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Expert evidence: golden tips

Economists are increasingly used as experts in arbitration and court proceedings around the world. But how can tribunals and courts best deal with complex expert evidence, and how can litigating parties use experts most effectively? Sir Bernard Eder of Essex Court Chambers, former High Court judge in the UK, and now an arbitrator and International Judge at the Singapore International Commercial Court (SICC), shares his 'golden tips'

1. Active case management by tribunal

I strongly believe that active case management by the tribunal in both litigation and arbitration is essential—in particular, to ensure that the disputes between the parties are resolved as quickly as possible at a reasonable cost. To my mind, this is particularly important with regard to expert evidence, which often represents a large element of the cost of litigation/arbitration. The tribunal should maintain a strict control on the scope of any expert evidence, including both the type of expert evidence that is permitted and the issues that the experts should deal with. If possible, this needs to be done at an early stage of the proceedings—preferably at the first directions hearing following the close of pleadings.

2. Necessary?

In the ordinary course of a case, there is no automatic 'right' to adduce expert evidence. For example, in litigation in the English High Court, CPR Part 35.4 stipulates that no party may call an expert or put in evidence an expert's report without the court's permission; and CPR Part 35.1 expressly restricts expert evidence to that which is 'reasonably required to resolve the proceedings'.[1] Such an approach is, or should be, similar in arbitration proceedings. In giving permission, the tribunal should consider not only the field in which expert evidence is required, but also the specific issues that the expert will address—and the likely costs involved. In my view, it is an essential part of active case management to consider specifically whether expert evidence is reasonably necessary both as a matter of principle and, perhaps more importantly, with regard to the precise scope and extent of any expert evidence. In many cases, the views of a so-called 'expert' are little more than a vehicle to present an argument that can equally be advanced by the party's advocate. That is often a waste of time and money. It is always important to bear in mind that the 'job' of the expert is not to tell the tribunal the answer to the dispute between the parties—that is the 'job' of the tribunal. In some cases, the best solution may be to refuse permission to adduce expert evidence until the party seeking such permission has produced a draft of the expert's report. This can then be considered by the opposing party as well as the tribunal. Further, the tribunal will then be in a much better position to decide whether or not to grant permission to allow such expert evidence to be adduced.

3. Independence

In High Court litigation, there are detailed 'rules' concerning expert evidence. For example, CPR Practice Direction 35 provides *inter alia* that expert evidence should be the independent product of the expert, uninfluenced by the pressures of litigation; and that experts should assist the court by providing objective, unbiased opinions on matters within their expertise and should not assume the role of an advocate. Again, in my view, similar requirements should apply in arbitration. That the expert should be 'independent' is important not only from an objective viewpoint. In my experience, it is usually transparently obvious when an expert is not expressing an independent view but is acting as an advocate for a particular party; and when this happens the views expressed by such an expert become of little, if any, value.

4. Questions

All too often, in my view, permission is granted to allow expert evidence without proper thought being given as to the questions that the expert needs to consider. For example, permission is sometimes granted to allow 'forensic accounting expert evidence' without any further

specificity. The result is often the production by the experts of long, rambling, unfocused expert reports going far beyond the pleaded issues. Ideally, the questions that the expert needs to consider should, so far as possible, be identified in advance and be as specific as possible. This is often not an easy task. Indeed, I recognise that in some cases, at least, this may be very difficult. However, the danger is that if this is not done, the result will be much waste of time and money later down the line.

5. Instructions

Equally, my view is that it is imperative to ensure that the instructions given to the expert are clear and precise. Needless to say, such instructions should generally be disclosed to the other party. Ideally, such instructions should be agreed between the parties so that each party's expert is provided with the same set of instructions and questions. In too many cases, the experts are given different instructions and asked to consider different questions with the result, again, of much waste of time and money—as well as much confusion. In giving such instructions, it is often important to identify what assumptions should be made by the expert. Such assumptions may vary depending on one or other party's factual evidence. Similarly, it is important to identify any relevant factual parameters. These may be of crucial significance to the views expressed by an expert.

It is a matter of some debate as to the extent of the instructions that should be given to an expert. To my mind, there is much to be said for the view that the expert should be told less rather than more. There is interesting research[2] to show that this 'minimalist' approach serves to ensure that the views expressed by the expert are likely to be more reliable because he/she will be uninfluenced by extraneous irrelevant matters. For example, a fingerprint expert who is asked to compare two sets of fingerprints does not need to have any knowledge about the 'background' to the exercise—and indeed there is a real danger that knowledge of such 'background' may wrongly infect the judgement of the expert.

