Chapter 20

ASSESSING EXPERT EVIDENCE

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I. INTRODUCTION

While it is common for arbitral tribunals to hear expert evidence, arbitrators’ practice with respect to appointment of experts and presentation and assessment of expert evidence varies – often reflecting the civil and common law dispositions of its members. Commonality among panels may be found in their widespread adherence to the IBA Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”), or to the rules specific to an arbitral forum, like the LCIA1 or ICDR.2 But even these are composites of civil and common law practices. For example, the widely used IBA Rules allow parties to follow the common law practice of calling their own expert.3 The IBA Rules also provide for the civil law tradition of the tribunal appointing its own independent expert.4 Proceedings under the ICC,5 LCIA, ICSID6 and UNCITRAL7 rules commonly feature experts serving in both capacities as well.

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1 London Court of International Arbitration Rules (“LCIA Rules”).
2 ICDR International Dispute Resolution Procedures (“ICDR Rules”).
3 IBA Rules, Art. 5.
4 Id., Art. 6.

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The possibility for both parties and the tribunal to call their own experts – and their ensuing interactions – reflect the hybrid nature of international arbitration. Thanks to the flexibility of arbitration as a method of dispute resolution, the manner of presenting expert evidence also varies according to the jurisdictional backgrounds of the panelists, the parties and their counsel. These practices, in turn, impact how arbitrators assess expert evidence. One emerging practice that blends both traditions in the interest of procedural efficiency is expert conferencing. This practice allows both tribunal and parties to participate in a conference with all experts on a particular issue, comparing testimony and asking questions as permitted.

This chapter describes the different methods of expert appointment and presentation of evidence in international arbitrations and the implications of these different methods on how arbitral tribunals assess expert evidence.

II. ARBITRATION PRACTICE: METHOD OF EXPERT APPOINTMENT

The method of appointment of experts may impact how the tribunal receives and assesses the evidence. Accordingly, many of the arbitration rules separately discuss experts appointed by the parties and those appointed by the tribunal.

A. Party-Appointed Experts

Most arbitration rules allow party-appointed experts as of right or without requiring prior approval by the tribunal.8 Party appointment of experts is rooted in the common law tradition, wherein each party...

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8 The IBA Rules (Article 5) and the ICSID Rules (Rule 32.1) expressly allow party-appointed experts. Although the ICDR, LCIA, and UNCITRAL rules are silent on the topic, in practice experts are often appointed by the parties in arbitrations under those rules. Although Article 20.3 of the ICC Rules requires parties to obtain tribunal authorization before appointing their own experts, ICC panels are typically very liberal in granting permission. See, e.g., Richard Bamforth & Ned Beale, Expert Evidence: The Evolution of Best Practice, Vol. 2 Iss. 3 Global Arb. Rev., 26-28, at 26 (July 2007).
presents an expert to testify on its behalf, leaving the judge to reconcile any conflicts between the two positions. Despite the common law roots of this method of appointment, international arbitral tribunals typically adapt this practice to fit the needs of their proceedings, and even arbitrations involving arbitrators, parties and counsel from civil law backgrounds may leave to the parties the responsibility to engage experts. Proceedings may thus be tailored to the parties’ needs (as well as to reflect their tolerance for the adversarial process) and a tribunal need not entirely rely on the parties’ dialectical behavior to reach a resolution. For example, an expert who has presented a report as her direct testimony might be subject to extensive cross-examination by counsel for the opposing party. In other proceedings, however, an arbitrator may assume a more inquisitorial role and question the parties’ experts herself, as is more common in civil law systems.

The more limited discovery in most arbitrations than is available in common law court proceedings can impact the quality and substance of party-appointed experts’ reports as well as the weight the tribunal will give them. Because communications between a party and its expert remain undisclosed, expert testimony and reports may be the result of extensive collaboration. In fact, it is not uncommon for multiple experts to be engaged to work as a team or even independently to address a complex technical or legal issue. In its Report on Reducing Time and Costs in Arbitration, the ICC Commission on Arbitration has recommended that each party be permitted no more than one expert for any particular area of expertise, thereby reducing the need to mine for truth in expert reports.

