Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?

*Giovanni De Berti**

I. The Need for Expert Assistance – A Booming Market

Back in 1996, the Woolf Report was detecting with some alarm an *"uncontrolled proliferation of expert evidence"*[1]).

The trend has not changed since. Forensic expertise has become almost a profession in itself. Firms specializing in forensic activities are offering their support in court or arbitration proceedings as party-appointed or court- or tribunal-appointed experts.

By browsing the internet, one can find an array of experts offering their forensic services in a number of fields, from automotive to computing, from building to engineering, from accounting to intellectual property, from DNA testing to toxicology, not to mention all of the possible medical specializations. On their websites, companies boast about employing internationally-recognized forensic specialists ever ready to furnish advice as expert witnesses in court cases or arbitration proceedings.

The big auditing firms have had forensic departments for a number of years now. There are expert consultancy firms with potentially thousands of individuals within their network and professional connections with thousands more unaffiliated experts[2]). Furthermore, universities are now offering master's courses in becoming a forensic expert[3]).

---

* *The author wishes to thank HU Yumei, associate with De Berti Jacchia Franchini Forlani, for her assistance in the preparation of this article.*

[1]) Lord Woolf MR, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996); Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last,* Arbitration International XXIV 137 (2008).

[2]) Michael Feutrill & Noah Rubins, *The preparation of expert evidence in international commercial arbitration: practical aspects,* Revue De Droit Des Affaires Internationales III 318 (2009).

[3]) The Italian Daily Corriere Della Sera published an article on Italian universities organizing master courses for forensic engineers on November 5, 2010. On or about that date, the writer received a personalized 3-pages letter from an US based group of economic

Sometimes one has the impression that the need to appoint experts and expert witnesses is taken for granted. Actually, some words of caution are authoritatively put forward. The ICC itself warned in 2007 that *"it is helpful to start with a presumption that expert evidence will not be required. Depart from this presumption only if expert evidence is needed in order to inform the arbitral tribunal on key issues in dispute"*[4]). However, in the following sentence, the ICC indicated that, if expert assistance is required, *"recourse can be had to the ICC International Centre for Expertise pursuant to the ICC Rules for Expertise"*, which can be found in the *"Guide to ICC Expertise"*, published in 2005[5]). Whatever the presumption, the famed institution had been preparing to face the requests of the market. Along the same lines, the Tokyo Maritime Arbitration Commission provides experts upon request[6]).

The need is there and the market is promising. But how and to whom are the experts providing assistance?

II. Party Appointed and Tribunal Appointed Experts – Common Law and Civil Law Approach: Battle of Experts versus Search for the Truth

The great division, with regard to the use of experts in arbitration proceedings is between party-appointed experts and tribunal-appointed experts, the former being more properly termed "expert witnesses"[7]).

The division derives from the court procedural rules and practice of the two great systems of law. When confronted with technical problems, the common law courts prefer to follow the same adversarial system applied in the submission of evidence, each party putting forward the aspects favourable to its position. Indeed the experts reporting to or appearing before the court are termed and treated as witnesses, with examination-in-chief, cross-examination and re-examination as the case may be, on questions asked by the opposing counsels. The court would act as a sort of umpire, refraining from directly questioning the expert witnesses and issuing its decision based on which one has put forward the better case. However,

---

experts in international arbitrations, listing their experience in evaluating and assessing damages as expert witnesses in cases involving agribusiness, construction, coal, electric power, mining, natural gas, oil and telecom, covering many of the international arbitration institutions known to the writer and some 20 countries from Argentina to Venezuela.

[4]) ICC, Techniques for Controlling Time and Costs in Arbitration § 65 (2007).

[5]) ICC, Guide to Expertise 19–31 (2005).

[6]) Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, *Rules Relating to Expert Opinion, Appraisal and Certification (in force since 1 September 2001)*, *in* Yearbook Commercial Arbitration xxix 437 (Albert Jan Van den Berg ed., 2004)

[7]) André J. Faurès, *Improving Procedures for Expert Testimony, in* Planning Efficient Arbitration Proceedings: Law Applicable In International Arbitration XVII 154–160 (Albert Jan Van den Berg ed., 1994); Alan W. Shilston, *Some Reflection on the Role of the Expert Witness,* Arbitration IV 251–258 (1992).

in international arbitration, the tribunal would make an effort to reconcile the differences and reach a decision which takes the conflicting opinions into account[8]). Indeed, one of the criticisms of this system is that the result is a battle of experts of doubtful neutrality, or even of declared partiality, the prize going to the more articulate and convincing one, not necessarily to the one telling the truth, the whole truth and nothing but the truth[9]).

