give opinion on technical matters within expertise; do not stray into areas that are factual / legal / outside expertise;
- Need to explain complex issues in a simple way so that the tribunal, who are not specialist in the technical area, can understand them.

Be independent:

- Duty is to the Arbitral Tribunal, even if that is not specifically written in the arbitration rules;
- If experts are 'hired guns' this will generally become apparent during the case and does not help the client in the end if the Tribunal loses trust in the expert.

Be well prepared:

- The expert needs to be fully involved in the case; this is not a role that can be delegated to a supporting team as the expert's opinions matter;
- The expert needs to know the details; there is no point appointing the 'best' expert around if they are not on top of the details as they can easily come unstuck in oral testimony.

Present results on the other side's case:

- Sometimes counsel do not want to instruct the expert to address the other side's case, but it is dangerous not to;
- If the tribunal find for the other side's legal case or valuation methodology and there is no alternative calculation, there is a good chance the tribunal will go with their numbers too;
- An experienced expert should resist instructions that limit scope in this way to the extent possible;

- If one side's expert has not addressed the other side's case, the tribunal may have power to make his happen anyway, such as by ordering a joint model.

B. Tips for Counsel and Experts from In-house Forensic Accountant Hayley Boxall

Help make life easy for the Tribunal:

- It is vital that arbitral tribunals understand the basis of damages calculations so that the final award reflects the evidence presented to them.

- Important to consider the issues and questions that the Arbitral Tribunal is looking to address when it considers the financial models presented by the party appointed experts. In my experience Arbitral Tribunals are looking to understand:

  (i) how the party appointed experts have arrived at their respective values for damages;

  (ii)what factors the experts have relied on to determine the inputs to their respective financial models and how sensitive the damages calculation are to different inputs; and

  (iii) what similarities and differences exist in the party appointed expert's damages calculations in terms of both methodology and inputs.

- Helpful for counsel to review the expert's report as if you were the Tribunal and ensure that it is easy to follow by a non accountant/expert

Ensure expert report links into pleaded case and legal issues

- Demonstrate how damages calculations tie into pleaded case/challenge other party's pleaded case

- Comment on issues of causation and remoteness as applicable to basis of quantum calculations and to extent within expertise

- Be careful just relying on counsel's instructions - be prepared to provide view/opinion on instructions given

Think about the best applicable format for the expert report

- Detailed executive summary (as this may be the only section that Tribunal has time to read in detail!) or detailed but concise body of the report and non-executive summary

- Technical details and calculations in appendices (these will be the focus of the other party's expert)

- Use of diagrams to explain complicated calculations/methodologies and to summarise outputs and sensitivities

Ensure that any quantum calculations and financial models are readily accessible and understandable by the Arbitral Tribunal

- Many damages calculations will be highly complex and a vast amount of work will be undertaken by the party appointed experts and their teams to prepare the expert report and the financial models. Whilst the level of detail is required to demonstrate the robustness of the financial model and the expert report, conclusions and expert opinion, the expert needs to cut through the complexity of the underlying detail to provide key findings in a digestible format for the Arbitral Tribunal.

Financial models need to:

- Contain more words!

  (i) For example, include commentary setting out the methodology adopted and the different steps in the expert's assessment of quantum including clear explanation as to how the steps are reflected in the financial model.

  (ii) Text boxes explaining what key elements of the calculations/financial model are doing.

  (iii) Narrated formulae (e.g. number of units x sales price x profit margin) so that the Arbitral Tribunal does not need to click into cells and work through what the calculation is doing.

- Be clearly presented/easy to follow

  (i) Summary tables and diagrams showing the inputs and outputs of the financial models and impact of using alternative assumptions
  Clear presentation of key inputs and outputs e.g. through colour coding, clear headings, diagrams.

  (ii) It is important for expert's models to distinguish which inputs are based on (a)

factual information such as market data, documents etc and (b) which are based on opinion i.e. witness evidence and expert's judgemental assumptions in order to help the Arbitral Tribunal navigate the model and assess the impact of different elements of the case.

(iii) Indexes and careful organisation of the tabs within the spreadsheet so that the Arbitral Tribunal can readily navigate the financial model and determine which tabs to focus on if they choose to.

- User friendly/enable the Arbitral Tribunals to feel comfortable using the model to assess the alternative outputs

Topic 10

WHAT ARBITRATORS LIKE AND DON'T LIKE IN EXPERT EVIDENCE

- Not all arbitrators are the same.
- Some 'user friendly' experts may not be good experts- the whims and peccadillos of the particular arbitrator may make them drawn towards the approach of the arbitrator.
- Generally, however arbitrators don't like experts who exhibit:
  - *Bias;*
  - *'Hired Gun Approach'*
  - *Unprofessionalism in terms of not properly presenting evidence etc*
  - Most arbitrators like experts who:
  - *Vary their approach to the facts of the dispute;*
  - *Keep up to date with changes in best practice;*
  - *Show professionalism*
  - *Lack bias*