When an arbitrator is not satisfied with the testimony of the parties’ experts, there is some authority for arbitrators, like judges, to

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reject the evidence of both sides’ experts. More common, however, than the outright rejection of both parties’ experts’ positions is the tribunal’s careful assessment of expert evidence through conferencing with or questioning the experts, or the tribunal’s appointment of an independent expert to resolve contested technical issues. An arbitrator (unlike an expert retained to decide the case in an expert determination proceeding) may not rely upon her own expertise – at least not without affording the parties an opportunity to comment. If she does, the award may be subject to challenge.

B. Tribunal-Appointed Experts

A practice available in many civil law countries and permitted under most arbitration rule systems is the tribunal’s appointment of an independent expert to assist the tribunal in deciding discrete issues. In civil law countries, this practice often manifests in experts to the court – as typified by the French expert judiciare – who provide technical evidence for the court’s consideration but on which the parties usually have the opportunity to comment. Tribunals

12 “[E]xpert witnesses, particularly in valuation cases, instead of giving evidence of their actual views as to the true position enter into the arena and as advocates put forward the maximum or minimum figures as best suited to their side’s interests. If experts do this then they must not be surprised if their views carry little weight with the judge.” Opinion of the Court of Appeal in Cemp Props. (UK) v. Dentsply Res. & Dev. Corp., [1991] 2 EGLR (Civ) 197, 200, cited in D. Mark Cato, The Expert in Litigation and Arbitration 700 (1999).


14 The IBA Rules (Article 6), ICDR Rules (Article 22), ICC Rules (Article 20.4), LCIA Rules (Article 21) and UNCITRAL Rules (Article 27) expressly allow tribunals to appoint their own independent expert. It is not uncommon for a tribunal to retain an independent expert in ICSID proceedings, as well. See, e.g., CMS Gas Transmission Co. v. Argentine Rep., Award, ICSID Case No. ARB/01/8 (May 12, 2005), published in 44 ILM 1205 (2005).

15 Bamforth & Beale, supra note 8, at 26; see also Fouchard Gaillard Goldman on International Commercial Arbitration § 1290 n.239 (E. Gaillard & J. Savage eds., 1999) (noting that while the tribunal’s right to appoint an independent expert may be found under domestic French law, and not its international arbitration law, French
typically have discretion in determining whether to appoint an independent expert, even when responding to a party’s request for such an appointment.\textsuperscript{16}

A tribunal’s appointment of an independent expert is not without its drawbacks. First, finding an expert who is satisfactory to both parties may be a daunting task.\textsuperscript{17} Parties may formally challenge the independence of the expert, as allowed under the IBA Rules.\textsuperscript{18} This option mirrors rights granted to parties in civil law jurisdictions, which are intended to ensure the ultimate independence of the tribunal-appointed expert.\textsuperscript{19} Likewise, “to ensure that no doubt can arise as to the expert’s neutrality,” a tribunal should take care not to choose an expert “from among the competitors of either party which, in some fields, limits the choice considerably.”\textsuperscript{20}

The panel also must be careful in delineating the tasks of the tribunal-appointed expert to ensure that the latter is not considered...
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to be usurping the panel’s role as decision maker.21 For example, in *Luzon Hydro Corp. v. Transfield Philippines*,22 an ICC tribunal in Singapore applying Philippines law appointed an expert with the mandate of assisting the tribunal on certain specified “administrative matters”, as well as providing an opinion on some technical matters. The parties failed to object to the expert’s role, even when he was charged with reviewing the tribunal’s draft award to ensure that it was using technically accurate terminology. After Luzon received an unfavorable ruling, it challenged the award in the High Court of Singapore. Luzon first contended that the tribunal’s expert had undertaken a greater role than that contemplated by the parties in their agreement, in part by playing much more than an administrative role and being “actively involved in analyzing the evidence.” 23 Luzon further argued that the tribunal’s reliance on the expert amounted to a “breach of natural justice,”24 on the ground that the tribunal did not share with the parties what advice the expert provided to the tribunal. In rejecting this, the High Court noted that the tribunal clearly set out the expert’s tasks in a letter to the parties, and that the expert set out his activities in his invoices to the parties. While the descriptions in these invoices were brief, the High Court found the information provided adequate to satisfy natural justice, and found no reason to believe that the descriptions provided were misleading.25 Furthermore, the High Court noted that neither party had objected to the role played by the expert – although it may have exceeded the bounds of an “administrative role” – until the award was issued. Accordingly, the Court dismissed the application on the ground that Luzon could not challenge an award on mere speculation of the expert’s