The civil law courts follow the so called inquisitorial system. The expert is not a witness indicated by the parties but somebody appointed by the court, the questions, even if proposed by the parties, are decided by the court, and it is the judge who examines the expert, without cross-examination. The idea is that in this way the expert is doubtlessly independent, impartial and neutral, exclusively looking for, and reporting what the expert consider to be, the truth. Among the criticisms, or maybe reservations, manifested by common law parties, is that they feel that their ability to control the manner in which an extremely important aspect of the dispute will be decided is taken away from them, while there is no real guarantee that the choice of the court falls on a real expert in that particular field: the appointed expert may indeed be perfectly neutral, but may be also perfectly wrong.[10]).

The difficult alternative in which the tribunal would find itself by electing either of these systems is that in the first case what is submitted as evidence of fact might be biased, in the second case it may be wrong and unduly usurp the role of the tribunal[11]).

The UNCITRAL Model Law of 1985, a compromise solution even after the amendments adopted in 2006, follows the civil law approach. Art 26 only provides for the event that an expert is appointed by the arbitral tribunal, even with the proviso *"unless otherwise agreed by the parties".*

In international arbitration, practice has shown that it is difficult to choose either system for general use, each case having different needs.

The UNCITRAL Notes on Organizing Arbitral Proceedings of 1996 noted in § 69 with some equanimity that *"A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In*

---

[8]) Michael Feutrill & Noah Rubins, *The preparation of expert evidence in international commercial arbitration: practical aspects,* Revue De Droit Des Affaires Internationales III 311 (2009).

[9]) Anayo Unachukwu, *Expert Witness: How Safe is Safety in Numbers?,* abstract in http://papers.ssrn.com (June 12, 2009); Christopher Seppala, *The Expert (or Experts) selected by the Parties,* Seminar in Arbitration and Expertise in Milan on December 13, 1991 (International Institute for the Promotion of Arbitration Culture, ICC Institute of International Business Law and Practice).

[10]) W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration,* Booklet 5, Part. IV 404 (1990).

[11]) Isabelle A. Hautot, *Introduction,* Arbitration and Expertise, XV[th] Annual Meeting, Paris, 23–24 November 1993 (ICC Institute of International Business Law and Practice) 5.

other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert".

However, they went on to suggest a sort of hybrid system, tempering the possible excesses of either system.

The suggestion was that where an expert is appointed by the tribunal, the tribunal should consult the parties both as to who the expert should be (§ 70) and as to the definition of the terms of reference of the expert so appointed (§ 71), and that the parties may have an opportunity to comment on the expert's report, including by presenting expert witnesses of their choice (§ 72).

Similar provisions were introduced in Art 20 of the *ICC Rules of Arbitration,* in force since 1998 (ICC Rules), and in Art 54 and 55 of the Arbitration Rules of the World Intellectual Property Organization (WIPO) of 2002.Other institutions provide for the appointment of either or both party-appointed experts and tribunal-appointed experts, such as the arbitration rules of the London Court of International Arbitration (LCIA) of 1998 (Art 20 and 21); the Swiss Chambers of Commerce of 2004 (Art 25); the Singapore International Arbitration Centre (SIAC) of 2010 (Art 22 and 23); and the Chamber of Arbitration of Milan of 2010 (Art 29).

With regard to the UNCITRAL Arbitration Rules, the 1998 edition only provided for tribunal-appointed experts in Art 27 (entitled "Experts"). However, when mentioning witnesses, the 2010 edition always and expressly specifies "including expert witnesses" in the new Art 27 ("Evidence") and 28 ("Hearings"). At the same time, the new Art 29 (formerly 27 and now entitled "Expert appointed by the arbitral tribunal") provides that the tribunal may appoint one or more "independent" experts "after consultation with the parties", that the expert so appointed must submit a description of his or her qualifications and a statement of his or her impartiality and independence and that the parties may raise objections as to the expert's qualifications, impartiality or independence.

In other words, the latest position of the UNCITRAL Rules is that both tribunal-appointed experts and party-appointed experts can participate in arbitral proceedings, but that the tribunal-appointed expert will be subject to a strict screening process, so as practically to enhance his or her credibility and standing[12]).

