

# Expert evidence in international arbitration

by *Practical Law Arbitration*

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*A note outlining the circumstances in which expert evidence may be adduced in international arbitration, and providing guidance on the relevant practice and procedure.*

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## Scope of this note

### Where do I find the rules governing expert evidence?

Tribunal's implied power

Law of seat

Parties' agreement or institutional rules

### Arbitral institution guidelines on the use of expert evidence in international arbitration

IBA Rules on the Taking of Evidence in International Arbitration

IBA Guidelines on Party Representation in International Arbitration

UNCITRAL Notes on Organising Arbitral Proceedings

ICC Techniques for Controlling Time and Costs in Arbitration

The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

CIArb Guidelines for Witness Conferencing in International Arbitration

### Do I really need an expert?

#### Party-appointed experts

Choosing an expert

Defining the issues

Preparing and producing the report

When to serve the report

Questions and supplementary reports

Dealing with "irrelevant" evidence

#### Tribunal-appointed experts

Proper role of the tribunal-appointed expert

Pros and cons

Appointment and terms of reference

Dealing with the tribunal-appointed expert

## **Experts' meetings and directions**

### **Presenting expert evidence**

Preparing for the hearing

Evidence in chief or direct testimony

Questioning at the hearing

Witness conferencing and other techniques

## **Scope of this note**

The use of expert evidence in international arbitration is commonplace. Although a tribunal is often chosen for its specialist knowledge or expertise, the appointment of an expert or experts to give evidence on specific issues can clarify and enhance the tribunal's understanding, and assist in its decision-making.

Expert evidence is an area where the differing approaches of the common and civil law are particularly apparent. Common law lawyers are familiar with an adversarial procedure that usually involves, broadly, the exchange of reports prepared by party-appointed experts, who are then cross-examined at an oral hearing, with a view to determining which party's case prevails. By contrast, the civil law system favours the appointment (by the tribunal, not the parties) of a single independent expert, and frowns on the use of "hired guns".

Each approach has its pros and cons, and most international arbitration tribunals will adopt a procedure in relation to expert evidence that reflects features of both systems. The exact details will vary depending on the background of the tribunal and the parties, the nature of the dispute, and any applicable rules or agreement. This note outlines the circumstances in which expert evidence may be adduced in international arbitration, providing guidance on practice and procedure, including the rules governing expert evidence, arbitral institution guidelines, party-appointed and tribunal-appointed experts and presenting expert evidence.

For a separate discussion on the concept of independence and the party-appointed expert, see *Blog post, Walking the line: independence and the party-appointed expert*.

## **Where do I find the rules governing expert evidence?**

### **Tribunal's implied power**

It is generally accepted that, in principle, the tribunal is entitled to hear expert evidence adduced by the parties, and to make procedural orders concerning the timing and manner in which that evidence will be presented. The tribunal must exercise its powers in accordance with natural justice: in particular, it must ensure that the parties' right to be heard is respected. This usually entails consulting with the parties and hearing their views before making any order about the service, exchange or presentation of expert evidence.

It is less clear whether the tribunal in an international arbitration will always have an implied power to appoint a tribunal-appointed expert (see [Tribunal-appointed experts](#)). Some national arbitration laws do recognise the power of the tribunal to make such an appointment even if the parties object; in other jurisdictions, the position is different. As the costs of such an appointment will generally form part of the overall costs of the arbitration, many tribunals will be cautious about appointing their own expert unless the law of the seat, or any applicable agreement or rules, expressly provide for it. In any event, the tribunal should allow the parties to be heard on the question of whether such an appointment should be made and, if so, who should be appointed.

## Law of seat

You should check the law of the seat, to ascertain whether there are any specific provisions of local law which might affect the tribunal's powers in relation to expert evidence. (For further general discussion of the possible significance of the arbitral seat, see [Practice notes, How significant is the seat in international arbitration?](#) and [Which laws apply in international arbitration?](#).)

For example, [section 33\(1\)](#) of the English Arbitration Act 1996 provides that "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter". [Section 37](#) further entitles the tribunal to appoint experts "to report to it and the parties", though this power can be excluded by agreement. All the experts' powers in this regard must be exercised in accordance with section 33 of the Act, which requires the tribunal to conduct the arbitration fairly. (For further discussion, see [Practice note, Procedural powers of the arbitral tribunal under the English Arbitration Act 1996](#).)

In *Secretariat Consulting PTE Ltd & Ors v A Company* [2021] EWCA Civ 6, the Court of Appeal dismissed an appeal, finding that the relationship between a provider of litigation support or expert's services and their client might have one of the characteristics of a fiduciary relationship. However, where the parties have entered into a confidentiality agreement, including an express provision dealing with conflicts of interest, no purpose was served by designating the relationship as a fiduciary one. The existence of a fiduciary duty of loyalty would not enhance the obligations arising from that contractual provision. For further details see [Legal update, No fiduciary relationship required between expert and client where contract dealt with conflicts of interest \(English Court of Appeal\)](#) and [Blog post, English Court of Appeal provides novel guidance on experts' duties to clients](#).

