Published on *The National Law Review* https://natlawreview.com

Expert Evidence in International Arbitration: Common Criticisms and Innovative Solutions

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An International Chamber of Commerce (ICC) task force was established to investigate whether witness evidence is fit for purpose. As discussed in our alert, their recently published report articulated a number of concerns held by practitioners about the probative value (or lack thereof) of overly-polished and lengthy fact witness statements that are carefully crafted by counsel. There may be change on the horizon for the use of fact witness evidence in international arbitration, but might the use of expert opinion evidence in international arbitration be similarly ripe for change?

There are certainly concerns regarding the value of expert evidence as currently utilised by parties in international arbitration, particularly in the case of party-appointed experts and concerns as to their impartiality. On 28 May 2021, Lord Hodge delivered the keynote speech at the Expert Witness Institute's annual conference, and he referred to a 2019 survey in which:

- Twenty five percent of experts reported that they had felt pressurised to change their report in a way that damaged their impartiality; and
- Forty one percent of experts indicated that they had come across other expert witnesses that they considered to be a 'hired gun.'

With many international arbitrations involving some element of expert testimony, and a clear preference in these cases for party-appointed experts, these survey results are worrying. In 2012, an International Arbitration Survey found that, where expert witnesses were involved, they were party-appointed 90 percent of the time, but less than half of respondents found expert witnesses to be more effective when appointed by the parties.

CRITICISMS OF THE CURRENT USE OF EXPERT WITNESSES

Concerns regarding the way in which party-appointed experts are currently used include:

- As indicated above, concerns regarding independence and impartiality. Party-appointed

experts can be perceived to be additional advocates for the party that appointed them.

- There is no clear regulatory framework applicable to party-appointed experts in most national or institutional procedural rules. Many parties make use of the International Bar Association (IBA) Rules of Evidence, but this is voluntary and provides broad guidance rather than strict rules.

- Party-appointed expert reports have been criticised for being too long and complex, and lacking clarity.

- Lack of coordination between party-appointed experts can lead to reports being exchanged simultaneously that, like ‘ships passing in the night,’ cover different issues or approach the same issues in a fundamentally incompatible way.

One might suggest that the answer is to increase the use of the existing, but rarely preferred, practice of using tribunal-appointed experts. However, this practice has its own potential pitfalls:

- Tribunal-appointed experts are often distrusted by the parties. This undermines trust in the arbitration proceedings as a whole, and it should also be borne in mind that the parties will be required to pay for the tribunal-appointed expert.

- In particular, in certain jurisdictions (for example, in the Gulf Cooperation Council), single joint experts are routinely appointed by courts. Parties often harbour concerns about whether a tribunal-appointed expert may become, by default, the arbiter of fact or technical issues - effectively resulting in the delegation of the tribunal’s decision-making function to the expert. This, at worst, may lead to arguments in respect of the validity of the final award and lead to challenges to the award and resistance to enforcement. Other concerns may also arise about undue influence that could be placed on a tribunal-appointed expert.

- In part as a result of the lack of trust identified above, many parties appoint their own experts in any event, in order to advise on any expert reports produced by the tribunal-appointed expert, and to assist in questioning the tribunal-appointed expert or making submissions as to the tribunal-appointed expert’s findings, for example.

- The tribunal would have to analyse the issues in sufficient detail to be in a position to appoint an appropriate expert at a relatively early stage of proceedings.

- There can be a less effective flow of the complete relevant factual background from the parties when experts are appointed by the tribunal and communications are conducted with the tribunal and all parties in copy.

THE RESPONSE OF ARBITRAL INSTITUTIONS

In recent years, various arbitral institutions and arbitration community groupings have tried to address the perceived pitfalls associated with the use of party- and tribunal-appointed experts in international arbitration.

- In the absence of a clear procedural framework in institutional or national laws, the IBA Rules

on the Taking of Evidence (last updated in December 2020) have provided fairly detailed procedures for experts to follow and, although these are optional and framed in terms that are more akin to guidance than optional strict rules, parties often agree to incorporate the framework into their procedural orders. The IBA Rules also encourage the use of particular tools to increase the efficiency of expert evidence, including pre-hearing meetings between experts to confer and attempt to reach agreement.

