



World Launch: ICC Expert Rules

A user Perspective: When and How to Involve Experts in International Arbitration Proceedings and other ADR Processes

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Introduction

This paper considers the role and use of the experts in international disputes. It focuses on the difference between party and tribunal appointments and the procedural rules that might apply. The new ICC Expert Rules are briefly considered, which provide in three sets of rules for the proposal of experts and neutrals, the appointment of experts and neutrals, and the administration of expert proceedings. The expert's mandate is explored, as are some practical considerations, such as issue identification, timetabling, joint meetings and expert reports.

Appointment: *parties or tribunal*

It has been said that the role of an expert in a commercial dispute is to provide independent opinion evidence based upon the facts. It is also frequently said that this requirement is entirely fictional, because most experts are in reality appointed and paid by one party and so experts may view the dispute from that party's perspective. An unbiased and careful review of the facts may well lead to a truly independent view, while at the other end of the scale, an expert may advocate a party's case and even be criticized as a "hired gun".

In many respects this criticism is levied against the Anglo-Saxon common-law jurisdictions, which for many years have allowed the parties a great deal of freedom to appoint their own experts. Many authors have considered this problem. For example, Andrew Bartlett described this as the "*chief unsustainable myth is the complete independence of the expert*".¹ Shilston has pointed out that the role of expert witnesses in common-law jurisdictions is "*ambiguous*".² Speaight, when considering litigation and the role of expert witnesses refers to "unresolved contradictions".³

The distinction in approaches between the civil and common law is in contrast on the international arena. Lawyers, experts and other consultants involved in domestic arbitration, will, in most circumstances, have developed their understanding from domestic litigation. The traditional approach of a particular country, governed by its domestic civil procedure rules, practices and guidelines will and are transposed into the international dispute resolution arena.

An alternative in international commercial arbitration is for the parties to agree that the tribunal can appoint the expert or experts. As party autonomy is paramount, the parties would of course need to agree, but the applicable procedural rules may provide the tribunal with the power to decide how expert evidence is to be dealt with in the arbitration.

Applicable Rules

If the parties select and appoint their own expert then the parties must comply with the directions of the tribunal and see that the expert delivers the report on time, meets with the other party's expert, and is available for the hearing. If a different approach is to be adopted by the tribunal then

1. Bartlett, A. (1994) the Expert "independence and parties ownership".
2. Shilston, A. (1992) "Some reflections on the role of the expert witness" 58, JCI Arb 4-251-258.
3. Speaight, A. (1996) "expert evidence – seven pillars of wisdom, but are they sound?" 62, JCI Arb 4-269-271.

they will need the consent of the parties or an appropriate power in the procedural rules or law. For example the Article 4 of the 2012 ICC Arbitration, dealing with the Request for Arbitration, states in Article 4.3:

"The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute"

Any Answer under Article 5, "Answer to the Request; Counterclaim", may be dictated by the depth of the Request, although any Counterclaim is free to set out the level of detail and attach an expert's report if truly helpful. Article 22.2 deals with the Conduct of the Arbitration:

"In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."

Terms of Reference are covered by Article 23, but do not (nor do they need to) set out any specific requirements with regards to experts. However, in practice the number and specialism of any experts and whether they are party appointed or tribunal appointed needs to be considered as well as the procedure and timetable to be adopted as part of the overall proceedings.

Case Management and Procedural Timetable are covered by Article 24. Article 24.1 states: "... the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted...". In respect of Establishing the Facts of the Case, Article 25.3 provides that "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, ...". Article 25.4 states:

"The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert."

The ICC's Effective Management of Arbitration⁴ dedicates section 9 to Expert Witnesses (pre-hearing issues), and deals with witness conferencing under section 10 Hearing on the Merits (including witness issues). Section 9 reminds us that there are 4 possibilities when it comes to appointing experts:

1. No experts;
2. Party appointed experts;
3. Tribunal appointed experts; and
4. Both party and tribunal appointed experts.⁵

Witness conferencing means that two or more witnesses are dealt with simultaneously. The benefit is that each can discuss or be cross examined in relation to the same specific issue. The witnesses are questioned together by each parties counsel and the tribunal. In particular they can debate issues with each other. Providing that the tribunal has read and understood to some degree all of the material relating to the expert's issues before the hearing and that the process is carefully managed by the tribunal, then this is a very effective and efficient technique for address the real core issues at the heart of the technical part of the dispute. In practice this means that the tribunal has to have analysed the materials and be able to act inquisitorially in the hearing.

4. Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives, ICC Commission on Arbitration and ADR, 2014.
5. Page 45.
6. UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).

Article 29 of the UNCITRAL Arbitration Rules, "Experts appointed by the Arbitral Tribunal", states⁶:

"1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the

parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings."

UNCITRAL Model Law Art 26 states⁷:

- "(1) Unless otherwise agreed by the parties, the arbitral tribunal*
- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;*
 - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.*
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."*

The AAA/ICDR (American Arbitration Association/International Centre for Dispute Resolution) updated its International Arbitration Rules effective from 1 June 2014 with the "International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)". Article 25 provides:

"1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.

2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.

7. General Assembly resolution 61/33 (2006).

3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall

give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.

4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.”

Under the AAA / ICDR Rules the Tribunal may fix the cost of the arbitration under Article 34 including *“the costs of assistance required by the tribunal, including its experts”*.

Article 21 of the LCIA Arbitration Rules dealing with “Experts to the Arbitral Tribunal” states:⁸

“21.1 The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal.

21.2 Any such expert shall be and remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect, delivered to the Arbitral Tribunal and copied to all parties.

21.3 The Arbitral Tribunal may require any party at any time to give to such expert any relevant information or to provide access to any relevant documents, goods, samples, property, site or thing for inspection under that party's control on such terms as the Arbitral Tribunal thinks appropriate in the circumstances.

21.4 If any party so requests or the Arbitral Tribunal considers it necessary, the Arbitral Tribunal may order the expert, after delivery of the expert's written report, to participate in a hearing at which the parties shall have a reasonable opportunity to question the expert on the report and to present witnesses in order to testify on relevant issues arising from the report.

21.5 The fees and expenses of any expert appointed by the Arbitral Tribunal under this Article 21 may be paid out of the deposits payable by the parties under Article 24 and shall form part of the Arbitration Costs under Article 28”

A common feature of the UNCITRAL Arbitration Rules, UNCITRAL Model Law, AAA/ICDR International Arbitration Rules and the LCIA Rules is that the tribunal can appoint the expert or experts. The tribunal has the power to identify the issues which a tribunal is to decide and to order the parties to provide relevant information. An expert's report is to be in writing, and the parties are to be given an opportunity to examine and comment upon the report. The quality of treatment between the parties and the opportunity to consider and put their case is of course paramount in arbitration, as it is in litigation.

The Model Law and these Rules do not provide procedures for dealing with expert evidence, nor do they provide support services for proposing, appointing or even administering expert proceedings. The ICC has published rules, and provides a proposal, appointment and an administration service.

ICC Expertise

The ICC's prior set of Rules for Expertise came into force on 1 January 2003. After careful consultation the 2003 Rules for Expertise have been updated and amended and the new three different sets of expert related Rules come into effect on 1 February 2015 (the Rules). The Rules recognise that experts with particular knowledge in technical, legal, financial and other fields may well be used in a variety of situations. One of those could of course be to compliment an international commercial arbitration. The Rules are however complimentary to the three distinct services provided by the ICC.

8. Effective 1 October 2014.

Those services are:

1. The identification and proposal of experts or neutrals;
2. The identification and appointment of experts or neutrals; and
3. The administration of expert proceedings.

The ICC is in a unique position as its network of 90 national committees around the world provides the ICC with direct links to government and business worldwide. The ICC therefore has access to a network of experts in a wide range of fields internationally. The ICC's International Centre for ADR (the Centre) is assisted by a Standing Committee for its work related to expert proceedings. Under the new Rules, the Standing Committee comprises a chairman, up to three vice chairmen and up to eleven further members for a three year renewable term. These individuals are drawn from around the world, thus adding to the international perspective of the ICC.

