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Expert Witnesses in Arbitration and Litigation Proceedings by R.D. Kent

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Expert Witnesses in Arbitration and Litigation Proceedings

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There are a number of important ways in which the role of expert witnesses in international arbitration is different than in a litigation proceeding in a national court. Of course, one of the hallmarks of international arbitration is that there is no such thing as standard "international arbitral practice;" rather, each proceeding is tailored by the parties and the arbitrators to fit the particular dispute at hand. Similarly, there is no such thing as standard "national court litigation practice;" proceedings will vary considerably depending on the jurisdiction and the level of the court in question. Nevertheless, it is possible to draw some generalizations about the role of expert witnesses in international arbitration and about the important ways in which that role differs from that of an expert witness in national court litigation, particularly in common law jurisdictions such as the United States.

Party-Appointed vs. Tribunal-Appointed Experts

In litigation in common law jurisdictions, the expert witnesses who offer evidence are usually retained by one of the parties to the dispute. By contrast, in international arbitration proceedings, in addition to party-appointed experts, the arbitral tribunal can appoint its own experts to provide evidence on particular aspects of the dispute, or to assist the tribunal in understanding the issues addressed by party-appointed experts. These experts are generally viewed as independent, and they are chosen by and instructed by the arbitral tribunal. They may be asked to submit a written report, to which the parties are generally given the right to reply (often via their own party-appointed experts). They are also usually subject to cross-examination by the lawyers for each party.

The arbitral tribunal may solicit the views of the parties as to whether it should appoint its own expert. In many cases, the parties will prefer not to have a tribunal-appointed expert. They may be concerned that the tribunal will simply defer to the expert on key issues in dispute, depriving them of an opportunity to advocate their own positions. In some cases, however, it may be more efficient and more effective to have a tribunal-appointed expert. This will be true particularly where the issues as to which expert evidence is required are not central to the dispute or are not heavily contested, and where the parties are given a role in selecting the expert.

If the arbitral tribunal does appoint its own expert, the parties and their lawyers must adjust their approach to presenting their cases in order to take account of the tribunal-appointed expert. The parties must consider whether to offer evidence from their own experts, or to allow the evidence of the tribunal-appointed expert to stand alone (subject to cross-examination by the parties). If they choose to present their own expert testimony, they must choose an expert with the qualifications, expertise, and demeanor that will be most effective in complementing (or challenging) the evidence from the tribunal's appointed expert. They must also consider how to challenge the testimony of the tribunal-appointed expert that is unhelpful to their cases without undermining the evidence that they will want to use in support of their cases. In addition, where the parties disagree with the evidence offered by a tribunal-appointed expert, they must consider how best to attack that evidence without alienating the arbitrators, who might feel loyalty or

sympathy towards the expert they appointed, or who may simply believe that their appointed expert is "neutral" and therefore more credible than the party-appointed experts.

Expert Retention

Even with respect to party-appointed experts, there are considerable differences in their roles in litigation and arbitration proceedings. These differences can be seen throughout the proceedings, including at the beginning of the process, when the experts are retained.

In litigation proceedings, particularly in United States courts, there is generally a very clear demarcation between "consulting" experts and "testifying" experts. An expert witness who testifies at trial in a U.S. court will be subject to extensive pre-trial discovery and cross examination, which will almost invariably include questions about her communications with the counsel who engaged her. For this reason, counsel in U.S. litigation proceedings are generally extremely careful not to have discussions about their strategy or their assessment of the case with a potential testifying expert. This means that the lawyers must determine even before engaging an expert witness whether the witness will be used as a "behind the scenes" member of the case preparation team, consulting with and educating counsel about various legal or technical issues involved in the case, or a testifying witness, who remains largely insulated from the case preparation.

By contrast, in international arbitration proceedings, expert witnesses are subject to far less discovery, and will rarely, if ever, be asked about their conversations with counsel. This makes it possible to engage expert witnesses at the outset of the case without determining whether those experts will ultimately submit an expert report or testify at an oral hearing. Counsel in international arbitrations therefore generally feel more free to discuss the legal and technical issues in their case, including potential weaknesses, with their experts, even if the experts may ultimately end up giving testimony. This can save considerable time and expense because it eliminates the need for duplicate experts (one to consult with and educate counsel and one to testify) and facilitates early and thorough development of the aspects of the case that require expert evidence. It also saves time at the oral hearing, as the expert is rarely cross examined on every avenue of analysis that was pursued, and why some analyses were rejected.

