When Experts Come From Different Planets: Finding the Difference Driving Seemingly Irreconcilable Expert Evidence in Arbitration

By Theodore K. Cheng and Sherman Kahn

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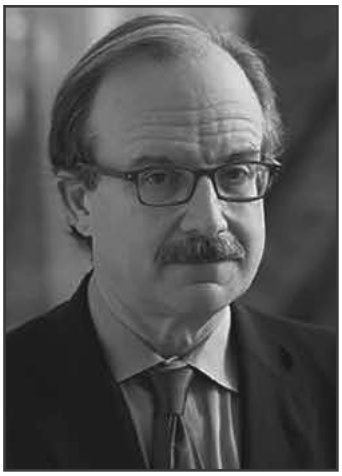

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Expert opinion evidence is a necessary part of many arbitrations that involve technical subject matter or require decisions on disputed issues of economics, accounting, or other specialized subject matter. With each party retaining its own expert witness, parties and their counsel sometimes push their respective expert witnesses to extremes in support of their positions. To the arbitrators, it often seems like the expert witnesses are coming from different planets. When this occurs, it can be difficult for arbitrators to resolve the matter because the experts have not given the arbitrators sufficient or adequate information—or even the correct information—from which to bridge the gap between the expert's opinions and reach the right result. Leaving the arbitration panel without sufficient tools to effectively resolve the case adds uncertainty and risk to the process. The authors note that the same problems often arise in court litigation, but write this article from their perspective as arbitrators.

When expert testimony is so affected by advocacy as to lose its ability to be considered credible, an arbitrator otherwise sympathetic to a party on the merits may be unable to provide the party its requested relief. Expert testimony that is insufficiently explained or supported leaves the arbitrator with no choice but to reject the testimony. What can be done when the proceeding is faced with the submission of expert reports and/or testimony that appear to be irreconcilable? What can arbitrators and counsel do when confronted with that situation, and, perhaps more important, what can they do to prevent that situation from ever occurring in the first place?

This article will explore some tools and techniques that arbitrators and counsel may wish to use to ensure that the presented expert opinion evidence is useful and to help the arbitrator find the common ground in seemingly irreconcilable expert testimony. These tools can help arbitrators efficiently and effectively analyze expert evidence to identify the real points of controversy and efficiently reach the correct result on the merits. Along the way, this article will also highlight considerations to keep in mind to enable the arbitrators to fully utilize the expert evidence that is being presented.[1]

This article is organized loosely according to the typical stages of an arbitration proceeding, starting with the preliminary conference, moving on to the evidentiary hearing, and then, finally, to the preparation of the award.

I. Expert Evidence Considerations in the Preliminary Stages

At the outset, it is important for arbitrators and counsel to recognize when expert testimony is necessary or helpful. The obvious situations might be where scientific, technical, or other specialized subject matter is anticipated to be addressed during the evidentiary hearing.[2] Disputes heavily steeped in industry custom and practice or jargon are also likely candidates for expert opinion testimony. In addition to the presentation of technical or scientific evidence, economics, accounting, valuation of property or business assets, and various damages theories frequently lend themselves to the use of expert witnesses.

Counsel will be more persuasive (and, thus, more effective) if the arbitrators are comfortable with the technical evidence and understand the key definitions. Counsel should come to the preliminary hearing prepared to have a realistic discussion about the nature and amount of expert testimony that is expected to appear in the proceeding. They should be prepared to advise the panel regarding how expert evidence may help the arbitrators decide the case and, thereafter, work with the arbitrators to develop a procedure for the presentation of expert evidence that will advance the resolution of the matter. Specifically, counsel should be prepared to discuss how to best present written summaries of expert opinions. Counsel should be willing to explore methods to enable opposing experts to access and manipulate their opponent's data; be prepared to discuss any procedures for the exchange of expert evidence; strongly consider using rebuttal reports to enable the experts to respond to one another's positions; and always consider how to ensure that the panel will understand the experts' opinions.

