HERBERT SMITH FREEHILLS

INSIDE ARBITRATION: WORKING WITH EXPERTS IN INTERNATIONAL ARBITRATION: MAXIMISING THE VALUE OF EXPERT EVIDENCE

20 August 2020 | London
Legal Briefings

Experts can play a central role in an arbitration, whether they advise behind the scenes or testify in proceedings. In either case, their input or opinion will be relied on by a party in order to persuade the Tribunal of the merits (or demerits) and quantum of a claim. It is likely that any expert evidence required for a hearing will be on a subject that is outside of the Tribunal's expertise or comfort zone, so the Tribunal will be looking for impartial guidance. In many cases the outcome of the case will depend heavily on the persuasiveness of the expert's opinion.

Issues requiring expert evidence will vary hugely from dispute to dispute. Common examples include chartered accountants on M&A and pricing disputes, lawyers giving evidence on matters of foreign law, and scheduling experts on construction project delays and disruption. However, sometimes disputes require expertise in a niche or technical area – anything from the ground movement at a particular site caused by an earthquake, to turbine blade failure, to document forgery. Emma Schaafsma, a Partner in our international construction and engineering disputes team, and Liz Kantor, a Senior Associate in our arbitration practice, give some practical insights into selecting and working with experts in arbitrations.

SELECTION STAGE

TIMING

It is sensible (and common) to commence the search for an expert as soon as a dispute starts to crystallise. There are a number of reasons why an early search could be necessary. First, if you are looking for an expert in a niche field you may well find yourself competing with the counterparty to hire the “perfect” expert. Indeed, it may well be that as the search progresses it becomes apparent that, rather than looking for one expert to opine on a number of issues, you need a number of experts to deal with discrete points, which could well extend the process longer than initially envisaged. Second, where the dispute arises on a large project or venture with multiple parties and advisors, it may be that some of the candidates that have the necessary experience are conflicted out of taking an appointment by reason of their colleagues’ previous roles . Finally but equally important, where the case outcome is heavily dependent on expert evidence, it is highly recommended to obtain a preliminary view on the technical merits as early as possible, and certainly before formal proceedings commence. This can flush out unmeritorious arguments and provide focus to the case strategy going forward.

CONFLICTS

The expert will need to conduct a conflict check to ensure that they (or the organisation for which they work) have not been involved with the dispute, the project or one of the parties (or a related party) in such a way that may compromise their independence. Conflicts should be checked on the basis of minimal information about the dispute, in case candidates are already working for a counterparty. As the expert is provided more information about the matter, and indeed as the case evolves, the expert will need to update their conflict check to ensure that there is no risk that their independence might be called into question. Following a recent case in the English Technology & Construction Court, we expect experts to include in their terms and conditions the client’s consent that they and/or other experts from the same organisation may accept future appointments against the clients on separate disputes related to the same project or transaction. The acceptability of these should be considered carefully in light of anticipated future disputes and revised accordingly.

OTHER POTENTIAL HURDLES TO INSTRUCTION

You will need to research more widely to understand whether there are any other factors that might affect, or otherwise call into question, the expert’s impartiality and credibility. For example, an expert may have published an article giving a view or opinion on an issue similar to the one now in dispute, which would not be consistent with the opinion they are inclined to give in the arbitration. If you are able to find the article your counterpart will most likely locate it too and use it in cross-examination to try to undermine the expert’s credibility.

EXPERTISE AND SUITABILITY

It is crucial that the expert has the requisite expertise for the role. For example, you may find a candidate with multiple degrees and doctorates on their cv, but with little or no experience of practical application in the field which will be an essential element of the opinion required. Equally, the candidate may be technically excellent at, for example, deciphering pages of computer coding, but unable to communicate their analysis and conclusions in a manner that is properly understood by the Tribunal. The more complex the dispute, and the higher the stakes, the greater the imperative to interview the potential experts to gauge the full scope of their experience and get a sense of how they might come across as a witness and ensure that the way they present their conclusions will resonate with the Tribunal. It may also be appropriate for the client's technical team to be involved in interviewing candidates who will be opining on technical issues, in order to ascertain and/or test their relevant technical expertise or competence. Depending on the case and the role, you may also want to ensure that the expert is comfortable with participating in a joint expert meeting and ultimately being cross-examined at a hearing. Finally, it's worth noting that it is becoming increasingly common for experts to provide references from lawyers and clients from previous mandates – it is worth following up on these as they can provide extremely useful information on how "user-friendly" the expert is likely to be. If the wrong expert is selected, hours of time can be wasted in focusing an expert's mind on the issues relevant to the case, or helping the expert phrase their conclusions in an intelligible way, or chasing the expert in the run up to a critical deadline.

AVAILABILITY

Just as Tribunals' diaries get booked up, so do those of good experts. It is therefore important to ensure that your expert will be able to dedicate sufficient time to the case. Whilst it may be cost efficient for experts to be assisted by juniors (particularly if you hire an expert from a big firm), it is important to make sure that (i) the expert feeds in their knowledge and experience to the report and (ii) the person actually signing the report and giving the evidence is fully on top of the issues. Otherwise this could come back to bite the expert in cross-examination.

INSTRUCTION STAGE

ROLE

In addition to independent experts who are formally instructed to provide an expert report and give testimony, it is also common to instruct "shadow experts" (sometimes referred to as "dirty" experts) on a consultancy basis, to work behind the scenes with the lawyers and the client to advise on case strategy as it relates to technical matters. It is important to keep these roles distinct so that your testifying expert remains impartial and "clean". These two roles can be equally important, but of course you are looking for different skills and should tailor your selection process accordingly.

