

**The Use of Experts in International Arbitration – Specific Issues
relating to Legal Experts**

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I. Introduction

The topic of this conference is "The Use of Experts in International Arbitration – Conflicting Assumptions and Expectations". The purpose of the conference is to explore various aspects relating to the presentation of expert evidence and specifically address the issue of conflicting assumptions and expectations that parties may have and how an arbitral tribunal could deal with them.

My task is to deal with specific issues relating to legal experts.

As many of us may have experienced, parties from different cultural and legal backgrounds may indeed have different ideas of the use and purpose of legal experts in international arbitration.

My presentation is structured in three parts as follows:

- Different ways of presenting the law before courts (I. below)
- Legal expert testimony in international arbitration (II. below)
- Recommendations (III. below)

II. Different ways of presenting the law before courts

Before exploring the use of legal expert testimony in international arbitration, it is useful to step back and look at how legal issues are commonly presented before courts. In essence, it seems that two different approaches or traditions exist as set out below.

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1. (Foreign) law as a factual issue

In some jurisdictions the court has a duty to apply the domestic law (the *lex fori*) *ex officio* and thus a duty to decide the law itself independent of the parties' submissions (*da mihi facta, dabo tibi jus*). Yet, if the law of these jurisdictions requires the court to apply foreign law to the merits, that foreign law is treated as a factual issue that the parties must prove through appropriate means.

In these jurisdictions, counsel will usually present issues of domestic law through argument in their written and oral submissions, by reference to statutes and regulations, case law and legal writing.

By contrast, when it comes to issues of foreign law, the courts in these jurisdictions will often not accept that foreign law can be "proved" simply by presenting legal argument, supported by reference to sources of law such as statutes, case law and legal commentary. Instead, they often require the parties to "prove" the relevant foreign law issue through expert witness testimony from legal practitioners or law professors from the foreign jurisdiction at issue.

If so, these legal experts will be treated much like any other witnesses of fact or expert witnesses on specific issues such as technical, commercial or financial matters. It will thus be for the parties to present their respective positions in the form of expert testimony, first by way of a legal opinion (legal expert report), followed by the possibility of cross-examination at a hearing before the court that is called to apply foreign law.

In the absence of sufficient evidence of foreign law, the courts may decide the legal issue at stake by applying domestic law instead.

In these jurisdictions, the role of legal experts is to serve as a means of evidence. With their testimony, the parties aim to prove a fact.

2. Law as a question of law

In many other jurisdictions, the approach is different. These jurisdictions treat both domestic and foreign law the same way, in that they require the court to decide issues of law *ex officio*, whatever the law applicable to the merits of the case.

In these jurisdictions foreign law is thus treated as a question of law rather than as an issue of fact, such that the court is not confined to the (foreign) law presented by the parties, and the presentation of the (foreign) law is not restricted to any particular form. Instead, the court is deemed to know the law not only with respect to domestic law but also as to foreign law (*jura novit curia*), except that with regard to foreign law the court may generally require the assistance of the parties and, in specific circumstances, may require them to prove the content of the foreign law at issue.¹ In addition, the courts may restrict themselves to apply foreign law in accordance with certain guidelines and principles, as is the case for example before Swiss courts:²

"It is in the nature of law that many legal questions are discussed controversially in both case law and legal writing. For this reason, it cannot be the task of a Swiss court to apply any aspect of a foreign substantive law autonomously and in accordance with principles of interpretation that it has established itself. Instead, it shall take guidance from the current state of discussion in such other country on the legal issues in dispute. Accordingly, the Supreme Court follows the prevailing opinion and, in case of controversies between case law and doctrine, the case law of the highest authority in order to take account of legal certainty and coherence of case law."

In the absence of sufficient evidence on the content of the foreign law, the courts may still decide the legal issue at stake by applying domestic law instead.³

In these jurisdictions, the parties will usually present issues of law, whether domestic or foreign law, through briefing and argument from their counsel with citations to relevant legal authority such as statutes, case law and scholarly writing. Yet they still sometimes submit legal opinions established by professors of law or eminent legal practitioners on issues of domestic law. For foreign law, even in these jurisdictions the presentation of legal opinions is fairly common, probably rather the rule than the exception.

¹ See, e.g. Article 16(1) of the Swiss Private International Law Act on the "Establishment of foreign law", which states as follows: "(1) The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties."

² Swiss Supreme Court Decision 4P.137/2002 of 4 July 2003 E.7.2.1; Swiss Supreme Court Decision 4A_428/2008 of 31 March 2009 E.3.1.

³ See, e.g. Article 16(2) of the Swiss Private International Law Act, which states as follows: "Swiss law shall apply if the content of the foreign law cannot be established."

In these jurisdictions, however, legal experts do not serve to prove a fact. Their role is limited to bolster the legal positions advocated by the parties on how the case should be decided on the merits. In these jurisdictions, legal experts are not necessarily subjected to cross-examination, unless the legal expert report (legal opinion) is relied on to prove the content of foreign law where the burden to prove that content has been imposed on the parties.