Certainly, arbitrators do not want their deliberations hampered, in any way, by a misunderstanding or a lack of understanding of the important technical evidence that may arise during the pendency of the case. Thus, arbitrators should affirmatively raise the issue of expert testimony with the parties and their counsel during the preliminary hearing, soliciting their input and views on the extent to which expert testimony will be helpful. They should also encourage the disclosure of expert opinions in advance through some orderly mechanism (such as the exchange of expert reports) and consider asking for rebuttal reports from each side. Arbitrators should also manage the process of exchanging these reports through careful scheduling to ensure that the opinions are fully fleshed out in the written work-product. The arbitrators should, of course, review the reports before the evidentiary hearing, with the objective of endeavoring to absorb the technical information in advance, identifying areas of commonality and divergence, and preparing any questions for possible use at the evidentiary hearing. All of the foregoing can be set forth in detail in the scheduling order that emerges from the preliminary hearing so that the exchange and development of expert evidence is well-handled. Doing so will also provide a mechanism for the parties to involve the panel if the exchange of expert evidence should somehow break down.

II. Preparing for the Evidentiary Hearing

Because the evidentiary hearing is the main event, during the final pre-hearing conference the arbitrators and counsel should discuss the presentation of expert testimony, exploring issues such as the timing of expert witnesses (i.e., witness order), the possibility of presenting a pre-hearing tutorial for the benefit of the panel, and the method of delivering the experts' testimony. Counsel should think well in advance about how expert testimony can assist the panel to understand the case. In particular, consideration should be given as to what presentation format will place the panel in the best position to fully consider the expert evidence that is being presented.

In a technology-laden case, consideration could be given as to whether a separate pre-hearing technology tutorial might assist the panel. Such a tutorial can be included in the parties' pre-hearing submissions or as a stand-alone presentation with slides and handouts. Tutorials can be presented by an outside or in-house technical expert, or even counsel with a technical background. To avoid unnecessary disputes over basic, foundational information, the contents of the tutorial may be agreed upon by counsel in advance, focusing on the technical issues that either counsel want to explain to the panel or that the panel has indicated that it wants explained. A pre-hearing tutorial, however, is not the appropriate time to deliver another opening statement to a party's evidentiary hearing; nor is it intended to be focused on the legal positions that a party will take during that hearing. It is meant to be a useful, educational tool designed to assist the panel in comprehending and distilling the technical aspects of the case so that those issues are better handled at the evidentiary hearing. In that regard, counsel might seek guidance from the panel about linking the tutorial to the disputed claims without too much advocacy about a party's position on the legal issues.

There are also many variations on how expert witnesses may deliver testimony.[3] Aside from the traditional direct examination followed by a cross-examination, there are other options that may result in significant savings of time and cost and/or be more suitable based upon the nature of the technical evidence being presented. For example, because direct examinations are frequently well-rehearsed and planned presentations of the expert witness' report, counsel can consider submitting the expert's report itself in lieu of presenting a live direct examination, and then permit the expert to be cross-examined by opposing counsel. Moreover, if the expert's testimony will include a lot of jargon or acronyms, counsel might consider providing a glossary and collaboratively working with the arbitrators in their efforts to fully understand the expert evidence. For their part, the panel should consider the wide discretion afforded to them under most provider rules so as to take advantage of the flexibility in arbitration to fashion a cost-effective and expeditious proceeding.[4] They should also consider *in camera* the extent of the questioning they intend to pursue during the evidentiary hearing, as well as the respective roles of the panel chair and wing arbitrators during the parties' presentations.

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III. Tools for Finding Common Ground at the Evidentiary Hearing

Where the parties are presenting competing expert opinion evidence, the authors recommend that the arbitration panel employ tools that find any common ground between the seemingly disparate positions articulated by the parties. Technical experts usually testify based upon scientific or industry expertise and, within a given scientific discipline, employ certain agreed-upon principles.

For example, it is unlikely that most experts would find disagreement about the laws of physics; even economists often agree on basic methodology. It is, however, the *application* of the relevant laws or methodology that is the source of the seemingly irreconcilable differences that emerge when the parties present their respective expert opinion evidence. Identifying common ground enables the arbitrators to find which element(s) of the experts' analysis are driving that difference.