INSTRUCTIONS

In order to provide a framework for an independent expert's report, it is common for the legal team to produce a "letter of instructions". This will outline the issues in dispute and contain the questions that the expert is expected to answer, along with the key assumptions that they should bear in mind. It will often attach the key documents and evidence that the expert will need to rely on. These instructions must be drafted very carefully in order to avoid them becoming contentious in due course – often disagreements between party-appointed experts stem from the fact that they have each been given different starting assumptions.

PRIVILEGE AND DISCLOSURE

It is also worth bearing in mind the circumstances in which expert instructions and draft reports could be disclosed to your counterparty, which will depend on the applicable rules of privilege in the arbitration. For example, under English law, instructions to experts are not privileged, but are also not ordinarily disclosable unless there are reasonable grounds to consider the expert's statement of instructions to be inaccurate or incomplete. Earlier drafts of an expert report are privileged. However, where a party wishes to substitute an expert who is already on the record, the first expert's report may be required to be disclosed as a condition of granting permission to change experts (to prevent a party from "expert shopping").

RULES AND GUIDELINES

The rules and guidelines applicable to an expert's report will depend on the seat of arbitration and the parties' agreement. However, it is common for the parties to agree, for example, that the IBA Rules on the Taking of Evidence (2010) ("the IBA Rules"). apply. These rules contain guidance as to, for example, the content of an expert's report and the circumstances in which an expert is required to give evidence at a hearing. Other relevant rules include the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration and the IBA Guidelines on Party Representation in International Arbitration 2013, which are intended to provide guidance where the arbitration is between parties of differing legal backgrounds.

WORKING WITH EXPERTS DURING PROCEEDINGS

"TEACH-IN"

It can be useful to invite an expert to attend a teach-in session with the client and legal team after they have undertaken a review of the documents and their instructions. This can also be a good opportunity to flush out an expert's preliminary views and concerns at a very early stage and ensure that the case strategy is aligned.

COMMUNICATION AND DOCUMENT MANAGEMENT

An expert may be required to provide a list of all documents they have reviewed and or relied upon in their analysis, or otherwise confirm this at the hearing. It is therefore good practice to set up at the outset a log that tracks what documents have been provided to the expert and when. It is also a good idea to put in place a protocol governing how the expert communicates with the legal and client team, not only to ensure that confidentiality and privilege are maintained, but also to avoid conflicting instructions or indeed something being missed. For cases which involve complex working documents, such as financial models used by quantum experts, it can be necessary to ensure that the format of the model is user-friendly, such that it can be shared with the Tribunal if needs be. Dynamic workbooks can be a very effective tool to assist the Tribunal at the hearing and in arriving at their decision.

THE EXPERT’S REPORT

SCRUTINISING AN EXPERT'S WORK

The expert must provide their own independent opinion in their report. Therefore the role of the legal team is to ensure that the report answers the questions posed and that it is drafted as clearly and accessibly as it can be. The legal team should also ensure that the expert’s report complies with any rules or protocol that the parties have adopted. For example, Article 5 of the IBA Rules contains a list of requirements concerning the content of an expert’s report.

EXPERT DECLARATION

Experts are also commonly required to make a declaration in their report that they consider their opinion to be complete and accurate, and that it constitutes their true, professional opinion. For example, the CIArb Protocol contains a standard declaration to be included in an expert report, and other rules, such as the IBA Rules, contain a requirement that the expert includes an affirmation of their genuine belief in the opinions expressed in the report. This is an important confirmation to the Tribunal of the expert’s impartiality, duty to the Tribunal and accountability for the contents of their report.

JOINT EXPERT MEETINGS

It is increasingly common for Tribunals to ask experts to hold joint expert meetings (without lawyers or clients present) with a view to narrowing the issues in contention – often recorded in a list of matters agreed and disagreed. This is sometimes done before experts prepare their reports, but it is more common for them to be held after the first round of reports, so as to narrow the scope of the reply reports and oral evidence at the hearing. Therefore it is important that the expert you instruct is comfortable doing this, and indeed ideally has had experience of doing so. Experts will need to bear in mind throughout the process that their primary duty is to the Tribunal and not as advocates of their clients’ position. If experts become entrenched in their positions and refuse to consider and properly respond to their counterpart’s view, the process can be extremely frustrating and, ultimately, fruitless. However, if done well, it can be very helpful for the Tribunal to focus on the real issues.

“EXPERT SHOPPING”

It is generally not acceptable for a party to change its expert because it does not like what its first expert has to say. However, that does not necessarily mean that once an expert has prepared a report, you have to use it. For example, a report may not be used if as a result of the analysis a head of claim is dropped, or the issue is considered no longer relevant to the dispute.

AT THE HEARING

PERFORMANCE AT THE HEARING

As mentioned above, the role of an expert at the hearing is to assist the Tribunal in resolving the dispute – they owe their principal duty to the Tribunal. If the Tribunal thinks that an expert has become an advocate for their side, the expert’s credibility is diminished. Conversely, an expert who tries to be as helpful as possible to the Tribunal will retain their credibility. It is also quite common for expert “hot-tubbing” or “conferencing” to be arranged, where two party-appointed experts give their evidence side by side. This can provide the Tribunal a valuable opportunity to question the experts on the same issue at the same time, and allow the experts to directly challenge each other’s views, to facilitate the Tribunal’s decision-making.

Expert evidence is critical to the outcome of many disputes and careful planning is required to ensure the right approach to expert selection, instruction and management. It is difficult to over-estimate the importance of thinking ahead and covering all the bases.

More Inside Arbitration

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ELIZABETH KANTOR
PROFESSIONAL SUPPORT LAWYER,

LONDON
+44 20 7466 2406
Elizabeth.Kantor@hsf.com

LEGAL NOTICE