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Expertise in International Arbitration
by B.M. Cremades and D.J.A. Cairns

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EXPERTISE IN INTERNATIONAL ARBITRATION

Bernardo M. Cremades[*] and David J. A. Cairns[**]

SUMMARY

A. Taxonomy of Expertise in International Dispute Resolution:
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(ii) A binding determination;
(iii) A conditional determination;
(iv) Scientifically contestable evidence;
(v) Fully contestable evidence.
B. The Long Debate over the Role of Expert Witnesses:
C. The Function of the Expert Witness in International Arbitration:
(i) The expert is a witness;
(ii) The expert enjoys certain privileges as a witness;
(iii) The expert witness has special duties;
(iv) The expert must be qualified as an expert;
(v) A party-appointed expert is not required to be independent of the Parties;
(vi) The role of the expert is to testify and to assist when required (and not to presume too much).
D. The Rise of the 'Star Expert':

International arbitration has changed dramatically in the last 15 years. The importance of expertise has also increased dramatically.

The major impetus for these changes has been the extraordinary rise of investment arbitration pursuant to bilateral or multilateral investment treaties. The upswing began in 1997 in which year ICSID registered ten new cases, in comparison with no more than three annually previously in the decade. In 2012 ICSID registered 50 new cases. By the end of 2012 the total number of known treaty-based cases had reached 518 cases, with the total number of cases, given the many confidential arbitrations, likely to be considerably higher.[1]

The investment arbitration mechanism has enabled investors to seek compensation for the effects of significant government programmes including the emergency legislation following the Argentine financial crisis in 2001, the

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[1] See *The ICSID Caseload-Statistics* (Issue 2013-1) page 7 (available on the ICSID website); UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, IIA Issues Note Nº 1, March 2013.

Argentine government debt restructuring programme, the nationalisation programmes in Venezuela and Bolivia, the expropriation of the Yukos group in Russia, and plain packaging legislation for tobacco in Australia. Last year saw the largest award to date in an investor-State arbitration of US$ 1.77 billion against Ecuador for the unilateral termination of an oil contract[2]. Investment arbitration has been the dispute resolution mechanism adopted for significant multilateral instruments of regional integration such as NAFTA, CAFTA, and the Energy Charter Treaty. The latest multinational entity to grapple with the implications of investment arbitration is the European Union, including the implications of intra-EU investment treaties and the division of responsibility between the EU and member states for claims by investors.[3]

Investment arbitration has rapidly ushered in procedural innovations that have revolutionized arbitration proceedings, including public interest submissions, public hearings, transparent procedures and class actions against States. It has provoked a policy debate in international institutions and demands from states for reform of the ICSID mechanism, a reversal of policy by some states in respect of their commitment to investor-State dispute resolution, as well as extensive criticism of investor-State arbitration from public interest groups.[4]

International commercial arbitration has continued to flourish concurrently with this boom in investment arbitration. Established commercial arbitral institutions report a healthy growth in their caseloads, while newer institutions in the Middle East and Asia have consolidated their places in the market. There has been a boom in the promulgation of soft law by both arbitral institutions and professional groupings of arbitral lawyers, seeking to standardise international procedures in such matters as the taking of evidence, disclosure of conflicts, professional ethics, case management and the use of experts. Arbitral institutions have promulgated new rules to reflect best practice, to expand the scope of arbitration by addressing matters such as multiparty arbitration, consolidation, emergency relief, and to maintain their positions in an increasingly competitive market place. Arbitration continues to expand beyond its historic base in international commerce and construction in diverse fields such as sport and finance. Commercial arbitration has achieved a new legitimacy and judicial

[2] *Occidental Petroleum Corporation v The Republic of Ecuador*, ICSID Case No. ARB/06/11 (Award October 5, 2012).

[3] EUROPEAN COMMISSION *Towards a comprehensive European international investment policy* (COM(2010) 343 final), pages 9-10; EUROPEAN COMMISSION *Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals* (COM(2012) 335 final).

[4] These criticisms include a deficit of legitimacy and transparency in investment arbitration; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns about the costs and time of arbitral procedures: see UNCTAD, *Reform of Investor-State Dispute Settlement: in Search of a Roadmap,* IIA Issues Note Nº 2, May 2013.

support in jurisdictions previously hostile to private decision making such as Latin America.[5]

There appear to be no consolidated statistics of the total annual amounts in dispute in international commercial and investment arbitration in recent years. Billion dollar claims in investment arbitration are not unusual.

With the sums involved and the extraordinary growth of activity, propelled particularly by investment arbitration, it is hardly surprising that international arbitration is a flourishing area for international law firms in otherwise rather dismal economic times. New specialist legal boutiques have emerged to capitalise on the reputations of leading arbitrators, and to avoid the problems of conflicts of interests inherent in large law firms. International arbitration has also attracted a wider range of satellite providers of support services such as training, knowledge management and database services, technical support, and most recently financial services through the arrival of third party funders in international arbitration. There has also been significant implications for the role of expert witnesses.