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23 *Luzon v. Transfield*, 4 SLR at 711.

24 *Luzon v. Transfield*, 4 SLR at 711-12.

25 *Luzon v. Transfield*, 4 SLR at 712-13 (noting that “Luzon’s case depended on the Court] giving the worst possible interpretation to descriptions that could equally easily be interpreted in an innocuous fashion.”)
impropriety, when no evidence existed that he exceeded his intended role. This judgment effectively extended the confidentiality attaching to tribunals’ internal deliberations to include the role and contribution of the expert. The decision underscores the importance for parties to understand and ensure compliance with a tribunal-appointed expert’s terms of reference.

Notwithstanding the potential for abuse of the tribunal-appointed expert’s privileged position, emerging practice among many international arbitral tribunals is to employ both civil law and common law approaches to expert evidence – allowing party-appointed experts to present reports or oral testimony to the tribunal while, when the parties’ experts’ differences cannot be reconciled by the tribunal, looking to a tribunal-appointed expert to assist the arbitrators in evaluating the parties’ conflicting positions. As a practical example, following the exchange of the parties’ expert reports, the ICSID tribunal in CMS Gas Transmission Co. v. Argentina announced its decision to retain independent experts “so as to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties’ experts.” The parties were then invited to file their “observations” on the independent expert’s report. Although the tribunal’s findings as to liability relied on expert reports submitted by the parties, in calculating damages the tribunal relied heavily on the assistance of its independent experts in adjusting the valuation methodologies advanced by the parties’ experts. A tribunal-appointed expert, however, is not an adjudicator and can do no more than assist the arbitrator in her role as decision maker by providing expertise helpful to her understanding of the issues.

The practice of allowing tribunal-appointed experts has even found acceptance in some common law jurisdictions, as seen in the

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26 A.A. de Fina, supra note 21, at 27-8.
28 Id. ¶ 50.
29 Id. ¶ 51.
30 Id. ¶ 418; see also ¶¶ 419-469 (full discussion of the tribunal’s adjustments to the parties’ experts proposed valuations).
English Arbitration Act of 1996.\textsuperscript{31} The common law influence in private international arbitrations remains quite strong, however, and parties sometimes not only question the tribunal-appointed expert but even “call their own experts to take issue with the view of the tribunal’s expert.”\textsuperscript{32} Such questioning by the parties, however, is typically coupled with, or followed by, an examination of the independent expert by the tribunal.

\textbf{C. Hybrid Approaches to Appointment of Experts}

In addition to these two main approaches to the appointment of experts, the parties may jointly appoint an expert. To maximize such expert’s utility to the tribunal, the parties should agree on the scope of the expert’s charge and provide the expert with clear instructions. Another approach, when highly technical issues go to the heart of the dispute, is for the parties to jointly appoint an expert as a member of the arbitral tribunal. A non-lawyer with technical expertise can be of great use to a tribunal faced with resolving complicated technical issues, in particular by helping the non-expert panelists weigh the evidence presented by the parties. It is usually advisable, however, that the chairperson of any panel be a lawyer to ensure that the tribunal acts in conformity with relevant rules.\textsuperscript{33}

