Kluwer Arbitration Blog

Making Expert Evidence Engaging: ACICA45 Panel Discussion

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Expert evidence is a feature of almost every arbitration. At the very least, parties will likely need to adduce expert evidence concerning the quantification of a claim for damages. However, depending on the subject matter of the dispute, a party may need to adduce expert evidence on any number of topics, ranging from aerodynamics to zoology. The expert's precise area of expertise notwithstanding, identifying, briefing, and preparing experts for arbitration is never a simple task.

On 12 May 2022, KordaMentha and ACICA45 – a community for young and emerging arbitration practitioners organised by the Australian Centre for International Commercial Arbitration – held its first in-person session in Sydney since the outbreak of Covid-19. The session, moderated by Domenico Cucinotta (Senior Associate, King & Wood Mallesons), explored various aspects of the appointment and instruction of expert witnesses in arbitration proceedings. The panel, made up of John Temple-Cole (Partner, KordaMentha), Jacqueline Koo (Associate Director, KordaMentha), Professor Chester Brown (University of Sydney and 7 Wentworth Selborne Chambers) and Tim Ash (Director, TBH Consultancy) provided valuable insight based on their experiences as testifying expert, counsel, and second chair to a testifying expert.

A needle in a haystack – how to choose the right expert?

The evening started by discussing one of the most challenging tasks: how to identify the right expert with relevant expertise and experience. Speaking from his experience as both counsel and expert, Professor Brown observed that identifying the right expert was crucial, otherwise the evidence would be of little evidentiary value or inadmissible. Professor Brown posed a number of practical questions for an expert to consider in assessing whether they are the right match for the engagement, including: (a) whether the issue(s) are within an expert's expertise; (b) whether an expert has any conflict of interest; (c) understanding the scope of work; (d) understanding the deadlines; (e) setting expectations on fee arrangements; and (f) confirming the expert's independence from the client and instructing counsel.

Mr Temple-Cole explained that counsel and experts should prepare for an initial conference in a similar way that one might prepare for an interview: setting out clearly the reasons for engaging an expert, what matters the expert is required to address and being unafraid to enquire and challenge a candidate on the relevance of their qualifications to the task being instructed.

“Dirty” experts v “clean” experts

The panel then discussed the necessity of engaging a ‘dirty’ expert in addition to any ‘clean’ or testifying expert they have already engaged for the proceedings.[1)]

Mr Ash recounted some of his experiences acting as a “dirty” or “consulting” expert. Mr Ash advised that a “consulting expert” could be involved in various circumstances and equipped with different tasks. For example, a “consulting expert” might be engaged early to assist in setting case strategy or testing various case theories. A “consulting expert” might also assist in identifying a suitably qualified “clean expert” and helping the counsel team prepare instructions, assumptions, and questions for the “clean expert”. Mr Ash explained that the value of a “consulting expert” is more obvious when a matter involves highly technical details, with which the legal team is not necessarily familiar.

Agreeing that a “consulting expert” can be helpful in upskilling the legal team on technical matters, Professor Brown warned that it is important to strictly observe the distinction between the “clean” and “dirty expert”, and to avoid them from meeting or discussing the matter together, so as not to compromise the independence of the “clean” expert.

Preparing the letter of instruction and brief of documents

Another common issue that arises when briefing an expert is how much (and what) information to give to the expert and how it ought to be presented. The panel agreed that briefing an expert is usually an iterative process whereby an early engagement letter is followed by a formal instruction letter with detailed assumptions closer to the time the final report is delivered. The panel also agreed that a well-prepared brief assists an expert in understanding the scope of engagement and what further documents might be helpful.

Drawing on her experience, Ms Koo opined that instructing lawyers should be tactical in selecting the documents to provide an expert in the first instance. She explained that a balance needs to be struck between providing the expert with enough information to progress the engagement, without overwhelming the expert with unnecessary documents that achieve little other than forcing the client to incur further costs in having the expert review such documents.