The same strict requirements for the tribunal-appointed expert, and more generally the requirement that tribunal-appointed experts must be and remain independent and impartial during the arbitration proceedings, are contained in international arbitration rules, such as those of the Court for Arbitration for Sport, of Lausanne, of 1994 (Art 44.3); the LCIA Rules of 1998 (Art 21); the WIPO Rules of 2002 (Art 55); and, most recently, the Arbitration Rules of the International Center for Dispute Resolution (ICDR) of June 2009 (Art 22), the Milan Rules of 2010 (Art 29), and the *IBA Rules on the Taking of Evidence in International Arbitration,* as revised and adopted in May 2010 (Art 6).

[12]) Claus von Wobeser, *The Arbitral Tribunal-Appointed Expert, in* International Arbitration, Back To Basics? ICCA International Arbitration Congress XIII 806 (Albert Jan Van den Berg ed., 2006).

III. Expert Witness or Expert Litigator? – Partisan with a Conscience versus Hired Gun

While the rules of international arbitration have underlined from the beginning, and increasingly so of late, the requirement that the tribunal-appointed expert must be and remain for the full length of the proceedings independent and impartial vis-à-vis the parties, the role of the party-appointed expert has followed a somewhat similar path.

In the common law court, according to procedural rules and practice, the party-appointed expert is seen more as a litigator with technical capabilities than an impartial adviser explaining the facts and aiding the Court to discover the truth. Admittedly, this adversarial role has its limits, and an overly partisan expert, to the point of distorting facts or scientific or technical principles, may incur the displeasure of the judges, appear to be totally unreliable and in the end obtain results that are contrary to those so unashamedly pursued.

In international arbitration, the efforts of bridging the divide between the two great systems of law have brought about a gradual harmonisation of the role of the party-appointed expert so as to bring it more in line with the role of the tribunal-appointed expert.

Actually, the trend that has been developing in international arbitration practice, and has been incorporated in successive editions of international arbitration rules, shows that a more stringent attitude has developed with regard to the use of party-appointed experts, requesting that even these experts comply with the requirements of independence and impartiality requested of the tribunal-appointed experts. This is apparently an adaptation of the common law system in its purest form[13]).

Thus, the *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration,* issued by the Chartered Institute of Arbitrators in 2007 (CIArb Protocol), contains evidence of this trend in its Preamble, according to which *"experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them".* Art 4 is even blunter, declaring that *"An expert that gives evidence in the Arbitration shall be independent of the Party which has appointed the expert to give such evidence",* that *"An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party",* that *"An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced",* and finally that the expert's opinion shall contain an Expert Declaration such as could indeed have been signed by a tribunal-appointed expert. In addition, the CIArb Protocol specifies that a party's instructions to its party-appointed

[13]) Michael C. Charlton, *The Quantity Surveyor as Expert Witness,* Asian Dispute Review 15–18 (2010); in the sense that the trend in international arbitration is towards party-appointed expert witnesses: Franz Schwarz & Christian Konrad, The Vienna Rules, A Commentary on International Commercial Arbitration in Austria 527–533 (2009).

expert would not be privileged and that the tribunal may order that they be disclosed upon good cause being shown[14]).

Remarkably, the UNCITRAL Arbitration Rules, as revised in July 2010, contain in Art 29 a thoroughly revised version of the previous Art 27: the new Subsec 2 of this article refers to the duty of the tribunal-appointed expert to submit a statement of impartiality and independence that could well be drafted in the same wording as that provided by the CIArb Protocol for the party-appointed expert.

Almost contemporaneous with the latter document, the IBA Rules adopted on May 29, 2010 also contain a thoroughly revised Art 5 on party-appointed experts. One of the novelties, with regard to the 1999 edition of the IBA Rules, is that the party-appointed expert must submit in the Expert Report *"a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal"* as well as *"an affirmation of his or her genuine belief in the opinions expressed in the Expert Report"*.

Both the CIArb Protocol and the IBA Rules go further than that. They both provide for witness conferencing, an approach that has gained some popularity. Party-appointed experts are supposed to coordinate through meetings and discussions to identify and reach agreement on the issues on which they have to provide an opinion, prepare and exchange drafts outline opinions, which shall be without prejudice and privileged from production to the Tribunal. The final task is for the party-appointed experts to produce a joint statement setting out points of agreement and of disagreement as well as the reasons for such disagreement as the case may be[15]).