Investment arbitration by definition involves claims of illegitimate State interference with foreign investment. In every investment arbitration the investment must be identified, the illegitimate interference demonstrated, and the effects of this interference on the value of the investment proved. Investment arbitration normally involves claims of expropriation of an investment, or a failure to accord an investment fair and equitable treatment, which requires in the damages phase the valuation of the investment expropriated or calculation of the loss resulting from the unfair treatment. Investment valuation is at the core of investment arbitration. Investment arbitration often involves sectors of the economy of strategic significance such as energy, telecommunications, and infrastructure and there are roles for sector experts in assessing the justifications for State treatment of investments in these sectors. Investment arbitration has even required tribunals, on the basis of expert evidence, to pass judgment on the causes and responsibilities of a national financial collapse.[6]

If the value of the international arbitration market is very large, the expert witness segment of this market is likewise lucrative.

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[5] For the statistics of the biennal trend 2007-2011 in the reported caseload of arbitral institutions see *'Corporate Choices in International Arbitration: Industry Perspectives'* 2013 International Arbitration Survey of Queen Mary School of International Arbitration and PWC, page 10.

[6] See *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16. All decisions are available at *http://ita.law.uvic.ca*

A. Taxonomy of Expertise in International Dispute Resolution:

There are three distinct methods to apply expertise in the determination of an international dispute. Firstly, the parties can appoint the expert to decide the dispute (the expert decision-maker). Secondly, a tribunal with jurisdiction over a dispute can appoint an expert who reports directly to the tribunal (the tribunal-appointed expert). Thirdly, the parties to the dispute may instruct their own experts, who present their reports as evidence to the tribunal (the party-appointed expert).

The choice between these three methods is ultimately for the parties, although the nature of the dispute and the legal culture of the parties are significant in practice. Expert determination is particularly suited where the matter in dispute is some form of valuation, such as share valuation in M&A transactions, rent reviews under commercial leases, and certain types of disputes in construction projects. It is also approriate where there exists a simple and effective enforcement mechansim (as, for example, in domain name disputes which are enforced through the registry structure). The tribunal-appointed expert is favoured more by continental than by common lawyers, and can be justified on pragmatic grounds where the amount in dispute does not justify multiple experts, or some imbalance between the parties (e.g. in financial resources or access to information) complicates the use of party-appointed experts. Party-appointed experts are the traditional common law technique for the presentation of expert evidence, and the predominant method in international commercial and investment arbitration.

There are hybrid forms of these three methods of applying expertise to legal disputes, and they also may be used concurrently. The dispute board commonly combines technical expertise and legal professionals in a single decision-maker, that also will usually hear party-appointed experts. Another hybrid is the figure of the single joint expert appointed by the parties, which has features analogous to the tribunal-appointed expert.

Expertise in dispute resolution can also be viewed from the perspective of legal effect. Expertise might take the form of ***an award, a binding determination, a conditional determination, scientifically contestable evidence, and fully contestable evidence.***

Firstly, where the parties nominate a technical expert as an arbitrator, then the decision will be in the form of an award. A decision of an expert in this form is not only binding on the parties, but also enjoys all of the jurisdictional advantages of arbitral awards including direct enforcement, international enforceability through the New York Convention, and immunity from judicial review on the merits.

Secondly, the parties might agree to accept the decision of an expert (what is commonly called ‘expert determination’). The expert determination in this case is contractually binding between the parties meaning that, in the event of non-compliance, the remedy is an action for breach of contract, without the advantage of the direct enforceability of an arbitral award.

Thirdly, there may be a conditional agreement between the parties to accept the expert determination, so that it only becomes binding when the condition is satisfied. An example is the use of a condition subsequent in the DAB procedure in Subclause 20 of the FIDIC (Red Book) Contracts for Construction, where a DAB decision becomes final and binding on the parties only if no notice of dissatisfaction is given by either party within 28 days of receiving the decision.

In the next phases of legal effectiveness the expert does not participate in the decision but merely produces a report. The report is evidence in the dispute resolution process, and the expert’s opinion only has such effect as is given to it by the tribunal.

The fourth level of legal effect is the scientifically contestable evidence of a single expert (which may be either tribunal or party-appointed). The report of this expert is not *per se* binding and may be impugned by the parties or rejected by the tribunal. However, a single expert is normally identified and selected with the consent of both parties. This usually means that certain features of the expertise are negotiated and agreed by the Parties in advance, including the identity of the expert and the adequacy of the expert’s qualifications, with any questions of independence or conflicts of interest disclosed and resolved prior to appointment. There might also often be agreement on the materials or data that should form the basis of the expertise. With such matters agreed in advance, they normally cease to be the subject of cross-examination or submissions by the parties, which is likely to focus on clarifying scientific aspects of the report such as methodology, possible conflicting data, reasoning and conclusions. The very fact that the expertise is entrusted by consent to a single expert means that the expert’s report, if professionally completed, has a higher degree of credibility that the report of an expert unilaterally chosen by one side.

