Should Experts Be Neutrals or Advocates?

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I. Introduction

In *R. v. Abbey*, Dickson J. emphasized the need for experts in trials in following words:

> "Witnesses testify as to facts. The judge or jury draws inferences from facts. With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with the ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of a judge or jury."

Redfern and Hunter on International Arbitration", fifth edition, has emphasized the need for expert evidence pithily:(1)

> "The third method of presenting evidence to an arbitral tribunal is by the use of expert witnesses. Some issues of fact can only be determined by the arbitral tribunal becoming involved in the evaluation of elements that are essentially matters of opinion. Thus, in a construction dispute, the contemporary documents, comprising correspondence, progress reports and other memoranda, and the evidence of witnesses who were present on the site may enable the arbitral tribunal to determine what actually happened. There may then be a further question to be determined; namely whether or not what actually happened was the result of, for example, a design error or defective construction practices. The determination of such an issue can only be made by the arbitral tribunal with the assistance of experts, unless it possesses the relevant expertise itself. Equally, in shipping arbitrations, the performance of a vessel or its equipment may need to page "149" be evaluated by experts, so that the arbitral tribunal may make the relevant findings of fact."

Experts can help the arbitral tribunal to understand technical matters, can clarify technical issues and facts, can summarize extensive technical evidence so as to put it in a simplified form and can even obtain evidence. In international arbitration experts play a significant role and have been characterized to be "the most frequent evidence".

Experts can be presented through "expert evidence" by the parties or can be appointed by the arbitral tribunals as such. Either way experts have a significant role in international commercial arbitration and will continue to do so, if not dominate, in future. The fact remains that international commercial disputes are getting more and more complex, be they technological-, financial-, accounting- or construction-related. Added to these are the financial stakes involved. Disputes involving large public projects may also affect lives of millions and involving environmental and human rights issues. Arbitral tribunals will have to lean more and more on experts in times to come.

But as was said in 1873:

> "Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."(2)

And repeated in 1994 by Macdonald J.:

> "If the person rendering the evidence assumes the role of advocate, he or she can no longer be viewed as an expert in the legally correct sense; instead, he or she must be viewed as advocating the case of a party with the attendant diminishment in the credibility of the report. Expert opinions guide the court but they do not determine the matters which are to be determined by the court."(3)

In *Government v. The Century Spinning and Manufacturing Co., Ltd.*, AIR 1942 Bombay 105, it was observed by John Beaumont, Kt., CJ, and Sen, J.:

> "The evidence of expert witnesses is generally of assistance to the court, but it has also its limitations. I think it is well known that in all these cases of valuation too much is often claimed and too little is offered as between the opposing parties. As the Privy Council pointed out in the same case which I have referred to before. 'Every expert witnesses has his own set of conjectures of more or less weight according to his experienced and personal sagacity with the result that the enquiry abounds with uncertainty and give[s] more than ordinary room for guess work.' Further, the expert witness sometimes begins with a predetermined conclusion. *page "150"* It is to my mind reversing the ordinary logical process of reasoning to let the conclusion justify the premises rather than let the premises justify the conclusion."

Experts have earned the infamous title of being 'Advocates'. One of the best summations of the Duties and Responsibilities of expert witnesses is to be found in the words of Justice Cresswell in the "*Ikarian Reefer*" case as follows:(4)

> "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193, per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be state[d] with an indication that the opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. and Others v. Weldon and Others*, The Times, November 9, 1990 per Lord Justice Staughton).
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
> 7. Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

This must apply with equal force to arbitration.

Even in the face of well-defined rules of international institutions as well as the IBA Rules on the Taking of Evidence in International Arbitration, the experts, as noted in the leading textbooks and the personal experience of most practitioners, are more advocates and less neutrals. A respected arbitral tribunal comprised of Böckstiegel, Noori and page "151" Holtzmann in *Rockwell*[5] critically examined the evidence of an expert before it and observed:

> "The Ministry has requested that an expert be appointed to evaluate Rockwell's alleged performance under the Contracts, in particular to assess the scope of the work done and whether it conforms with the contractual requirements. In the Tribunal's view, the question whether to appoint an expert need only be reached in a case where the party requesting the appointment has sufficiently substantiated its claims or defense. It is not the task of an expert appointed by the Tribunal to argue a party's case."