By contrast, **French** arbitration law recognises total freedom on the part of an arbitrator to make decisions concerning expert evidence. This would include the freedom to appoint its own expert, even if the parties objected; or, conversely, to refuse to appoint an expert even if the parties had requested such an appointment.

The **Swedish** Arbitration Act 1999 adopts a middle ground, providing (in section 25) that the tribunal may appoint experts unless both parties are opposed.

## Parties' agreement or institutional rules

The arbitration agreement, or (more commonly) any applicable institutional rules, may contain provisions governing expert evidence. Usually these take the form of a provision conferring the power to appoint its own expert: procedural powers in relation to experts called by the parties are usually contained in more general provisions concerned with the tribunal's power to admit and consider evidence.

## ICC Rules

The *International Chamber of Commerce (ICC) Rules* provide for a general power to "establish the facts of the case by all appropriate means" (*Article 20(1), ICC Rules 1998; Article 25(1), ICC Rules 2012, ICC Rules 2017 and ICC Rules 2021*). More specifically, the rules provide that the tribunal may decide to hear "experts appointed by the parties ... in the presence of the parties, or in their absence provided they have been duly summoned" (*Article 20(3), ICC Rules 1998; Article 25(3), ICC Rules 2012 and ICC Rules 2017; Article 25(2), ICC Rules 2021*). The tribunal may appoint and set terms of reference for an expert, and the parties are entitled to question him at a hearing (*Article 20(4), ICC Rules 1998; Article 25(4), ICC Rules 2012 and ICC Rules 2017; Article 25(3), ICC Rules 2021*).

Appendix IV to the ICC Rules 2012, 2017 and 2021 provides examples of case management techniques that can be used by the tribunal and the parties to control time and costs. Those relevant to expert evidence suggest:

- Identifying issues that can be resolved by agreement between the parties or experts.
- Limiting the length and scope of written and oral witness evidence (both fact witnesses and experts).

See further *ICC Techniques for Controlling Time and Costs in Arbitration*.

## LCIA Rules

Article 20 of the *London Court of International Arbitration (LCIA) Rules 1998, 2014 and 2020* contains detailed provisions governing the presentation of factual and expert witness evidence. The tribunal may appoint an expert to report to it on specific issues, and is entitled to order the parties to supply the expert with documents or other materials. The parties are entitled to examine the expert at a hearing (*Article 20.4, LCIA Rules 1998 and 2014; Article 20.5, LCIA Rules 2020*).

In January 2018, the LCIA published a note on experts in international arbitration in which it sets out the various ways that experts are used in international arbitration and the various challenges associated with each, together with recommendations for parties and arbitrators (see *Legal update, LCIA publishes note on experts in international arbitration*).

## UNCITRAL Rules (1976)

The *UNCITRAL Rules 1976* provide that the tribunal is entitled to appoint, and set terms of reference for, an expert. The parties are obliged to supply any documents or materials requested by the expert. The parties are entitled to comment on the expert report, and to examine him at a hearing (*Article 27*).

## UNCITRAL Rules (2010 and 2013)

Articles 27 and 28 of the *UNCITRAL Rules (2010 and 2013)* contain provisions governing factual and expert witness evidence presented by the parties. In addition, the tribunal may, after consultation with the parties, appoint an independent expert to report to it in writing on specific issues (*Article 29(1)*). The parties may be required to provide the expert with any relevant

information or documents which the expert may require (*Article 29(3)*). The parties are entitled to cross-examine the expert at a hearing (*Article 29(5)*).

### **The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules)**

Under the *SCC Arbitration Rules 2010 and 2017* the parties may submit written experts' reports, and experts must attend a hearing for examination unless the parties agree otherwise (*Article 28, 2010 Rules; Article 33, 2017 Rules*). The tribunal has power to appoint one or more experts "after consultation with the parties". The tribunal-appointed expert must produce a written report, which the parties are entitled to comment on; and the parties may also examine the tribunal-appointed expert at a hearing (*Article 29, 2010 Rules; Article 34, 2017 Rules*).

### **Swiss Rules of International Arbitration (2012)**

The *Swiss Rules 2012* expressly clarify that any person (including a party) may act as an expert witness, and that it is not improper for parties to interview experts (*Article 25(2)*). The tribunal is entitled to appoint, and establish terms of reference for, an expert. The expert may request the parties to supply him with documents and materials. The parties are entitled to comment on his report, and to examine him at a hearing (*Article 27*).

### **ICDR Rules 2014 and 2021**

In addition to general procedural and evidential powers, the tribunal may appoint an expert to report on specific designated issues. The parties must supply the expert with documents or materials which he or she requires, and may comment on the expert's report and examine him or her at a hearing (*Article 25, ICDR Rules 2014; Article 28, ICDR Rules 2021*).

### **CIETAC Rules 2005, 2012 and 2014**

As well as possessing general powers to determine procedure and evidence, the tribunal is entitled to consult or appoint experts or appraisers "for clarification on specific issues". The parties must provide the expert with any documents or other materials requested by the tribunal. The parties are entitled to comment on the expert's report.