The final level of legal effectiveness of an expert report is the fully contestable report of the expert is unilaterally presented by one party, without acceptance by the other party or the tribunal, in circumstances where there are multiple experts providing their opinions. In this scenario, it is not only an expert’s methodology, reasoning and conclusions that might be contested, but also the expert’s impartiality, the consistency of the evidence with prior scientific writings or evidence of the expert, the suitability for the expertise of the qualifications of the expert, the expert’s prior relations with the parties to the litigation, or interests in the same sector. In this scenario the expertise may be challenged on both

scientific and collateral grounds, and cross-examination might be aggressive. In these circumstances an expert that is well prepared and experienced in giving evidence has an advantage, although hearing preparation, particularly when conducted in close collaboration with lawyers, raises its own issues as to the integrity of the expert's evidence.

In practical terms, the expert decision-maker raises different questions from the expert witness. The remainder of this article considers the role of the expert witness in international arbitration. The paradigm case is a large commercial or investment arbitration, with a tribunal of professional arbitrators, where expert evidence is indispensable to the determination of the dispute, and one of the issues is the best means to present the expertise to the tribunal.

B. The Long Debate over the Role of Expert Witnesses:

A consistent feature of the history of expert witnesses is the expression of dissatisfaction with their role. In this sense, recent initiatives in international commercial arbitration relating to experts are not a result of novel concerns; rather international arbitration is simply a new context for perennial debates, and proposals often already tried elsewhere.

The criticisms of expert witnesses appear both in common law and continental jurisdictions, and both party-appointed and tribunal-appointed experts have provoked expressions of dissatisfaction and calls for reform. The common law historically utilised party-appointed experts, but even in the nineteenth century there were widespread complaints of the partisanship of experts and their inability to agree on the subject matter of their expertise. There were also early complaints of the presentation of expert witnesses not properly qualified in the subject matter of their evidence, the abuse of hypothetical questions in the examination of experts, the abuse of the expert's privilege to express an opinion, and the inability of experts to express themselves effectively in legal proceedings. Proposals for reform in the United States included court-appointed experts, state sanctioned panels of neutral experts, and greater involvement of the presiding judge in supervising the formulation of questions to experts.[7]

[7] On the historical arguments about expert evidence in the United States see JENNIFER L. MNOOKIN *Idealizing Science and Demonizing Experts; An Intellectual History of Expert Evidence*, 52 Villanova Law Review 101-136; LEARNED HAND *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. Law Review 40 (1901) (proposing *"…a board of experts or a single expert not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province…[To] this tribunal would be transferred the present so called expert evidence. Either side might call all the experts that money could procure…only the difference would be that the final statement of what was true would be from the assisting tribunal"* at 56); DENIS O'BRIEN *Opinion Evidence* 1 Colum L.R. 180 (1901) proposing (at 182) the regulation of the compensation of experts, and (at 183) greater involvement of the presiding judge in supervising the questions to experts.

The problems of expert evidence were a major feature of the comprehensive review of expert evidence carried out in England in the 1990s under the auspices of Lord Woolf, that resulted in the promulgation of new Civil Procedure Rules (**"CPR"**) in 1998.[8] Lord Woolf identified expert evidence as a major source of unnecessary cost in civil litigation,[9] particularly by reason of the excessive or inappropriate use of experts and the partisanship of experts.

The solution to these problems in the CPR was to bring expert evidence firmly under the control of the court. The court should decide what expert evidence is reasonably required, and no party may call an expert witness without the court's permission.[10] Secondly the CPR explicitly provides that the overriding duty of the expert is to the court,[11] with an expert further required to certify in his report that this duty to the court has been understood and complied with. Thirdly, the Court and the parties are under a duty to restrict expert evidence 'to that which is reasonably required to resolve the proceedings.'[12] Finally, single joint experts were strongly endorsed by Lord Woolf on the grounds of impartiality, cost effectiveness, equality and the facilitation of settlement.[13] The CPR provides that the court can direct evidence by a joint expert and for the instructions to a single joint expert.[14]

In contrast, in Spain the historical position (until the reform of civil procedure in 2000) was that the only permissible type of expert was the court-appointed expert. This system was supported by official regional lists of experts classified according to types of expertise. This system was based on the premise that neutrality was paramount, and party appointed experts violated the neutrality imperative as well as the principle of the contestability (*contradicción*) in a system where rights of cross-examination were so rudimentary. Despite a system based exclusively on court-appointed experts, parties in Spanish litigation still insisted on presenting their own experts as ordinary witnesses, or their reports as documentary evidence, giving rise to conflicting case law as to the correct evidentiary weight of these methods of indirect presentation of expert evidence.

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[8] Lord Woolf's *Access to Justice: Interim Report* was published in June 1995, which was followed by the *Access to Justice: Final Report* in July 1996 and, after widespread debate and consultation, the promulgation of the new Civil Procedure Rules 1998. See DAVID JA CAIRNS *England's Procedural Revolution* and *Procedures Under Woolf* (2000) New Zealand Law Journal 323 and 395.

