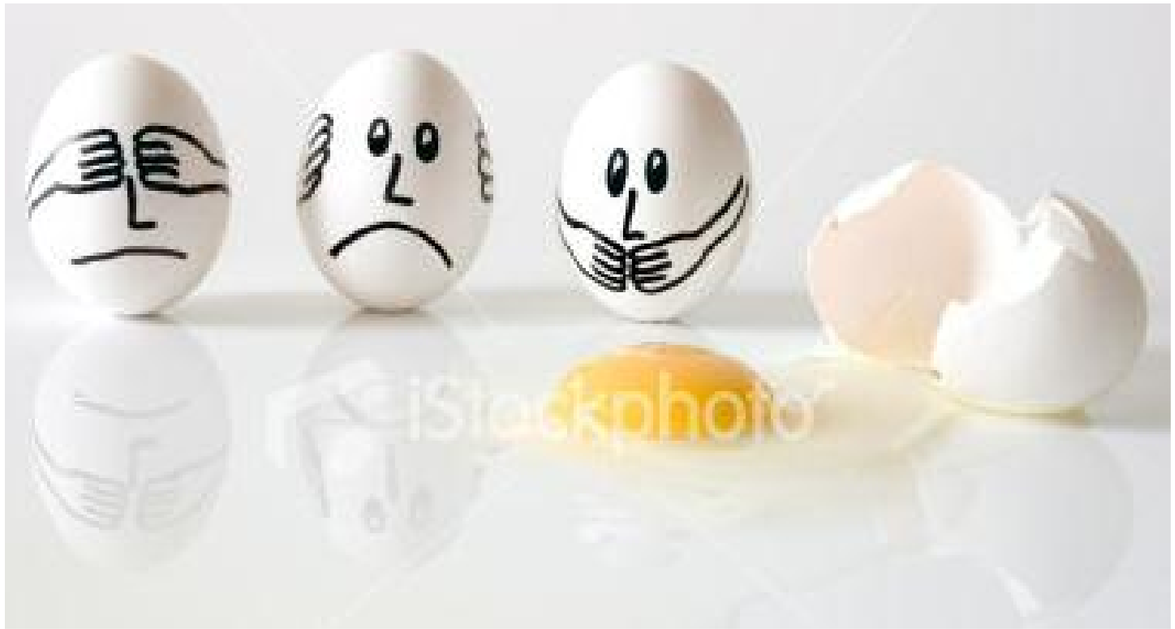
THE BEST EVIDENCE MONEY CAN BUY

International construction law expert** Doug Jones **reviews recent moves to try and make expert witnesses more loyal to the truth than to their clients



The use of expert witnesses hired by parties in a dispute has been the subject of much attention in recent years, both in the context of domestic judicial systems, as well as in international arbitration.

That's because they tend to be perceived as 'hired-guns', tailoring their evidence to positively reflect upon the party by whom they were appointed. This situation is exacerbated when parties and tribunals operate on an implicit understanding that this, indeed, is their role.

In some domestic jurisdictions, such as Denmark, the judicial culture is so resistive to party-appointed expert witnesses that such evidence is rarely admitted.[1] But in international arbitration the use of expert witnesses is widespread and arbitrators are often left with the challenge of determining the accuracy and veracity of conflicting expert evidence.

Conflicting expert evidence is not of itself necessarily problematic, and is a natural consequence of probing areas of complex, specialist knowledge. But when this conflict arises due to the reticence of the experts to depart from the 'party line', the fundamental utility of expert evidence is called into question.

The adversarial nature of the common law tradition, and that of many international arbitrations, can account for this attitude in several ways.

First, the simple fact that the expert is appointed, instructed and paid by a particular party can result in a feeling of loyalty toward that party. Particularly where the expert seeks to be appointed by that party in future disputes.

Second, the confrontational cross-examination environment can put experts on the defensive and generate a fear that his or her credibility is being attacked. This can result in a reluctance to concede that certain parts of the tendered evidence are not as concrete as may otherwise be thought.

Finally, as recognised by a former member of the Council of the Australian Medical Association, there is a reluctance amongst professionals to subject themselves to the rigorous process of providing independent expert evidence when the conflicting evidence of an expert acting as a 'hired-gun' is accepted, despite lacking scientific credibility.[2]

WINDS OF CHANGE

In 1996 the UK's 'Master of the Rolls' Lord Woolf produced a report which expressed concern over the excessive costs and delay involved in litigation.[3] One of the issues he identified was the uncontrolled proliferation of expert evidence and the lack of impartiality on the behalf of party-appointed experts.

