Developing Expertise to Deal with “Experts” in International Arbitration

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One of the perceived advantages of arbitration is that it allows parties to select one or more decision makers (arbitrators) with a level of technical or scientific expertise and professional experience higher than that of the average judge. Arbitration has always been welcomed as a fitting alternative to traditional litigation, where the judges tend to be generalists, their dockets overcrowded, and their budgets inadequate. Be it a simple commercial dispute over a financial broker’s commission or a highly complex one involving intellectual property rights and biotechnology, it is not hard to imagine why the parties to a contract would prefer to put their fate in the hands of an expert, who arguably is able to devote him or herself entirely to the matter, and therefore can deliver the best possible award. The academic studies available on international arbitrator appointments suggest that the parties and their counsel tend to devote a significant amount of time and effort in choosing their arbitrators. Consideration of the candidates’ expertise, experience and substantive knowledge about the subject matter, reputation, and other factors is deemed very important.

Notwithstanding all of the effort parties devote to ensuring their arbitrators are real experts, it has become increasingly common in the context of transnational and complex disputes to seek the appointment of other professionals whose role is to further assist the tribunal in understanding the issues, or to help the advocates in strengthening or supporting their arguments. The roles of these individuals vary greatly, but they are generally called expert witnesses since they are usually brought in to offer their opinion in the form of testimony, a common feature of the Anglo-American civil litigation system. The need to bring more experts —other than the arbitrators— into the process finds its justification in the fundamental right that the parties have to present their case, including offering all necessary evidence to support their arguments. Some might say, however, that the use of expert witnesses in arbitration can be expensive, thus defeating another important feature of arbitration, which is its cost efficiency. Despite their importance, experts are rarely discussed in the vast and fast growing universe of conferences, academic courses, and scholarly publications related to international arbitration.

The issues involving expert witnesses are both numerous and much deeper than can be fully addressed in this blog post. However, we can at least touch on two of the most salient issues: the appointment of expert witnesses, and their examination.

Regarding the appointment of experts, one of the main issues relates to who should appoint them: should the tribunal be the one determining their necessity and making the selection, or should the appointment of experts be left to the parties, as part of their right to present their case? Some middle-ground solutions suggest that the tribunal appoints the experts from a shortlist submitted by

the parties (i.e. Sachs Protocol). As with many other things in arbitration, the parties and the tribunal may agree on what best fits the dispute at hand, whether following national standards, institutional rules, protocols (e.g. CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration) or relevant soft law provisions such as articles 5 and 6 of the IBA Rules on the Taking of Evidence. Whether the parties or the tribunal appoint the experts might also have important implications for the perceived impartiality and independence of those experts and may determine the measures that need to be taken in order to maintain the integrity of the proceedings. In the case of party-appointed experts, a host of issues arise, ranging from the amount of assistance or guidance a party may provide to an expert to the appropriateness of coaching expert witnesses for cross-examination (a practice known as “woodshedding” in the Anglo-American tradition).

Another important related issue is the examination of the expert witness opinion, including assessing its credibility and integrity. In many cases, the most important part of such assessment takes place during the hearing, which gives the parties and the members of the tribunal an opportunity to examine the expert face to face. Regardless of whether the expert has already furnished a written report or is just rendering her opinion live at the hearing, the increased influence of U.S.-style lawyering in international arbitration has made the cross-examination of witnesses one of the main attractions of the arbitral hearing. This practice, which is commonplace in the American courtroom, is making its way into the international arbitral process at a fast pace. International arbitration practitioners are increasingly concerned about forewarning and preparing their experts for an eventual “cross” that might impact their credibility or the validity of their testimony, with the potential of either undermining or strengthening their case. Arbitrators are also tasked with setting boundaries and maintaining the efficiency of the proceedings; even arbitral institutions may enact rules that regulate the matter.

Another increasingly popular form of expert witness examination allegedly originated in Australian courts is the imaginatively-named “hot tubbing” method, which consists of directing the experts to offer their testimony and asking one another challenging questions simultaneously. The perception is that this method may increase efficiency by reducing time and costs, but the reality is that it really depends on the type of dispute, the parties, the arbitrators, and the complexity of the issues at stake.

As with many other aspects of international arbitration, more discussion and research —both regarding the law in the books and the law in action— are needed to better understand the role of expert witnesses in this field and find the right balance that preserves the parties’ rights while maintaining the efficiency of the proceedings.