Undoubtedly the role of an expert is twofold: first, to advance the case of the party calling him, so far as it can properly be advanced on the basis of information available to the expert in the professional exercise of his skill and experience; and, second, to assist the court or the tribunal, which does not possess the relevant skill and experience, in determining where the truth lies. How best to balance these two is a challenge faced by every arbitrator and every practitioner. But can these two at all be balanced? And if yes, then how to go about doing the same is the subject of today's discussion.

Experts must be led and shown as neutrals in examination in chief but should be exposed as advocates in cross-examination.

II. Expert Witness Must be Led and Shown as Neutral in Examination-In-Chief

More often than not parties lead expert evidence through affidavits. Tribunals mostly encourage this manner of submission of evidence by parties. It is quite common to find that such evidence is either prepared by or under direct supervision of parties' lawyers. It therefore loses its purpose, significance and most of all credibility. It is not uncommon to find expert witnesses signing their statement that has been prepared by lawyers on dotted lines as evidenced by the following story:

> "In a domestic arbitration involving substantial disputes of financial implication between the Acquirer of Government shares in Fertilizer Company through disinvestment process and Government of India, expert evidence was led on behalf of Government of India in the form of an affidavit evidence of a Chartered Accountant. His cross examination revealed how mechanically he had given the evidence.
>
> Q21. Do you recall when you were first approached by Ms. X?
>
> A. For this matter one Mr. Y, first approached me and then Ms. X had a discussion with me when she handed over these papers to me. That was in Nov. 2006.
>
> Q22. From your memory do you remember that name of the Notary before whom you affirmed the affidavit?
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>
> A. I don't remember.
>
> Q23. Where was the affidavit affirmed?
>
> A. That was in Noida."

The affidavit was actually affirmed in New Delhi, thus disclosing how casually the affidavit-in-chief was prepared by lawyers and signed by the expert who did not even remember where he had affirmed the affidavit.

Justice Laddie in *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.*[6] exposed the pitfalls of this approach when he said:

> "The whole basis of Mr. Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the

> issues before it…. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice the truth in pursuit of victory is a fact of life.
>
> The court tries to discover it when it happens. But in case of an expert witness the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right that in ensuring that one side or another wins.
>
> An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by Mr. Goodall is a euphemism for 'misleading selectivity'. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being 'found out'.
>
> The reality, of course, will be somewhat different. An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is being cross-examined. Most witnesses would not be prepared to admit he was approaching the drafting of his report as a partisan hired gun. The result is that expert's report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence much of its value. I would like to think that in most cases cross-examination exposes the bias. Where there is no cross-examination, the court is clearly at much risk of being misled.
>
> In view of the above, it is relevant to remind those concerned with the preparation of expert's report of some of what Cresswell J. said in The '*Ikarian Reefer*'….
>
> In the light of the matters set out above, during the preparation of this judgment I re-read Mr. Goodall's report on the understanding that it was drafted as a partisan act with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues."

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The simple solution therefore lies in leading the expert evidence as examination-in-chief before the tribunal rather than through affidavit evidence. Even though the party, its lawyers and the expert may have discussed the disputes as well as their viewpoints in relation thereto, the evidence led orally will look natural, convincing and inspiring in confidence. The tribunal will have the advantage of observing the demeanor of the witness. This offers a real opportunity to the lawyers for the parties leading evidence to demonstrate skills in advocacy in eliciting from the expert, first and foremost, the facts upon which his opinion is to be based and then leading to the opinion itself. It is a poor advocacy to leave the other side to elicit facts through cross-examination which may change the very basis of the opinion.