For example, an expert serving as an arbitrator must be mindful of her position as a non-lawyer in a legal proceeding. There is the risk of an arbitrator with technical expertise ruling based upon information of which the parties are unaware or on which they had no opportunity to comment. The expert panelist ought to be clear on her role as an arbiter assessing the evidence presented by the parties. Likewise the expert panelist must respect the “legal” expertise of the

\begin{footnotes}
\item[31] English Arbitration Act, 1996, § 37; see Redfern, \textit{infra} note 13, at 108.
\item[32] Siegfried H. Elsing & John M. Townsend, \textit{Bridging the Common Law-Civil Law Divide in Arbitration}, 18 Arb. Int’l 59, 64 (2002). For example, many rules governing party-appointed experts require a hearing, allowing an opportunity for the parties to cross examine one another’s experts. IBA Rules, Art. 5.4; ICSID Rules, Art. 35.1.
\item[33] Redfern, \textit{infra} note 13, at 109.
\end{footnotes}
“lawyer panelists,” especially when determining an award for parties whose dispute is clearly governed by treaty or contract.

It is important to note in this regard the critical differences alluded to above between an expert determination proceeding and arbitration. Expert determination is an entirely different manner of dispute resolution in which an expert is expected to resolve the dispute based on her own expertise. This method is most commonly used in the context of a technical or construction matter, or in valuation disputes. It is meant to be an inexpensive and quick alternative to arbitration.34

III. ARBITRATION PRACTICE: MANNER OF PRESENTING EXPERT TESTIMONY

The manner in which expert testimony is presented can impact the outcome of a case. Usually, an expert presents evidence in a written report, submitted prior to the hearing. The number and scope of expert reports may vary depending upon the case and the panel. The IBA Rules (Article 5) (governing party-appointed experts) and Article 6 (tribunal-appointed experts) set minimum guidelines for the form and content of expert reports: an expert should submit her report in writing, and articulate both the method and facts on which the report is based. Nonetheless, private international arbitral tribunals exercise great procedural flexibility in dealing with expert evidence, and “[i]n a given arbitration proceeding, there may be one round of written submissions or multiple rounds, one expert report or several rounds of expert reports and replies, a comprehensive expert report on all issues in dispute or several reports each one addressing one specific question, one oral hearing or several oral hearings (or even no oral hearings), or even an entirely separate stage of the proceedings devoted entirely to expert evidence.”35

The expert’s report will often serve as her direct testimony. As opportunities for oral expert testimony vary and are not guaranteed, a

34 Id. at 106.
35 Kent, supra note 10, at 4.
clear and understandable report that can withstand the characterizations of adverse counsel is essential. Both the IBA Rules and the ICSID Rules provide for *ex curia* conferences of the party-appointed experts at the discretion of the panel. The IBA Rules state that this meeting should produce a list of matters on which the experts agree and disagree. The intended purpose of these meetings is to focus any expert oral testimony on matters actually in dispute.

Once a hearing commences, oral direct testimony by the expert might be limited to establishing the validity of the report and a brief summary of its findings. More extensive oral direct testimony may be subject to time constraints, such as a “chess clock” approach, forcing the expert (or the examining attorney) to make the best use of the time available. It is not uncommon, however, that an expert’s sole opportunity to present oral testimony would be during examination by the tribunal or during cross-examination, when the adverse party has the advantage of controlling the discussion. This reliance on cross-examination, which is quite traditional in common law jurisdictions, poses novel challenges in the context of international arbitrations. To start, civil lawyers often have strong negative reactions to cross-examination. Cross-examination also does not eliminate the need of a tribunal to examine the witness, though it is


37 IBA Rules, Art. 5.3; ICSID Rules, Art. 36(b). The ICSID Rules provide that the tribunal may “with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself.”


39 The entire format of expert examination by counsel may elicit this reaction, according to some commentators. “The idea of a witness being presented by the lawyer for a party in the question-and-answer format of common law direct examination is vaguely distasteful to civil lawyers. And the idea of a witness being required to agree or disagree with statements by a lawyer in the format the common law calls cross-examination is positively repugnant to them.” Elsing & Townsend, *supra* note 32, at 62.
common for the panel to wait until the parties have finished questioning, hopefully thereby avoiding redundant examinations.  

