

# ICCA CONGRESS 2006 – MONTREAL

## Session 7 - Techniques for Eliciting Expert Testimony

### Expert Conferencing and New Methods

by

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#### Introduction

1. The role of “experts” in the context is to assist, educate and advise the arbitral tribunal, in a fair and impartial manner, in specialist fields (*eg*, technical, forensic accountancy, legal etc) in which the arbitrators (or some of them) do not themselves have relevant expertise in specific issues in dispute between the parties.
2. Historically, the practices of arbitrators and advocates in relation to the use of experts, from both common law and civil law countries, have tended to mirror the procedures and techniques adopted by the national court systems into which they were originally educated as litigation practitioners. In most cases this is neither necessary nor appropriate.

#### Common Law and Civil Law Practices

3. The main disadvantage of the common law system is that the expert “evidence”<sup>1</sup> presented to the arbitral tribunal is “bought” by the party presenting it. The party in question simply would not present the testimony to the tribunal if the expert’s opinion was unfavourable to its case. Judges in national courts have

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<sup>1</sup> In the arbitration context, as opposed to a criminal trial, it is far from certain that experts should be described as “witnesses”, or give “evidence” or “testimony”, as implied by the title of Session 7. In a commercial dispute, they provide “opinions” or “information” to a national court or arbitral tribunal.

rules and sanctions at their disposal that are designed to eliminate, or at least discourage, blatantly partisan experts.

4. In arbitrations no such rules exist (unless applied by express or implied agreement), and in any event an arbitral tribunal cannot impose effective sanctions. The result is that tribunals find themselves faced with deciding between the opinions of opposing experts who have provided diametrically opposite opinions to questions such as, for example, “Why the did the bridge fall down?”,<sup>2</sup> with little or no unbiased expert advice to guide them.
5. The civil law system suffers from the disadvantage that the parties (or their advocates) tend to think that their dispute will be decided by the tribunal-appointed expert, rather than by the arbitral tribunal that was appointed by the parties to resolve it. The parties’ advocates tend to distrust tribunal-appointed experts because they feel that their ability to control the manner in which what may be the most critical element in their case will be presented has been taken away from them.<sup>3</sup>
6. Over the last thirty years or so various efforts have been made to develop a satisfactory hybrid system for the presentation of independent expert assistance to arbitral tribunals. The 1976 UNCITRAL Arbitration Rules<sup>4</sup> provide that, where the tribunal appoints an expert, the parties may require a hearing at which they may “interrogate” the tribunal’s expert and produce their own experts to rebut the advice or conclusions of the tribunal’s expert. This is an unwieldy and expensive exercise that rarely justifies, in terms of cost, the effort spent on it. The ICC Rules are less explicit, but ICC arbitrators rarely refuse consent to a

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<sup>2</sup> One side’s expert says, with great conviction, “faulty design of the bridge”. Equally convincingly, the other side’s expert says “defective materials used in construction of the bridge”. Cross-examination of experts by counsel is considered by many international arbitrators as an inadequate tool to assist them in making a determination between the opposing views of such experts.

<sup>3</sup> For a description of the comparative practices adopted in various national systems, see *Comparative Arbitration Practice*, ICCA Congress Series no. 3 (1986), pp 107-111.

<sup>4</sup> UNCITRAL Arbitration Rules, Article 27.4. Broadly similar provisions appear in the LCIA Arbitration Rules, Article 12.2.

party that wishes to present expert testimony to the tribunal even where the tribunal has already appointed its own expert.<sup>5</sup>

7. The 1999 edition of the IBA Rules on the Taking of Evidence in International Commercial Arbitration provides more sophisticated procedures.<sup>6</sup> However, these Rules are aimed at regulating and codifying compromise solutions between the existing alternative civil law and common law practices rather than at “advancing the science”. What is needed is a search for new and reliable cost-effective ways of assisting the arbitral tribunal to perform its task; at the same time as satisfying the fondness of the parties (or, more frequently, their advocates) for the formalistic and often lengthy rigmarole of direct examination, cross-examination and re-examination of experts.

