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Tricky Technical and Quantum Matters for Rising Arbitrators: RAI's Conversation with Dr. Pablo T. Spiller

Alexander David Barnes (Von Wobeser y Sierra, S.C.) · Saturday, May 15th, 2021 · Rising Arbitrators Initiative (RAI)

On 21 April 2021, members of the executive committee of the Rising Arbitrator's Initiative (RAI) hosted a discussion and Q&A session with Dr. Pablo Spiller (Compass Lexecon), who has testified as expert in more than 150 arbitrations across a broad range of sectors over more than two decades. The discussion was led by Paul Tan (Cavenagh Law LLP, Clifford Chance Asia), and the Q&A was led by Flavia Mange (Mange & Gabbay).

Beyond providing attendees with a unique insight into the perspective of one of the world's foremost economic experts in international arbitration, the discussion offered food for thought for rising arbitrators on not only the best practices that they should look to adopt in the generation and examination of expert evidence, but also on how international arbitration as an industry may benefit from implementing practices that hold experts, and the work they produce, to account.

Being 'Straight' with Headstrong Clients

The introductory theme of the discussion concerned the client-expert relationship, and its interrelation with the expert's duties in an arbitration. On being retained for any given arbitration, Dr. Spiller explained that he does not lose sight of the two essential duties that he considers himself bound to: (i) a duty to the arbitral tribunal to be objective and independent, and (ii) a duty to the client to be truthful. On the latter, he explained that clients will commonly have exaggerated views and expectations, and that he is required to inform such clients that their expectations may be unachievable. This is rarely an easy process, given the often strong-headed nature of the individuals in senior roles in multinational industries or governments; however, a "mouthpiece" expert, in his view, will not last long in the industry. Dr. Spiller noted that the smooth collaboration with counsel is important in this effort of managing clients' expectations.

Dr. Spiller further noted that it may be highly valuable for the client to be provided with an independent preliminary economic assessment, to the extent possible, before any legal proceedings are initiated. Precisely because often clients have overly optimistic expectations about damages, an independent preliminary economic assessment by a damages expert can help counsel to manage such expectations. He noted that he has observed an increase in this practice since the 2008/2009 financial crisis, and recommended that counsel promote it, in lieu of launching disputes 'gung ho'.

Optimizing the Quality of Expert Analysis

The discussion turned to the respective merits and pitfalls of the use of the 'adversarial' system of presenting expert evidence, as contrasted to the use of a sole, tribunal-appointed expert. Dr. Spiller is an advocate of the adversarial approach. In his view, a thorough adversarial process should be seen as akin to a brainstorming session, whereby multiple experts, their counsel, and the arbitrators, work collectively to generate the most comprehensive analysis possible. Dr. Spiller noted that the presence of the counterparty and their respective expert places a utile degree of pressure on each expert to ensure that their analysis is as sound – and therefore impervious to criticism – as possible. That incentive to prove one another wrong, he further noted, leads each side to undertake considerable efforts to produce credible supporting or countering evidence, which adds value to the overall brainstorming process.

A sole tribunal-appointed expert, he conversely considered, is by corollary not under the same pressure as a party-appointed expert to produce a solid, comprehensive analysis. Moreover, in Dr. Spiller's view, there is simply too much at stake in most arbitrations for the task of presenting a comprehensive economic analysis to fall upon the shoulders of one individual. The "randomness" of the selection process of such expert, and the possibility that a tribunal-appointed expert will be comparatively less receptive to challenge or criticism than a party-appointed expert were other factors he considered to count against the practice of retaining a sole expert. This, however, must be differentiated from a Tribunal retaining an expert to help the Tribunal on complex matters.