- In 2007, the ICC produced a report on reducing time and costs in arbitration, which was most recently updated in 2018. Unsurprisingly, inefficient use of expert evidence was highlighted as one issue that can significantly increase the time and costs of an arbitration. The ICC report encourages tribunals to work from the presumption that expert evidence is not required and, in the event expert evidence is required, reminds parties that the ICC International Centre for Alternative Dispute Resolution can propose one or more experts in a particular field of activity at no additional cost and with no obligation on the parties to use that/those expert(s). The ICC report also reminds all parties to consider whether a single expert appointed by the tribunal, or jointly by the parties, may be more efficient.

- The London Court of International Arbitration (LCIA) published a note on experts in international arbitration in 2018, which notes that “The traditional role for experts, in which they draft an expert report for a party and then testify at a hearing, has been joined by a number of different methods to improve the quality and efficiency of decision-making. These methods, while providing opportunities for experts, parties, and arbitrators, do not necessarily result in experts being involved optimally.” The LCIA suggests that experts working together throughout the process, and witness conferencing at a hearing, can help to narrow points of disagreement. Many practitioners with experience of witness conferencing emphasise the central importance of the tribunal properly preparing and then taking ownership of the “hot tubbing” phase. Like the ICC, the LCIA reminds the parties that it may potentially be more effective for the tribunal to appoint an expert to ensure a non-partisan view. Furthermore, the LCIA considers that “a natural extension of having a tribunal-appointed expert is to have an expert as a member of the tribunal,” not least to overcome concerns that the tribunal has delegated its fundamental decision-making responsibility to a third party. In disputes where technical issues have the potential to be as determinative as legal ones, this can ensure that the tribunal has the necessary legal and technical expertise to decide the dispute. However, tribunal selection is already a highly contentious area of arbitration and the selection of an expert may lead to significant disputes between the parties regarding the type of expert to be appointed, how and by whom the expert will be appointed, and whether the expert will be appointed as a co-arbitrator (necessitating one party compromising its free choice) or the chair, thus impacting any potential time and cost savings. In our view, this practice has worked best on the fairly rare occasions when the institution has been empowered to select all three members of the tribunal.

- Recognising the potential value of expert witness conferencing in hearings, the Chartered Institute of Arbitrators (CIArb) released guidelines for witness conferencing in April 2019. The CIArb notes that conferencing makes it easier to compare experts’ different views on an issue, and for experts to challenge each other’s views. Furthermore, the quality of evidence may be improved more generally, because an expert will be less willing to make technically weak or incorrect assertions in front of another expert. However, there are also drawbacks to this approach. In addition to the need for full tribunal engagement and commitment to the process (as noted above) witness conferencing may result in shorter hearings, but it can also lengthen the hearing and more time and costs may be expended prior to the hearing in

preparing for the expert conferencing. The quality of evidence may also be negatively affected if experts are hostile to one another, or one party's expert is more reticent due to differing levels of experience, cultural factors, or a pre-existing relationship between the experts.

- In 2018, a working group with representatives from around 30, mainly civil law, countries produced the Prague Rules on Efficient Conduct of Proceedings in International Arbitration. While the Prague Rules do not preclude the use of party-appointed experts, the focus is heavily on the use of a tribunal-appointed expert and how this might best be achieved. The Prague Rules provide for the tribunal to (i) establish requirements for potential experts, (ii) seek suggestions from the parties that will not bind the tribunal, and then (iii) appoint a candidate or a joint expert commission consisting of multiple candidates. The Prague Rules require the tribunal to continually monitor the expert(s)' work and keep the parties informed of its progress. Whilst it is still early days, the Prague Rules do not yet seem to have become established as a commonly used alternative to the IBA Rules of Evidence.

- Other ideas that are common to many rules and guidelines include:

    - Setting out as early as practical the list of issues that are to be covered by expert evidence clearly so that all experts work towards the same goal

    - Building into the procedural timetable a process aimed at narrowing the issues in dispute as far as possible

    - Making provision for the experts to meet (or confer by video conference) several times to discuss the issues, without the parties or counsel

    - Encouraging the use of lists of questions and lists of agreed / not agreed issues

    - Dispensing with direct examination in favour of short focused presentations of the key opinions of each expert on the remaining issues in dispute

These attempts by arbitral institutions and arbitration community groupings to improve the effectiveness of the way in which expert evidence is presented and then tested in international arbitration have now been around for a number of years, but some consider the criticisms about expert evidence remain as valid as ever. However, individuals active in the arbitration sector may have more innovative solutions to offer.

