Experts in Arbitration

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As is the case in domestic litigation, subject matter experts frequently play an important role in the resolution of arbitrated disputes. Sometimes, either through incorporation of state or federal rules of civil procedure or simply as a matter of habit, the manner of dealing with experts in arbitration closely resembles domestic court proceedings. In other cases, especially in international arbitral proceedings, the manner of dealing with experts is quite different from what United States-based litigators are accustomed. This paper provides a general outline of the subject and discusses some key topics regarding the appointment and use of experts in arbitral proceedings.

**TYPES OF EXPERTS**

It is first important to distinguish the types of experts commonly found in arbitral proceedings. This paper primarily will consider party- and panel-appointed experts. Party- and panel-appointed experts are witnesses intended to assist the arbitrators in deciding issues before them. As witnesses, they do not make decisions even if the arbitral tribunal appoints them to be special masters. At most, they make recommendations to the arbitral tribunal on specific issues.

There are two other major categories of experts commonly used in arbitration: experts as decision-makers in expert proceedings and experts as arbitrators. Experts as decision-makers in expert proceedings make final determinations on issues within their designated jurisdiction. Typically, these decisions are subject to review by arbitrators under standards set forth in the parties’ arbitration agreement or by domestic courts where there is no arbitration agreement. For example, the parties may have set forth formulae or procedures the expert must follow when conducting the expert proceedings. Where there is an arbitration agreement, the agreement may give to arbitrators the power to determine whether the expert properly followed the contractual instructions. Ultimately, in that case, the arbitrators determine whether to confirm or vacate the expert’s determination. The arbitrator’s decision is then subject to customary judicial standards of review in the appropriate jurisdiction.

Sometimes, parties designate experts as the arbitrators of a particular dispute. When designated as arbitrator, the expert has all the powers of an arbitrator subject only to the customary judicial standards of review in the appropriate jurisdiction. The key difference between an expert proceeding and an expert as arbitrator is that an expert proceeding lacks the legal status of an

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arbitration award. That is, the decision in an expert proceeding cannot be turned directly into a judgment as can be done with an arbitration award. Typically, contracts that include expert proceedings provide a procedure for the expert determination to be confirmed by arbitrators so that the resulting arbitration award can be turned into a judgment.

Although this paper discusses some aspects of expert determinations to the extent those proceedings are imbedded within arbitration agreements, this paper primarily concerns experts acting as witnesses in arbitrations.

**CONTRACTUAL TREATMENT OF EXPERT WITNESSES IN ARBITRATION**

Fundamentally, arbitration agreements treat the topic of expert witnesses in three ways. First, some arbitration agreements expressly deal with the topic of expert witnesses. This is common for commercial contracts that provide for resolution of technical and quasi-technical disputes through the arbitration process. For example, a contract that requires the redetermination of equity interests in an oil and gas field frequently will provide for expert witnesses on topics related to oil and gas field development and production. The contract may go so far as to regulate how and in what manner the expert information will be presented to the arbitral tribunal, including data collection and formulae and procedures to be followed by any expert witnesses when rendering relevant opinions.

Second, many arbitration agreements do not expressly deal with the topic of expert witnesses. Instead, they will rely on incorporation of external standards that may expressly deal with the issue, including arbitration rule sets, domestic civil procedure laws that regulate expert witnesses, or non-contractual guidelines, such as the International Bar Association’s Rules on Taking Evidence in International Arbitration. The arbitration rule sets incorporated into the parties’ arbitration agreement may provide no guidance, leaving such issues to the discretion of the arbitrators.

For example, arbitration agreements that incorporate the American Arbitration Association’s (AAA) International Dispute Resolution Procedures have, by such incorporation, agreed to Article 22(1), which grants to the arbitral tribunal the right to appoint “one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.”¹ There are, however, no express rules concerning party-appointed experts. Instead, Article 20(6), provides that “[t]he tribunal shall determine the admissibility, relevance, materiality[,] and weight of the evidence offered by any party.” This general provision gives the arbitral tribunal the authority to accept or reject expert evidence proffered by the parties.²

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² See also the American Arbitration Association’s domestic commercial arbitration rules, which do not expressly provide the arbitral tribunal with authority to appoint an independent expert or address party-appointed experts, but instead have general Rule 31(b), which provides the arbitrators with authority to “determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.” Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures (2013), available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.
Other common rule sets are similarly general in their treatment of expert evidence. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provide the authority for the arbitration tribunal to appoint an expert (Article 29), but provide no detail regarding party-appointed expert witnesses, other than to acknowledge a party’s right to offer such evidence (Articles 17 and 27). 3 The 2007 CPR Rules for Non-Administered Arbitration from the International Institute for Conflict Prevention and Resolution (CPR) provide for the possibility of an arbitrator-appointed expert (Rule 9.3(d)), but otherwise give the tribunal procedures for the arbitral tribunal to consider expert evidence.