[9] LORD WOOLF *Final Report*, Chapter 13, para. 1; *Interim Report*, Chapter 23, paras 1-2, 10-11. Lord Woolf quoted an article describing modern expert witnesses as *"a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be of disadvantage to their clients. The disclosure of expert evidence .... has degenerated into a costly second tier of written advocacy."*

[10] Rule 35.4 of the CPR.

[11] Rule 35.3 of the CPR provides:

"(1) It is the duty of experts to help the court on matters within his expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

[12] Rule 35.1 CPR.

[13] LORD WOOLF *Final Report*, Chapter 13, para 21.

[14] Rule 35.7 and 35.8 of the CPR.

At the same time there were many other sources of dissatisfaction with this system. Parties complained of the way judges tended to accept the conclusions of court-appointed experts in their entirety and without discussion. The reports of official experts were often substandard because of the inadequate instructions or lack of any direct knowledge of surrounding circumstances, and sometimes they relied on the prior reports of party-appointed experts with a more extensive and immediate knowledge of surrounding events. These problems were compounded by the delays inherent in a system that relied on court-appointed experts from official lists, with the need for the intermediation of the court in communications and the the provision of information to the experts. In the Civil Procedure Law 2000 Spain moved to a new system permitting party-appointed experts as well as court appointed experts, and made provision for the questioning of experts by the parties and the court at the hearing.[15]

The final jurisdiction to address in this review is Australia, which is the source of an innovation that has had considerable impact in international arbitration. A solution developed in Australia to concerns about partisanship and the costs and delays attributed to expert evidence was concurrent evidence (also known as expert conferencing). Expert conferencing involves a modification of the hearing procedure for party appointed experts whereby experts from the same or closely related fields testify together "*During concurrent evidence sessions, expert witnesses are usually presented with an opportunity to make extended statements, comment on the evidence of the other experts, and are sometimes encouraged to ask each other questions and even test opposing opinions.*" Concurrent evidence in Australia was supplemented by complementary reforms such as the pre-trial joint meetings of experts, leading to a joint report, and the imposition of a formal code of conduct on experts that recognises the paramount duty of an expert is to the court and not to any party. The virtues of expert conferencing claimed by its supporters include that it embodies a more scientific ethos, it provides a better environment for experts to communicate their opinions, it reduces partisanship and the influence of lawyers, and it saves time, money and resources.[16]

This short review suggests concerns about experts, and particularly concerns about partisanship and the efficient presentation of expert evidence are ubiquitous in international civil procedure. Concerns have been expressed in both

[15] The current provisions in Spanish law relating to expert evidence appear in Articles 335-357 of the Civil Procedure Law (*Ley de Enjuiciamiento Civil*). On the previous legislation and its problems see VICENTE GIMENO SENDRA (Editor*) Proceso Civil Práctico* (La Ley, Madrid, 2005, Vol. IV) Art. 335, pages 661-663.

[16] See GARY EDMOND *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure* 72 Law & Contemporary Problems 159 (2009), quotation at 162-163; the virtues claimed for expert conferencing by its supporters are summarised at 166-169. See also DOUG JONES *Party Appointed Expert Witnesses in International Arbitration - A Protocol at Last* 24 Arbitration International 137 (2008) at 147-149 Concurrent expert evidence is also authorised in England under the CPR by Practice Direction 35.11.

common law and continental legal systems, and a wide range of possible solutions have been proposed. It is intriguing that in common law jurisdictions, where experts have historically been presented by the parties, the solution to the problems of expert evidence is seen in more control of the tribunal over expert evidence, whereas in Spain the inefficiencies of tribunal-appointed experts has led to greater party participation in the presentation of expert evidence.

Some common features do, however, emerge from the various solutions proposed. Firstly, it seems desirable to provide for multiple means for the presentation of expert evidence, to enable tribunals and the parties to adjust the presentation of expert evidence to the demands of the particular case. The possibilities of party appointed experts, tribunal appointed experts, or a single joint expert appointed by the parties may co-exist within the same procedure. Similarly, conventional cross-examination, expert conferencing and tribunal questions, or a combination of these techniques, may be used at the oral hearing. Flexibility is a characteristic of the modern treatment of expert evidence.

A second common feature is the imposition of an express duty of objectivity. Spanish civil procedure requires experts to swear or affirm that they have acted with the 'greatest possible objectivity', while in England an expert must expressly state that the expert has understood and complied with their overriding duty to help the court with matters within their expertise.[17] The express duty of objectivity is sometimes reinforced by duties of disclosure, such as the requirements in the CPR that an expert must set out all material instructions, whether written or oral, on the basis of which the report was written,[18] details of the expert's qualifications, material relied on in making the report, persons involved in the preparation of the report, and where a range of opinions are possible then summarise the range and give the reasons for the expert's own opinion.[19]

Thirdly, there is a clear trend to favour communication between experts during the legal procedure, including mandatory pre-hearing meetings, the exchange of draft reports, joint reports, and witness conferencing.

