

## ETHICS

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# Ethical Issues Arising from Using Expert Witnesses in an Arbitration

## Introduction

Under certain circumstances expert witnesses may be required to give evidence during arbitration proceedings these experts may include professionals such as engineers, doctors, insurers, estate surveyors, architects etc. To elucidate Dr. Gregory Bell in a panel discussion titled "Expert Witnesses in Arbitration" states that experts are called to testify in cases where the quantum of damages is in issue or where issues of industry conduct are in question. He states that arbitrators usually ask parties in the dispute to prepare a list of possible experts from which they could choose to assist the arbitrator in determining the quantum of damages. Dr Michael Hammes a co-panelist in the same discourse is of the view that expert witnesses are relied on in disputes where third party assessment of facts is required and critical to the party's case.

The Arbitration and Conciliation Act 2004 allows the use of expert witnesses. Section 22 provides that:

(1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) appoint one or more experts to report to it on a specific issue to be determined by the arbitral tribunal;

(b) require a party to give to the expert any relevant information or to produce or provide access to any documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the points at issue.

## Ethical Issues

Several ethical issues arise from using expert witnesses in arbitration. One of such issues is the extent to which counsel is allowed to prepare the witness for giving testimony during international arbitration. The rules vary from one jurisdiction to another. While in the UK, barristers and solicitors are not allowed to prepare witnesses too rigorously before trial, in the USA and Nigeria, lawyers are not so limited. Therefore, parties have to be mindful of these differences when conducting arbitration in these countries.

Another ethical issue is whether non-lawyers are aware of their ethical obligations while giving evidence during arbitration proceedings. Some professions are not bound by strict ethical codes. In the United States of America Troy Harris in his article titled: "ICDR/CIARB/LACBA Conference - International Arbitration in the Pacific Rim: The Use of Reliance Documents & Expert Witnesses - Efficiency & Fairness A New Focus For The Expert Witness Debate In International Arbitrations" notes that the National Society of Professional Engineers has promulgated a Code of



Ethics for Engineers, under which its members have various duties when serving as expert witnesses:

'Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements or testimony, which should bear the date indicating when it was conducted.

Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialised knowledge on behalf of a former client or employer.

Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers.'

The arbitral tribunal in an international arbitration can disregard any expert testimony it has adjudged to be incredible. For example, the IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules') allow tribunals to 'determine the admissibility, relevance, materiality and weight of evidence', including the evidence of expert witnesses. Significantly, the IBA Rules also require party-appointed experts to submit reports including, inter alia, 'a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal' and 'an affirmation of his or her genuine belief in the opinions expressed in the Expert Report'.

Another interesting debate is whether neutral tribunal appointed expert is preferred to party-appointed experts. Some argue that tribunal experts are in a better position to find the truth in an arbitration because party appointed arbitrators might favour the party who appointed them. In debunking these theories Robert De

By Chair of the International Arbitration Practice Group at Connon Wood LLP states instructively that "The danger on focusing on how an expert is appointed is that a measure of reliability will be associated with it. However, neutrality is no guarantee for the soundness of an expert opinion. Testing it is. And while it has been argued that a 'battle of the experts' or various ways of having the expert witnesses square off, is a way of doing this, it turns expert witnesses into advocates. The risk inherent in a battling or hot-tubbing expert witnesses, is that it places emphasis on the expert witness having skills more akin to a lawyer's. As a result, focusing on various problems associated with the ways an expert witness is appointed, and the concomitant solutions, merely risks introducing a whole new set of problems.

Instead, counsel and international arbitration Tribunals would do well to focus on testing the witnesses' and expert opinion's reliability. Irrespective of how or by whom the expert witness was appointed."

## Conclusion

From the foregoing it can be agreed that the use of expert witnesses in arbitration is necessary in certain circumstances for the effective resolution of the dispute between the parties. However, experts should be mindful of their ethical obligations. The ICC rules contain robust provisions on the appointment and ethical obligations of an expert, it provides Under Article 3 that : 2. In confirming or appointing an expert or a neutral, the Centre shall consider the prospective expert's or neutral's nationality, residence, training and experience, and the prospective expert's or neutral's availability and ability to conduct the work to be carried out. The Centre shall make all reasonable efforts to appoint an expert or a neutral having the attributes, if any,

which have been agreed upon by all of the parties. If, despite such efforts, the Centre is not able to identify an expert or a neutral having all of the attributes agreed upon by all of the parties, the Centre may ask the parties whether they wish the Centre to appoint more than one expert or neutral (who between them have the requested attributes), or whether the attributes agreed upon by the parties may be modified. 3. Every expert or neutral must be and remain impartial and independent of the parties involved in the proceedings, if any, unless otherwise agreed in writing by such parties. 4. Before an appointment, a prospective expert or neutral shall sign a statement of acceptance, availability, impartiality and independence. The prospective expert or neutral shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's or neutral's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the expert's or neutral's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them. 5. If any party files a written objection with the Centre asserting that the expert or neutral does not have the necessary attributes, is not fulfilling the expert's or neutral's functions or is not independent or impartial, the Centre may replace the expert or neutral after having considered the observations of the expert or neutral and the other party or parties. 6. Any information or documents given to the expert or the neutral by the Centre or any party in connection with the appointment shall be used by the expert or the neutral only for the purposes of the appointment and shall be treated by the expert or the neutral as confidential.