First and foremost, lawyers advising parties in an arbitration requiring expert evidence must be sure that such evidence, if honestly tendered, will support the case of the party they represent. It would be suicidal to tender an expert witness knowing full well that such a witness is being asked to depose contrary to honest and objective opinion that he or she may harbor. In such a situation it is better to leave out the expert witness and allow the other party or perhaps the tribunal to bring in the expert and then hope to shake him or her through cross- examination. But once the decision is taken to lead expert evidence the lawyer must first help the party in identifying the right witness and then acquaint him with full facts and evidence on record to the extent it is relevant to enable him to form solid, inspiring and objective opinion. He should be briefed but not tutored. It is my experience, that in-depth discussion by lawyers fully acquainted with facts and issues in presence of parties and even technical personnel goes a long way in apprising the expert fully while eliciting from him his views at the pre-evidence stage. Failure to do so will result in what happened in the award of *Arbitral Chamber for Fresh Fruits and Early Products* in a dispute between a

French seller and a Dutch buyer:[7] The dispute was that the potatoes sold by French seller were for industrial use which fact was not disclosed to the expert who deposed that the goods were unfit to be packed in bags and for immediate consumption therefore forcing the Tribunal to reject his opinion straight away.

Once that is done the next task is how best to introduce the expert witness to the tribunal. He must be put to ease throughout examination. He must therefore be taken extensively through the journey as to his qualification, experience and credentials. Thereafter he should be slowly walked through facts and lastly left to form and express his opinion as an expert in his own words for the tribunal to hear for itself. The questioning-in-chief must be simple and uncomplicated. Technical issues admixtured with facts and legal technicalities once discerned from the larger controversy must be separated from "technical facts in issue" so as to allow the expert to address the latter.

Such an expert witness or his examination-in-chief will usually stand the scrutiny of cross-examination. It is also many a times necessary to ask the expert witness, in chief, inconvenient questions and elicit simple and convincing answers rather than leave them in cross where the chances are that the witness might falter.

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III. Expert Witness Attacked as Advocate in Cross-Examination

Cross-examination by each party, whether or not it succeeds, contributes substantially to a proper decision. The value of destroying an opponent's evidence is immense, but cross-examination may sometimes even enhance the credibility of the evidence in the eyes of the tribunal. It is strategically wiser to refrain from cross-examination than to do it badly. Lawyers must therefore weigh the pros and cons of cross-examination of the expert witness and once the decision is taken to cross-examine, lawyers must be sure on what particular aspects in examination-in-chief questions must be directed to.

Is it possible to shake the very credibility of the expert's qualifications, experience and credentials? If yes, it must be done in a subtle and respectful manner. Is it possible to shake the witness on relevant facts? If yes, then the witness should be put short, quick and numerous questions allowing him to either fain ignorance on vital facts and/or contradict himself. But it must always be remembered that this journey must be as short as necessary and no further.

Once done on facts the witnesses must be confronted on his opinion. The best way to proceed is to allow him to admit that more than one opinion or interpretation is possible on the same set of facts or even on different facts. It is ill-advised to attack the expert through direct question on opinion which he is positively likely to reaffirm. Remember that before going to any form of destructive cross-examination, it would be better for the defendant's advocates to conduct cross-examination constructively by emphasizing favorable facts which could assist his case. At this stage the expert is cooperative and will be willing to speak freely, being unguarded.

In one international commercial arbitration while cross-examining an expert witness of the other party in respect of a contract which mandated a performance test upon commissioning of a large industrial plant, I confronted the expert with the following questions and his answers supported what was the case of the party I represented, namely, the performance test was not done because it involved costs:

> "Q. Would you say that various projects and plants with which you were associated based on CFB Technology between 1981 to 1999 were successfully commissioned?
>
> A. At the end, all the plans were commissioned successfully. But initially few started problems which had to be solved. The plants in two places have still not been commissioned.
>
> Q. In cases where plants were commissioned, were performance tests also conducted?
>
> A. Not in all the cases. Whether a performance/acceptance tests is conducted is the decision of the operator/utility. Since the performance/acceptance test is relatively expensive, sometimes the performance/acceptance test is avoided. In most of the cases, however, a

performance/acceptance test has been conducted.