A. Witness Conferencing

Witness conferencing, which is gaining popularity, is another approach to presenting expert evidence. It works equally well with both tribunal-appointed and party-appointed experts. This practice has been used extensively in Asia and Australia and is attracting increasing support among European and American arbitrators. Witness conferencing allows a tribunal to hear expert testimony and question experts in conference, permitting it to observe how the experts react to one another and potentially narrowing the scope of issues on which disagreement exists and which must be addressed at the hearing.

A tribunal examining party-appointed experts in conference may benefit from the opportunity to illuminate differences in parties’ experts’ positions. Article 5.3 of the IBA Rules, for example, allows an arbitral tribunal to order party-appointed experts to meet and confer on issues raised in their reports and record issues upon which they reach agreement. The conference may also provide a forum for the tribunal’s expert to interact with the parties. Article 27.4 of the UNCITRAL Rules provides for a hearing at which the parties may “interrogate the tribunal’s expert and produce their own experts to rebut the advice or conclusions of the tribunal’s expert.”

The timing of the expert conference can be tailored to the tribunal’s needs. The ICC Task Force, like the IBA Rules, has recommended the use of pre-hearing expert conferences. By meeting and discussing views in advance of the hearing, experts can narrow

40 Id. at 63.
41 Bamforth & Beale, supra note 15, at 27.
42 Id. at 27-8.
43 A similar provision can be found in the LCIA Rules, Art. 12.2, and the IBA Rules, Art. 6.4. For an excellent discussion of witness conferencing, see Martin Hunter, Expert Conferencing and New Methods, ICCA Congress Series 2006-Montreal, Sess. 7 [date].
the issues in dispute. This process is facilitated by requiring experts, after the exchange of reports, to prepare a list of issues on which they agree and disagree.\textsuperscript{44} Such pre-hearing planning can also facilitate more effective witness conferencing later in the hearing. Later conferences may call fact and expert witnesses together before the tribunal. Alternatively, several conferences may be held to address disputes involving complex factual or technical issues on a piecemeal basis. A panel may benefit from this opportunity to break from the party-directed flow of the hearing and focus on comparing the positions of multiple experts on a single issue.\textsuperscript{45}

\textbf{B. Area of Competence}

The role of the expert with a specialized area of competence deserves further attention. Across different legal systems, experts essentially assist a trier of fact in dealing with issues that require specialized knowledge beyond common experience.\textsuperscript{46} This expertise may be discrete and even limited to assisting the panel on a procedural matter.\textsuperscript{47} At the other extreme, the expert with technical expertise – particularly when appointed by a tribunal – may effectively act as the final authority on matters of great importance to the case. International investment arbitrations, for example, can hinge on the valuation of an expropriated asset – a matter on which an expert may effectively have the last word.\textsuperscript{48}

Unlike in the borderless realm of international arbitration, matters of foreign law are infrequently confronted in national court

\textsuperscript{44} ICC Task Force, \textit{supra} note 11, ¶ 70.
\textsuperscript{45} Bamforth & Beale, \textit{supra} note 15, at 27.
\textsuperscript{47} The IBA Rules, Art. 3.7, for example, provides for expert review of a document whose production is opposed by a party.
\textsuperscript{48} Michael Straus, \textit{The Practice of the Iran-U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts} 3 J. Int’l Arb. 57, 64 (1986). Straus notes the experience of the Harza panel, which was careful to avoid over-reliance on experts for legal decision making, and relied on experts more in their technical capacities.
litigation proceedings. Accordingly, the need in court proceedings for legal experts to expound on the procedural and substantive laws of the governing jurisdiction has been relatively scarce, and no standard approach has emerged for the advocacy of foreign law. International arbitrations, on the other hand, are often governed by a domestic law with which panelists are unfamiliar. Tribunals faced with parties from common law jurisdictions may treat the evidence presented by legal experts as a matter of fact to be accepted and applied by the panel. In such cases, panelists may rely on the parties to appoint qualified experts to present and explain the rules at issue for the tribunal’s benefit.49 Given the proclivity of civilian lawyers to question the objective value of party-appointed experts’ presentations, however, a tribunal may supplement the testimony of party-appointed legal experts by appointing its own expert.50