The aim of such a strong invitation to cooperate, within the framework of international arbitration, to experts who, in their original common law role, have been dubbed "hired guns"[16]), is apparently to call instead on them to assist the Tribunal in reducing the contentious issues between the parties to the point that they may eventually disappear[17]). A quasi-mediator role that is indeed provided by certain national laws[18]) and that, in the writer's experience, can be successful[19]).

[14]) Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last,* Arbitration International XXIV 1, 137–156 (2008).

[15]) Eugenio Hernandez-Breton, *Expert Evidence, in* International Arbitration Checklist 130 (Grant Hanessian & Lawrence W. Newman eds., 2009); Dana H. Freyer, *Assessing Expert Evidence, in* Leading Arbitrators's Guide To International Arbitration 439 (Lawrence W. Newman & Richard D. Hill ed., 2008); Nael G. Bunni, *Some Thoughts from Experiences in Construction Arbitrations, in* Back To Basics? ICCA International Arbitration Congress XIII 789–794 (Albert Jan Van den Berg ed., 2006). For a detailed description of the technique of witness conferencing, J. Martin M. Hunter, *Expert Conferencing and New Methods, in* International Arbitration 2006: Back To Basics? ICCA International Arbitration Congress XIII 820 (Albert Jan Van den Berg ed., 2006). For a variant of witness conferencing known as "hot tubbing", Jones, *supra* note 14, at 146.

[16]) Woolf, *supra* note 1.

[17]) Jones, *supra* note 14, at 141.

[18]) Art 199 of the Italian Code of Civil Procedure provides that the Court-Appointed Expert may help the parties to settle the dispute in certain cases.

[19]) For interesting cases of attempts by a single tribunal-appointed expert to help the

IV. The Ethics and the Guidelines – Quis custodiet custodes veri?

Another development that has made the role of the expert witness more similar to that of the tribunal-appointed expert is represented by ever more sophisticated and stringent codes of conduct and ethical rules.

This evolution started within the court system, namely in the UK seminal case of *Ikarian Reefer,* of 1993[20]), which established certain guidelines based on the principle that the expert witness' duty to the court overrides any duty to the client. Namely, the court indicated that

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced by the exigencies of litigation.
- An expert witness should provide independent assistance to the court by way of objective and unbiased opinion to matters within this expertise.
- An expert witness should never assume the role of an advocate.
- An expert witness should not omit to consider material facts that could detract from his concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside his expertise.
- If, after the exchange of reports, an expert changes his view on a material matter, having read the other side's report or for any other reason, such change of view should be communicated to the other side without delay, and when appropriate, to the court.[21])

At that time, these principles applied to court proceedings in England and Wales, not to arbitration. However, it has been noted that they constitute a comprehensive code, governing all necessary aspects of expert witnessing. Also, it could be said that, as between party-appointed expert and tribunal-appointed expert, at the primary level there would be no difference in the nature and scope of the expert's duty and to whom it is owed. At the secondary level, however, the party-appointed expert indeed owes a duty to his client but, comparably, the tribunal-appointed expert, in advising the tribunal, must no less be bound by such provisions of the arbitration agreement or *Lex Arbitri,* thereby implying a duty to-

parties settle the case before the tribunal had rendered the award, Yves de Haller, *A case Study of the Role of the Expert in an Arbitration Involving the Construction of an Energy Plant, in* Preventing Delay And Disruption Of Arbitration/Effective Proceedings In Construction Cases, Icca Congress Series V 517–523 (Albert Van den Berg ed., 1990); Philip Jenkinson, *Presentation of an Experience of Expertise During an Arbitral Proceedings, Arbitration and Expertise* in Milan on December 13, 1991 (the International Institute for the Promotion of Arbitration Culture, ICC Institute of International Business Law and Practice).

[20]) *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.* (1993) 2 Lloyd's Rep. 68, at 81–82.

[21]) Mark Kantor, Valuation for Arbitration, Compensation Standards; Valuation Methods and Expert Evidence 279–314 (2008) at 287.

wards the respective parties[22]). Thus the respective positions of the tribunal-appointed expert and the party-appointed expert were, or rather should be, very similar indeed.