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In terms of the presentation and examination of oral evidence, Dr. Spiller considered that party cross-examination is "fundamental" and, indeed, "the essence of a hearing". In his opinion, there is a case to be made that direct examination could be avoided entirely; that is, that under some circumstances it could be more valuable to head straight to cross-examination. "Hot tubbing" can be important, in his view, however it requires a lot of active input from the tribunal to be used effectively. He analogized that often, passive tribunals allow "hot tubbing" to turn into "mud wrestling", and that all this ultimately leads to is the spraying of mud into the tribunal's eyes. Effective "hot tubbing", he submits, is achieved where an active president of a well-prepared tribunal has carefully prepared specific questions and an organized structure for the session, focusing on the main areas of disagreements among the experts.

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However, for Dr. Spiller, the related concept of a joint expert report between the parties' experts subsequent to the presentation of their individual reports is rarely illuminating, and seldom leads to a true meeting of the minds. Whereas insignificant divergences may be resolved in them, the central issues will hardly ever be. Moreover, Dr. Spiller noted that there is a risk that the joint expert report becomes a too summarized or incomplete version of the expert reports themselves, with the risk of the Tribunal misunderstanding the respective positions of the experts. Instead, he

considers that experts should attempt to increase the quality of their reports by writing more succinctly and to the point (leaving all supporting analysis and material to footnotes and appendices), and clearly identifying the areas of agreements or disagreement with the opposing expert, so that such "joint report" is not required.

Greater Scrutiny for Experts?

As the discussion moved onto the pitfalls of the use of expert evidence in arbitration, Mr. Tan asked Dr. Spiller what he thought more arbitrators should be doing to get the most out of it. The key message from Dr. Spiller was that the arbitrator must optimally prepare for the hearing ("preparation, preparation, preparation"), as that is exactly what a good expert will have done. To best contribute to the collective brainstorming exercise, considerable time should be invested into the careful preparation of questions.

With respect to the shortcomings of the present system, Dr. Spiller considered a crucial issue to be the lack of sanctions for the presentation of baseless or untruthful expert evidence. In his view, given the sums usually at stake, it is unsatisfactory for evidence based exclusively on opinion to be presented without the potential for consequences. In this vein, Dr. Spiller suggested that the widespread adoption of a doctrine similar to the *Daubert* standard (as established in the 1993 US Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals Inc*.) may be an important advancement for international arbitration. That is, Dr. Spiller submitted that international arbitration may benefit from the practice of being explicit when rejecting expert evidence because it considers it to lack scientific basis.

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His advice to arbitrators is not to shy away from giving their views on expert witnesses in their awards. Even if a tribunal's conclusion is that it lost faith in an expert, Dr. Spiller considers that it would contribute to the advancement of the profession for that to be reflected in the award.

Dr. Spiller, in the subsequent Q&A session, also discussed cases where experts may undertake their economic analyses based on a presumption of a lesser or different liability to that which has been alleged by the claimant party. That leads to expert testimonies "passing in the night" as each discusses a different claim. He observed, however, that aside from providing an opinion on the claim as presented, often it is best to present damages assessments based on different sets of instructions so as to assist the Tribunal should it decide to accept some claims and reject others.

In response to a question from Ana Gerdau de Borja Mercereau (Derains & Gharavi) concerning the saving of time and costs in situations where the experts adopt different assumptions and methods, Dr. Spiller mentioned that usually an integral part of the brainstorming process is for economic experts to consider and potentially present multiple methods as approaches to any given analysis, noting that there is usually no single foolproof method to tackle an economic question, and that all cases are different.

Conclusions

The RAI's discussion with Dr. Spiller offered rare insights into the perspective of a seasoned economic expert witness in international commercial and investment arbitration. The overall impression left was that a system based on the adversarial process with opposing expert witnesses, that pits expert witnesses against one another, is no bad thing – indeed it is arguably essential to the integrity of the tribunal's economic analysis. However, Dr. Spiller also warns that in order to ensure such integrity, the arbitrators must necessarily be well-prepared and active participants in the collaborative process. Perhaps most notably, he urges arbitrators not to shy away from criticizing experts in their awards when their work lacks scientific basis, a practice that would benefit the international arbitration practice akin to impact of the *Daubert* standard in US litigation.

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