Under the CIETAC Rules 2005 (which apply to arbitrations commenced before 1 May 2012, unless the parties agree the 2012 Rules should apply), the parties may examine the expert at a hearing if the tribunal considers it appropriate (*Article 38*). Under the CIETAC Rules 2012 (which apply to arbitrations commenced on or after 1 May 2012) and the CIETAC Rules 2014 (which came into force on 1 January 2015), the expert or appraiser is obliged to attend the hearing, and to provide oral explanations on his report, if requested by the parties and if the arbitral tribunal considers it necessary (*Article 42(3), CIETAC Rules 2012 and Article 44(3), CIETAC Rules 2014*).

### **DIAC Rules**

Under the *DIAC Arbitration Rules 2007*, the tribunal may, on the grounds of avoiding duplicated or irrelevant evidence, limit the appearance at hearings of expert witnesses (*Article 29.2*). The tribunal may, after consulting the parties, appoint one or more experts to report on specific issues. Any such expert is required to sign a confidentiality undertaking. The parties

must supply the expert with any documents or materials required by the tribunal. The parties are entitled to comment on the expert's report, and to examine him at a hearing (*Article 30*). The rules make clear that the expert's opinion "shall be subject to the tribunal's power of assessment of those issues", that is, the tribunal is not bound by the expert's conclusions.

## Arbitral institution guidelines on the use of expert evidence in international arbitration

Further guidance as to appropriate procedures and practices concerning expert evidence can be found in the (non-binding) guides published by the arbitral institutions, including, most notably:

- [IBA Rules on the Taking of Evidence in International Arbitration](#) (IBA Rules).
- [IBA Guidelines on Party Representation in International Arbitration](#) (IBA Guidelines).
- [UNCITRAL Notes on Organising Legal Proceedings](#) (UNCITRAL Notes).
- [ICC Techniques for Controlling Time and Costs in Arbitration](#) (ICC Techniques).
- [Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration](#) (CIArb Protocol).
- [CIArb Guidelines for Witness Conferencing in International Arbitration](#).

In December 2018, new guidelines for use in arbitrations involving parties from civil law countries launched in Prague (see [Legal update, Prague Rules launched on 14 December 2018](#)). The rules are called *Inquisitorial Rules on the Taking of Evidence in International Arbitration* and are referred to as the Prague Rules. For a separate discussion of the Prague Rules, see also [Blog posts, Prague Rules... or does it?](#), [The Prague Rules: all change?](#), [The Prague Rules: is the happy partnership between the common law and civil law evidentiary tradition in arbitration really a fiction?](#) and [Why the Prague Rules may be needed?](#).

## IBA Rules on the Taking of Evidence in International Arbitration

The IBA Rules contain a useful guide to approaching evidence in international arbitrations, and in practice the Rules are frequently applied by arbitrators (see [Practice note, Evidence in international arbitration](#)). Article 5 of the IBA Rules addresses party-appointed experts, and Article 6 addresses tribunal-appointed experts.

### Party-appointed experts

Key features of Article 5 (party-appointed experts) are:

- Experts' reports are to be directed to "specific issues" and are to be submitted within the time ordered by the arbitral tribunal (*Article 5(1)*).
- Article 5(2) contains requirements relating to the content of party-appointed experts' reports. The report must include:
  - details of the expert's name, address and background;
  - a statement regarding the expert's present and past relationship (if any) with any of the parties, their legal advisers and the tribunal;
  - a description of the expert's background, qualifications, training and experience;
  - a description of the instructions given to the expert;
  - a statement of the expert's independence from the parties, their legal advisers and the tribunal;
  - a statement of the facts on which the expert's conclusions are based;
  - the conclusions themselves (including a description of how those conclusions were arrived at);
  - if the expert report has been translated, a statement of the original language and the language in which the expert is going to give testimony at the hearing;
  - an affirmation of the expert's genuine belief in the opinions expressed in the expert report; and
  - the expert's signature and the date and place of signature.
- The tribunal has discretion to order a meeting of experts (*Article 5(4)*). See further [Experts' meetings and directions](#).
- The expert is to attend to give testimony at an evidentiary hearing if requested to do so by any of the parties or the tribunal (*Article 8(1)*). Failure to do so without a valid reason will lead to the tribunal disregarding the evidence unless the tribunal decides otherwise, in exceptional circumstances (*Article 5(5)*). The rules further make clear that if the appearance of a party-appointed expert has not been requested, none of the other parties will be deemed to have agreed to the correctness of that expert's evidence (*Article 5(6)*).

### **Tribunal-appointed experts**

Key features of Article 6 (tribunal-appointed experts) are:

- The tribunal, after consultation with the parties, has the power to appoint and set terms of reference for one or more independent experts to report to it on specific issues (*Article 6(1)*).

- The expert is to provide a statement of independence, and any objections to be raised within the time ordered by the tribunal, and to be dealt with promptly (*Article 6(2)*).
- The expert has the same authority as the tribunal to request the parties to provide documents or evidence or to provide access for inspections; any disputes as to the relevance, materiality or appropriateness of the request is to be decided by the tribunal (*Article 6(3)*).
- The expert is to produce a written report to the tribunal, copied to the parties, who are entitled to respond in submissions or by the service of a party-appointed expert's report (*Article 6(4)-(5)*).
- The parties or the tribunal are entitled to require the expert to attend a hearing for questioning (*Article 6(6)*), and the expert's report is to be assessed by the tribunal with due regard to all the circumstances of the case (*Article 6(7)*).
- The fees and expenses of the expert form part of the costs of the arbitration (*Article 6(8)*).