In many cases there are a limited number of factors driving the differences in expert opinions. In general, experts value their reputations, and most reputable experts adhere to established methodologies. Careful and incisive work by the arbitrators can expose a remarkable amount of agreement among even the most contentious experts. Doing so effectively requires the arbitrators to actively engage with the evidence and expose the various positions to better identify and isolate those areas of common ground.

Take, for example, a case in which competing expert witnesses will be presenting evidence on the value of a manufacturing business. In this example, the experts generally agree that the business should be valued based upon the value of the real estate and the physical plant, along with a discounted value for the business' future revenue. Yet, the experts reach radically different valuation conclusions. This happens because their other assumptions may differ markedly. The job of the arbitration panel is to identify which assumptions are driving the difference. In the example, the arbitration panel can identify the source of the difference by looking at the following questions:

- Do the experts agree on the value of the real estate and/or the physical plant?
- Do the experts agree on the methodology for depreciation?
- Do the experts agree on the plant's production estimates?
- Do the experts agree on the plant's capacity?
- Do the experts agree on the discount rate?
- Do the experts agree on the future market conditions?

If the experts approach even one of these assumptions differently, this difference may ultimately lead to the expert witnesses setting forth highly divergent and, sometimes, irreconcilable opinions. If the arbitrator can isolate which of the assumptions is driving the difference, the arbitrator will be better positioned to resolve the issue(s) accurately and fairly based upon the evidence.

Arbitrators may employ a variety of techniques to uncover the experts' points of agreement and disagreement. One such technique that arbitrators and counsel can consider is the "hot tubbing" of experts (also known as "concurrent evidence"), which can include a situation where the expert witnesses are sworn and provide their testimony at the same time, often sitting together at a table or in the witness box. The experts may then challenge and question one another, and the panel often questions the witnesses directly, thereby stimulating a near-direct dialogue between the experts and the panel, with counsel sometimes limited to stating objections.[5]

There are many varieties of hot tubbing, the full explanation of which is beyond the scope of this article. However, one way in which hot tubbing may be accomplished is to follow these steps: (1) the arbitrators identify the issues to be addressed and apprise the experts; (2) with both experts present, one of them addresses the first issue; (3) the other expert may then provide a counter-opinion on that same issue; (4) the arbitrators then ask their questions; (5) each side then separately questions one or both experts; and (6) the arbitrators return for further questions, and counsel ask any last clarification questions.

This technique is frequently discussed in the literature (particularly with respect to international arbitration), but is rarely used in U.S. domestic arbitration, more likely than not due to domestic counsel's relative lack of familiarity with the technique and their discomfort at losing some degree of control during the process. Joint testimony, though, allows arbitrators and counsel to question the experts with immediate input from the other expert(s). It also allows the experts themselves to directly challenge each other's evidence and can enable arbitrators to more easily identify and focus in on the key issues in a case.

Another technique that arbitrators and counsel can consider is to agree to hold a pre-hearing expert meeting. Sometimes considered an offshoot of hot tubbing, the experts would meet prior to the evidentiary hearing, without counsel present, to pinpoint the areas of disagreement and discuss the relevant issues. The arbitrators would set a time by which the parties' experts are to meet and identify their points of agreement or common assumptions. The experts would then be asked to submit a joint written report to the arbitrators identifying those points.[6]

A variation on this type of meeting is to identify shared assumptions at the evidentiary hearing itself by scheduling an expert-to-expert colloquy at the hearing.[7] The arbitrators ask the experts to briefly supplement their written reports in each other's presence. The experts then discuss their differences in front of the panel to see if they can come to an agreement or better clarify the issues. This is then followed by having the arbitrators (and not counsel) examine the experts. The arbitrators' approach is usually different from counsel's approach because the arbitrators have no preconceived notions about the case. They tend to see inconsistencies, omissions, or outright mistakes—often overlooked by counsel—and can afford the experts an opportunity to explain them away. Obvi-

ously, an examination of the experts, either separately or jointly, presents distinct advantages and disadvantages, which the arbitrators and counsel should discuss in advance of the evidentiary hearing.