Some rule sets do provide detail regarding expert witness procedures. For example, JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules), Rule 20, generally permits parties to submit expert reports for consideration by the arbitrators, and Rule 22 gives the arbitrators authority to accept or reject such evidence. 5 JAMS Rules 16.1 (Expeditied Procedures) and Rule 17 (Exchange of Information) expressly deal with the manner of exchange of expert information. The International Chamber of Commerce (ICC) Arbitration Rules 6 and ICC ADR Rules, which were recently replaced by the ICC Mediation Rules, 7 similarly provide procedures for the arbitral tribunal to consider expert evidence.

If incorporated into the parties’ arbitration agreement, the IBA Rules for the Taking of Evidence in International Arbitration (IBA Rules on Evidence) provide reasonable guidelines for both party and tribunal-appointed experts in Articles 5 and 6, including what must be provided as to the identity of the expert and support for the proffered expert’s expertise; the form and content of any expert report; and whether the expert must attend the hearing. 8

8. See Article 25(3)-(4), Article 37(1), and Appendix IV (Case Management Techniques) of the ICC Rules of Arbitration. Id.
Third, arbitration agreements that do not incorporate arbitration rule sets rely on the law of the seat to provide rules with respect to expert witnesses. For arbitrations held in the United States, either state or federal arbitration laws may be expressly or implicitly incorporated into their arbitration agreements. Those agreements that incorporate United States federal law under the *Federal Arbitration Act*, by implication, leave the issue of expert witnesses to the discretion of the arbitrators because the *FAA* does not otherwise deal with expert evidence. On the other hand, if the parties have expressly incorporated the Federal Rules of Civil Procedure (FRCP) to govern disclosure in the arbitration proceedings, FRCP Rule 26 governs the identification of expert witnesses, the contents of expert witness reports, and the deposition of experts.

Similarly, if the parties incorporate state civil procedure laws, those laws will govern disclosure of expert witnesses. For example, those arbitration agreements that incorporate California Code of Civil Procedure regarding discovery thereby include Sections 2034.210 to 2034.310, which provide detailed requirements for expert witness disclosure in California state court proceedings, into their arbitration agreements.

Where the parties’ arbitration agreement does not expressly deal with experts or incorporate sufficiently detailed rules that provide necessary procedures, the parties and arbitration tribunals should draft rules on an ad hoc basis as a part of the directions or procedural orders governing the arbitration. Failure to have a sufficiently detailed set of rules agreed upon by the parties or imposed by the tribunal can lead to surprise at the arbitration hearing and, consequently, the potential for unfairness.

**Suitability of Expert Evidence**

It is generally the case that, unless expressly limited by the parties’ arbitration agreement, the decision to include or exclude proffered expert evidence is left to the discretion of the arbitrators under their general authority to determine the relevancy, admissibility, and weight of evidence. This vague standard is quite a departure from the legal standards applied in federal and state courts in the United States. The United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), set the standards for federal courts to act as gatekeepers when determining whether to admit expert evidence, including both the topic of the evidence and the quality and methods used by the expert. The effect of *Daubert*, its progeny, and the state analogues is to place the burden on the party offering expert evidence to show that the expert evidence is relevant, scientifically reliable, and uses accepted methods and means to render an opinion.

Unless the federal rules, or similar rules in another jurisdiction, are expressly incorporated into the parties’ arbitration agreement, the arbitrators have broad discretion to accept or reject expert evidence. Indeed, because there is no enforcement penalty when arbitrators hear evidence—no matter how weak—and because there may be an enforcement penalty if arbitrators are found to have excluded relevant, material evidence, one can expect tribunals to liberally grant requests to introduce expert evidence, no matter how unscientific or tangentially relevant it might actually be. As a result, one can expect a much wider range of accepted expert evidence in arbitration.

