



## Experts in International Disputes

### Introduction

It has been said that the role of an expert in an international construction dispute is to provide independent opinion evidence based on 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 criticised as a "hired gun".

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

The distinction in approaches between the civil and common law is evident in 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 are transposed into the international dispute resolution arena.

An alternative in international commercial arbitration (whether or not the underlying dispute relates to construction) 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 empower the tribunal to decide how expert evidence is to be dealt within the arbitration.

### Applicable Rules

If the parties select and appoint their own expert then they 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, it will need the consent of the parties or an appropriate power in the procedural rules or law. For example, article 27 of the UNCITRAL Arbitration Rules states:

- (i) The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference established by the arbitral tribunal shall be communicated to the parties.

UNCITRAL Model Law article 26 states:

- (i) 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
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- (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.

The AAA/ICDR updated its International Arbitration Rules on 1 September 2007 with the International Dispute Resolution Procedures. Article 22 provides:

- (i) The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal
- (ii) The parties shall provide such an expert with any relevant information
- (iii) Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties
- (iv) A party may examine any document on which the expert has relied in such a report.
- (v) 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 Rules, the tribunal may fix the cost of the arbitration under article 31, 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, also provides that, unless otherwise agreed by the parties in writing, the tribunal may appoint one or more experts and information can be provided to them, and the parties shall have the opportunity to examine the experts in a hearing.

A common feature of the UNCITRAL Model Law and Arbitration Rules, AAA/ICDR International Arbitration Rules and the LCIA Rules is that the tribunal can appoint experts. The tribunal may identify the issues that it is to decide and 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 equality of treatment of the parties and the opportunity to consider and put their case is of course paramount in arbitration, as it is in litigation.

But how is expert evidence dealt with? The ICC, whose International Centre for Expertise I chair, has published rules for this purpose, and provides a proposal, appointment and an administration service.

## Finding an Expert

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

## Rules for Expertise

The ICC's Rules for Expertise came into force on 1 January 2003. The rules recognise that experts with particular knowledge in technical, legal, financial and other fields may be used in a variety of situations. One of those could of course be to complement an international commercial arbitration. The rules

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support the three services provided by the ICC in this regard, which are:

- (i) the proposal of experts;
- (ii) the appointment of experts; and
- (iii) the administration of expertise proceedings.

The ICC has access to a network of experts in a wide range of fields internationally. The ICC's International Centre for Expertise is assisted by a standing committee, which comprises a chairman, two vice chairmen and eight further members, who are all drawn from around the world and are appointed for a three-year renewable term.

### Proposal of Experts

Anyone may ask the Centre to propose experts. The Centre will make a proposal direct, or through an ICC national committee. It then has no further involvement. The person requesting the proposal must make a non-refundable payment for each expert (currently US\$2,500). If the arbitral tribunal makes the request, the proposal is free.

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

### Appointment of Experts

The Centre will also appoint experts. Any person may make a request, providing that it can be demonstrated that the parties have agreed that there should be a joint appointment. Parties may agree after the arbitration has commenced, or the Rules may provide that the tribunal can appoint an expert.

### Administration of Expert Proceedings

The purpose of the administration of expert proceedings by the Centre is to provide a non-binding written expert's recommendation. So, the parties can arrive at a non-binding recommendation, or agree at any time to accept the expert's report as binding.

The Centre's administration of the expert proceedings includes coordination between the parties and the experts, encouraging the expeditious completion of the expert proceedings, supervision and appointment of an expert, review of the form of the expert's report and concluding the expert proceedings. The expert is appointed and shall determine the issues, in consultation with the parties, and set out the basis of their "*mission*" to a timetable.

### The Expert's Mission

Article 12 of the ICC Rules for Expertise sets out the requirements for the expert's "*mission*". The expert is effectively identifying the scope of the work to be carried out and shall identify the issues to be covered in the written report. The procedure for investigating those issues and no doubt any tests or analysis that may be required are also to be identified. Modifications may be required once further information becomes available, but will require the agreement of the parties. The mission requires the expert to take charge of the proceedings, identify the issues, set out a procedure and timetable and then work to it.

### CI Arb Protocol

The Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed

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Expert Witnesses in International Arbitration was launched in October 2007. The 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 may adopt the Protocol in its entirety or in part, or 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 arbitration.

The Protocol gives effect to three fundamental principles. First, that each party is entitled to know, reasonably in advance of any hearing, the expert evidence upon which the other parties rely. Second, that experts should not advocate the position of the party appointing them; and finally, there should be, before any hearing, the greatest possible degree of agreement between the experts.

In support of these principles, article 3 states that a party should not adduce expert evidence without the tribunal's permission. In such circumstances, the tribunal shall direct whether expert evidence is to be given, the issues in respect of which it applies, the number and identity of experts, and whether tests or analysis are required.

Article 4 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.*"

## What is the Expert being asked to do?

An expert needs to be clear about his or her "*mission*", "*instructions*" or "*mandate*". The appointment of an expert requires that expert to receive clear instructions and, ideally,

a timetable. The instructions may be provided by the appointing party, joint instructions may be agreed by the parties or the tribunal may set them out. An unsatisfactory position may arise where the expert is to receive joint instructions from the parties, the parties cannot agree and so each sets out different instructions with which the expert then needs to deal. It is of course extremely helpful if in those circumstances the tribunal may settle on one set of instructions.

In any event, the tribunal should have the power to determine a definitive list of issues, even if it needs to devise a process to determine an initial set of issues in consultation with the parties, and then the experts are given the opportunity to develop the issues, which the tribunal can 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 deal with the following issues:

- (i) 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.
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- (ii) Documents.
  - (iii) Is a site visit required?
  - (iv) Are any tests required?
  - (v) Is a preliminary report required?
  - (vi) 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?
  - (vii) A meeting of experts to discuss the agreed issues, tests, etc and produce a report setting out their areas of agreement and disagreement.
  - (viii) Delivery of a joint report identifying agreement and disagreement.
  - (ix) Opportunity for parties and the tribunal to put written questions to the experts.
  - (x) Final reports on areas of disagreement.
  - (xi) Further opportunity to question experts.
  - (xii) Allowance of sufficient time at the hearing for expert to explain their views and to be cross-examined.

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

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. This second approach is known as “*witness conferencing*”. 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 issue and test possible conclusions.

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

## Powers and Procedures

The powers of an expert are relatively limited. An expert is essentially a witness of fact, but one 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 that cannot be readily understood without specialist knowledge.

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, so the expert can follow them, investigate the facts and come to conclusions all within the time frame directed by the tribunal. The position of an expert is potentially an onerous one.

## Practical Considerations

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

- (i) Identification of the issues.
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- (ii) Timetabling.
  - (iii) Procedures for developing the particular questions of the experts, carrying out any tests, visiting the site, and analysing test results.
  - (iv) Joint meetings of experts (who should attend?).
  - (v) The need for a written joint expert report of areas of agreement and disagreement (together with brief reasons for any disagreement).
  - (vi) Whether to report only on areas of disagreement and by issue.
  - (vii) The potential for witness conferencing at hearing.

If the tribunal is to manage the arbitration efficiently, and write an award that addresses each of the issues that are properly in dispute between the parties then, a focused schedule of issues must be produced. Procedures may need to be developed so that the experts' questions can be raised, and tests, site visits, and test results analysis can be carried out.

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 for cross-examination.

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 agreement and disagreement. Reasons for disagreement should also be briefly set out. A report from each expert need only deal then with the areas of disagreement issue by issue. The reports can be compared by the tribunal. From this an agenda for the hearing can be established.

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