Finally, there is a distinct trend of tribunal supervision of the presentation of expert evidence. This is clearly apparent in the CPR where permission is required from the court to present expert evidence, the court may restrict expert evidence or direct that the evidence is given by a single joint expert, the court may require discussions between experts or that expert evidence be given concurrently. Concurrent evidence by its very nature requires tribunal involvement to control and direct the exchange. Spanish procedure provides for the direct judicial

[17] Article 335(2), Spanish Civil Procedure Law; Rules 35.3 and 35.10 CPR.
[18] Rule 35.10 of the CPR and paragraph 3.2 of Practice Direction 35.
[19] Paragraph 3.2 of Practice Directive 35.

questioning of expert witnesses and also a specific procedure for the judicial evaluation of allegations of a lack of impartiality or independence by an expert.[20]

Developments in international arbitration very much accord with these developments in civil procedure. International arbitration is based on party autonomy and arbitral tribunals in disputes involving parties from different legal traditions have long been accustomed to consulting with the parties regarding the presentation of evidence, including expert evidence. Both party-appointed and tribunal-appointed experts have long been part of international arbitration practice. The flexible approach to expert evidence in modern civil procedure is in complete harmony with the bases of international arbitration.

Expert conferencing has also been embraced by international arbitration. In international arbitration expert conferencing offers additional advantages where counsel or members of the tribunal do not come from an established tradition of the cross-examination of experts. Pre-hearing meetings of party-appointed experts, by order of the tribunal, were endorsed by the *IBA Rules on the Taking of Evidence in International Commercial Arbitration.* A recent novel form of expert communication and cooperation proposed in international arbitration is expert teaming which aims to combine features of party-appointed and tribunal-appointed experts. Under this proposal each part proposes an expert to form part of an expert team of two experts to be appointed by the tribunal. The expert team then prepares a report under the supervision of the tribunal, with the parties having the right to comment on the preliminary report and to question the expert team at the evidentiary hearing.[21]

There have been two recent efforts in international arbitration to provide a comprehensive set of guidelines for party-appointed experts. There is the *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* issued by the Chartered Institute of Arbitrators in 2007 (***"Protocol"***), and Article 5 of the 2010 issue of the *IBA Rules in the Taking of Evidence in International Commercial Arbitration*. Both documents have a strong common law flavour, and are inspired in the Woolf reports and the English CPR.

The Protocol is the more detailed document requiring an expert's opinion to be *"impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party"*, as well as imposing an express duty on the expert echoing the CPR, *"to assist the Arbitral Tribunal to decide the issues in*

[20] Art. 343, 344 & 347.2 of the Civil Procedure Law. The procedure to impeach (*tachar*) a party-appointed expert for lack of independence or impartiality requires a formal decision from the court, but does not result in the automatic exclusion of an expert report. A proven conflict of interest however will be taken into account in evaluating the weight to be placed on the expert's evidence.

[21] See KLAUS SACHS *Protocol on Expert Teaming: A New Approach to Expert Evidence* in ALBERT JAN VAN DEN BERG (editor) *Arbitration Advocacy in Changing Times* (ICCA Congress Series Nº 15, Wolters Kluwer, 2011) 135.

respect of which expert evidence is adduced."[22] Both the Protocol and the IBA Rules provide for expert meetings and the identification of points of agreement and disagreement. The mainstay of both documents is a prescriptive list of required disclosures and declarations in the expert report including a description of the expert's qualifications, instructions, the facts, matters and documents taken into account and the expert's opinions and conclusion. They both also require an express declaration of the genuineness of the opinion expressed. This declaration is particularly elaborate in the case of the Protocol which requires the expert to include in their report a declaration in the following form:

> *"Article 8 – Expert Declaration*
>
> *1. The expert declaration referred to in Article 4.5(n) shall be in the following form:*
>
> *"(a) I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal 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;*
>
> *(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."*

In conclusion, the developments in relation to expert evidence in international arbitration reflect the same concerns and proposed solutions as international civil procedure generally. The partisanship of experts in an adversarial environment and the costs and inefficiencies associated with poorly presented or excessive expert evidence have been the driving concerns. The favoured solutions have involved flexible proceedings, the recognition of express duties of impartiality on experts, mandatory

[22] Protocol Article 4 – *Independence, Duty and Opinion*. On the Protocol, see generally DOUG JONES *Party Appointed Expert Witnesses in International Arbitration - A Protocol at Last* 24 Arbitration International 137 (2008).

communication between experts, prescribed disclosure by experts in their reports and in the procedure generally, and an active role for the tribunal in managing expert evidence both in its preparation and in the questioning of experts at the hearing.

These solutions impose increased demands on both the experts (in terms of communication, disclosure, and express duties of impartiality) and on the tribunals, and in doing so may diminish party and lawyer control over the content and presentation of expert evidence. The practice of international arbitration in the matter of experts is by no means uniform, and arbitral tribunals lack the powers of domestic tribunals to require compliance with prescriptive rules for expert witnesses, particularly in the absence of agreement of all parties. It is also too early to evaluate the levels of use or impact of the Protocol, or the detailed provisions of the 2010 issue of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration.*

C. The Function of the Expert Witness in International Arbitration:

This review enables the following conclusions to be drawn regarding the function of expert witnesses in international arbitration:

(i) The expert is a witness: The primary role of the expert is to testify before the tribunal. It is worth emphasizing that the expert, despite the special features of their role, is still a type of witness. In many respects experts are treated in the same way as witnesses: they are obliged to speak the truth (on matters of fact), appear at the hearing to answer questions, and their evidence or credibility may be contradicted or challenged in the proceedings. As with other witnesses, the tribunal has the obligation to evaluate and give such weight to expert evidence as it considers appropriate.