Q. Is it correct that before giving your opinion in respect of the present disputed boilers, you did not visit the site and inspect the boilers at any stage?

A. It is correct that I have not visited the site. In the case of the present dispute, which is mainly concerned with the design and operation of the boilers, the documents provided were detailed enough to make an evaluation."

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Earlier the same witness contradicted his own evidence to the point of losing credibility, as follows:

"Q. Could you turn to paragraph 3.2.d of your affidavit. Read the last two lines at the end of the page 'relating to … fuel'. Would it not have been appropriate for any manufacturer/supplier to simply request new fuel for conducting a performance test if the fuel being used was not appropriate?

A The fuel for the performance test has been clearly specified in the contract, that is lignite. (Question repeated). Yes. For the performance test, the manufacturer would have demanded the correct fuel.

Q. Are you aware on the basis of the review of the documents that as late as April and May of 2000, company A and company B had jointly agreed that performance test will be conducted in respect of the three boilers first on coal and then on lignite?

A. No. Performance test with coal makes no sense. Because most of the guarantee values are not applicable for coal."

In the same arbitration another expert witness during my cross-examination undermined his own independence and objectivity, as follows:

"Q. Before preparing this report along with Mr. X, did you not feel it appropriate to visit the boiler site in question?

A. The company A which had entrusted us with this task had not asked us to visit the site.

Q. Have you been associated in the past with Group A in any capacity?

A. No. This is my first job with Group A. Mr. X had worked with Group A earlier.

Q. In the team of yourself and Mr. X, was Mr. X a senior person in terms of qualification, experience etc.?

A. I know Mr. X from college days. We had studied together. We had started working independently in 1994, each one of us for himself. We have done many jobs together.

Q. Did Mr. X contact you for this job also?

A. Yes. It was his idea to include me."

In yet another international commercial arbitration my cross-examination revealed how poorly the expert was supplied and acquainted with relevant documents and had instead based his opinion on documents selectively supplied by the claimant.

"Q. Would you kindly turn to paragraph 8 of your affidavit. Would it be correct therefore to assume that you did not seek any other document other than what Claimant had provided you, Sir?

A. I was provided with all documentation that the claimant had, which obviously included exchanges of correspondence from the respondent and the Claimant.

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Q. No, Sir, my question is different. Did you seek any document other than what Claimant had provided you?

A. Sorry, I apologize. Obviously, during the course of my enquiry, I examined further supporting information in relation to manuals and other information that has been referred to in the statement of claimant's witness No. 1, because there was further information that was provided that I think wasn't in the original claim submission.

Q. No, other than claimant's witness No. 1's satisfaction or claimants satisfaction, my question, Sir, to you is did you seek any other document or other information to satisfy your own self other than what was provided?

A. The answer to that, I think is no."

Cross-examination, if conducted skillfully, can expose experts projecting themselves to be neutrals as advocates. The judicial criticisms emanating from courts and tribunals for over a hundred years are well founded.

IV. What then is the Solution"

One of the methods suggested and now successfully implemented is to have joint meetings between experts of both parties allowing them to agree on as many issues of dispute as possible, narrowing down the points in controversy. This method also has its advantage because most important facts on which respective opinions are based will also stand agreed upon if not admitted. The cross-examination then stands limited as to the points of difference and thus reduces time and costs. This method also allows the arbitral tribunals to have better and clearer understanding as to points in controversy and particularly as to technical aspects.

But perhaps an even stronger approach may be appointment of experts by arbitral tribunals. This method is now agreed upon in most international instruments like the UNCITRAL Model Law and is also provided in many domestic laws (for example, the English Arbitration Act 1996) and even the rules of arbitral institutions like the Arbitration Rules of the LCIA (London Court of International Arbitration), the Rules of the International Chamber of Commerce, American Arbitration Association, Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre Administered Arbitration Rules. The Chartered Institute of Arbitrators has in fact framed exhaustive rules in this regard which throw substantial light on the manner and method of this technique. International Bar Association's Rules on the Taking of Evidence in International Arbitration also deal with this aspect quite clearly.