Parties frequently offer expert evidence on foreign law, accounting, assessors, valuations, construction engineering, medical evidence, oil and gas engineering problems, and all manner of other areas of technical expertise. In addition, one could expect to see other areas of proffered expert evidence that might not meet Daubert-like standards if offered in court. For example, the LACBA’s Southern California Directory of Experts and Consultants includes topics such as “Travel and Tourism,” which might have trouble meeting the Daubert standard, no matter how experienced the proposed expert might be. The potential breadth of expert “evidence” available in arbitration leads to the use of experts for a very broad variety of topics, and the lack of a common gatekeeper standard to govern the quality of the evidence provided means that tribunals are left to hear all the proffered evidence even if the weight ultimately given may be low (if, of course, the tribunal recognizes sham science when it sees it).

**DISCLOSURE OF EXPERT WITNESS REPORTS**

The manner and extent of disclosure of expert witness reports is governed by the arbitration agreement and the rules incorporated into the agreement. The key problem with expert witness disclosure is assuring that each party’s expert and the tribunal have enough information from the other party’s expert to understand the expert’s qualifications and potential biases and to be able to reproduce the other expert’s work, including all opinions, identification of the supporting data, and any assumptions used by the expert. Article 5.2 of the IBA Rules on Evidence provide a good framework for the content of the expert’s report:

The Expert Report shall contain:
(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors[,] and the Arbitral Tribunal, and a description of his or her background, qualifications, training[,] and experience;
(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
(c) a statement of his or her independence from the Parties, their legal advisors[,] and the Arbitral Tribunal;
(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
(e) his or her expert opinions and conclusions, including a description of the methods, evidence[,] and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(h) the signature of the Party-Appointed Expert and its date and place; and
(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
Rule 26 of the Federal Rules of Civil Procedure and state codes of civil procedure provide similar requirements for the contents of expert reports. Very few arbitration rule sets, however, provide sufficient detail for the contents of expert reports to avoid the serious pitfalls that come with vague and inadequately documented expert reports. Accordingly, it is recommended that, if the parties’ arbitration agreement does not include detail of the type provided for in the IBA Rules on Evidence or FRCP 26, the parties should ask the arbitrators to include such requirements as part of their directions or procedural orders.\(^\text{10}\)

In addition to basic rules of disclosure and discovery, the parties should decide on the extent to which interactions between counsel and the expert, including instructions, communications, and drafts of the expert report, should be disclosed as part of discovery. Aficionados of United States court procedures are familiar with the traditional rule that, once an expert has been formally designated, work product and attorney-client privileges are no longer effective. Recent changes to FRCP 26, however, have excluded from disclosure and discovery draft expert reports and all but certain specific categories of communications between counsel and expert.

Rules concerning disclosure differ depending on the jurisdiction. Accordingly, in one jurisdiction, counsel communications with the expert may be subject to disclosure, whereas the same types of communications will not be subject to disclosure in another jurisdiction. Typically, the arbitration rule sets provide for the arbitrators to determine which disclosure rules will be applied in the subject arbitration through determination of applicable procedural law. To the extent the parties have elected to incorporate the IBA Rules on Evidence, Article 9 of those Rules provides a robust framework for making determinations on these issues. To avoid surprise in this area of disclosure, it is best practice either to agree with opposing counsel on the rules of disclosure or take up the issue with the arbitral tribunal at the earliest opportunity to make sure everyone knows and is playing by the same rules.\(^\text{11}\)

**PARTY- AND TRIBUNAL-APPOINTED EXPERTS AS WITNESSES IN ARBITRATION PROCEEDINGS**

In the end, the point of expert evidence is to persuade arbitrators to decide a technical issue in a particular manner where the arbitrator probably lacks the technical expertise to determine whether the expert evidence is right, wrong, or somewhere in the middle. The customary process to test opposing expert reports through cross-examination can be very frustrating for arbitrators, who are not greatly assisted in determining the “correct” outcome, even by the most effective cross-examination. This feeling of discomfort with the customary means of testing expert evidence has led to some experimentation in arbitration.

