
Kluwer Arbitration Blog

‘Experts’ in International Arbitration

J. Martin Hunter (Essex Court Chambers) · Monday, February 7th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

During the last quarter of 2010 the German Arbitration Institution (‘DIS’) and the Chartered Institute of Arbitrators (‘CIAarb’) held a conference in Frankfurt to debate the relative merits of the ways in which civil law/common law court procedures are adopted or adapted for use in international arbitrations.

One of the more interesting sessions was devoted to the use of ‘experts’. Unsurprisingly, a majority of the participants in Frankfurt were civil lawyers. Intriguingly, most of the civilian lawyers present favoured the common law style ‘party-appointed’ expert witness approach, and many of the common lawyers preferred the civil law ‘tribunal-appointed’ expert practice. The reasoning was so diverse that it is impossible to summarise it adequately. However, it seemed that the main reason for the preference of the civilians was antipathy towards the notion of the tribunal-appointed expert being the person who actually decides the case; and the feeling of the common lawyers against the ‘expert witness’ system was the risk of tribunals becoming too reliant on the skill of cross-examining counsel.

The most interesting part of the debate, at least from this contributor’s viewpoint, came when the spotlight was focused on the ‘Sachs Protocol’, which was proposed in a paper presented by Dr Klaus Sachs at the 2010 ICCA Congress in Rio de Janeiro. This developed an ingenious ‘hybrid’ system in which each party proposes a short list of a specified number of potential experts; the tribunal chooses one person from each party’s list; and the resulting ‘expert team’ becomes the ‘tribunal’s expert’ adviser. The procedure then to be adopted envisages at least one ‘open’ session at which the parties’ counsel may address and/or question the expert team in the presence of the arbitral tribunal.

As with any new system, refinements and procedural safeguards need to be devised; and it would be useful to undertake some experimental work in a classroom using mock arbitration scenarios. However, in principle the ‘Sachs Protocol’ seems to offer a promising solution to the perceived problems, in the international arbitration scenario, with the stark alternatives between the ‘pure’ civil law and common law court processes.

The purpose of this contribution to KAB is an attempt to provoke considered reactions

to the interesting and thoughtful suggestions made by Klaus Sachs. The present commentator promises to try to provide reactions to comments and suggestions on this topic.

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The image shows a promotional graphic for Kluwer Arbitration Practice Plus. On the left, there is a blue banner with the text 'Kluwer Arbitration' and the Wolters Kluwer logo. On the right, there is a screenshot of the software interface. The interface has a blue header with a checkmark icon and the text 'Explore Practice Plus'. Below the header, there is a profile card for 'Gary S. Barr' with a photo and some statistics. The main area of the interface displays several data visualizations, including three donut charts and a list of results. The bottom of the graphic features a dark blue bar with the text 'Kluwer Arbitration' on the left and the 'Wolters Kluwer' logo on the right.

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