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The “Additional Weapon”: Practical Tips for Effective Expert Conferencing in Arbitration

Kabir Singh, Shobna Chandran, Siddhartha Premkumar (Clifford Chance) and Andrew Foo (Clifford Chance Asia) · Monday, March 28th, 2016

Introduction

Expert conferencing is undoubtedly gaining popularity in international arbitration. Many leading arbitrators are supporters and proponents of expert conferencing. Its attraction is growing in Singapore, as borne out by the results of a 2013 survey by the Singapore International Arbitration Centre.

Expert conferencing can prove a baffling process for the lawyer trained to deal with witnesses (including experts) one at a time, the lawyer accustomed to the solemnity of sequestration, and the lawyer who has honed his skills as master of the arena, never asking a question in cross-examination to which he does not already know the answer (see Michael Hwang SC, “Witness Conferencing and Party Autonomy”, *Selected Essays on International Arbitration* (Academy Publishing, 2013), para. 8.) This article offers practical guidance on how counsel may take advantage of expert conferencing to enhance the efficiency of the arbitral process. As prominent arbitrator Michael Hwang S.C. has noted, expert conferencing can be “*an additional weapon*” for counsel – for those who can effectively use their clients’ witnesses to rebut the testimony of the other side’s witnesses – effecting “*immediate contradiction for maximum impact*“(see Michael Hwang SC, “Witness Conferencing and Party Autonomy”, *Selected Essays on International Arbitration* (Academy Publishing, 2013), para. 9).

Formal Guidance

Despite the popularity of expert conferencing, there is little formal guidance issued by legislation, arbitral institutions or other international organizations on this subject. Two notable sources of guidance should however be mentioned. First, Article 8.3(f) of the IBA Rules on Taking of Evidence in International Commercial Arbitration expressly places expert conferencing on the menu, while providing some detail on what this entails: it states that the Tribunal, either by request of a party or on its own motion, can vary the proceedings “*including the arrangement of testimony…in such a manner that* ***witnesses be questioned at the same time and in confrontation with each other (witness conferencing)*** *” (emphasis added). Second, the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration similarly contemplates witness/expert conferencing as a procedural option for parties:*

> "Witness conferencing is a technique in which two or more fact or expert witnesses presented by one or more of the parties are questioned together on particular topics by the arbitral tribunal and possibly by counsel. Consider whether this technique is appropriate for the arbitration at hand".

Why expert conferencing is gaining traction

Expert conferencing is particularly useful in cases covering technical subject-matters such as mergers and acquisitions, financial accounting and valuation, intellectual property, financial derivatives, large-scale infrastructure projects and construction.

Expert conferencing makes the evidentiary process more efficient. It is desirable to have opposing expert witnesses challenge each others' views as expert witnesses will be well-versed with the technical subject-matter of the dispute (see Michael Hwang SC, "Witness Conferencing", *The 2008 Guide to the World's Leading Experts in Commercial Arbitration* (Jamie McKay ed) (The Legal Media Group, 2008), p. 3). Experts are also less likely to make patently false statements when challenged by their peers for fear of being caught out, and the associated reputational damage.

Expert conferencing also speeds up the process of taking in expert evidence, as each relevant question is asked only once and the experts take turns to present their views on the same issue. The increase in the speed of the proceedings, coupled with the contemporaneous nature of conferencing, leads to substantial savings for the parties. More clarity will also be achieved on technical issues which are likely to be hard to grapple with.

It has also been noted that the adoption of expert witness conferencing leads to a higher likelihood that the matter will be settled by the parties. This is because the process and exercise of the witness conference allows the parties to identify the issues and merits of their respective positions with much greater clarity (see Wolfgang Peter, "Witness Conferencing" (2002) 18 Arb Int'l 47, p. 56.).

Practical steps

Where expert conferencing has been proposed, agreed or ordered, the following practical tips are likely to assist counsel in deciding whether or not to proceed with expert conferencing, and if a decision is made to proceed with it, how to maximize the opportunity:

1. Before agreeing to proceed with expert conferencing, counsel should consider the strength of their expert witnesses, i.e. their assertiveness, knowledge and tenacity (see Nemeth, Haidostan, "The hot tub method of taking expert testimony: what you need to know" (2014) Arbitration News.).
2. Once it has been decided that expert conferencing is to be used and/or it has been ordered, counsel should try to agree the mechanics of the expert conferencing prior to the hearing. The matters which should be considered include:
a. a defined list of issues pursuant to which the expert conferencing will proceed;
b. the time that should be apportioned for expert conferencing on each issue, and the order in which the issues should be examined;
c. whether cross-examination should separately be allowed in respect of particular issues and/or witnesses, and if so, whether a 'chess clock' method of time allocation will be adopted (and if so, the details of such method);

d. whether the Tribunal or counsel shall lead the expert conferencing session(s), and when and how the other may intervene;
e. the structure of the expert conferencing session – e.g., whether it is necessary to allow the experts to present an opening statement setting out their views on the key issues in dispute before commencement of the formal session;
f. whether, and to what extent, the experts will be permitted to adduce fresh evidence during the expert conferencing session;
g. the weight to be given to written testimony that is not addressed in the expert conference; and
h. when and how the expert conferencing process shall conclude.
3. After the exchange of all expert and reply expert reports, counsel should consider whether there is or will likely be substantial agreement on certain issues in dispute. If so, counsel should consider suggesting the following to the experts:
a. Pre-hearing 'without prejudice' meetings or calls between the experts — this would involve the experts discussing their respective positions on each of the issues in dispute on a "without prejudice" basis. This will be led by the experts, but counsel may wish to sit in, to ensure that they are kept up to speed on the issues being discussed. If parties are able to reach agreement, they may inform the Tribunal in the form of a joint expert report (which will be elaborated on below).
b. Joint expert report — this would involve the experts issuing a joint expert report, explaining the points of agreement (and the agreed position) and disagreement (including each party's respective position) between both sides' experts. This will assist the Tribunal and counsel to focus on only the disputed issues at the hearing, making the best use of the hearing time available.
4. If it is decided that the experts should present opening statements, issues to consider include: *(a)* whether counsel should be permitted to assist the experts in distilling the key issues to be highlighted to the Tribunal; *(b)* the use of demonstrative exhibits; *(c)* whether the experts should present their statements uninterrupted by counsel (while allowing for the Tribunal's queries); and *(d)* whether a written opening statement should be tendered prior to the hearing.
5. In preparation for expert conferencing, counsel should ensure that the experts have effectively organized their documents for easy access and presentation during the conference. All of these steps would aid in achieving an effective hearing.

Conclusion

Tribunals regularly employ expert conferencing for the myriad of benefits it brings to the arbitral proceedings. As explained in this article, expert conferencing can be used to maximize procedural efficiency if the mechanics of conference are agreed in advance, and the process managed effectively. However, if not deployed and managed carefully, expert conferencing has the potential to spiral out of control, wasting precious hearing time and depriving the Tribunal of the opportunity of receiving crystallized evidence on narrow issues in dispute.

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