Ultimately, all of the foregoing techniques are designed to focus the inquiry on determining what is driving the difference among the experts, to crystallize the disputed issues and assist the arbitrators to reconcile what, on its face, appears to be irreconcilable expert opinion evidence. Any questions posed by the arbitrators should be to obtain a better understanding of the case and not, of course, to assist one or the other party in the presentation of its case.

These techniques can help the tribunal identify the variables in the analysis about which the experts really disagree. For example, returning to the manufacturing valuation case above, if it turns out that the difference between the experts is driven by market assumptions and an assumed discount rate, the arbitrators can then assess those elements free from the noise introduced by the other, essentially undisputed, assumptions adopted by the experts in their opinions.

IV. The Post-Hearing Phase

After the evidentiary hearing is over, the case is largely in the hands of the arbitrators. But in large, complex, and technology-laden cases, it may be useful to provide for post-hearing briefing and/or oral argument. In such post-hearing submissions, it is incumbent upon counsel to tie together the disparate elements of the presentation at the evidentiary hearing, including the portion relating to expert testimony evidence, and give the arbitrators the tools they need to resolve the case. Counsel should seek to bridge seemingly irreconcilable expert testimony gaps for the panel during this post-hearing phase. For example, if there was testimony about a test and its results, counsel should explain what they want the panel to understand about the test and the results as it supports proof of the claims or defenses. The parties should explain what the technical evidence demonstrated and how, including providing testimonial and documentary references from the record.

Linking the technical evidence to proof of the elements of the disputed claims and defenses provides necessary and valuable context for the arbitrators. Providing a roadmap of the key technical evidence/events (*e.g.*, product development and/or testing, design/construction of building, etc.) can also be enormously helpful in marrying that technical evidence with the other non-technical evidence adduced at the hearing. It is also always helpful to provide the arbitrators with copies of the slides and/or handouts that the arbitrators can take with them for use in their deliberations and award-writing.

For their part, arbitrators should let counsel know the technical issues that they consider important and where they would like the parties to address the technical evidence and issues. Arbitrators need to be clear and specific about what issues should be briefed so as to provide the necessary guidance during this final advocacy stage of the proceeding. If the panel has actively worked at the hearing to identify common ground and the issues driving the differences, they should be in a good position to ask the right questions to be addressed in the parties' post-hearing submissions, and, ultimately, arrive at the right result.

Endnotes

1. The authors previously presented a webinar version of this article for the American Arbitration Association, a recording of which is available at https://www.adreducation.org/courses/when-experts-come-from-different-planets-tips-for-maximizing-the-value-of-experts/17prw012/.
2. *See* Patricia D. Galloway, *Using Experts Effectively & Efficiently*, Dispute Resolution Journal (Aug./Oct. 2012), at 27 ("The purpose of expert reports and testimony is to assist the arbitration panel's deliberations and specifically facilitate the panel's understanding of the technical issues.").
3. *See, e.g.*, George Ruttinger and Joe Meadows, *Using Experts in Arbitration*, Dispute Resolution Journal (Feb./Apr. 2007), Vol. 62, No.1, at 48 (discussing effective expert presentation).
4. *See* Galloway, *supra* note 2, at 28 (discussing how established arbitral institutions have rules and procedures to afford arbitrators wide discretion in the conduct of the proceeding and encourage processes that are cost-effective and efficient).
5. *See generally* J. Christian Nemeth and Lisa Haidostian, *The 'Hot Tub' Method of Taking Expert Testimony Is Gaining Steam: What You Need to Know*, Arbitration News (Feb. 2014), at 91; Galloway, *supra* note 2, at 33-34.
6. *See* Nemeth and Lisa Haidostian, *supra* note 5, at 91.
7. *See* Galloway, *supra* note 2, at 30-33 (discussing the practice of a joint expert meeting).

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