### **Twentieth century developments**

8. Within the scope of the regimes established by the existing sets of arbitration rules, including the IBA Rules, a number of experienced international arbitrators have experimented with “expert conferencing” techniques, usually limited to circumstances in which the parties and their counsel are willing to participate in this format. In this kind of procedure the parties first present their written expert reports, as under the IBA Rules; then the experts are required to meet in advance of the hearing to draw up lists of (a) matters on which they agree, and (b) matters on which they do not agree.
9. Based on list (b), the tribunal prepares an agenda designed to encompass the matters on which the experts are not agreed, and presents it to the parties and their advocates in advance of the hearing.<sup>7</sup> Then, after all the fact witnesses from both sides have been heard, the independent experts retained by the opposing parties come before the arbitral tribunal seated alongside each other at the witness table.

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<sup>5</sup> Craig, Park & Paulsson., *International Chamber of Commerce Arbitration*, 2<sup>nd</sup> ed. (Oceana 1990), p. 404.

<sup>6</sup> IBA Rules on the Taking of Evidence in International Commercial Arbitration, Articles 5 and 6.

<sup>7</sup> For the sake of efficiency, this may be done at an early stage of the hearing after the experts have arrived at the hearing location, and during the period in which the fact witnesses for each side are giving their oral testimony.

10. The chairman of the arbitral tribunal<sup>8</sup> then takes the experts through the agenda, item by item. The experts are requested to explain in their own words the basis for reaching the opinions set out in their written reports, and to answer each other's main points. They may also be encouraged to debate these points directly with each other if the arbitral tribunal considers that this would be useful. Experience indicates that the transcript of such a debate is of infinitely more assistance to the arbitral tribunal than the transcript of a traditional "sparring match" between one side's expert and the other side's cross-examining advocate. It is rare that event for such a cross-examination to be more useful to the arbitral tribunal than a childish "Yah-Sucks-Boo" type of exchange of repetitive and unanswered propositions.
11. Arbitral tribunals do not usually adopt an expert conferencing procedure unless the parties (through their advocates) agree to it. Further, the parties' advocates are usually permitted, if they wish, to conduct a traditional cross-examination after the expert conferencing session has been completed. This is both reasonable and appropriate. There may be matters that the arbitral tribunal has not raised, such as apparent inconsistencies between an expert's prior published works and his or her opinion in the current case.

### **Current Developments**

12. Experience indicates that an expert conferencing system such as the one described above works well, *provided that* the experts are genuinely independent and not taking instructions from the counsel representing the party that retained them. For the procedure to work efficiently the arbitral tribunal must take the task of drawing up the agenda for the conference seriously, and ensure that the session is chaired firmly but fairly by the arbitrator charged with organising the process.

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<sup>8</sup> Or one of the other arbitrators designated by the others, on the basis of his or her understanding of the technical issues, or simply because that arbitrator designed the agenda on the basis of the experts' (a) and (b) lists.

13. However, it still suffers from the habitual tension that exists between the arbitrators and the advocates. The interest of the arbitrators is to understand the technical aspects involved in the disputed specialist area, and to receive honest opinions and advice from the experts, so that they may decide the specialist issues in dispute fairly as between the parties. It is not the function of the arbitral tribunal to decide the issues on which side has the best advocate, or team of advocates.<sup>9</sup>
14. The interest of the attorneys is to win the case for their client; and for this purpose they want to be able to control the territory that their experts are to be asked to cover. The process of the direct examination of their experts is often rehearsed against a script, sometimes in front of a video camera and/or a “mock tribunal”.
15. Skilled cross-examiners are trained in the techniques for controlling the scope of an expert’s answers by posing a series of “closed” questions that deny the expert the opportunity to expand on his or her answers, or to put them in a particular context. This scenario is frustrating for experienced arbitrators, who may feel that they are learning only to admire the forensic skills of the cross-examiner rather than the merits of the expert’s opinion.
16. In the civil law system, where the practice of judges and arbitrators is to appoint their own experts to assist and advise them, these vices are largely absent. In international arbitrations in which the parties are represented by lawyers from civil law countries it is common for the parties to raise no objection to such a procedure. In such countries cross-examination is virtually unknown, so the arbitral tribunal will not often have the benefit of a skilled cross-examination of fact witnesses. In some (but by means all) cases cross-examination of fact witnesses, probing the story told by a witness by testing it against the contemporaneous documents and other collateral evidence can be useful.

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<sup>9</sup> Still less on the basis of which side has the most expensive team of advocates.