## IBA Guidelines on Party Representation in International Arbitration

The IBA Guidelines were adopted by the IBA Council in May 2015. They are intended to provide guidance in instances where the differing legal backgrounds of parties and their legal representatives may impinge on the integrity and fairness of the arbitral proceedings. They apply where and to the extent that parties to the arbitration have agreed that they should. Guidelines 18 to 25 concern the interactions between party representatives and witnesses and experts. Key points to note in relation to the use of expert evidence are:

- Before seeking any information from a potential expert, the party representative should identify themselves and give reasons for seeking the information (*Guideline 18*).
- A party representative may assist an expert in the preparation of expert reports (*Guideline 20*).
- A party representative should seek to ensure that an expert report reflects the expert's own analysis and opinion (*Guideline 22*).
- A party representative may meet with the expert to discuss and prepare their prospective testimony (*Guideline 24*).
- A party representative may pay or offer to pay, or acquiesce in the payment of expenses incurred by the expert in preparation for a hearing and for his or her professional services (*Guideline 25*).

## UNCITRAL Notes on Organising Arbitral Proceedings

The UNCITRAL Notes on Organising Arbitral Proceedings address the matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings. They are particularly appropriate for use by a tribunal in an ad hoc arbitration. The Notes contain broad guidance on the tribunal's approach to expert evidence in international arbitration. Key points in relation to tribunal-appointed experts are:

- Where the tribunal is empowered to appoint an expert, various practical options are open to it. For example, it may either simply proceed to select its expert, or may consult with the parties, perhaps using lists of candidates or discussing the profile of the proposed expert (*paragraph 70*).
- The discretion to appoint an expert usually includes the determination of the expert's terms of reference, though the tribunal will often consult with the parties before finalising these. It is usually helpful to require the expert to include in the report information about the underlying facts and the methodology applied, to aid evaluation of the report (*paragraph 71*).
- Where, as is usual, the parties have the right to comment on the expert's report, it may be helpful to set time limits for the comment, or the procedures for the questioning of the expert (*paragraph 72*).

In relation to party-appointed expert evidence, the Notes emphasise that the tribunal may consider imposing requirements relating to the form, timing and presentation of the evidence (*paragraph 73*).

## ICC Techniques for Controlling Time and Costs in Arbitration

The ICC Commission report, *Techniques for Controlling Time and Costs in Arbitration* (ICC Techniques), was published in 2007 with the aim of proposing methods for tailoring arbitral procedure to maximise efficiency. (For information about the background to the ICC Techniques, see [Legal update, ICC techniques for controlling time and cost in arbitration](#).)

The report contains some helpful guidance on how expert evidence can be approached. Key points are:

- There should be a presumption that expert evidence is not required, which should be departed from only if expert evidence is necessary to inform the tribunal on "key issues in dispute" (*paragraph 65*).
- The issues on which expert evidence is to be adduced should be clarified at an early stage (*paragraph 67*).
- In most cases, there should be no more than one expert per party giving evidence on any particular area of expertise, and the parties should consider agreeing a limit to the number or rounds of expert reports and whether simultaneous or sequential exchange would be more efficient (*paragraphs 68-69*). Consideration should also be given to the use of single joint experts, or tribunal-appointed experts (*paragraph 71*).
- Where experts meet, it is worth asking them to compile an agreed list of issues and an indication of what is common ground (*paragraph 70*).

The ICC Techniques report is expressly referred to in Appendix IV to the ICC Rules 2012, the ICC Rules 2017 and the ICC Rules 2021, which will apply to all arbitrations commenced on or after 1 January 2012 or 1 March 2017 or 1 January 2021 respectively. Appendix IV provides examples of case management techniques that can be used by the tribunal and the parties for controlling time and cost. These essentially distil some of the above guidance and include:

- Identifying issues that can be resolved by agreement between the parties or their experts.

- Limiting the length and scope of written and oral witness evidence (both fact witnesses and experts).

## The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

The CIArb Protocol can be used by parties when party-appointed experts are needed to adduce evidence. It is not intended to cover tribunal-appointed experts or single joint experts. As the foreword to the Protocol explains, it follows the structure and aligns itself with the IBA Rules of Evidence. However, it expands on the IBA Rules in that it gives more details on what tests and analysis should be conducted by experts and also more specific guidance on what an expert's opinion should contain:

- The CIArb Protocol may be used in its entirety or in part, as determined by the tribunal or agreed by the parties.
- It reinforces that an expert's opinion should be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or any party (*Article 4(1)*) and that the expert's duty is to assist the tribunal to decide the issues in respect of which expert evidence is adduced (*Article 4(2)*).
- Article 4(4) contains details of what an expert opinion should contain, including a declaration of objectivity and impartiality (see *Article 8*) and requires that it be signed and dated.
- All instructions to, and any terms of appointment of, an expert should not be considered privileged against disclosure in the arbitration, but the tribunal should not order disclosure of the instructions or terms of appointment or permit questioning of these unless it is satisfied that there is good cause to do so (*Article 8*).
- Article 6 sets out a procedural framework for the way in which expert evidence should be adduced, including joint meetings between the experts to identify the issues in dispute, the tests and analyses which should be conducted, the preparation of a joint statement, written opinions, and oral hearings of expert evidence.