INNOVATIVE SOLUTIONS FROM ELSEWHERE

We have considered a number of solutions for the more effective use of expert evidence in international arbitration, as proposed by various individuals in recent years. We outline some of these proposals below, and then proceed to offer our own ideas for how expert evidence in international arbitration may be helpfully reformed for the benefit of all parties seeking to resolve their disputes through arbitration.

Expert Teaming

Dr Klaus Sachs proposed a new approach (in a paper presented at the International Council for Commercial Arbitration Conference in Rio de Janeiro in 2010) to expert evidence that he termed

"expert teaming," which combines elements of both party- and tribunal- appointments.

Dr Sachs proposed that the parties each provide a shortlist of independent candidates, and the tribunal selects an expert from each list to establish an expert team. The team works up a preliminary report, which is circulated to the parties and the tribunal for comment, following which the experts prepare a final joint report, identifying areas on which they cannot reach a joint conclusion. The experts will be present at the hearing, and can be questioned by the tribunal, the parties or a party-appointed expert.

There appear to be some clear advantages to this hybrid approach. Unlike pure tribunal-appointments, it is more likely to get buy in from the parties who are each represented on the expert team. It also provides a system of checks and balances that is absent where the tribunal relies on a single tribunal-appointed expert. Carefully drafted terms of reference for the expert team, which clearly set out the issues they are required to opine on, will make it clear that the dispute itself will still be properly decided by the tribunal.

As against party-appointed experts, terms of reference also encourage the experts to draw up reports that respond specifically to the issues identified in the terms of reference, limiting the scope for expert reports that are too long and broad reaching. There is also an obvious advantage to severing the link between experts giving evidence, and their fees for so doing being paid by one of the parties - in Dr Sachs's proposal, the expert team fees are shared equally between the parties. Finally, this proposal sees the experts draft reports from scratch, relying only on the evidence and their expertise, and preventing parties from being tempted to provide outline reports or any other guidance on what the report should contain.

While seemingly carrying a number of attractive features, Dr Sachs's approach does not seem to have secured the traction that many felt it merited when it was first proposed. This may be a result of party's (and counsel's) unease with the loss of control that they may perceive to result from the formation of a "team."

A Technical Secretary

In an article for the *German Arbitration Journal* in 2020, Lisa Reiser and Kathrin Hüttman proposed that tribunals start appointing technical secretaries.

This proposal is partly borne out of the nature of expert evidence in the German courts: the German Code of Civil Procedure provides for the appointment of court-appointed experts only, and any party-appointed expert reports are considered part of the party's submissions. While party-appointed experts are allowed in German arbitrations, they are regarded as less credible.

Reiser and Hüttman suggest that the appointment of tribunal-appointed experts often happens far too late in proceedings. Their solution is to equip the tribunal with a technical secretary at the outset, who can help explain technical details to the tribunal, identify the differences in reports by party-appointed experts, and explain to the tribunal which issues are technically conclusive. A technical secretary could help to focus the minds of the tribunals, and the experts, on the technical issues that are genuinely most important to and problematic for the dispute.

The key criticism of this approach, which Reiser and Hüttman acknowledge, is that the parties may argue that it infringes their right to be heard, particularly if the technical secretary can make arguments to the tribunal that the parties have not been privy to and have not had a chance to

comment on. However, Reiser and Hüttman seek to overcome this criticism by suggesting that the technical secretary share its findings with the parties for comment. Furthermore, they note that tribunals already employ administrative secretaries to assist with work behind the scenes (although we note that the use of administrative secretaries is not free from controversy), and plenty of judicial systems (including the Supreme Court of the United States) rely on junior lawyers to do a lot of significant work in the background, yet there is no question that the decision is ultimately that of the judges / arbitrators on the case, as a result of the submissions of the parties.

If the appointment of a technical secretary can help in focussing the attention of all parties on the key technical issues, and reducing the time and cost spent on battles between party-appointed experts, perhaps it is worth trying.

Adapting the Practice of Party-Appointed Experts

Rather than introducing something other than party-appointed experts, Professor Doug Jones AO proposes changing how they are used. Prof. Jones proposes adopting a procedure that allows the experts to limit their differences prior to submitting any evidence, streamlining the issues at each stage and ensuring that reports respond to one another.

Prof. Jones suggests that this be achieved by:

- Agreeing a common list of questions for experts to work from;
- Deferring the production of expert reports until all factual evidence is available;
- Party-appointed experts work together to prepare a joint report first, identifying areas of agreement and disagreement. This allows experts to discuss their positions without prejudice before committing themselves to a particular position in evidence.
- Individual reports follow, on areas of disagreement only. Where disagreement flows from an underlying dispute of fact, the experts should set out their conclusions on the basis of the counter-expert's assumptions so that, when the tribunal makes the relevant finding of fact either way, it has the input of both experts on the consequences of this.