Although there is not necessarily a need to segregate consulting experts from testifying experts, it is still common in international arbitrations to have multiple experts. Multiple experts may be engaged early in a proceeding in order to solicit multiple views on a complex subject, because the experts have different backgrounds or areas of expertise, or because the scope of the dispute is such that the relevant analysis or calculations are beyond the resources of any single expert. Multiple experts may be engaged as a team or as individuals and may work cooperatively or independently as the project requires. Again, the limited scope of discovery into the preparation of expert evidence in an international arbitration means that the experts are generally more free than experts in U.S. litigation proceedings to collaborate and share ideas without the risk of their communications being subject to discovery by the opposing party, or the risk that one expert will be viewed as having "ghost written" the testimony of another, as has happened recently in U.S. litigation..

Another difference worth noting is the use of legal experts. In most national court litigation proceedings, issues of foreign law are relatively uncommon. By contrast, in international arbitration, the relevant procedural and substantive laws are, almost by definition, foreign to at least some of the parties and the arbitrators. There is no standard approach to advocacy on issues of foreign law. In some cases, the parties' counsel will simply argue issues of foreign law in their written submissions by citing the relevant authorities and making legal arguments based on those materials. In other cases, one or both parties will submit testimony from expert witnesses (often law professors or distinguished practitioners) on the foreign law. In cases where the parties take different approaches to arguing issues of foreign law, it can be difficult for the tribunal to assess their respective arguments. For this reason, when one party submits testimony from an expert in foreign law, the other party often feels compelled to match this testimony with expert witness testimony of its own.

Another difference in the retention of experts in litigation and arbitration proceedings is in the timing of expert retention. In arbitration proceedings, the procedural order governing the arbitral process will often require the parties to submit expert reports at a relatively early stage of the proceedings, sometimes as early as with the parties' initial memorials. This forces the parties and their counsel to identify the issues that will require expert evidence early in the process and to engage experts and develop their evidence in tandem with the development of the factual evidence and legal arguments. By contrast, in U.S. litigation, the parties are often not required to submit expert reports until considerably later in the process. In U.S. litigation matters, it is not uncommon for the parties to spend months or even years developing the facts of the case before engaging testifying experts and developing their testimony. This is another reason that experts in arbitration matters are often more involved in discussions about case strategy and case preparation than are experts in litigation matters.

Finally, by definition, international arbitration involves different national legal systems. The parties, the arbitrators, and the witnesses are often from different jurisdictions. The law governing the arbitration procedure is often different than the law governing the merits of the dispute, and both may be foreign to the parties and the arbitrators. An expert witness in an international arbitration proceeding therefore must be sensitive to the differences in the legal systems that are relevant to the dispute. An expert who is rooted too firmly in his own legal tradition may be blind to the differences between that system and the governing law or the law familiar to the arbitrators and may have difficulty communicating his evidence to the tribunal effectively. When selecting experts in international arbitration proceedings, particularly those experts who may submit written reports or testify, it is critical that the parties choose individuals who are sensitive to the unique context of the arbitration, and who will be able to communicate effectively with the tribunal.

Pre-Hearing Procedures

Once they have been engaged, there are considerable differences in the way that experts are utilized in arbitration proceedings as compared to U.S. litigation proceedings. In general, these differences arise from the procedural flexibility and the relative lack of discovery in international arbitration. There are significant differences not only in the conduct of oral

hearings (discussed below), but also in pre-hearing procedures, including written submissions, disclosure and discovery, and hearing preparation.

The procedural flexibility in international arbitration means that every arbitration can be subject to different procedural requirements, including for written submissions and expert reports. In 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 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. Counsel and the experts must remain flexible and be prepared to adapt to the specific procedure adopted by the relevant tribunal.