## CIArb Guidelines for Witness Conferencing in International Arbitration

In April 2019, the Chartered Institute of Arbitrators issued [Guidelines for Witness Conferencing in International Arbitration](#). The Guidelines and the accompanying explanatory notes are aimed at assisting parties, tribunals and witnesses in determining whether witness conferencing, the practice of hearing witnesses concurrently (also known as "hot-tubbing") is desirable and if so, how best to conduct a conference. The Guidelines recognise that witness conferencing can take many forms and do not seek to limit the flexibility of the parties and tribunal in establishing a procedure best suited to the dispute (see [Legal update, CIArb releases Guidelines for witness conferencing in international arbitration](#)).

The Guidelines are divided into three sections:

- **Checklist.** This is a list of factors to take into account when determining whether to use witness conferencing.

- **Standard Directions.** These are a list of general directions that can be used at an early stage of the proceedings and incorporated into a procedural order. They allow the possibility of using conferencing if determined to be useful at a later time and do not preclude consecutive questioning as is more usual.
- **Specific directions.** These directions can be used once the parties have decided to use witness conferencing. Three frameworks are provided depending on whether the conferencing is being conducted by the tribunal, the witnesses themselves, or counsel and the frameworks can be combined to suit the circumstances of the case.

## Do I really need an expert?

As well as providing evidence in support of your case, instructing an expert can have wider benefits. An expert can act as a valued adviser, helping you to organise and understand the underlying factual evidence. An expert can assist in analysing your opponent's case, and identifying the live issues in a case. Experts can also be enormously helpful in assessing an appropriate level for settlement. Sometimes experts are appointed at an early stage of the proceedings to assist with the formulation of claims without a view to necessarily presenting an expert report. These experts are often referred to as "shadow experts" or "dirty experts" because they are largely invisible to the other participants in the arbitration. The experts can be helpful in that they may prevent meritless claims from being brought (see [Legal update, LCIA publishes note on experts in international arbitration](#)).

However, instructing an expert can be extremely expensive, particularly where the case does not settle and a full hearing is necessary. In the ICC Techniques, the ICC Commission has recommended that the starting point in international arbitrations should be a presumption against the adducing of expert evidence, to be departed from only where it is clear that expert evidence is necessary to inform the tribunal on specified issues (see [ICC Techniques for Controlling Time and Costs in Arbitration](#)). Resist the temptation to assume automatically that the parties must appoint experts to give evidence. For example:

- Consider whether there may be other ways of proving your case. For example, in relation to issues of quantum or market rates or prices, it may be possible to establish a case by reference to published market data rather than adducing a report from a market expert. In some cases, it may be beneficial to limit the expert's role to an advisory capacity, and avoid the costs of preparing a report or hearing expert evidence.
- Where issues of foreign law arise, international arbitration tribunals may, in any event, be sceptical about the value of reports from expert foreign lawyers. It may be appropriate to rely on published legislation and case-law reports instead or to engage co-counsel from the relevant jurisdiction.
- Consider whether the dispute could be determined on the basis of issues which do not require expert evidence. For example, if expert evidence is relevant only to issues of quantum, then it may be sensible to defer any quantum evidence until liability is determined.
- If expert evidence is necessary, always define the issues on which expert evidence is required, and analyse these as closely as possible, to avoid "mission creep". Consider whether it may be more efficient for different experts to address different issues and/or draft different sections of a report.

## Party-appointed experts

### Choosing an expert

Where expert evidence is necessary, it is important to select and retain the best possible expert as early as possible. Early retention is particularly important where the pool of suitable experts is small: if you do not retain the best expert, your opponent may do so. In *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela (ICSID Case No ARB/10/19)*, an ICSID tribunal rejected the claimant's application to disqualify an expert appointed by the respondent and to exclude his expert report (see [Legal update, ICSID tribunal rejects application to disqualify expert and to exclude his report](#)). The claimant had argued, unsuccessfully, that the expert should be disqualified because the claimant had previously sent the expert documents and information relating to the claim, as it had considered instructing that expert. The tribunal rejected the application, as it could not be shown that the expert had accessed or read confidential information that would impact on his impartiality. In *Bay View Group LLC and another v Republic of Rwanda (ICSID Case No. ARB/18/21)*, the claimant sought unsuccessfully to disqualify the Rwanda's legal expert on the basis that as the managing partner of a local law firm, he had previously provided legal advice to a predecessor of one of the claimants on issues relevant to the proceedings. In that capacity, he received privileged and confidential information directly relevant to the issues in dispute in this case. Therefore, he should have disclosed this relationship, which created a conflict of interest. The tribunal accepted Rwanda's evidence on the issue and said that any lack of integrity could be pursued through cross examination (see [Legal update, ICSID tribunal refuses to disqualify Rwanda's legal expert finding no conflict](#)).