**JOINT REPORTS AND WITNESS CONFERENCING OF PARTY-APPOINTED EXPERTS**

One of the mechanisms frequently used by arbitrators is to require the opposing experts to meet and prepare a joint report isolating the agreements and disagreements between them. Article 5.4 of the recently amended IBA Rules on Evidence expressly provides for this procedure:

\(^\text{10}\) See also CIARB PROTOCOL, supra note 9.

\(^\text{11}\) See id. at art. 5 (Privilege).
The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement[,] and the reasons therefore.¹²

Although this procedure has a good ring to it and appears constructive, there are plenty of problems lurking beneath the surface. First, there is no indication as to whether counsel for the parties may attend and participate in the joint expert meeting or in the drafting of the joint expert report. To the extent counsel are permitted to be present and participate, the process becomes less useful to the arbitrators because advocacy may overtake any real attempt to reach agreement. To the extent counsel are not permitted to be present or participate in the drafting of the joint report, counsel may appoint experts based on the expert’s willingness to understand and advocate the appointing party’s commercial or technical position rather than on the expert’s technical expertise. In any event, the joint expert report procedure adds time and cost to the proceedings, perhaps with little to show for it.

Another experiment in expert evidence presentation is so-called “hot tubbing” or joint conferencing, which is a procedure whereby experts on the same topic appear simultaneously at the arbitration hearing.¹³ In joint conferencing, the experts comment on each other’s testimony and may be asked to respond to questions posed by the arbitrators, counsel for the parties, and the other expert. The idea behind this procedure is to isolate areas of agreement and disagreement by having the experts expose their agreements and disagreements in real time in front of the tribunal. Hot tubbing may extend the hearing time and make it difficult for counsel to control the examination, but it may have more upside potential than joint expert reports.

Of course, the parties can simply revert to the traditional means of testing expert evidence through direct and cross-examination. Counsel often prefer the traditional cross-examination method to test expert evidence because it gives them more control over the framing of the issues in dispute. Tribunals generally have the flexibility to accept the expert’s report as the expert’s direct examination and then require the expert to sit for cross-examination. In that regard, many rule sets allow the arbitrators to disregard expert evidence where the expert refuses to sit for cross-examination.¹⁴

**TRIBUNAL-APPOINTED EXPERTS**

It is axiomatic that parties do not appoint experts who do not support their case. Thus, notwithstanding any requirements of independence in the parties’ applicable rules governing expert evidence, there can be little doubt that a party’s expert evidence will support that party’s case. Indeed, there is little doubt that the party-appointed expert will have been paid significant

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¹² *IBA Rules on Evidence, supra* note 9.
¹⁴ See *IBA Rules on Evidence, supra* note 9, at art. 5(5).
sums to prepare a supportive expert report. This phenomenon has led to justifiable skepticism of party-proffered expert evidence and has encouraged the practice of tribunal-appointed experts.

As noted above, many rule sets and arbitration laws allow the arbitral tribunal to order the appointment of a neutral expert. The UNCITRAL Model Law on International Commercial Arbitration (Model Law) provides in Article 26:

(1) Unless otherwise agreed by the parties, the arbitral tribunal
   (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
   (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods[,] or other property for his inspection.
(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.\textsuperscript{15}

ICC Rule 25(4) similarly provides that: “The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference[,] and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.”\textsuperscript{16} Article 6.1 of the IBA Rules on Evidence provides:

The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.\textsuperscript{17}

For arbitral proceedings where technical issues are at the core of the commercial outcome, the appointment and terms of reference for the tribunal-appointed expert are critically important. Although subject to cross-examination by the parties and confirmation by the arbitral tribunal, parties should expect the arbitral tribunal to consider the conclusions of its own appointed expert to be presumptively correct.

There are organizations that will act as the appointing authority for tribunal-appointed experts. For example, the ICC, by means of its Rules for Expertise, will make a binding appointment of

\textsuperscript{16} See ICC Case No. 6497 (1994) (tribunal-appointed independent accounting firm as expert).
\textsuperscript{17} See also Chartered Inst. of Arbitrators, Practice Guideline 10: Guidelines on the Use of Tribunal-Appointed Experts, Legal Advisers and Assessors, supra note 9.
an expert when it is satisfied that it has jurisdiction to do so. The relevant ICC National Committee, as determined by the ICC, generally appoints the expert in such cases. This usually means the National Committee at the seat of the arbitration will select the expert based on the submissions of the parties. As is usual with ICC Court proceedings, this is something of a black box procedure lacking the transparency one would hope for in this process.