The 'Woolf Report' was immensely influential and sparked reforms in the UK and other countries of the common law tradition. Many of these reforms relate to methods of enhancing the independence of experts. For example, in the UK the Civil Justice Council drafted a Protocol for the Instruction of Experts to give Evidence in Civil Claims, which since 5 September 2005 applies to all steps taken by experts or by those instructing experts. It sets out matters such as:

- the importance of experts to litigation;
- the duties owed by experts (and the need to balance the duty of reasonable skill and care owed to the retaining party with the overriding duty of the court);
- the considerations that ought to be taken into account when evaluating whether expert evidence is necessary in any given case; and
- the contents of experts' reports, including a standard statement which that must be included at the end of all reports, verifying the truth of the statement and the completeness of the opinion (the wording of which is mandatory).

These reforms provide the context for the creation of the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules on Evidence") in 1999 and the Chartered Institute of Arbitrators' Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration ("CIArb Protocol") in 2007.

The IBA Rules on Evidence are commonly used in international arbitrations, but they have been criticised for inadequately dealing with the issue of party-appointed expert's independence. For example, they require experts appointed by the *tribunal* to provide a statement of independence from the parties and the tribunal *prior* to accepting an appointment (Article 6), but they do not impose the same obligation on *party*-appointed expert witnesses. This was notable, given the greater risk of bias toward the appointing party compared to tribunal-appointed experts.

The 2010 amendments to the IBA Rules rectified this deficiency to a degree. Article 5 now requires the party-appointed expert's report to contain a statement of independence from the parties, from their legal advisors and from the arbitral tribunal. This requirement is not as robust as that for tribunal-appointed experts who must provide a statement of independence before appointment, thereby ensuring the expert's mind is focused upon his or her paramount duty to the tribunal before he or she has a chance to identify with the case of either party. Nevertheless, the revision is a step towards ensuring the arbitral tribunal is better able to assess the weight that should be accorded the expert's evidence.

The 2010 IBA Rules on Evidence also include a provision, at Article 5(2)(b), requiring the expert to provide a description of the instructions which they have received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would affect the expert's impartiality. However, this requirement needs to be carefully considered given that the CIArb Protocol and the IBA Rules on Evidence are designed to operate in conjunction with one another. The CIArb Protocol provides that while instructions are not "privileged", they should not be ordered to be disclosed by the arbitral tribunal without good cause. As such, Article 5(2)(b) of the IBA Rules should be understood to require that the description of the instructions received by the expert must always be provided, but the instructions themselves should only be requested by the arbitral tribunal when there is good cause for doing so, for example where the expert's impartiality comes into question.

The CIArb Protocol has been structured along similar lines to the IBA Rules on Evidence, with the aim of enabling an arbitral tribunal to include in its directions "expert evidence shall be adduced in accordance with the CIArb Protocol". The drafters have also endeavoured to align the Protocol with the IBA Rules on Evidence by ensuring that the language is consistent, if not identical. Given the increasingly wide acceptance of the IBA Rules on Evidence, this is an important and useful feature. The CIArb protocol is intended to provide more detailed guidance than the IBA Rules on Evidence, for example, on what should and should not be in an expert's written opinions. The Protocol also caters for tests and analyses to be conducted, which the IBA Rules on Evidence do not.

The CIArb Protocol goes some way to enhancing the independence of party-appointed expert witnesses and their usefulness to the tribunal by picking up on many of the reforms that have been implemented by national courts. Article 4 states that an expert that gives evidence in the arbitration shall be independent of the party which appointed the expert, and payment of reasonable professional fees will not itself vitiate this independence. The CIArb Protocol contains three additional clear statements of the principles of independence:[4]

- an expert's duty in giving evidence is to assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced;
- an expert's opinion should be independent, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party; and

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- the expert's opinion must include an expert declaration in the form set out in Article 8 (declaring that the opinion provided conforms with these requirements).

The reforms outlined here can potentially add to the efficient and effective use of expert evidence, and they are a step in the right direction. But what is still needed is an assessment across the board of the value of recent litigious developments in order that the lessons learned in court may be applied with equal success by the arbitral tribunal, and the establishment of a framework by which such measures can be effectively implemented and enforced. *ICON*

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1. Jacob C Jorgensen, 'Expert Witnesses in Danish Arbitration' (2008) 26(3) ASA Bulletin 479, 480.
2. M Nothling, Expert Evidence: The Australian Medical Association's Position. www.aija.org.au/info/expert/Nothling.pdf.
3. Right Hon. Lord Woolf MR, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996).
4. CIArb Protocol Articles 4.1, 4.3 and 4.4(k).