The services provided by ICC are now each set out in a specific set of rules (mirroring the services offered by the ICC):

1. Rules for the Proposal of Experts and Neutrals;
2. Rules for the Appointment of Experts and Neutrals; and
3. Rules for the Administration of Expert Proceedings.

In addition, each set of Rules contains an appendix which sets out the function of the Standing Committee in respect of the particular service, and a second appendix deals with cost calculations. The three procedures are considered below.

Proposal of Experts and Neutrals

Anyone may ask the Centre to propose one or more experts or neutrals. The Centre will make a proposal through an ICC national committee or perhaps direct. The Centre then has no further involvement.

The person requesting the proposal must make a non-refundable payment for each expert. Currently that fee is US\$3,000 for each proposal.

The Centre when selecting an expert for proposal will consider the information provided in the request and will then try to match a prospective expert's qualifications to the particular circumstances of the case. The Centre will also take into account the expert's availability, normal place of residence and language skills.

A prospective expert or neutral is required by the Centre to sign a statement of acceptance, availability, impartiality and independence. The expert or neutral is also to make disclosure in writing of any facts or circumstances that might call into question that expert's independence.

Appointment of Experts or Neutrals

The Centre will also appoint experts. This will only be done where the parties have agreed that an appointment of an expert is to be made by the Centre, or where the Centre is otherwise satisfied that there is sufficient basis for appointing an expert.

Any person may therefore make a request, providing that it can be demonstrated that the parties have agreed that there should be a joint appointment. It could, therefore be an agent acting on behalf of the parties, or one of the parties acting for both of them or alternatively, the tribunal based upon an agreement of the parties. Either party may agree after the arbitration has commenced, or the Rules may provide that the tribunal can appoint an expert.

The request for an appointment requires the same details as for a proposal, but in addition, a copy of the parties' agreement or other foundation for the basis of the request must also be provided to the Centre. If a request is made by only one of the parties, then the Centre will send a copy of the request to the other party and request observations within a limited time.⁹ The Centre will then proceed on the observations, or if no observations are received within the time limit, the Centre will proceed as it see fit and so may appoint.¹⁰

Once again, the appointment is made either through the ICC National Committee or directly. The expert must once again be independent and is required to disclose facts or circumstances which might call into question the expert's independence.

A non-refundable fee is payable to the Centre when making the request.¹¹ A fee is payable for each request for an appointment.

Administration of Expert Proceedings

The purpose of the administration of expert proceedings by the Centre is to provide a non-binding (unless the parties agree that the report shall be binding) written recommendation of an expert. The expert is appointed or jointly nominated by the parties and confirmed by the Centre and is required to determine the issues, in consultation with the parties, and set out the basis of their "*mission*" to a timetable. The mission of the expert may change as more information becomes available, but the role of the expert is nonetheless to provide a written non-binding recommendation.

A non-refundable fee is paid for the request for each Request, and in addition a deposit is required which is likely to cover the administrative expenses of the Centre and the fees and expenses of the expert. The Centre will determine the amount of the deposit, but the parties are able to calculate the likely amount by visiting the ICC's website. The Centre will not proceed until the fee and the deposit has been paid. It is not possible for the Ruler or the Centre to identify the cost of the expert or neutral. Neither can the partner, tribunal expert or neutral determine the likely cost of the expert or neutral until the omission has been determined.

On the conclusion of the proceedings or termination of the proceedings, the parties are required to pay any excess. Payment must be made before notification of the expert's final report.

The Centre's administration of the expert proceedings is diverse and involves timetabling and assisting with the efficient progress of the proceedings and scrutinising the expert's report.

The Expert's Mission

Article 6 of the ICC Rules for the Administration of Expert Proceedings sets out the requirements for the expert's "*mission*". The expert is effectively identifying the scope of the work to be carried out by them. Modifications to the expert's mission may be made by the expert, in writing, only after full consultation with the party. Any such modifications shall be communicated to the parties and to the Centre.

The expert is, therefore, to identify the issues to be covered in the expert's report. The procedure for investigating those issues, and no doubt any tests or analysis that may be required are also to be identified. Article 6 recognises that modifications may be required once further information becomes available, but those modifications require communication to the parties.