Organizations acting as appointing authorities for expert witnesses should and often do permit challenges for cause to the selected tribunal-appointed expert. Challenges are either resolved by the appointing authority or the arbitral tribunal. A key challenge in the selection of a tribunal-appointed expert is the tension between the proposed expert’s notoriety in the field of expertise and the likelihood that the more well-known an individual expert or expert firm is, the more likely the proposed expert will have been employed by one or both of the parties. In addition, there are many fields of expertise where the likely candidates for expert are not professional neutrals, but instead regularly work in the field for companies like the parties in the subject dispute. Because experts are appointed in the event of disputes between parties who may be past or future customers, there may be a natural reluctance for qualified experts to take on what may be a one-time position as neutral expert when the outcome may very well cause one or more of the parties to strike the expert or the expert’s firm from the list of potential vendors.

As a result of these challenges, it is important that the expert selection process be transparent, especially where the tribunal must appoint an individual or a firm that does not regularly perform the role of a neutral in arbitral or expert proceedings. This step is important to maintain the credibility of the proceedings and to limit the likelihood of post-arbitration challenges to the expert’s conduct. In that regard, there are many jurisdictions where an expert not acting as an arbitrator lacks the immunities available to the tribunal and, therefore, may be subject to civil actions for negligence in the conduct of the expert’s duties.

**COST CONSIDERATIONS**

Experts can be very expensive. If each party hires an expert, double the cost. If the tribunal adds its own appointed expert, triple the cost. Loser generally pays for all of them. For many cases, the parties have multiple experts, doubling, trebling, or quadrupling the expert costs. The more well-heeled party may hire more experts than the financially challenged party, thereby potentially gaining an advantage in the arbitration proceedings. Worse, the arbitral tribunal could, by hiring its own experts and requiring the parties to pay for the expert’s work in advance (subject to later allocation), cause one or the other party to default for lack of funds.

It is not just the number of experts that drives up costs. Because it frequently is difficult to predict exactly what the other side is up to, parties often over instruct their own experts under the view that one can always delete unnecessary portions of a report, but it is difficult under the press of time to catch up to an unexpected expert issue. All this leads to the conclusion that there

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19 See, e.g., id. at art. 7.
20 See ICC Case No. 6497 (1994) (accounting firm recused itself from serving as an expert because it might jeopardize relationship between expert’s affiliate and affiliate of a party).
must be some way to get a handle on expert costs while still providing the tribunal with assistance. Although the parties’ counsel may be of a mind to cooperate to limit the numbers and scope of expert issues by agreement, ultimately, it will be up to the arbitral tribunal to establish procedures that will narrow the use of expert evidence to only those topics that are suitable for expert evidence and are pivotal to the resolution of the dispute.

The parties and tribunal also may consider efficiency measures designed for the particular issues in the case at hand. For example, in a matter involving compliance with the Americans with Disabilities Act, there are two types of expert issues. First, there are the relevant physical facility measurements to be determined. Second, there is the opinion as to whether such measurements are in compliance with the law or constitute reasonable accommodations. For the measurement issues, it seems unnecessary and costly to hire two experts to make what should be non-controversial physical measurements. Why not hire a single expert to make the measurements to form the database for use by the parties’ experts on compliance and reasonable accommodation? The parties then can bid out the work jointly and negotiate a joint contract with the expert.21

There are many kinds of cases where the bases of expert opinions rely on non-controversial measurements or calculations. Opinions of value may rely on sales data. Why have two experts spend time and money compiling the same set of data? A dispute may hinge on resolution of the appropriate assumptions to be used when putting data into a formula. Why not have a joint expert prepare the calculations using both sets of alternative assumptions to prevent duplication of non-controversial calculations? The party-appointed experts can then limit their testimony to support of one set of assumptions or another. The valuation of an oil and gas field may rely on a common set of well data and seismic surveys. Why not have a joint expert compile the data into a common dataset for use by the parties’ appointed experts?

In the end, if parties and tribunals cannot identify means to lower the costs of expert evidence, arbitration very well may lose its allure to parties deciding whether to insert arbitration clauses into their contracts.