In a recent survey and report, law firm Bryan Cave Leighton Paisner considered a number of topics associated with the use of party-appointed experts, including whether a party should have the right to rely on the evidence of an expert it has appointed, whether party-appointed experts are truly independent or merely "hired guns", and the extent to which tribunals should control the use of party-appointed experts. See [Legal update, BCLP International Arbitration Survey 2021 on expert evidence: key findings published](#) and [Blog post, BCLP Arbitration Survey 2021: Expert Evidence in International Arbitration: Saving the Party-Appointed Expert](#).

It is important to try and establish whether or not your opponent intends to retain an expert even if you do not think an expert is necessary. This is because, if your opponent is adducing expert evidence on a particular issue, if that issue is contentious or materially affects the substance of your client's case, it may be best to test that evidence by instructing your own expert evidence on the subject. Seek, if possible, to obtain specific agreement with the other side on whether expert evidence on a particular issue should be adduced, and then, obtain express directions from the tribunal on how such evidence should be obtained and presented. (See the Singapore case of *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd [2014] SGHC 220*), discussed in [Legal update, Singapore High Court considers application to set aside arbitral award based on tribunal's procedural directions](#).)

There are no formal requirements relating to the suitability of a person to act as an expert witness in an international arbitration, but you should consider the following:

- The nature of the expert's qualifications, expertise, and reputation, in the relevant field.
- Whether more than one expert is required and, if so, whether they will serve joint or separate reports.
- The language in which the expert will write reports and give evidence.

- Whether the expert is still active in the relevant field.
- Whether the expert has experience of acting as a witness (in litigation, arbitration or both).
- Any conflicts of interest or other circumstances which might give rise to accusations of impartiality or bias.

When you have located a suitable expert, you should also check:

- The expert's availability over the likely duration of the arbitration; in particular, whether the expert has accepted any other appointments which are likely to affect availability for meetings or hearings.
- The expert's terms of engagement (fees and other terms).
- Whether the expert is bound by any professional body's code of conduct and, if so, what that entails. You should also ascertain whether the expert has ever been the subject of any complaints or similar with the relevant professional body.

An internet search is also worth considering.

## Defining the issues

Perhaps the most important task, from the point of view of minimising costs and delays, is to define the issues to which expert evidence will be directed. Too often, the decisive issues in a case do not emerge until the expert testimony, by which time, costs have been incurred in relation to irrelevant or peripheral discussion. In larger cases it will usually be worth attempting to compile a list of what is in issue, and what is common ground, to focus and limit the scope of the expert evidence (see, for example, Article 6(1) of the CIArb Protocol).

In terms of timing, such a list can most easily be formulated by reviewing the parties' written submissions. The list can then be used by experts as a basis for their reports, and may be further refined following any experts' meeting (see [Experts' meetings and directions](#)).

If the parties have proceeded to serve expert evidence with the claim and defence submissions, a list of issues should still be formulated, possibly following any experts' meeting.

## Preparing and producing the report

The expert will generally produce a report having first considered:

- The nature of the dispute and (where formulated) the defined issues for expert evidence.
- The underlying evidence.

### Can I speak to the expert about his report?

It is common practice for experts to discuss the case with the appointing party and lawyers before finally formulating the written report. These discussions can provide a useful opportunity to gauge the strength (or otherwise) of your case, and to identify the decisive issues in the dispute. In this regard, international arbitration differs sharply from litigation in (for example) the US, where pre-trial discussions with experts would be subject to extensive disclosure obligations, and are therefore avoided. For further discussion of privilege in international arbitration, see [Practice note, Privilege in international arbitration](#).

The lawyers will often advise on the formulation of the expert's reports, for example, by ensuring that all relevant issues have been covered, that it is based on correct factual assumptions, and that it is consistent. However, it would not be ethical for lawyers to attempt to persuade the expert to change the substance of his opinions.

### Format and style

There are no formal requirements as to the format or style of the expert's report. However, parties should ensure that the report is as clear and incisive as possible. This is because:

- If the expert is not cross-examined, the written report will be the only opportunity to convey a party's case to the tribunal. If the report is confusing or densely written, that opportunity is lost.
- A strong, clearly expressed expert's report can greatly enhance the prospects of a favourable settlement.

Article 5(2) of the IBA Rules contain useful pointers as to the presentation of expert evidence. In general, the report should include:

- The full name and address of the expert, his or her present and past relationship (if any) with any of the parties, and a description of his or her background, qualifications, training and experience.
- A statement of the facts on which he or she is basing his or her expert opinions and conclusions.
- His or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions.
- An affirmation of the truth of the expert report.
- The signature of the expert, together with the date and place of signature.

Article 4(4) of the CIArb Protocol also provides useful guidance, and states that the report should also contain:

- A statement setting out all instructions the expert has received from the appointing party and the basis for remuneration of the expert.

- A statement on which matters the expert has been unable to reach an opinion on and which matters are outside the expert's area of expertise.
- A declaration in the terms set out in Article 8 of the CIArb Protocol.

In addition, it is often prudent to set out, at the outset of the report, the issues which the expert has addressed, together with an executive summary of the experts' conclusions. An explanation of any technical terminology used in the report should be introduced at an early stage. The expert should identify the basis of any factual assumptions: to avoid over-long narrative sections; it is generally preferable to include detailed factual information, calculations or other source materials as appendices to the main report.