This idea has slowly but decidedly percolated into the codes relating to expert witnesses in international arbitration.

A number of organizations have by now imposed a requirement that experts owe an overriding duty to the tribunal. Such a duty is spelled out in the Code of Practice for Experts issued jointly in 2005 by the Academy of Experts and the Expert Witness Institute, and endorsed by EuroExpert, the Organization of European Expert Associations. Art 1 of the Code states

> *"Experts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following;*
>
> *a) the Expert's independence, impartiality, objectivity and integrity,*
>
> *b) the Expert's duty to the Court or Tribunal*
>
> *c) …"*

In 2003, the ICC issued a new edition of its Rules of Expertise. The Rules are administered by the ICC International Centre for Expertise, which is run by the ICC as part of its Dispute Resolution Services and proposes experts both to parties wishing to obtain the name of a potential expert witness, and to an arbitral tribunal wishing to appoint an expert. In either case, the Rules, as set out in Art 7, specify that *"every expert must be independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties*" and that *"a prospective expert shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties".*

Other codes of conduct have been issued requesting independence and impartiality from expert witnesses. In 2008, the American Institute of Certified Public Accountants (AICPA) issued a Code of Professional Conduct, requiring objectivity in the performance, by its members, of all professional services. "Objectivity" imposes the obligation to be impartial, intellectually honest, disinterested and free from conflicts of interest. The Uniform Standards of Professional Appraiser Practices (USPAP), as developed by the Appraisal Foundation, contain a legally binding Ethics Rule, requiring appraisers to conduct appraisals *"with impartiality, objectivity and independence, and without accommodation of personal interests"*[23]).

The adoption of a code of conduct for expert witnesses in any given proceedings would ensure such independence and objectivity as expected of them[24]).

---

[22]) Hew R. Dundas, *Party-Appointed and Tribunal-Appointed Expert: What is the Duty of an Expert and to whom is it Owed?*, 20TH ANNUAL SYMPOSIUM OF ARBITRATORS, Paris, 14 March 2005.

[23]) For a detailed description and discussion, KANTOR, *supra* note 21, at 287–299.

[24]) Dave Dushyant, *Contemporary Practice in the Conduct of Proceedings: Techniques for*

V. The Expert Opinion and the Award – Too Authoritative by Half?

One of the reservations expressed by common law parties when the tribunal follows the civil law approach and resorts to a tribunal-appointed expert is that in this way the tribunal *de facto* nominates a fourth arbitrator, to whom it delegates the decision on the issues on which the expert has to, as it were, pass judgement.

It is true that often, in civil law countries, arbitrators (as indeed judges) would normally attach decisive importance to the opinions of tribunal-appointed experts. A by-product of this attitude is that the report of the tribunal-appointed expert may have the same effect as the alternative dispute resolution proceedings known as "early neutral evaluation", and will therefore often result in a settlement of the dispute, since the report will provide a very clear indication of how the case will be decided. In short, a tribunal-appointed expert will in most cases be the one who determines the outcome of the dispute. To put it more critically, "*the courts often attach the same amount of importance to a [tribunal-appointed expert] as the ancient Greeks attached to the Oracle of Delphi – it determines the substance of the dispute and essentially merely leaves the question of costs determination to the court*"[25])

The criticism is not without merit, and actually international arbitration rules have been increasingly concerned with avoiding the worst results of the tribunal, in most cases composed of jurists only, having to rely on the opinion of an expert appointed, obviously, by non-experts.

Consequently, recent editions of international arbitration rules have required, in ever increasing details, that the arbitral tribunal should appoint an expert only after consultation with the parties; that, before accepting the appointment, the candidate expert should submit a description of his or her qualifications; that the parties may submit in turn their objections to such qualifications and their observations to the expert's report; and that the expert must be present at any evidentiary hearing, to be questioned by the tribunal, the parties and any party-appointed expert[26]).

Assistance given and observations submitted by the parties and by the party-appointed expert to the tribunal-appointed expert appear to set up collateral proceedings of a technical nature, parallel to the arbitration proceedings themselves.

Eliciting Expert Testimony – How Party-Appointed Experts Can Be Made Most Useful, in International Arbitration 2006: Back To Basics? ICCA International Arbitration Congress XIII 819 (Albert Jan Van den Berg ed., 2007).