So strong is the acceptability of this approach that the US Court of Appeal, 11th Circuit, in it s1998 decision *Industrial Risk Insurers v. MAN Gutehoffnungshütte GmbH*[8] even upheld an award based on evidence of an expert who was initially retained by the appellant party, then dropped but was called by the Arbitral Panel to testify "sua sponte". The court rejected the argument of "side-switching" and even held that the same did not *page "157"* violate any of the provisions of the 1958 New York Convention to enforce such an award.

True, this method is attacked on the ground that it may amount to delegation of decision-making powers by arbitrators to a third party. There is a fine line between blindly depending and receiving evidence from an expert. The established authority suggests:

(a) The arbitrators are bound to act judicially and cannot delegate the ultimate award to an expert.
(b) The arbitrators are free to accept the advice obtained from the expert and the weight to be given to that advice.
(c) In case of a conflict amongst experts, the arbitrators must make a factual finding as to which evidence they prefer.
(d) Any advice given by an expert must be disclosed to the parties and they must be offered reasonable opportunity to contest it and if necessary lead their own expert evidence.
(e) Arbitrators can seek expert advice on the form but not the content of the award.

V. Conclusions

To conclude experts – neutrals or advocates – have a firm place in international commercial arbitration in the modern world. Whether they remain neutrals or advocates depends on the parties and the lawyers representing them. Experts' usefulness to tribunals being immense, tribunals will increasingly exercise their powers to appoint

their own experts.

But then there can always be a situation like the one in the following story of John Hutton Balfour-Browne, King's Counsel,

> "I remember in the inquiry into the Regent's Canal Railway Bill I was 'put up' to be impertinent by Mr. James Staats Forbes, who had a 'spice of the devil' in him. Sir Fredrick Bramwell ('Hogshed' Bramwell) was the witness and, as I have said before, he was a most admirable witness. But although he was excellent as a witness he had done very little as a constructive engineer. Afterwards, no doubt, he and his partner, Mr. Harris, were engineers for some important Power Bills, and for one sewage scheme, at least; but Bramwell's real forte was evidence. He was very often an Umpire in arbitrations, especially in arbitrations under Section 43 of the Tramways Act. Upon the occasion in question Mr. Forbes suggested that I should ask him what works he had designed or constructed, and being young I acted upon his somewhat cruel suggestion.
>
> 'We all know', I said, 'your eminence as a witness, but would you tell me what you have done as an engineer? What works have you designed or constructed?'
>
> 'Not very much,' he answered.
>
> 'Can I help you? You designed a floating dock for Bermuda, did you not?'
>
> He assented with a 'Yes' which sounded like a grunt.
>
> 'And it would not float?'
>
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>
> Again he grunted.
>
> 'And you also designed, if I am not mistaken, the Caterham Lunatic Asylum?'
>
> But, as I say, it was Mr. Forbes' doing."

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1 Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER, *Redfern and Hunter on International Arbitration*, 5th edn. (Oxford University Press) p. 406.

2 *Lord Arbinger v. Ashton,* (1873) 17 LR Eq 358 at 374.

3 *Perricone v. Baldassarra,* [1994] O.J. No. 2199.

4 *National Justice Compania S.A. v. Prudential Assurance Co. Ltd.*, [1993] 2 Lloyds Rep. 68.

5 *Rockwell International Systems Inc. v. Iran,* 23, Iran-US CTR (1989), 150.

6 (1996) C.I.L.L. 1083.

7 *Arbitral Chamber for Fresh Fruits and Early Products (EEC)*, ICCA *Yearbook Commercial Arbitration* VIII (1983) p. 118.

8 141 F.3d 1434 (11th Cir.1998).