The fact that an expert is a witness also means that the role of the expert is not compatible with the role of counsel. This incompatibility is particularly important with legal experts, such as experts on foreign law in commercial arbitration, or experts in public international law and investment arbitration. The role, privileges and ethical obligations of counsel and expert witnesses are incompatible, so while an expert witness may be invited to make a presentation as a witness, or to ask a fellow expert questions as part of an expert conference, an expert cannot make submissions or cross-examine another expert from the counsel's table (and as a practical matter an expert who attempted to do so would entirely undermine their credibility with the tribunal).

(ii) The expert enjoys certain privileges as a witness: If it is true that the expert is a witness, then it is equally true that the expert is a special type of witness. This is recognised in the separate treatment of experts in the rules of evidence and civil procedure of domestic jurisdictions, and in the 'soft law' of international arbitration.

The expert witness has the privilege of expressing an opinion on a matter within his or her own expertise. In practise this can mean the expert has considerable freedom to address possible explanations and consequences of the subject matter of the expertise.

The expert also increasingly enjoys privileges in relation to the tribunal, notably the recent recognition of a privilege of 'assisting' the tribunal, and the privilege as a tribunal-appointed or single joint expert of communicating directly with the tribunal.

(iii) The expert witness has special duties: The expert also has special duties in international arbitration. The most important of these duties is the duty to be objective in expressing an opinion. An ordinary witness is expected to speak truthfully as to the facts, but not to approach the facts objectively.

The duty of objectivity is the cornerstone of the special status of the expert, and considerable effort has been made in recent years in both national jurisdictions and international arbitration to guarantee the objectivity of expert evidence. This has been done both directly, by informing the expert of the duty of objectivity and requiring the expert to acknowledge this duty in writing (as in paragraph 8(1)(b) of the Protocol), but also indirectly by placing the expert into a closer relationship by the tribunal (including informing the expert that their privilege and duty is to assist the tribunal), requiring experts to work together and share information, and adopting a collegiate rather than adversarial form of questioning at the hearing (through, for example, expert conferencing).

In practice, the objectivity of the expert is very important to the tribunal's acceptance of the credibility of the expert. Objectivity requires the expert to be candid in their evidence, to identify matters that might adversely affect their opinion, and also to be prudent in expressing their conclusions.

(iv) The expert must be qualified as an expert: It might appear self-evident that the expert must be qualified as an expert**,** but proper qualification sometimes raises issues when an expert strays outside their primary field of expertise into matters on which they are not properly qualified to express an opinion.

The formal corollary of the requirement that an expert be qualified is that the expert qualifies themselves in their report (or at the commencement of their oral testimony). The simplest way to do so is to include a detailed CV in the attachments to the report. Paragraph 8(1)(c) of the Protocol also expressly requires the expert to confirm that the matters on which the expert expresses the opinion are within their expertise.

(v) A party-appointed expert is not required to be independent of the Parties: There is an expectation that a tribunal-appointed expert will not only be objective but also be independent of the parties. Indeed, a party is unlikely to accept an expert who is not independent, or at least has not made an adequate disclosure of any matter that may affect their independence.

However, independence from the parties is not in general a prerequisite to express an expert opinion. In particular a party-appointed expert will not be independent in the strictest sense, for at the very least there will be a commercial relationship with the party that has instructed the expert and will pay the fee.

Further, an employee or regular contractor to a party might be qualified as an expert witness[23]. For example, an engineer, closely involved with a major construction project and employed by the contractor might be equally qualified as a witness on matters of fact, and qualified to express an expert opinion on the causes or consequences of those facts. The fact that the engineer is not independent, and indeed might not only have a relationship of employment but also potential interests of professional reputation involved does not disqualify the expert from expressing a professional opinion.[24]

[23] Cf the English Court of Appeal decision in *Field v Leeds City Counci*l [1999] EWCA Civ 3013 (*"...there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight but that is another matter"* per May LJ at paragraph 31). Further, the non-disclosure of a conflict of interest by an expert does not automatically disqualify their evidence: see *Toth v Jarman* [2006] EWCA Civ 1028.

[24] See *Elsamex S.A. v República de Honduras* (ICSID Case Nº ARB/09/04) where the Tribunal considers an argument that the reports prepared by an engineer appointed by the Claimant were not admissable because the engineer was not independent (in that he worked in a company that was part of the same corporate group as the Claimant), had not properly disclosed his relationship with the Claimant in his reports, and had relied on data supplied by the Claimant. The Tribunal found that the engineer was fully qualified in the subject matter of his expertise (Award, paragraph 327), that the relationship with the Claimant was neither hidden nor denied, and lack of independence of a party-appointed expert was no reason to exclude his reports. Further, the reports would be given such value as they deserved in accordance with their persuasiveness, technical and contractual support, and to the extent that they were convincing, considered in light of the allegations relating to the underlying data (Award, paragraph 328).