Article 7 requires the expert to identify a provisional timetable for the conduct of the expertise proceedings. Modifications to the timetable must be communicated to the parties and to the Centre.

9. Article 1.4.

10. Article 1.5.

11. Article 4.

The expert's mission, therefore, requires the expert to take charge of the proceedings, identify the issues, set out a procedure and timetable and then work to it. Modifications to the issues or procedures must be agreed with the parties, while adjustments to the timetable need only be communicated to the parties, but must also be communicated to the Centre.

The expert's findings are to be set out in a written report. The report should be delivered within the timetable, and of course must only deal with the issues identified in the mission. It should contain reasons.

The parties must be given the opportunity to be heard and/or make written submissions before the expert produces their final written report.¹²

All of the information given to the expert by the Centre or disclosed during the course of the proceedings is to be treated as confidential.¹³ However, the expert's report is to be admissible in any judicial or arbitral proceedings that involve the same parties (unless the parties agree otherwise, which is probably quite unlikely).¹⁴

The expertise proceedings are administered by the Centre. As a result, under Article 9.1 once the final draft report is prepared, it is sent to the Centre before it is signed. The Centre will review it and may require modifications to be made. The report is therefore not to be communicated to the parties by the expert. The expert does not have any power to sign the report until the Centre has approved the report.

Once the Centre has approved the report, the expert may sign it and provide sufficient copies to the Centre to allow for one copy for each party and then one for the Centre to retain. The Centre will then serve the report on the parties, and notify the parties that the expert proceedings are concluded.

The Centre can waive the requirement of Article 9.1 if requested by the parties, and the Centre considers that a waiver is appropriate in that particular case.

There are two important duties placed upon the parties under Article 13.

First, non-participation will not deprive the expert of the power to make findings and render a report. If the report is non-binding, then the non-participation of a party will most likely make the process of little use. However, if the parties have already agreed that the report is to be binding then, depending upon the other dispute resolution procedures in the contract, the experts' findings may be enforceable. This is not an entirely straightforward area. Much will depend upon the dispute resolution procedures in the contract, and the applicable law.

Second, by agreeing to the ICC Rules, the parties have agreed that they will provide documents and adhere to the expert's report. Importantly, they also agree to facilitate the implementation of the experts' mission and to provide free access to the "place" so that the expert can carry out a proper investigation.

CI Arb Protocol

The Chartered Institute of Arbitrators' Protocol for the Use of Party-appointed Expert Witnesses in International arbitration was launched in October 2007.¹⁵ The Chartered Institute of Arbitrators' protocol is aimed at improving the efficiency and economy of preparing and giving expert evidence in international arbitration. It focuses on parties from different legal backgrounds, and those parties and the tribunal many adopt the protocol in its entirety or in part, or they may use it as a guideline when developing their own procedure. It is supplementary to the applicable law and the institutional or ad hoc rules that apply to the conduct of the arbitration.

12. Article 8.1.

13. Article 11.3.

14. Article 8.4.

15. Rees, P. J. (2007) CI Arb News "The Use of Party-Appointed Experts in International Arbitration".

The protocol is said to give effect to the following principles:

“Each Party is entitled to know, reasonably in advance of any hearing the expert evidence upon which the other Parties rely;

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

There should be established before any hearing the greatest possible degree of agreement between the experts.”¹⁶

Article 3 of the CIAB Protocol deals with permission to adduce expert evidence. It states that a party should not adduce expert evidence without the permission of the tribunal. In such circumstances the tribunal is to direct whether expert evidence is to be given, the issue or issues in respect of which expert evidence applies, the number of experts, their identity and whether tests or analysis are required.