A final summary, setting out the expert's conclusions on every issue raised, is an invaluable aid to the tribunal.

### **Underlying factual material**

If your expert does not have access to the factual information necessary to produce a report, an application to the tribunal for further disclosure of documents or production of other materials may be necessary. In practice, the relatively limited scope of disclosure in most international arbitrations can significantly hamper the production of effective experts' reports.

### **When to serve the report**

In international arbitration, expert evidence may be served with, and in support of, the initial claim and defence submissions. Alternatively, the parties may serve submissions and then proceed to serve experts' reports. The tribunal will generally set a deadline for the service or exchange of expert evidence.

Consider carefully whether sequential service or simultaneous exchange of reports is preferable. In many cases, simultaneous exchange will be preferred, though in such a case it is particularly important to ensure that the issues on which the experts will give evidence have been carefully defined in advance. Otherwise there is a real risk that the expert reports will not "join issue".

### **Questions and supplementary reports**

It may be convenient for the experts to prepare supplementary reports, identifying where they disagree with their opposing expert's reports. If a meeting of experts is to take place (see [Experts' meetings and directions](#)), then it will usually be advisable to defer the service of supplementary reports until after the meeting.

Although supplementary reports inevitably add to the expense of the arbitral proceedings, they can be helpful in further narrowing and defining the issues to be determined.

Sometimes the tribunal will submit questions to the experts, to be answered in writing, with a view to narrowing and clarifying the issues. The parties may also raise questions about the expert reports. If necessary, the tribunal has power to order those questions to be answered.

## Dealing with "irrelevant" evidence

You may find that the opposing expert has produced a report which strays outside the scope of the defined issues. The tribunal is most unlikely to exclude that evidence, and supplementary reports can provide a useful opportunity for dealing with it. In most cases, therefore, the better approach is first to write to the other parties and the tribunal, identifying the evidence which strays outside the permissible scope. The supplementary report can then be used as an opportunity to address any new points which have been raised.

## Tribunal-appointed experts

Most institutional rules contain provisions entitling the tribunal to appoint an expert, to advise it on issues which arise in connection with the dispute (see *Parties' agreement or institutional rules*). In addition, the law of the seat may confer that power on the tribunal (see *Law of seat*).

In theory, this should represent an opportunity to save costs, by limiting the number of experts to one. In practice, many parties are resistant to tribunal-appointed experts. At the time of appointment, it will be difficult or impossible to predict the evidence which the expert will give. Parties perceive a risk that the tribunal will defer to the views of the expert, particularly where no other expert evidence is presented to challenge those views.

The parties will often seek to adduce their own party-appointed expert reports in addition to that of the tribunal-appointed expert, meaning that the overall costs of the expert evidence are likely to be increased rather than reduced.

## Proper role of the tribunal-appointed expert

The role of the tribunal-appointed expert is to assist and advise the tribunal in relation to specific issues. The expert is not entitled to usurp the tribunal's decision-making role. The parties must be given the opportunity to comment on any advice which the expert gives to the tribunal. The tribunal is not bound to accept the conclusions of the tribunal-appointed expert. However, in practice, if there is no countervailing expert evidence, there is a tendency to do so.

## Pros and cons

The main drawback of tribunal-appointed experts is costs. In practice, parties are rarely content to allow the tribunal-appointed expert's evidence to stand unchallenged, and will usually seek to adduce their own expert evidence. Since the tribunal-appointed expert's fees are treated as the costs of the arbitration, they are inevitably paid by the parties, not the tribunal.

Other drawbacks of tribunal-appointed experts, as set out by the LCIA in its note on *Experts in International Arbitration* (see *Legal update, LCIA publishes note on Experts in International Arbitration*), are:

- The fact that some parties may seek to challenge the enforceability of an award on the basis that the tribunal improperly delegated its decision-making powers to the tribunal-appointed expert.

- The tribunal needs to have a sufficient grasp of the issues in dispute to enable it to appoint a suitable expert.

Despite these drawbacks, there are situations in which a tribunal-appointed expert can perform a valuable role in the arbitration. A tribunal appointed expert may, for example, be able to act as a "facilitator" between the parties and their experts, identifying the decisive issues and seeking to maximise areas of agreement. In addition, a tribunal expert can provide a "truly non-partisan view" of the issues enabling the tribunal to take a more robust and accurate approach to its conclusions.

For a discussion on "bad" experts, see *Blog post, How should the tribunal handle a "bad" expert?*.

## Appointment and terms of reference

The means by which the expert is selected and appointed is within the discretion of the tribunal, but in practice the tribunal would usually consult with the parties both as to whether an expert is appointed at all and, if so, to identify a mutually satisfactory candidate. Any objections should be raised as soon as possible, so that they can be considered by the tribunal.

Remember to check any applicable rules, and the applicable law of the seat of the arbitration. Some domestic laws preclude the tribunal from appointing an expert where the parties object to this.

It is particularly important, in the case of tribunal-appointed experts, that the issues on which evidence is to be given should be closely defined. For example, Article 6(1) of the IBA Rules requires the tribunal to:

"establish the terms of reference for any Tribunal-Appointed Expert report after having consulted with the Parties."