**SOME STRATEGIC CONSIDERATIONS**

**TRIBUNAL-APPOINTED LEGAL EXPERTS**

There commonly are two types of situations where an arbitral tribunal considers it useful to appoint a legal expert. First, when an arbitral tribunal is comprised entirely of non-lawyer, subject matter experts, as is often the case in construction or accounting arbitrations, the tribunal may consider it helpful to hire a legal expert to deal with the parties’ legal arguments. In that event, the legal expert appointed by the tribunal will make recommendations to the tribunal as to how to rule on the parties’ legal arguments. Essentially, it is the reverse of the situation where a lawyer-dominated tribunal appoints subject matter experts for advice.

The second common situation is when the law of a particular jurisdiction governs a contract, but none of the members of the tribunal has expertise in the law of that particular jurisdiction. The

21 See Moeller v. Taco Bell, 816 F. Supp. 2d (N.D. Cal. 2011) (parties stipulated to a joint expert to take ADA measurements at Taco Bell’s California outlets).
tribunal may appoint an expert in the law of the relevant jurisdiction to advise on any legal issues that might arise that depend on such law.

Practitioners may not be happy with either situation, especially if the tribunal is left to appoint the legal advisor. The parties may have in mind appointing a former high court judge, while the tribunal may have in mind a lawyer with some subject matter expertise. Unless the arbitration agreement provides for the parties to select the legal advisor, they will be somewhat at the mercy of the tribunal’s selection, except for viable conflicts of interest.

Whoever is selected as legal advisor effectively acts as a filter between the advocates and the tribunal on the relevant legal issues. Although some rules and mandatory law at the seat may require that the parties be given an opportunity to question the tribunal-appointed expert (e.g., Model Law Article 26), such questioning may not be a very satisfactory means to persuade the decision-makers on challenges to the tribunal-appointed legal expert’s conclusions. Because the tribunal is likely to accept whatever its own appointed legal expert might conclude on issues within the expert’s mandate, the parties’ counsel are left to trying to persuade the appointed expert, frequently without the usual procedural briefings and oral argument.

Strategically, there are three stages in the arbitration process when the parties can deal with this issue. First, the parties can draft into their arbitration agreement provisions that prohibit the hiring of a legal expert, require that at least one of the arbitrators have expertise in the law of the relevant jurisdiction, or give themselves the power of selection should the tribunal determine to appoint a legal expert.

The next stage is during the arbitrator appointment process. Any party very concerned about the possible selection of a legal expert may nominate as its party-appointed arbitrator (if such appointment is available under the particular arbitration agreement or incorporated rule set) an arbitrator with legal background in the law of the subject jurisdiction. Indeed, even in cases calling for appointment of subject matter experts as arbitrators, there frequently are subject matter experts who also have law degrees.

Finally, when drafting the directions for the arbitral proceedings, the parties can agree on the means and manner in which the tribunal may appoint a legal expert. Party autonomy means that even if the tribunal would rather select the legal expert using its own criteria, the parties can mandate a process to their joint liking.

**Expert Proceedings Imbedded Within Arbitrations**

Contracting parties frequently foresee technical disputes with commercial consequences. As a result, many arbitration agreements provide for expert proceedings within the context of a commercial arbitration. That is, the parties call for the appointment of an expert to resolve a technical issue required for the resolution of a commercial dispute. The expert proceeding generally will occur first, followed by an arbitration proceeding to resolve any disputes concerning the conduct or outcome of the expert proceeding and the effect of the outcome on the subject commercial issue.
The key procedural concerns are: the appointment of the expert; the expert’s instructions; the expert’s contract and compensation; the procedures the expert will follow to conduct his or her work and to consider the parties’ positions and evidence; and the standard of review to be applied by the arbitral tribunal to the expert’s conclusions.

**Appointment of the Expert**

As with the appointment and selection of an arbitrator, the appointment and selection of the expert is critical to the procedure, both in perceived fairness and quality of decision-making. Although parties may attempt to jointly select an expert from qualified individuals or firms, in the end, the parties’ procedure must provide for an appointing authority or method to resolve any impasse. In that regard, the parties should take care to design the selection procedure to account for potential conflicts; qualifications of the expert; the source and manner of selection from a list of candidates; independence; and the expert’s experience in adjudicative proceedings. The appointing authority for the expert should not be the same as the administrator for the arbitral proceedings unless that body has significant experience in the selection and appointment of subject matter experts. If the parties devise a procedure to resolve any deadlocks in the selection of the expert, rather than using an appointing authority, the parties also must provide a means to resolve disputes about the appointing method.