Article 4 of the CIAB Protocol deals with independence, duty and opinion. An expert is required to be independent of the Party which has appointed the expert. However, payment by an appointing party does not in itself viciate the expert’s evidence. The evidence is to assist the tribunal, and the expert’s opinion is to be “independent, objective, unbiased and uninfluenced by the pressures of the Dispute Resolution process or by any party. Article 4.4 sets out the requirements of an expert’s written opinion. The list initially includes many familiar items, but goes onto provide a useful and more complete guideline than many of the current procedural rules. It states:

- “(a) contain the full name and address, background, qualifications, training and experience of the expert;*
- (b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;*
- (c) contain a statement setting out all instructions the expert has received from the appointing Party and the basis of remuneration of the expert;*
- (d) only address the issue or issues in respect of which the Arbitral Tribunal has given permission for expert evidence to be adduced;*
- (e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;*
- (f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;*
- (g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);*
- (h) state which matters the expert has been unable to reach an opinion on;*
- (i) state which matters (if any) are outside the expert’s area of expertise;*
- (j) adequately reference all documents and sources relied upon;*

16. Preamble, paragraph 4.

- (k) contain a declaration in the form set out in Article 8; and
- (l) be signed by the expert and state its date and place.”

The emphasis is on restricting the expert to the issues for which expert evidence is required, and clearly defining the scope, limitations, assumptions and opinions relating to those issues. The expert must set out those issues for which they cannot reach an opinion, and identify areas which are outside the expert’s area of expertise. All documents that are referred to must be referenced and identifiable.

Drafts and working documents are privileged and cannot be disclosed, but all instructions and any terms of appointment are not privileged and may be disclosed.¹⁷

Article 6 sets out a procedure for adducing expert evidence. The experts are required to hold a discussion in order to identify the issues upon which they are to provide evidence, identify any tests and analysis that may need to be conducted and try to reach an agreement on how those tests and analysis are to be carried out. The tribunal may also require the experts to prepare and exchange draft outline opinions in order to assist the experts in progressing matters.¹⁸

Once the experts have concluded their discussions, then they are to set out the issues, tests, analysis and identify any areas of agreement and disagreement, together with reasons for the disagreement, and send this to the parties and the tribunal. If tests and analysis are required, then they should be carried out in the agreed manner. If agreement cannot be reached, then each expert can carry out those tests that he or she considers appropriate, but this must be done in the presence of the other expert.¹⁹

A written opinion is then produced, which is exchanged simultaneously. The experts can review each other’s opinion, and if necessary write supplementary opinions which are again exchanged simultaneously.²⁰

If the experts provided a written opinion, they are obliged to give an oral testimony at the hearing. This may only be dispensed with if both parties agree and the tribunal confirms that agreement. If an expert does not give a testimony at the hearing, the tribunal are to disregard the expert evidence unless “in exceptional circumstances” the tribunal decides that the opinion may be considered.

Finally, Article 8 provides an expert declaration in a particular form:

- “(a) I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal to decide the 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, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.*
- (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 effect 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.*

17. Article 5 – privilege.
18. Article 6(a).
19. Article 6(b) and (c).
20. Article 6(d) – (g).

- (f) *I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify the parties to this arbitration and the arbitral tribunal forthwith.*

Finding an expert

Locating an appropriate expert is not an easy task. Many international lawyers specialise in particular types of dispute, and so build up knowledge of the individuals with particular expertise in that area. The parties may also have a view about who might be an appropriate expert. Tribunals may themselves have a certain amount of expertise, although will be careful to ensure that each party has an opportunity to respond to any matter that might affect the award. There is also the danger of a tribunal raising an issue that has not been raised by either party, and then be criticized for developing one of the party's cases.

Domestic institutions in many countries keep lists of experts for a variety of specialist areas. The only institution that provides a proposal and appointment service internationally is the ICC.

The expert's mandate

An expert needs to be clear about his or her "mission" or "instructions" or "mandate". The appointment of an expert requires that the expert receive clear instructions and ideally a timetable. The instructions may be provided by the party that appoints the expert, or joint instructions may be agreed by the party, or the tribunal may set out the instructions. The unsatisfactory position may arise where the expert is to receive joint instructions from the parties, the parties cannot agree upon those instructions and so each set out different instructions which the expert then needs to try to consider, decipher and deal with. It is of course extremely helpful if in those circumstances the tribunal has the power to settle one set of instructions.

In any event, the tribunal should have the power to determine a definitive list of issues, even if the tribunal needs to devise a process whereby an initial set of issues are determined by the tribunal in consultation with the parties, and then the experts are given the opportunity to further develop the list of issues which the tribunal can then determine after further consultation with the parties. A clearly set out list of issues is crucial when determining an award that includes a number of technical issues between the parties.