Having established terms of reference, or a list of issues, the parties are entitled to complain if the tribunal-appointed expert strays outside those defined terms or issues.

## Dealing with the tribunal-appointed expert

A tribunal-appointed expert is frequently authorised to deal directly with the parties, for example, to request further evidence or documents.

Ensure that any such communications are evidenced in writing and copied to the tribunal, and all the parties. If you object to any request for information or documents, then you should raise that objection and the tribunal will rule on it. Article 6(3) of the IBA Rules provides, in this regard:

"... Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal ... The Tribunal-Appointed Expert shall record in the report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue".

If you decide to appoint your own expert to challenge the evidence of the tribunal-appointed expert, it is particularly important to ensure that the expert's qualifications and expertise are comparable to those of the tribunal-appointed expert.

## Experts' meetings and directions

A meeting of expert witnesses can be an invaluable method of narrowing the issues. The two experts may find that there are points on which they agree; and the nature of any disagreement can usually be clarified. It is usually preferable for the parties' lawyers not to attend the meeting. It will usually be helpful to hold any experts' meeting before supplementary reports are served.

However, it is important to ensure that any experts' meeting is focused and structured. It can be helpful to agree a list of points for the experts to consider, with a view to ensuring that they do not stray outside the relevant issues.

After the meeting, the experts should usually be asked to produce a joint statement of any points on which they agree, together with a list of issues on which they do not agree, giving an explanation of the nature of their disagreement.

Sometimes, it may be appropriate for an expert to approach the tribunal directly to seek directions about the scope or service of supplementary reports, or about the experts' meetings. However, it would be more usual for these approaches to be made by the parties.

## Presenting expert evidence

Where experts continue to disagree on points in issue, the tribunal will usually direct a hearing so that the experts can be questioned. This may form part of the main hearing, or there may be a separate hearing for expert evidence. If you do not wish to question an opposing expert witness, then inform the tribunal and the other parties, so that the tribunal can take a view as to whether it is necessary for the expert to attend a hearing. For example, if the tribunal has limited the time for the questioning of all witnesses, you may decide to concentrate on other witnesses and leave criticism of the expert report to submissions. If so, you must make clear that despite not questioning the expert, you intend to criticise his report.

If your expert is not questioned, it is particularly important to ensure that his report is clear and comprehensible.

Sometimes, it may be convenient to hold a separate hearing for the expert evidence. However, if this happens you may, in any event, wish your expert to attend any other hearings, so that he or she can advise you on the significance of any evidence; in particular, factual witness evidence.

## Preparing for the hearing

The expert should ensure that he or she is familiar with all the documentary evidence and witness statements which are relevant to the issues which are to be addressed. The expert should also ensure that he or she re-reads the report(s), and those of the opposing expert, before the hearing. Sometimes attendance at an expert witness training course may be helpful.

## Evidence in chief or direct testimony

The tribunal will generally direct that the written reports are to stand as direct testimony. This enables the parties to proceed directly to questioning the expert.

## Questioning at the hearing

The claimant will usually "call" its expert first, to be questioned. Lengthy common-law style cross-examination is not usual in international arbitration, so it is important to get to the point quickly. This is particularly important where the tribunal has limited the time permitted for questioning. If a report has been authored by more than one expert, you should clarify at the outset which expert will speak to which part of the report.

When the expert has been questioned by the opposing party, the appointing party will usually "re-examine" the expert. This provides an opportunity to clarify any evidence which might otherwise be damaging.

Finally, the tribunal will usually ask its own questions. Some tribunals will intervene to ask questions throughout the questioning process; others will wait until the parties have finished their questions before intervening.

## Witness conferencing and other techniques

The tribunal may decide to order all the experts to be questioned together. This means that a particular question will be examined by all the experts, in discussion together, rather than one by one. This technique ("witness conferencing" or "hot tubbing") can often quickly clarify the true points of disagreement and agreement.

However, if a particular witness is diffident or not comfortable speaking out in a group discussion, that witness' evidence may be ignored. Equally, if an expert is more accustomed to the rigours of cross-examination, she or he might be more likely to make concessions in a group discussion than under examination by a legal representative.

As witness conferencing or hot tubbing is often under the control of the tribunal, it is also important to ensure that the tribunal is fully briefed on the facts and issues in dispute so that it is able to effectively manage the procedure. A further factor to consider is whether the party legal representatives are comfortable handing control of the delivery and adducing of the expert evidence over to the tribunal.

Another useful technique can be to permit the experts to question each other directly, rather than the questioning being performed by the parties' lawyers.

These techniques are becoming increasingly familiar to many lawyers and tribunals, but do need to be approached with care. If used successfully they can result in the true nature of the dispute being disclosed more quickly.

In April 2019, the Chartered Institute of Arbitrators issued [Guidelines for Witness Conferencing in International Arbitration](#). The Guidelines and the accompanying explanatory notes are aimed at assisting parties, tribunals and witnesses in determining whether witness conferencing is desirable and if so, how best to conduct a conference. While conferencing is more commonly conducted by the tribunal, it can be conducted by counsel or by the witnesses themselves and the Guidelines are helpful in determining which procedure is best for the case at hand (see [Legal update, CI Arb releases Guidelines for witness conferencing in international arbitration](#)).