6. Format and content of reports

In High Court litigation, CPR Practice Direction 35 sets out detailed requirements with regard to the form and content of an expert's report. Such requirements make good sense and should generally be followed in arbitration. Unfortunately, one of the difficulties frequently encountered is that although an expert may be at the 'top of his/her field', he/she may have little or no experience in providing a report for use in litigation, with the result that the report may not be as clear or useful as might otherwise be the case. Given the general requirement that the report should be the independent product of the expert (see above), there is no easy answer to this difficulty. In my view, the solution lies in ensuring that the original instructions given to the expert explain clearly what he/she needs to do.

7. Service—simultaneous or sequential?

This is an important question that is often overlooked but which, in my view, needs to be considered carefully. Traditionally, the general approach has been that expert reports should be exchanged simultaneously—and this is often regarded as the default rule. However, in many cases, there is much good sense in adopting a different approach—i.e. sequential exchange. This avoids the risk of reports passing each other like ships in the night, addressing different issues based on different premises—and can often save much time and money. However, I fully recognise that such an approach is not appropriate in every case.

8. Joint meeting and joint memorandum

The meeting of the experts is a very important stage in the process. The purpose of such a meeting is not merely to give the experts time and space to discuss generally the views that they have each expressed in their respective reports. More importantly, the purpose of the meeting is threefold: (i) to identify what they agree on; (ii) to identify what they do not agree on; and (iii) to explain briefly their respective reasons for any such disagreement. The result is—or should be—the joint memorandum. This is a crucial document. When considering the expert evidence, this is probably the first document that the tribunal will want to look at—if only because it identifies, or at least should identify, the differences between the experts that the tribunal will ultimately have to resolve. In effect, it tells the tribunal what it has to determine with respect to any expert issues. It is also an important document because it usually quickly reveals whether both of the experts are being sensible.

9. Supplementary report(s)

These are also crucial documents in the process—in particular because they assist in defining the issues that need to be determined by the tribunal. A short, focused supplementary report can be invaluable to the tribunal.

10. Hot-tubbing?

In theory, I am very much in favour of hot-tubbing in particular cases—for example, where there is a large number of relatively small technical issues in a construction case as set out in a detailed Scott Schedule.[3] However, I have no particular experience myself of such an exercise. In the field of competition law, the High Court used a hot-tubbing process for the first time in the 2015 *Streetmap v Google* case.[4]

11. Problems

A major problem can sometimes occur when an expert changes his/her mind. Of course, this may result in costs consequences for one or other party. But the real problem is the disruption that it may cause to the substantive hearing, particularly if such a 'change of mind' occurs close to or even during the hearing itself. The tribunal has an overriding duty to ensure that the proceedings are conducted fairly. So, faced with a change of mind, the tribunal will have to consider carefully what needs to be done. Is the change of mind dramatic or, at least, significant? Should this new evidence be excluded? Will cross-examining counsel be able to deal with this new evidence? Will the other expert(s) need additional time to consider their own evidence?

Ultimately, the hearing may have to be adjourned—but, in my view, this should generally be regarded as a last resort. And, if the hearing is adjourned, what other orders (including costs orders) should be made?

Concluding remarks

Ultimately, the task of any tribunal is to ensure, so far as possible, that the proceedings are conducted with a view to resolving the disputes between the parties fairly, within a reasonable time, and at a reasonable cost. These 'golden tips' are simply part and parcel of that overall task.

Sir Bernard Eder

This article is a summary of a talk given at 'Akin Gump Arbitration: The Expert Academy', a conference in the London office of Akin Gump Strauss Hauer & Feld LLP, 10 November 2016. The views expressed are those of the author alone.

[1] Civil Procedure Rules, as used by the courts in England and Wales.

[2] See, for example, Dror, I.E. (2011), 'The paradox of human expertise: Why experts can get it wrong', pp. 177–88, in N. Kapur (ed.), *The Paradoxical Brain*, Cambridge University Press.

[3] The purpose of a Scott Schedule is to set out in tabular form the positions of the respective parties on each item in dispute for use at the hearing of the case.

[4] [2016] EWHC 253 (Ch), judgment of 12 February 2016. On the origins and experience of hot-tubbing in Australia, see Rares, S. (2013), 'Using the "hot tub": how concurrent expert evidence can help in understanding the issues at hand', *Agenda*, November, http://www.oxera.com/Latest-Thinking/Agenda/2013/