**The Expert’s Instructions**

When the parties in their contractual negotiations anticipate disputes of a technical nature, they may also provide instructions for how the expert is to proceed and which specific issues are to be decided by the expert. The scope of issues to be decided by the expert (subject to arbitrator confirmation) constitutes the jurisdiction of the expert. The instructions provided to the expert, if mandatory, provide the procedures the expert must follow to carry out the expert’s tasks, even if the expert believes other procedures are technically more robust. Mandatory instructions also are jurisdictional in the sense that the expert’s failure to follow mandatory instructions invalidates the expert’s decision. The more detailed and specific procedures are the less room for discretion available to the expert without risking invalidation of the expert’s decision.

**The Expert’s Contract and Compensation**

The expert’s contract generally constitutes the terms of reference for the expert. Though the contract may include whatever instructions are contained in the underlying contract between the parties, the contract will be a negotiated document between the parties or the appointing authority and the expert to determine how the expert will conduct his or her work and at what cost. The procedures the expert will use to interact with the parties frequently are included in the contract as well. In addition, parties can expect the expert to attempt to include waivers of liability for its own negligent performance because an expert not acting as an arbitrator typically does not enjoy the immunities generally available to arbitrators under domestic law.

**Expert Procedures**

As a general rule, subject matter experts are not fans of the typical legal hearing process. Experts either consider themselves more collaborative decision-makers or feel the need to be independent of party-initiated influences. In either case, experts tend to shun briefings and hearings that include direct and cross-examination. Instead, experts tend to seek procedures that provide them with relevant data and the tools to carry out their work, only allowing the parties to
briefly comment on the expert’s tentative results before the results are finalized into a decision. If this kind of non-legal procedure is unsatisfactory to the parties, they should not leave design of the procedure to the expert.

**Standard of Review by Arbitral Tribunal**

When an expert proceeding is imbedded into an arbitration agreement, it is typical for the expert’s decision to be given considerable deference. The arbitration agreement, even if it does not expressly say so, usually will give the arbitrators authority to determine whether the expert acted on issues within the expert’s jurisdiction and followed the mandatory instructions provided by the parties. The arbitration agreement also may provide for substantive review of the expert’s determination using some deferential standard allowing correction for manifest error or the like. Anything more intrusive into the expert’s field of expertise probably defeats the purpose of the expert proceeding and will result in duplicative procedures.

**Identification and Selection of Party-Appointed Experts**

It is not surprising that the identification and selection of party-appointed experts is one of the most difficult and time consuming tasks the advocate will undertake in the arbitration process. In that regard, there are some key decision points in the process. First, for many disputes, the party and its counsel must determine whether to use an in-house expert or an outside consultant. In many cases, given the time constraints of an arbitral proceeding, the in-house expert may have greater expertise and notoriety on a specific topic than any outside consultant could have. Indeed, the in-house expert may have published scholarly articles on the specific topic. In addition, in-house experts often have access to important proprietary information that is unavailable to outside experts.

As is evident, however, the in-house expert may not be considered as “independent” as an outside, paid consultant, and it may be difficult to get the in-house expert to unravel conclusions based on information available to all parties and proprietary information. Where in-house experts constitute the cream of the world-class experts on a particular topic, as is often the case in the oil and gas industry for example, the decision as to whether to use in-house or outside experts can be difficult. Unless there is no outside expert of sufficient quality, however, counsel should strongly consider using an outside expert as the “independent” expert for at least cosmetic purposes.

Next, assuming the party has elected to appoint an outside expert, it can be very challenging to identify the right expert or firm of experts. In many of the more insular industries, the competent outside experts are known to both parties and are regularly consulted on routine matters. These experts and their firms may be reluctant to become involved in partisan disputes between existing or potential customers. Some competent experts or firms simply will not participate in adversary proceedings, even absent conflicts of interest. Thus, when preparing a list of potential expert witnesses, it is important to identify as many qualified individuals and firms as possible so that, when culling down the list due to conflicts and lack of interest on the part of the potential expert, there are at least a few candidates left.