III. Legal expert testimony in international arbitration

International arbitration is "international" by definition. It involves parties, counsel and arbitrators from different jurisdictions and cultural backgrounds, and as such is a transnational process, even though by the choice of the seat it is tied to a particular *lex arbitri*, and by the choice of a governing law it is tied to the body of law of a particular jurisdiction. It is just obvious that, as often claimed, there is no "foreign" law in international arbitration, just as little as there is any "domestic" law. Instead, the bottom line is that "all laws are just law".⁴

Therefore, the approach to legal issues before international arbitral tribunals is fairly similar to the one prevailing in the jurisdictions presented under II./2 above. International arbitral tribunals will normally regard legal issues as questions of law, not fact. And they will normally take the view that the arbitrators should determine the content of the applicable law to the best extent possible of their own motion (*ex officio*),⁵ with the assistance of the parties but without any general rules to guide them.⁶ For obvious reasons, unlike courts, international arbitral tribunals may not decide the case by applying "domestic" law if the relevant "foreign" law cannot be established.⁷

⁴ Karrer, 212.

⁵ In similar terms see, e.g. ILA Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, stating that "arbitrators are not confined to the parties' submissions about the contents of applicable law" (Recommendation 7).

⁶ In this spirit, the ILA Recommendations (cit.) confirm that in ascertaining "the contents of a potentially applicable law or rule, arbitrators may consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties' advocates, opinions and cross-examination of experts, scholarly writings and the like" (Recommendation 9).

⁷ At best, they could, as proposed by the ILA Recommendations (cit.) in a well-meant but doubtful effort to close that gap, suggest to the parties to "apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard" (Recommendation 15).

Yet, it is quite striking to see that the two different ways of presenting issues of (foreign) law before courts have somehow also spilled over into international arbitration.

In some cases, the parties prefer that their counsel plead the relevant issues of law directly to the arbitral tribunal by relying on legal authority such as statutes, case law and legal commentary. If their counsel is not trained in the law applicable to the merits, these parties would simply expect their counsel to associate with a law firm that has the required (local) legal expertise.

In other cases, however, the parties prefer to present their legal position in the form of legal expert testimony, first in the form of one or more expert reports (legal opinions), and then subject to cross-examination at an evidentiary hearing.

Under the first approach, the law is presented to the arbitral tribunal much like issues of law are advocated before local courts in jurisdictions where (foreign) law is always regarded as law, not fact.

Under the second approach, however, the way the parties plead the law rather resembles the manner in which issues of law are presented to local courts in jurisdictions where foreign law is treated as a question of fact. Indeed, by relying on legal expert testimony, the parties deal with the law as if it was a fact subject to proof, and they offer "evidence" in support of their legal position essentially in the same way as they do in relation to other factual allegations that require particular expertise, such as e.g. a construction defect through expert testimony of an engineer or architect, or market evaluations and financial analysis in support of a damages claim through expert testimony of a forensic accountant.

Which approach is preferable?

I think that the question cannot be answered in the abstract, and it will quite often depend on subjective preferences.

Personally, I tend to share the views of those who submit that in the majority of cases, the method of advocacy by counsel is more productive, expeditious and cost-effective than that of testimony by legal experts.⁸

⁸ Donovan, 2.

What is key, in my view, is to see that whenever the relevant sources on the applicable law (statues, case law, commentary, etc.) are available, there is in principle no compelling reason to introduce expert testimony. This is so because in international arbitration the arbitrators, at least if they are lawyers, are supposed to be the "legal experts" themselves. They have been selected by the parties to decide their case in accordance with the legal system that governs the dispute, no matter whether they are qualified to practice in that jurisdiction. In particular, they are expected to have the capacity to read and understand sources of law, and to assess, weigh and evaluate legal argument, whatever the law applicable. Indeed, international arbitrators are expected to "think like lawyers",⁹ such that there is in principle no need to present legal expert testimony to help them understand the law, whether or not they are trained in that law.

With these considerations in mind, I submit that the parties should carefully evaluate in each case whether presenting legal issues through legal expert testimony makes good sense. In fact, I tend to suggest that in many cases to do without legal experts may save considerable effort, time and costs, without causing any harm to the strength of one's own legal position.

IV. Recommendations

The above *tour d'horizon* shows that there may well exist conflicting assumptions and expectations between the parties (and arbitrators) in relation to the use and usefulness of legal experts in international arbitration.

This leads to conclude this presentation with a (non-conclusive) list of recommendations that parties, counsel and arbitrators may consider helpful when dealing with the issue of how legal questions should be presented to the arbitral tribunal.

Recommendation 1: *Address the possible ways of presenting the law at an early stage of the proceedings.*

It is wise for the arbitral tribunal to raise from the beginning, e.g. in the first case management meeting, how it expects the parties to present the relevant legal issues, and in particular to discuss with them the pros and contras of presenting

⁹ Donovan, 9.

legal argument through legal expert testimony.¹⁰ That may help avoiding unpleasant surprises with potential adverse effects on the procedural calendar at later stages of the arbitration, e.g. if the party that has the "last word" in the exchange of pre-hearing submissions, all of a sudden supplies a legal opinion at the last minute.