There is a danger here of confusion because of the ambiguity of the term 'independence', particularly in the context of international arbitration. Independence can refer to the quality of mind of not being influenced by factors irrelevant to the expertise. In this sense 'independence' is used synonymously with the more precise and preferable terms 'objective' or 'impartial'. This is a quality required of experts. However, independence is also commonly used in international arbitration to refer to an absence of certain personal or economic relationships with the parties. Independence in this second sense is mandatory in a member of the tribunal, but not in an expert witness.[25]

Of course, an expert may always be questioned about their independence or relationship with other parties. Most importantly the tribunal must take into account the possible interests of the expert in assessing the objectivity and weight of the expert's evidence. The expert should expect questions on his relationship to the parties appointing him, and the best approach to neutralize these collateral questions seeking to impugn his credibility is full disclosure in his report of any relevant relationship with the parties There is an obvious - and perhaps irreconcilable - tension in the expectations of an expert who has a relationship with a party, or some interest in the outcome of the arbitration, who at the same time is expected to be objective and to assist the tribunal[26]. The expert must try to reconcile his duty and his interests, and both counsel and the tribunal must be vigilant to ensure the expert does so.

(vi) The role of the expert is to testify and to assist when required (and not to presume too much):

The expert must testify, and assist as appropriate, but must be careful not to over-reach him or herself and presume to instruct the tribunal. The initiatives to require experts to acknowledge a duty to assist the tribunal, or the practice of expert conferencing in which members of the tribunal

[25] There is perhaps insufficient care with this ambiguity in the *IBA Rules on the Taking of Evidence in International Commercial Arbitration.* Article 5(2)(c) requires an expert report to contain *"a statement of his or her independence from the Parties, their legal advisers and the Arbitral Tribunal"*. If this is means no more than that the nature of an expert's relationships with the parties should be disclosed then it is unexceptionable. However, the expression might wrongly suggest to a casual reader that a party-appointed expert must be independent. Similarly, the title to Article 4 of the Protocol refers to independence, but what the Article in fact requires (Art 4(4)(b)) is not independence of the parties, but merely disclosure of past or present relationships with the parties (and others).

[26] Cf. JOHN H. LANGBEIN *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985) at 835: *"I sometimes serve as an expert....and I have experienced the subtle pressures to join the team-to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune."* For similar comments by Thomas Wälde see MARK KANTOR *Valuation For Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008) at 294.

participate, increase the direct engagement between the tribunal and experts, without infringing the rights of the parties to due process. These initiatives ultimately involve a balance between the rights of the parties, the privileges and duties of the expert, and the privileges and duties of the tribunal, which must be respected by all.

For its part, the arbitral tribunal must never accept the evidence of an expert simply because of the authority of the expert, even (and perhaps particularly so) where the expert is tribunal-appointed or jointly appointed by the parties. The opinion of a particular expert might be entirely accepted by a tribunal on its merits, in the same way as an individual witness might be preferred over the evidence of all others on its merits, but only after the tribunal has understood and critically appraised the evidence.

Expert evidence presents particular demands for a tribunal that must evaluate the expertise, including often conflicting evidence of various experts. Above all, this exercise requires extensive preparation by the arbitral tribunal, including a willingness to understand the bases of the expertise and to explore alternative hypotheses or explanations.

D. The Rise of the 'Star Expert':

The expansion of investment arbitration and a significant and lucrative role for experts within the investment arbitration process is likely to create new tensions for the expert witness.

The problem areas for experts in investment arbitration are likely to be questions of expert objectivity and the increased demands on experts by parties and their lawyers. For some time now there has been a developing class of 'professional experts'; individuals well-qualified in their field who devote themselves exclusively to advising parties in litigation or arbitration. Investment arbitration is encouraging this phenomenon, particularly with the economic and accounting evidence required to quantify investors' losses from state action and breach of international obligations.

The experienced professional expert witness offers many advantages to the parties in an arbitration. The professional expert understands the arbitral process, explains well key concepts and conclusions through readily comprehensible reports, presents their opinions confidently in a hearing, defends their opinions in cross-examination or expert conferencing, and possesses a familiarity with lawyers and their working habits. In short these experts offer not only expertise in their specialized field, but also what might be called a 'process expertise' or the skills necessary to communicate persuasively in the arbitral process.

The culmination of this professionalization of the expert in investment arbitration is the figure of the 'star expert' that appears before the tribunal not only with impressive qualifications in his or her field of expertise, but is also endowed with the know-how, confidence and communication skills of 'process expertise'.

Such an expert can also offer his or her process skills at a strategic level to the parties. An expert well-experienced in cross-examination can suggest lines of examination for the expert appointed by the opposing party. Such an expert can also identify strengths and weaknesses in the legal arguments of the parties over quantum issues. In short, such an expert can contribute to the strategic management of the case, as well as presenting expert evidence effectively. Such an expert is clearly attractive to the parties in arbitrations where the sums in dispute are enormous.