Some panels may avoid the use of legal experts altogether in order to make clear that the panel is the one making the final decision. But expert testimony can be offered in such a way as to not present legal conclusions. Legal experts such as law professors and distinguished practitioners from the jurisdiction may be relied upon to set out the governing law, on the basis of which parties may craft their legal arguments. On this basis, a tribunal can determine which approach is more convincing and from there make its own findings. Alternatively, each party may present relevant authorities in their submissions. A tribunal-appointed expert may be useful in this latter situation, by identifying and addressing conflicts between party-supplied authorities.51

Tribunals relying on experts for their specialized knowledge should be wary of a potential threat to the confidentiality of arbitral


50 Id. at ¶ 8. El-Kosheri also notes that recourse to legal experts is typically limited to critical issues in controversy in a given case, and are not necessary when dealing with the typical issues of contract interpretation, with which all experienced panelists across common law and civil law jurisdictions are familiar. Id.

51 Kent, infra note 10, at 3.
proceedings, namely, that the relatively small network of arbitrators and technical experts may encounter one another on multiple occasions – possibly addressing the same topic. Although it seems a foolish practice, some experts might find themselves testifying before an arbitrator in contradiction of a position taken in a previous, unrelated arbitration before the same arbitrator. While this matter clearly goes straight to the expert’s credibility, the arbitrator must be careful not to breach the confidentiality of documents and testimony from the earlier proceeding. Cato suggests that the arbitrator should disclose “the fact of knowledge of this matter from a previous arbitration,” though not the details of the alleged contradiction, and offer the parties an opportunity to address her on it. 52 Failure to disclose may cause bigger problems for the arbitrator, for example if a party learns of the arbitrator’s knowledge and suspects it played a part in her award.

IV. CONCLUSION

The manner of appointment of experts in international arbitrations varies by panel, as does the experts’ role. Depending on the jurisdictional backgrounds of the parties, their counsel and the arbitrators, experts may be appointed by the parties, the tribunal, or both – often at the discretion of the tribunal. But the method of appointment does not follow a clear common law/civil law divide, as both party-appointed and tribunal-appointed experts have appeared in proceedings where both civil and common law practitioners are represented. Arbitral tribunals thus often choose a hybrid model and tailor expert selection and the manner of presenting expert evidence to the needs of their proceedings.

An arbitrator’s choice to rely on the parties for expertise or to appoint her own expert may impact how an arbitrator assesses evidence. For example, the decision to allow the parties to cross-examine experts may depend on the extent to which the expert is seen as a “partial” witness. And despite the civil lawyer’s wariness of

52 Cato, supra note 12, at 723-4.
cross-examination, it is often necessary in some form to ensure that expert testimony is not accepted as fact without an understanding of the expert’s underlying assumptions. Unless specifically appointed as a member of the panel, experts should maintain their separateness from the tribunal and should be available for questioning by the parties. Finally, experts serving as arbitrators must be careful not to function as the decision maker in an expert determination proceeding and must disclose to the parties, and afford them an opportunity to comment on, any information on which the tribunal rely in making their decision.

Future trends in the realm of expert evidence most likely mirror those in arbitration in general – the search for greater efficiency in time and cost, combined with a desire for more cooperative proceedings. As a practice which promotes procedural efficiency and cost-cutting, witness conferencing will thus probably play a significant role in the future. The ICC reminds us that expert evidence is not a requirement of an arbitration, and should only be introduced to the extent necessary to inform the tribunal on a key issue in dispute.\footnote{ICC Task Force, supra note 11, ¶ 65.} That said, expert witnesses likely will continue to be a common feature in many arbitrations.