

The Expert

The Role of the Expert in Presenting Your International Arbitration Case

The Expert

“An Expert is a man who has made all the mistakes, which can be made, in a very narrow field.”

(Niehls Bohr)

The Kiss Principle

- “The Kiss Principle or “You do not really understand something unless you can explain it to your grandmother.”
(Albert Einstein)

- “To strive, to seek, to find and not to yield.”
(Alfred Lord Tennyson)

The Expert

“Writing is Fighting”
(Mohammed Ali)

The Role of the Expert

The role of the Expert may vary and access to his/her work may be limited based upon that role.

- Consulting Expert
- Testifying Party Expert
- Testifying Rebuttal Expert
- Tribunal Expert – not Cross-Examined

Duty of the Expert

- The Expert is considered to have a duty to the Tribunal, not merely to the party that appointed him/her.
- The Expert is not an advocate.

Qualifications

- The qualifications of the Expert
 - Daubert USA
 - Ikarian Reefer English High Court (QBD)

- Standards, Duties and Independence

Documents

- ❑ In ICC Arbitration the documents that an Expert would typically rely upon for analysis in a US construction litigation matter may not always be complete or even obtainable.
- ❑ Consequently, the absence of certain documents may affect the selected analysis approach and elements of proof.
- ❑ Requests must generally be highly specific by document name not just type and justification given

Documents

- Nevertheless, the Expert should be provided with, and if necessary request, sufficient material that is relevant to his/her conclusions to perform the necessary analysis.
- “Where expert evidence refers to photographs, plans, calculations ... these must be provided to the opposite party at the same time as the exchange of reports.” [Ikarian Reefer]

Discovery limitations can impact a construction matter in several ways

- Programme (Schedule) Analysis
- Disruption/Inefficiency Analysis
- Quantum Analysis

Differing Requirements

The duties, responsibilities and report of an Expert may vary from that required by the [Federal] Rules of Civil Procedure in an ICC Arbitration.

(Rules of Civil Procedure, Rule 26(a)(1) and (2).

National laws and the Expert's Role

The duties, responsibilities and report of an Expert “across the pond” include the seven requirements.
[Ikarian Reefer]

Guidance

The Code of Guidance For Experts And
Those Instructing Them

(The Academy of Experts)

The Guidance

CPR Code of Guidance – 1st July 2004

2 Duties of the Expert Generally

2.1 An Expert witness has an overriding duty to assist the court which has the Overriding Objective of dealing with cases justly and to that end:

- 1) The Expert should provide an opinion that is independent, regardless of the exigencies of litigation. In this context, a useful test of 'independence' is that the Expert would give the same opinion if given the same instructions by an opposing party. The Expert should not take it upon himself to promote the point of view of the party instructing him (sometimes referred to as 'engaging in an advocacy role').
 - 2) The Expert should confine his opinions to matters which are material to the dispute between the parties and provide opinions in relation only to matters that lie within his expertise. Accordingly, the Expert should indicate clearly where a particular question or issue put to him falls outside his expertise.
 - 3) The Expert should take into consideration the whole of the material facts before him at the time his opinion is expressed. The Expert should indicate those facts, literature or any other material on which he has relied in forming his opinion and indicate that his opinion is provisional (or qualified, as the case may be) where he considers that further information is required or if, for any other reason, he is not satisfied that this opinion can be expressed finally and without qualification.
 - 4) The Expert should inform those instructing him without delay of any change in his opinions on any material matter and the reason therefore.
 - 5) The Expert should have regard to the content of any relevant guides published by the court before which he may appear as an expert witness.
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Expert's Report

- It is universal practice that an Expert's evidence is reduced to a written report. [IBA Rules of Evidence in International Arbitration Article 5]
- Written report is normally produced after conferencing between the respective party experts
- An Expert's report (s) in an ICC Arbitration can be distinguished in form and content.



Layout of the report

- 15.12 The Expert will give a statement of the source of instructions and the purpose of the report.
- 15.13 The Expert will include a chronology of the relevant events where there is a relevant factual history.
- 15.14 The Expert will normally set out a clear statement of the issues with which he is dealing in his report at the beginning of the report.
- 15.15 A summary of the Expert's conclusions is mandatory.²⁶ The summary should be at the end of the report after all of the reasoning. There may be cases, however, where the benefit to the court is heightened by placing a short summary at the beginning of the report whilst giving the full conclusions at the end. For example, it can assist with the comprehension of the analysis and with the absorption of the detailed facts if the court is told at the outset of the direction in which the report's logic will flow in cases involving highly complex matters which fall outside the general knowledge of the court.

CPR Code of Guidance – 1st July 2004

Expert's Report

□ The Expert's report should summarize the facts or instructions given to the Expert which are material to the opinions expressed or upon which opinions are based.

□ It must set out the expert's method and the evidence and information used in reaching its conclusions.

Expert's Report

The Expert's report must clearly distinguish between those facts the experts knows to be true, those facts he has assumed, and those facts he has been instructed to assume.



Expert's Report

The Expert's report must be verified by a statement of truth.

Statements of truth and duty to the court

15.21 The wording of the mandatory statement of truth must not be modified;³² that statement, together with the mandatory statement that the Expert understands his duty to the court and has complied with that duty, must be placed at the end of the report³³ and may be incorporated in an Expert's Declaration.

15.22 The Expert must declare that the report has been prepared in accordance with this Code and the requirements of the Civil Procedure Rules.

2.4 The form of the statement of truth is as follows:

'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.'



EXPERT'S DECLARATION



For all civil cases in England & Wales under CPR this Declaration should be inserted into the Expert's Report between the end of the report and the Expert's signature.

I.....DECLARE THAT:
[INSERT FULL NAME]

1. I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.
3. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
4. I have shown the sources of all information I have used.
5. I have not without forming an independent view included or excluded anything which has been suggested to me by others including my instructing lawyers.
6. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.
7. I understand that;
 - a) my report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath or affirmation;
 - b) I may be cross-examined on my report by a cross-examiner assisted by an expert;
 - c) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
8. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

Expert's Appointment

Experts may be appointed by the Tribunal whose role in arbitration may require that they communicate directly with the parties' expert absent the presence of party counsel.

- 21.3 The purpose of all discussions between Experts, and the Experts' duty, is, wherever possible, to:
- 1) Narrow the issues in the case;
 - 2) reach agreement on any Expert issue;
 - 3) identify the reasons for disagreement on any Expert issue;
 - 4) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.

CPR Code of Guidance – 1st July 2004

When the Experts Agree

From CPR: CPR Code of Guidance - 1st July 2004

22 Parties' Duty to Consider Being Bound by Agreements Reached Between Experts

22.1 The parties may agree to be bound by any agreement that had been reached at an Experts' discussion. The parties have a duty, implied by the overriding objective to consider agreeing to be bound by agreements reached by their Experts. Accordingly, where a party refuses to be so bound, it should record its reasons."

Questions to the Experts

- 5.1** Questions asked for the purpose of clarifying the expert's report (see rule 35.6) should be put, in writing, to the expert not later than 28 days after receipt of the expert's report (see paragraphs 1.2 to 1.5 above as to verification).

Demonstrative Evidence

- Demonstrative evidence is more and more common, but not universally accepted in many countries.
- How do you put on demonstrative evidence when you have a written statement as evidence in chief?

Expert Witness Preparation

Expert witness preparation varies from country to country and therefore may be viewed differently by tribunal members.

Oral Testimony

ICC Arbitration offers the possibility of oral testimony in various ways or not at all.

[Art. 20(3)]

Questions?

www.thelenreid.com

www.paiworld.com