The star expert combines the qualities of an expert with qualities that are normally associated with legal counsel, particularly persuasiveness, communication skills and a strategic role in the management of the arbitration. The question is whether such a star expert can remain objective at the same time as providing these additional services to the client. The more closely involved an expert is in aspects of case preparation outside his particular field of expertise, the greater the risk of partisanship. It is an old problem in a new guise – an expert that works too closely with the lawyers for one party loses his or her objectivity and (albeit subtly) mentally shifts from testifying as a witness to acting as an advocate.

The costs of expertise in an investment arbitration is also likely to add pressure on the objectivity of the expert. This pressure might become acute if experts begin to adopt the type of innovative funding arrangements (such as success fees) that are increasingly common for lawyers in investment arbitration[27].

The importance of expert evidence that is not only well-founded technically but also persuasively presented is likely to encourage more structured expert preparation, including the use of mock cross-examination and conferencing scenarios. At the same time the professional expert is also likely to generate collateral issues in investment arbitration. The expert's report normally describes the mission of the expert and the documentation upon which the expert relies, but we can expect efforts to discredit an

[27] On success fee arrangements of party-appointed experts see MARK KANTOR *Valuation For Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008) at 289-290.

expert's objectivity by seeking disclosure and transparency in the relationship with the appointing party and their lawyers and funders.

The star expert, with the prestige, impressive credentials and persuasive communication skills runs the risk of overreaching the bounds of testimony to express definitive opinions on matters that are for the tribunal to decide. Some expert witnesses, combining their skills with many years' experience of particular contract forms or a particular type of proceedings, address the tribunal as if their role is to instruct rather than to inform. This presumption can be counterproductive with an experienced tribunal but poses risks for a weak or inexperienced decision maker. The star expert may not for this reason be a suitable candidate for a tribunal-appointed expert, or even for a single or joint expert.

A particular manifestation of the star witness phenomenon in investment arbitration is the practice of treating public international law as an issue for expert evidence in investment arbitration, rather than the submission of counsel. Conferring on a lawyer (albeit a highly respected lawyer) the special status of an 'expert', and asking this lawyer to affirm their impartiality, is expected to give their statements more weight than the same statement made from the counsel table.

The expert is a special class of witness. The expert has special privileges, duties and a role in arbitration not shared by other witnesses. At the same time the expert is a highly specialised professional urged and presumed to be impartial, and so enjoys superior respect in this sense to the partisan legal professionals. There appears sometimes to be a tendency to equate a special class of witness with a superior class of witness, or to place the expert on a pedestal. From this perspective, the emergence of the phenomenon of the star expert is not a surprise. However, the international arbitration community must guard against the destabilizing threat of this tendency.

What may ultimately be required is a more realistic perspective by lawyers and arbitrators on the limitations of expert evidence. It is prudent to urge experts to impartiality, but it is also prudent to recognise that impartiality is a chimera. At the end of the day, party-appointed experts are paid by one party only. On a broader level, some commentators have argued that lawyers have an idealized view of expertise so that, while accustomed to the adversarial nature of the law, they assume that in scientific or technical disciplines there is such a thing as an impartial, objective and unbiased opinion. In all fields of knowledge there are robust disagreements between experts (climate change is an obvious example) as well as opportunities for *bona fide* differences of opinion between authorities. Differences of

opinion, even strong differences of opinion in scientific or technical matters are not necessarily an indication that there is something amiss or a malign influence (such as large fees or aggressive lawyers) over an expert. It is also human nature – stronger in some than in others – to defend a position once taken, or a cause once engaged.[28]

The question of the possible partisanship or bias of experts might be reduced but cannot be eliminated by procedural innovations such as expert declarations, meetings or conferencing. For this reason, there will always remain a role for effective cross-examination of experts. Possible bias or error is inherent in the nature of expert opinion so that due process requires that the parties have an opportunity to address these concerns during the arbitral process. Similarly, arbitral tribunals must be careful not to equate the authority and persuasiveness of an expert with the correctness of the opinion. No matter how complicated the expertise, the members of the arbitral tribunal must sufficiently prepare themselves to engage in a constructive evaluation of the evidence, and to ensure they understand the evidence sufficiently to make their own decisions, and to explain their decisions with their own reasons.

[28] When a more sympathetic perspective is taken to expert disagreement then the advantages of many efficiency enhancing measures (such as expert meetings, teaming or conferencing) may be questioned, as well as confirming the greater security in the use of multiple experts instead of single joint experts and tribunal appointed experts. It simply cannot be assumed that the avoidance or minimisation of expert disagreement is necessarily conducive to the more efficient resolution of disputes. On the idealization by lawyers of expertise see JENNIFER L. MNOOKIN *Idealizing Science and Demonizing Experts; An Intellectual History of Expert Evidence*, 52 Villanova Law Review 101-136; and GARY EDMOND *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure* 72 Law & Contemporary Problems 159 (2009)