It is vitally important that the tribunal establishes, at the preliminary meeting, a well-structured timetable.

Timetable

A timetable for expert evidence should consider the following:

1. Instructions; identifying the issues in adequate detail based on the pleadings. The expert may well need to assist in the development and refinement of the issues, but the tribunal, the parties and the experts all need to start from the same point.
2. Documents.
3. Is a site visit required?
4. Are any tests required?
5. Is a preliminary report required?
6. Will a meeting be useful (experts only, or perhaps with the parties and tribunal present) to develop the issues, agree on scope of tests, nature of test, timing, use of a single laboratory etc.

7. A meeting of experts to discuss the agreed issues, tests etc and produce a report setting out their areas of agreement and disagreement.
8. Delivery of a joint report identifying agreement and disagreement.
9. Opportunity for parties and perhaps the tribunal to put written questions to the experts.
10. Final reports on areas of disagreement.
11. Further opportunity to question experts.
12. Allow sufficient time at the hearing for expert to explain their view and to be cross examined.

A clear list of issues must be agreed or settled by the tribunal as early s possible. Ideally the experts will want to set out to answer the question put to them based on the issues between the parties. If the expert report follows the list of issues, then at the hearing the tribunal can hear evidence on an issue by issue basis, making the identification of the real differences between the experts an easier task.

Powers and Procedures

The powers of an expert are relatively limited. An expert is essentially a witness of fact, but one that is providing an opinion about a technical matter. An important skill of an expert is, therefore, to be able to set out in layman's terms factual issues which cannot be readily understood because some specialist knowledge is needed to unravel the facts.

The powers and procedures for the expert to follow must therefore be established by the appointing party, if applicable, and any tribunal. Clear instructions must be provided to the expert, in order that the expert can follow those instructions, investigate the facts and come to conclusions about the issues put to the expert all within the timeframe directed by the tribunal. The position of an expert is therefore potentially an onerous one.

Conclusion: *Practical Considerations*

The practical considerations for the parties and in particular the arbitral tribunal in any international commercial arbitration involving expert evidence are:

1. Identification of the Issues;
2. Is an expert needed at all? If so how many?
3. Balance: complexity, cost and the impact of the expert evidence on the outcome;
4. Timetabling;
5. Procedures for developing the particular questions of the experts, carrying out any test, visiting the site, and analyzing test results;
6. Joint meetings of experts (who should attend);
7. The need for a written joint expert report of areas of agree and disagreement (together with brief reasons for disagreement);
8. Report only on areas of disagreement and by issue; and
9. The potential for witness conferencing at hearing.

Identification of the Issues

If the tribunal is to manage the arbitration in an efficient manner, and write an award that address each of the issues that are properly in dispute between the parties then, a focused schedule of issues must be produced.

Is an expert needed at all?

It is important to identify early the issues (if any) about which expert evidence would assist in resolving the dispute in a cost efficient manner.

Timetabling

This has been covered above.

Procedures

Procedures may need to be developed so that the particular questions of the experts, carrying out any test, visiting the site, and analyzing test results can be carried out and completed.

Joint meetings of experts

A procedure and timetable for developing the questions between the parties, which must then be addressed by the experts, is very useful. Requiring the experts to meet and discuss each issue can save time and money. The experts can discuss all of the issues and work out where they agree and disagree. The need to identify the reasons for disagreement will focus their minds, and will provide the basis for a focused expert report and cross-examination.

Written joint expert report

Once the experts have met, they should work at producing a written table dealing with all of the issues. It should set out the areas of agree and disagreement. Reasons for disagreement should also be briefly set out.

Limiting and focusing the Expert Report

An expert report from each expert need only deal then with the areas of disagreement on an issue by issue basis. The reports can be compared by the tribunal. From this an agenda for the hearing can be established.

Witness conferencing

The parties may cross-examine the experts in the traditional way, or both experts can be questioned by the tribunal and the parties at the same time. A discussion can take place about each issue in turn. In effect, the tribunal has the opportunity to understand the core of the difference between the experts on a particular issues and test possible conclusions.

This process often reveals which expert has the most understanding of the problem, and is able to contribute the most.

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January 2015