Arbitrators sometimes use innovative procedures to narrow the issues in dispute between the parties' respective experts in advance of an oral hearing. They may order the experts to meet in advance of the hearing and to agree on a list of points as to which they are in agreement and a list of issues as to which they have different views. The arbitrators may also order the experts to submit written replies or comments on each others' reports. After reading the parties' submissions, the arbitrators may even submit questions to the experts and ask each to respond in writing.

As already mentioned, one critical difference between U.S. litigation and international arbitration is that there is considerably less discovery in most international arbitration proceedings. While this is generally welcomed by international arbitration lawyers and their clients, it can have significant effects on the expert evidence given in the dispute. As already discussed, the lack of discovery into conversations between experts and counsel can lead to increased communication and collaboration, which can facilitate the preparation of relevant and focused expert reports. On the flip side, limited discovery can seriously hinder the preparation of expert evidence if one party does not have access to the data necessary for the expert's analysis. This may be particularly true for the expert engaged by the respondent party, who might not have sufficient data to do his own analysis of the issues in dispute and may be limited to criticizing the report submitted by the claimant's expert.

The relative lack of discovery into the preparation of expert evidence also means that counsel is more free to work with expert witnesses in the preparation of their expert reports. While there is no doubt that lawyers in litigation proceedings also find ways to influence the style and approach of expert reports (but of course, not the substance), they often seek to do so in ways that will not be subject to the discovery process. The communications between lawyers and experts in litigation proceedings will generally be oral and it is unusual for the lawyers and the experts to exchange edited drafts of an expert's report. In international arbitration proceedings, by contrast, it is common for experts and counsel to exchange e-mails or other written correspondence, even regarding substantive points in the expert report, and it is not uncommon for lawyers to edit draft expert reports (again, as to style, not substance).

There are also significant differences in how lawyers prepare experts for oral testimony in litigation and arbitration proceedings. In litigation proceedings in common law jurisdictions,

it is common for lawyers to prepare experts for their testimony in lengthy meetings in which they discuss questions that might be posed by the opposing counsel and even engage in mock questioning to help the expert learn to formulate answers in response to rigorous cross-examination. In litigation in civil law jurisdictions, by contrast, it is uncommon – and may even be unethical or illegal – to meet with a witness in advance of the oral hearing. In these jurisdictions, there is no preparation of fact witnesses and there may be little or no preparation of expert witnesses. As with many other procedural matters, the practice in international arbitration falls somewhere between these extremes. The extent of preparation for testimony of party-appointed experts will vary considerably from case to case, depending on the backgrounds (and ethical obligations) of the lawyers, the procedural law, and procedural orders issued by the arbitration tribunal. In many cases, counsel will prepare expert witnesses for their testimony by discussing the key points in the case and the key points of agreement and disagreement among the experts. Counsel may also engage in mock questioning, but usually less formally and to a lesser extent than lawyers do in preparation for U.S. trials.

Oral Hearings

The differences in expert witness testimony in arbitration and litigation are also readily apparent at the stage of the oral hearings. In common law jurisdictions, litigation generally culminates in one trial, at which all of the evidence is presented. In international arbitration, there can be one oral hearing, at which factual and expert evidence is presented and legal arguments are made, a series of hearings dealing with different aspects of the case, a separate oral hearing devoted solely to hearing expert testimony, or even no oral hearing if the parties have agreed to have their dispute decided solely on the basis of the written submissions.

In arbitration, the most common method of hearing oral testimony from party-appointed experts is for the expert to be questioned briefly by the lawyer for the party who appointed her, then to be cross-examined by the lawyer for the opposing party, and finally to be questioned by the arbitrators. If there have been written expert reports, those reports generally stand in for the direct testimony of the expert; in this case, the questioning by the lawyer for the party who appointed her is generally limited to a few questions to introduce her and to remind the tribunal of the key points of her testimony. Tribunal-appointed experts are generally subject to cross-examination by the lawyers for both parties and may also be questioned by the tribunal.