When determining which of the remaining candidates should be selected as the party-appointed expert, there are typically considerations of qualifications; skill; experience in the topic at hand;
experience in adversary and expert proceedings; cost; timing of appointment; and geography. Most of these considerations are routinely considered in domestic court litigation. A few require additional thought in domestic and international arbitration. For example, there is a tension between selecting the expert as soon as possible so that the expert has time to complete the required initial work and waiting until after the selection of the arbitral tribunal to make sure there will not be a legal conflict or a cultural or language barrier. Indeed, where it is likely that the tribunal will appoint an expert or the contract calls for the appointment of an expert, the timing and manner of the party-appointed selection process should be done so that it is not seen to interfere with the contractual or tribunal selection process.

It is the case that most international arbitration agreements declare the language of the arbitration. It is important that the party-appointed expert be fluent and able to present the expert report and testimony in the language of the tribunal and any tribunal-appointed expert. Nothing is harder to translate than technical jargon. Accordingly, it very well may be that even if the world’s preeminent expert is available to prepare a report and testify, that expert may not be a good choice if that expert’s report and testimony will have to be translated into the language of the arbitration.

Geography is a special consideration for international arbitrations. Where an expert requires a team to assist in the preparation of a report, rebuttal documents, and testimony, proximity to the seat of the arbitration is important. Where the party-appointed expert is based on one continent and the arbitration proceeding is held on another continent, logistics become both a cost and practical issue. With electronic communications and the ability to upload and download vast amounts of data in very short periods of time, it certainly is possible to have remote working sites for experts. It is, however, very costly to set up a remote office for the expert, including travel costs, expert time, and office equipment. Frequently, due to the highly specialized nature of some expert topics and the limited supply of qualified experts who do not have a conflict and who are not otherwise deemed ineligible, the parties may not have the luxury of selecting the expert based on proximity to the arbitral proceedings.

**CONFLICTS OF INTEREST**
For individuals acting as arbitrators, there is a body of law concerning conflicts of interest. The IBA has very useful guidelines with red, orange, and green lists of potential conflicts to determine circumstances when a proposed arbitrator should be disqualified. For individuals or firms acting as experts, there generally is a requirement to state one’s independence (notwithstanding who is paying for the expert’s services) and perhaps to provide a listing of relationships with the parties and others interested in the proceedings; but, there is no mechanism to disqualify party-appointed experts and, absent something in the arbitration agreement or in the rules of an appointing authority, there is no direct mechanism to disqualify a tribunal-appointed expert. In the customary situation where the tribunal directly appoints its own expert without resort to an appointing authority, there typically is no disqualification procedure and no detailed standard for independence and impartiality.

As noted above, some of the guidelines that may be incorporated into the parties’ arbitration agreement or procedural orders include a requirement that party- or tribunal-appointed experts reveal existing relationships, but none of these guidelines requires the disqualification of an
expert based on such matters. This can result in perceived unfairness and the appearance of
impropriety without immediate recourse. For apparently biased party-appointed experts, one can
expect the arbitral tribunal to take into account such apparent bias when weighing the expert’s
evidence. For tribunal-appointed experts, there is no such easy remedy. Indeed, the tribunal,
having probably rejected some challenge to the expert’s independence, may very well be
offended if a party continues to press the point.

The most effective way for parties to deal with this issue is in their arbitration agreement before
a dispute arises and before either party has had occasion to select an expert for a particular
dispute. The parties can mandate independence by creating their own “red,” “orange,” and
“green” lists of relationships within their arbitration agreements so that, for example, the arbitral
tribunal would have no choice but to disqualify a party-appointed or tribunal-appointed expert
who has a relationship on the red list. Of course, with respect to party-appointed experts, there is
no real fix for the most obvious conflict—the expert likely is biased in favor of the party paying
the expert’s fee even if that fee is not contingent on the outcome.

CONCLUSION

In many cases, expert evidence is necessary to assist tribunals without the specific technical
expertise required to resolve a particular dispute. In other cases, expert evidence is used as
merely another method of placing a party advocate before the tribunal. In either case, expert
evidence can vastly increase the costs of arbitration. The parties and the tribunal share joint
responsibility to focus expert evidence to key topics and to provide a procedure that crystallizes
areas of agreement and dispute in the most efficient, cost effective, and fair manner.