[25]) O. Bondo Svane, as cited in Jacob C. Jørgensen, *Expert Witnesses in Danish Arbitration*, ASA Bull., 26, 3, 488 note 35 (2008).

[26]) UNCITRAL Arbitration Rules (2010) Art 29; SIAC Rules (2010) Art 23; IBA Rules (2010) Art 6; ICDR Arbitration Rules (2009) Art 22; UNCITRAL Model Law (2006) Art 26; CIArb Guideline 10 on the Use of Tribunal Appointed Experts, Legal Advisers and Assessors (2006) § 1; WIPO Arbitration Rules (2002) Art 55; ICC Rules of Arbitration (1998) Art 20; UNCITRAL Notes on organizing Arbitral proceedings (1996) §§ 69–72.

The tribunal-appointed expert would perform a quasi-arbitral role, examining the facts and documents, hearing the parties – normally through the party-appointed expert, often with the presence or contribution of legal counsel as well – and eventually issuing the expert's opinion. On such opinion the tribunal will, in most cases, base its own award, on the aspects submitted to and covered by, the tribunal-appointed expert's report.

Given these guarantees of a fair hearing, due process and control of qualifications and conflict of interest, the above mentioned reservations of undue delegation should be reasonably put to rest. The argument that either one or three jurists (as the arbitral tribunal is composed in most cases) should be better able to decide highly technical issues by listening to two or more technical advocates arguing in an adversarial setting, rather than relying on a technical expert, chosen in full consultation with the parties and operating under close scrutiny by expert colleagues, appears somewhat unconvincing to the writer (admittedly, a civil law jurist, though with some knowledge and experience of common law). After all, no one would argue that arcane issues of law should be decided by one or three lay persons after listening to arguments put forward by sophisticated lawyers. Even more so in international matters.

VI. Conclusion – The Way Forward

Rules on international arbitration, which are constantly being updated, usually represent the status of best practices in the field at the moment of issue. Guidelines, in turn, tend often to outline and promote the next best practices.

It remains to be seen how much of either of them is applied or, respectively, followed.

We have detected a trend in rules, guidelines and codes of conduct, to harmonize the approach to be followed by both tribunal-appointed experts and party-appointed experts, requiring the latter to satisfy the standards of independence, impartiality and neutrality expected from the former.

However, it has been noted that the adoption of an overriding duty on the part of party-appointed experts towards the court and the tribunal has not been universal in the common law world, due to the circumstances that prevail in an adversarial system. If arbitral rules require impartiality and independence from party-appointed experts, parties may be encouraged to seek experts who are partisan in reality, but appear impartial and independent: that is, experts who have developed polished acting skills[27]).

Arbitration rules, codes of conduct and procedural orders to the contrary notwithstanding, party-appointed experts in arbitration proceedings will still conduct themselves, if not as barefaced "hired guns", as subtle (or not so subtle) advocates of the party retaining them. This does not mean that tribunals should

[27]) Kantor, *supra* note 21, at 249.

be left, as in former times, with the alternative either to follow the common law adversarial system, and believe the party-appointed expert putting up the better show, or to apply the civil law system, and rely blindly on a tribunal-appointed expert, however selected and operating in a vacuum.

A mixture of the common law and civil law systems of taking expert evidence should emerge, driven by a search for greater efficiency in time and cost, as well as greater cooperation between the parties and between the parties and the tribunal[28]).

A system where the expert is appointed by the tribunal in close consultation with the parties, possibly on the parties' joint recommendation[29]), where it works in conjunction with, with the help and under the scrutiny of, the expert witnesses of the parties, if any is at this point really necessary, and delivers an opinion which is submitted to, and commented upon by, the parties and their experts.

In this way, such opinion will indeed be comparable to the award issued by an arbitration tribunal, and thus can be, though certainly does not have to be, the basis of the tribunal's award, as regards the technical points about which the opinion was issued.

[28]) Dana H. Freyer, *Assessing Expert Evidence, in* Leading Arbitrators's Guide To International Arbitration 442 (Lawrence W. Newman & Richard Hill eds., 2008); J. Martin M. Hunter, *Expert Conferencing and New Methods, in* International Arbitration 2006: Back To Basics? ICCA International Arbitration Congress XIII 823 (Albert Jan Van den Berg ed., 2007).

[29]) Michael C. Charlton, *The Quantity Surveyor as Expert Witness,* Asian Dispute Review 17 (2010).