If it is determined that the parties may, if they so wish, rely on legal expert testimony, the tribunal should further clarify at the outset that any such legal expert will be treated like any other party-appointed expert, e.g. in accordance with Article 5 of the IBA Rules on the Taking of Evidence in International Arbitration, if these Rules have been adopted. That may help the parties to understand that the engagement of legal experts will not necessarily stop with the submission of their written reports, but that they may be subjected to cross-examination, with all the associated burden, including time and costs for preparation, travel and appearance of the legal experts.

Recommendation 2: *Determine at the outset that legal opinions will not be considered as "sources of law" and do not constitute "evidence" in the strict sense.*

Again in order to avoid subsequent surprises, it is suggested that the arbitral tribunal should make clear from the start that it will apply the law ex officio, while at the same time making the parties aware that they are required to assist the tribunal in establishing the content of the applicable law. In particular, the arbitral tribunal should be transparent with the parties to the effect that it will consider legal issues, whatever the law applicable, as questions of law, not fact. That may help avoiding the parties to think that legal argument would be treated the same way as factual allegations, i.e. by applying rules of evidence or legal standards of proof, such as e.g. the standard of "preponderance of the evidence" or the standard of "beyond reasonable doubt". As the case may be, it may also help the parties to better assess whether legal expert testimony may be useful and add value to their case at all.

¹⁰ See, e.g. also ILA Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, according to which "arbitrators should promptly [...] establish appropriate procedures as to how the contents of the law will be ascertained" (Recommendation 3).

Recommendation 3: *Make sure that the legal opinion of your expert is concise and short.*

Parties should be aware that engaging legal experts will necessarily result in certain overlaps and duplications, as the (same) legal issues will not only be pleaded and briefed by counsel, but in addition through separate expert reports. With this in mind, legal opinions should be kept as short as possible and succinctly focussed on the relevant legal problem(s). Otherwise, they risk to be counter-productive, in that the arbitrators might see them as a nuisance rather than as a useful tool.

I remember a case where the various legal opinions of two law professors were together almost twice as long as the parties' written pleadings. As one can imagine, that was not only rather boring, but also quite exhausting and to some extent annoying.

Recommendation 4: *If possible, legal expert reports should try to avoid opining on how the tribunal should decide the case.*

The most important and challenging task of the arbitral tribunal is to render a decision on the merits of the dispute in accordance with the applicable law. This is what the arbitrators have ultimately been chosen for to do by the parties. In my experience, it is therefore certainly neither beneficial for the credibility nor for the overall appearance of a legal expert if his or her legal opinion goes well beyond to explain what the law is, by suggesting in no uncertain terms how the law should be applied to the case at issue and thus trying to convey to the arbitral tribunal how it should decide the dispute.

Here is a telling example, which I witnessed a few years ago in a case where the tribunal had to determine, among other things, whether a joint-venture partner had acted in bad faith in dealing with certain matters at the level of the joint-venture company. One of the legal opinions was peppered with statements such as the following:

"In the case of the JV-Company, the directors of A. had acted in bad faith because the board of directors (including the A. directors) unanimously resolved to comply with the JV-Agreement.

[...]

However, in the present arbitration case, it is obvious that the Respondents have acted in bad faith by failing to comply with their obligations under the JV-Agreement and the A. directors had failed to comply with the board resolution (for which they have themselves voted in favour)."

These types of statements pleading the appointing party's case in a legal opinion are, to put it mildly, just wasting the arbitrators' time. What I did not miss from the appearance of the law professor who had written this opinion is the following conversation with opposing counsel in cross-examination:

Counsel: "Then I would like to move on. Do you know how many references to good or bad faith your opinions include?"

Professor X: "Many times, but I don't remember how many."

Counsel: "I stopped counting at 30."

If legal experts nevertheless consider it fit to express views on how to apply the law to the case (sometimes they are urged to do so by "their" parties), he or she should do so with *souplesse* and in deference to the fact that this task is ultimately reserved for the arbitral tribunal.

Recommendation 5: Sometimes less is more!

Listening to an oral examination of legal experts after having read their written reports is in my experience rather often not much further enlightening, no matter whether the legal experts are subjected to cross-examination or heard sitting together at the witness stand in a so-called "witness conferencing" (or "hot tubing"). This is so in part because legal experts are lawyers, such that they – like counsel and the arbitrators – think like lawyers. They normally have adopted the legal position advocated by their appointing party and, like lawyers do, carefully avoid making any "mistakes" or unnecessary concessions.

Bearing this in mind, the parties are in my view well advised to consider that, in practically any international arbitration, cross-examining the other party's expert witnesses is a right, not an obligation. The parties are free to exercise that right as they see fit. If the appearance of an expert witness has not been requested, none of the parties is deemed to have submitted to the correctness of the content of the expert report, as aptly stated, e.g. in Article 5(6) of the IBA Rules on the Taking of Evidence in International Arbitration. In other words, no adverse inference may be drawn by the tribunal from a decision not to cross-examine a

legal expert. Instead, the tribunal remains free to assess the content of any such report, including legal expert reports, largely as it considers appropriate.

List of selected publications

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