

Use of Experts in International Arbitration

Dispute Resolution Expert Talks

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Overview

- 1 Civil and Common Law Approaches
- 2 Implications for International Arbitration
- 3 International Arbitration Guidelines
- 4 Proactive Case Management Strategies

Civil and Common Law Approaches to Experts

- Civil law:
 - » Court appointed experts.
 - » Remunerated by the party which bears the litigation costs.
 - » Inquisitorial.
 - » Narrative form.
- Common law:
 - » Party appointed experts.
 - » Remunerated by the appointing party.
 - » Adversarial.
 - » Cross-examination.

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Implications for International Arbitration

- Use of party appointed experts in international arbitration is widespread.
 - » Both common law and civil law lawyers are grappling with the challenges associated with party appointed experts.
- Avoiding the "hired gun" in expert evidence.
 - » Ensuring experts remain independent.

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International Arbitration Guidelines



IBA Rules on the Taking of Evidence



Chartered
Institute of
Arbitrators

CIArb

CIArb Protocol for the Use
of Party Appointed Expert
Witnesses

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Proactive Case Management Strategies

- ▶ Innovative case management practices developed in common law courts have inspired developments in international arbitration.
- ▶ Proactive management of expert evidence is critical.
- ▶ Three strategies which span the arbitration:
 1. Managing expert evidence;
 2. Streamlining the exchange of expert evidence; and
 3. Expert assistance with the award and quantum calculations.

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Proactive Case Management Strategies

1. Managing Expert Evidence

2. Exchanging Expert Evidence

3. Assistance with the Award

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1. Managing Expert Evidence

- ▶ Early identification of experts and disciplines.
 - » Confirm the independence of experts.
- ▶ Creating a list of expert issues.
 - » Identify issues upon which experts of like discipline will opine.
 - » Eliminates any uncertainty and inconsistency.
- ▶ Common assumptions and methodologies.
 - » Analysis based on alternate assumptions and methodologies.
 - » Uncover areas of actual expert disagreement.
- ▶ Common data sets.
 - » Ensuring experts have access to the same materials.

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Proactive Case Management Strategies

1. Managing Expert Evidence

2. Exchanging Expert Evidence

3. Assistance with the Award

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2. Exchanging Expert Evidence

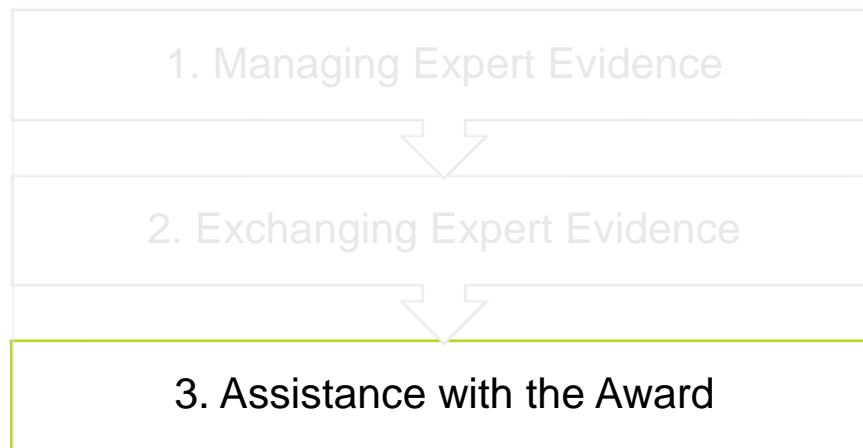
- ▶ Conferral between experts of like discipline.
 - » Producing joint reports identifying matters of agreement and disagreement.
 - » Subsequent individual report confined to areas of disagreement.

- ▶ Hot-tubbing.
 - » Streamlining expert issues.
 - » Enables consensus to be reached.

- ▶ Without the conferral process, the effectiveness of hot-tubbing is reduced.

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Proactive Case Management Strategies



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3. Assistance with the Award

- ▶ Relational data model.
 - » Created using the mathematical methodology of quantum experts.
 - » Calculations are based on Tribunal's findings.

- ▶ Joint assistance from experts of like discipline after the hearing.
 - » Economical.
 - » Experts confer and generate calculations based on Tribunal's findings.
 - » Communication between experts and Tribunal must be confidential.

- ▶ These processes provide greater accuracy and efficiency in calculating quantum.

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Concluding Remarks

1. Overriding duty of experts is to assist the Tribunal.
2. Experts should be impartial and independent from the party by whom they are appointed.
3. Key to best practice: international guidelines in conjunction with proactive case management strategies.

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