Prof. Jones also suggests that, particularly in the case of quantum experts, the tribunal should be allowed to hold confidential discussions with the experts and without the parties, in order to perform the calculations required to make a final award on quantum. Prof. Jones makes it clear that there would be no discussion of anything that requires the provision of an expert opinion, but that discussions would be limited to assistance that the tribunal needs in working out the calculations required for an award based on the tribunal's conclusions.

There has been discussion of the use of models that quantum experts can design together, and then provide to the tribunal to use alone. However, the reality of complex arbitrations is that there can often be too many variables and complexities for the creation of a model that can be used by the tribunal without assistance to be cost-effective or even possible. See, for example, our recent alert on the potential pitfalls in the use of damages models by tribunals.

Allowing quantum experts to work confidentially with the tribunal in drawing up an award is something that has been raised as a possibility in arbitrations that K&L Gates has been involved in. Although the

idea of an expert discussing issues without the knowledge of the parties, and directly with the tribunal and counter-expert, may make the parties feel uncomfortable, if it is clearly limited to the working out of an award based upon conclusions on matters of fact and law that the tribunal has already decided, it may be a sensible way of approaching complex issues of quantum. After all, an expert's duty ought properly to be to assist the tribunal, not to advocate for the party that appointed it.

Early Agreed Protocol

Another less radical, but certainly helpful, proposal has been employed by tribunals sitting in cases in which K&L Gates has been acting as counsel in recent years. This involves the tribunal taking an active role in formulating detailed guidance in the form of protocols incorporated into early procedural orders that set out how the party appointed experts will approach the preparation of their evidence. In our experience, this has the potential to have particular application to disputes that involve highly technical expert evidence on issues of liability, perhaps more so than damages-related expert evidence relevant to issues of quantum.

In drafting an appropriate protocol for the use of expert evidence, a tribunal can set out:

- The questions to be answered by expert testimony, and a requirement for reports to be limited to these issues;
- A date from which meetings of experts, without counsel, will commence with a view to more precisely defining the issues in dispute prior to them preparing their reports;
- Requirements for experts to set out agreed and not agreed issues, often after the exchange of the first round of reports;
- In the case of technical experts, the early identification and disclosure of pre-existing test results, and the setting of a clear timetable for identifying the need, and a timetable, for the conduct of any further testing;
- A target date for final reports, to be limited to matters on which the experts disagree; and
- Protocols for presentations by and questioning of experts at the hearing.

Although this solution may appear simple, and perhaps draws on some of the existing 'good practice' that all practitioners are already aware of, the active involvement of the tribunal and the setting out of these parameters in a procedural order at an early stage in proceedings can ensure that good practice is actually followed by the parties.

It also enables the parties to agree to bring expert evidence forward in the procedural timetable and avoids testing becoming a driver of procedural delay. This gives the experts a much longer period to agree and narrow the issues between them, and reduces the chances of issues remaining not agreed simply because the experts have not had time to properly consider them.

An advantage of this proposal is that it does not radically alter the existing status quo, is less likely to undermine party (and their counsel's) trust in the process and can be readily adopted by parties and tribunals now. There may be some risk of greater cost and more 'front loading' as to when the expert costs are incurred but, when used effectively, it can ultimately prove to have a significant

streamlining effect and bring about the efficient use of experts that in some cases can become unwieldly.

CONCLUSION

In our view, Dr Klaus Sachs's 'expert teaming' idea has much to commend it, being an innovative solution that appears to combine the strengths and tackle the weaknesses of both party-appointed and tribunal-appointed experts. However, in the several years since it was first floated, the fact is that it has not gained the traction that perhaps it ought to have and it is rarely adopted by practitioners.

The approach that has a better chance of securing broader acceptance in practice at the current time is for an early agreed protocol to be set out by the tribunal. As noted above, this is something that can be adopted by parties and tribunals without delay, and does not require a significant conceptual change in the way expert evidence is approached. However, a pro-active tribunal that sets out a clear framework for expert evidence at an early stage in proceedings can nevertheless make significant progress in addressing some of the concerns practitioners have raised regarding the use of expert evidence in international arbitration.

National Law Review, Volume XI, Number 236