17. Nevertheless, by 2006 the science had not advanced sufficiently to permit “expert conferencing” to be described as an accepted or routine international practice. It was still in its relative infancy and regarded with suspicion at least by many common law advocates.

**The future: back to basics?**

18. A possible way forward might be to eliminate some long-established *habits*. It was not an accident that the word “habitual” was used, earlier in this paper, to describe the inherent tension between the interest of the arbitral tribunal, as the decision-making body, to gain as much knowledge about the issues to be decided as possible and the interest of the advocates to gain strategic and/or tactical advantages over the opposing party.
19. The interest of the advocates is to maximise the impact on the arbitral tribunal of the strongest aspects of their clients’ contentions, and to minimise the impact of the weakest. One well-trodden path for achieving the latter is to submerge the debate on the weak points to the level of excruciating detail, complicating everything that can be made more complicated and obfuscating everything that can be obfuscated - often by repetition of the same points in slightly different clothing, accompanied by an avalanche of barely relevant documents.
20. Practitioners who have experience of serving both as members of arbitral tribunals and as advocates over the course of their careers are well aware of the “tricks of the trade”, and - on both sides of the table - have developed techniques for dealing with most different scenarios. However, this paper is not concerned with making opening or closing speeches, seeking the production of documents or examining, cross-examining and re-examining fact witnesses; it is concerned with the role of experts.
21. It may be possible to reform out-dated twentieth century habits for handling experts by focusing on their underlying role – that is, as described above, to assist, educate and advise the arbitral tribunal. Perhaps, when the experts are

heard, the layout of the hearing room might be changed so that it would be more like a classroom<sup>10</sup>, with the experts seated on a platform, or stage.

22. The “audience” could be arranged around them in a semi-circle with the tribunal in the centre, flanked by the advocates and other players. In a scenario like this, surely the old cross-examination habits would evaporate? It would not prevent the experts from being challenged, either by each other or by the parties’ advocates – or indeed by members of the arbitral tribunal. A transcript would be taken in the normal way (accompanied by a video, where appropriate); and visual aids could be used as in a conference or seminar. It would be necessary for the arbitral tribunal to devise a system for maintaining an orderly and fair proceeding as between the parties, but this should not create any insurmountable difficulties. In the twenty-first century it is frequently done this way when taking the testimony of absent fact witnesses by videoconference.

### **Summary and conclusions**

23. It is clear that the participation of experts in international commercial arbitration is here to stay for the foreseeable future. The complexity of process design and construction technologies are way beyond the comprehension of “ordinary” engineer/technical arbitrators, let alone law professors or other legal practitioner arbitrators. Taken together with the ever-increasing ability of human beings and their computers to produce huge quantities of data either in electronic and/or hard copy form, this has made the presentation of expert assistance and advice to arbitral tribunals an enormously expensive and time-consuming operation. Traditional habits for presenting and testing the contributions of experts to the process have contributed to lack of efficiency in providing arbitral tribunals with the assistance and advice they need to enhance their ability to decide technical issues in a manner that is fair between the parties.
24. In the interest of procedural efficiency and limiting the ever-increasing cost of dispute resolution in international commerce it is desirable that the arbitration

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<sup>10</sup> Or, even better, for the session with the experts to be held a different room

community should work towards finding better ways of determining specialist technical issues that are not within the expertise of the members of the tribunal. The alternative practices currently adopted by arbitral tribunals and advocates are either unwieldy and/or unreliable (party-experts tested by cross-examination); or present an impression of delegation by the arbitral tribunal of its decision-making mandate (opinions of tribunal-experts untested by the parties); or are potentially unacceptably expensive (such as the UNCITRAL and IBA models).

25. It is not the purpose of this paper to suggest that a “classroom” option on the lines suggested above is the only feasible solution, or indeed that it would necessarily be the best way. The purpose is to encourage the community of international arbitration practitioners to search for imaginative solutions to replace out-dated twentieth century litigious habits with more efficient and cost effective methods of transferring specialist technical knowledge to arbitrators whose background and training is usually in the field of law. Possible solutions could be tested in experimental form by using “mock” and/or “moot” case studies, in a controlled environment under the auspices of academic institutions.<sup>11</sup>

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<sup>11</sup> For example, as at the annual ITA events in Dallas