In some cases, tribunals have taken innovative approaches to hearing expert witness testimony. One method that is increasingly popular is "witness conferencing." In this approach, the tribunal questions multiple witnesses in tandem. In some cases, the tribunal may hear all of the fact and expert witnesses from both sides at the same time. In other cases, the tribunal may hear all of the expert witnesses together, or may hear the experts who have addressed a particular issue jointly. Witness conferencing allows the tribunal to pose the same question to multiple witnesses simultaneously and allows the witnesses to respond to and to build on each other's testimony. The dynamic becomes more of a discussion among the witnesses than a traditional adversarial cross-examination. This type of approach allows the tribunal to hone in on the specific issues that it believes are most important to the resolution of the dispute and on those points on which the witnesses have the most divergent views.

While experts in U.S. litigation must appear to give testimony at trial (generally, if an expert does not appear, his report is regarded as hearsay and not admitted to the record), it is not uncommon in international arbitration for expert witnesses to submit written testimony, but not to be called to testify at the oral hearing. This may happen where the opposing party does not attach much significance to the issues on which the expert has testified or where the opposing party believes there is not much to gain from cross-examining the expert. This can also happen where the tribunal has allocated each side a fixed amount of time to use in witness examination, and the opposing party has elected to spend that time with other witnesses. If the expert is not called for cross-examination, the written expert report will stand on its own as the expert's testimony. This possibility makes it especially important that experts in international arbitration proceedings draft their written reports to be as comprehensive and comprehensible as possible. Where more than one expert has signed an expert report, some tribunals will require that all of the experts who have signed the report be available to testify at the oral hearing, others will allow the party offering the testimony to select one expert for oral testimony, and some will even allow the opposing party to select which expert or experts to cross-examine.

At the oral hearing, experts are often allowed to be present for the testimony of fact witnesses and other expert witnesses. Depending on the tribunal and the arbitral situs, the experts may testify under oath or may simply be reminded that they are expected to testify truthfully. There may be abbreviated, or even no, direct testimony if there have been written expert reports. Cross-examination by the opposing party's counsel is often shorter and less aggressive than cross-examination in common law courts. When the cross-examination is conducted by lawyers who are not from a common law tradition, the cross-examination may also be an entirely different style of questioning, which may or may not be effective in uncovering the weaknesses of the expert's testimony. There are generally few, if any, objections made by the lawyer for the party who is offering the expert testimony. In some arbitration proceedings, experts will need to testify in a language other than the language of the arbitration, which necessitates the use of interpreters.

At some point during the oral testimony, the tribunal will generally ask questions directly of the expert. The questioning by the tribunal varies widely from arbitration to arbitration. In some cases, the tribunal will be very active, interjecting questions during and after the lawyers' examinations. In other cases, the tribunal will be more passive and may ask few, if any, questions, generally at the end of the expert's testimony. Considerable differences may be observed from one arbitrator to the next, even on the same tribunal. The questions from the tribunal are a valuable clue to the expert and to the lawyers of how the tribunal may be thinking about the salient issues. The experts should carefully consider the tribunal's questions and should strive to answer them openly and thoroughly. It is often best to treat these questions as an opportunity to educate the tribunal as opposed to defending oneself from challenge (as one often treats cross-examination).

There are generally no formal rules of evidence in international arbitration. Most applicable procedural laws and arbitration rules give the tribunal the discretion to consider whatever evidence they deem relevant. The lack of strict evidentiary rules eliminates the need to "certify" experts, as one must do in U.S. courts. It also allows the examining lawyers and the arbitrators to ask a broader range of questions and to frame their questions with less regard to

formal rules.

Conclusion

In complex commercial disputes, expert evidence is often important to the final outcome. This is true both in national court litigation and in international arbitration. Many of the things that make expert testimony effective in litigation are also important in international arbitration proceedings. In addition, however, the unique context of international arbitration requires additional skills on the part of the experts and the lawyers. In particular, the procedural flexibility of arbitration presents both challenges and opportunities, and the experts and the lawyers must be adaptable and look for ways to use that procedural flexibility to their advantage. Additionally, the international character of the disputes, and of the tribunals who are appointed to resolve them, requires that the lawyers and the experts be able to transcend their own backgrounds and training and adapt their approach to the complex legal and cultural environment of the arbitration. Experts who are able to do this are usually very effective in persuading tribunals of their evidence, and add significant value to the decision making process.