On the same topic, Professor Brown noted that while there could be some frustration from repeatedly requesting more documents by an expert from instructing lawyers, it would be preferable to start the briefing with a smaller universe of key documents and responding to requests for further documents as the engagement progresses. Professor Brown also cautioned against the practice of putting detailed questions to an expert in writing too early, as that carries the risk of opposing counsel questioning the reason for the changed instructions or questions over time.

Dealing with draft reports

The panel turned next to the issue of draft reports and, specifically, the different approaches to the level of review or input counsel should have on draft reports, and the potential discoverability of draft expert reports.

Ms Koo considered it good practice to assume that all drafts are discoverable. Based on that assumption, Ms Koo expressed a preference for experts only providing a near-final draft to avoid any wholesale changes by counsel. Such a draft should also include appropriate disclaimers as to the finalisation of calculations and quality assurance checks.

Although it is not improper for experts and counsel to discuss the content of a draft report, Ms Koo and Mr Ash considered it important for the expert to maintain their independence and to look upon any comments from counsel as suggestions only, rather than directions to make changes.

From a legal perspective, Professor Brown recognised that the possibility of drafts being disclosed was a serious issue. Professor Brown explained that privilege often attaches to draft expert reports since they are usually prepared for the dominant purpose of an ongoing proceeding. However, the applicability of privilege must be determined on a case-by-case basis. For example, a draft prepared for the expert's own purposes (akin to a working paper) may not necessarily be privileged, even if it is communicated to the instructing lawyer.

Joint expert conferences and joint expert reports

The panel observed the recent trend in both arbitration and domestic litigation to require experts engaged by opposing parties to meet and produce a joint expert report identifying areas of agreement and disagreement.

Mr Temple-Cole and Mr Ash recounted some experiences of attending expert conclaves and agreed that a joint expert meeting could be productive, allowing the experts to narrow the matters in dispute, present to the tribunal/court in a neat and simple way the precise differences between experts, and put the experts on notice of potential areas for cross-examination.

Mr Temple-Cole and Mr Ash suggested that a successful joint expert meeting relied upon: (a) experts not raising new topics or issues during the conclave; (b) clarifying the key elements of the case with counsel prior to the meeting; and (c) taking a proactive approach in preparing the first draft of the joint expert report.

Preparing for and being subject to cross-examination at a hearing

Finally, the panel discussed their experiences of being cross-examined, the styles of cross-examination they considered to be (in)effective and how to best prepare for oral examination.
Mr Ash reflected on his experiences as a testifying expert in construction disputes and explained that instructing counsel would be well-served by taking the time to explain the hearing process, dramatis personae, and hearing logistics with the expert to ensure their familiarity with the environment and settle any potential nervousness. Mr Ash explained that it can be dangerous for a lawyer to try and challenge an expert directly on their subject matter expertise, and so frequently the focus of cross-examination is trying to parse out potential inconsistencies in the expert report(s). Accordingly, it is critical that the testifying expert is intimately familiar with their report and is prepared to explain to the tribunal or court their opinion, and the reasons for the conclusions reached.

Mr Ash and Mr Temple-Cole warned testifying experts against arguing with opposing counsel, or volunteering answers to questions that were not asked. Experts ought to (as best as possible) be alive to counsel's cross-examination tactics and should be prepared to ask counsel to repeat or clarify their questions, if necessary. Mr Temple-Cole explained that, to a certain degree, the only thing a testifying expert can do is to keep calm and carry on.

References

?1 For the avoidance of doubt, the dichotomy is not used to impugn the character or morality of an expert. The words "clean" and "dirty" simply distinguish the roles assumed by different experts. A "clean" expert is a testifying expert, whose role is independent to their instructing lawyers and the paramount duty is to the court or tribunal before whom they appear. By contrast, a "dirty expert" will not give evidence to a tribunal and play more of a consultancy role to the legal team, helping them understand the subject matter better.

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