



ARTICLE ON THE CROSS-EXAMINATION OF EXPERTS

By Juliette Fortin



In this article, I present my personal experience of cross-examination as a quantum expert. Some aspects might be similar to the ones experienced by experts in fields other than accounting, finance and economics (for example, technical experts). However, I do not express any views on the role of those experts.

I first give a brief overview of the expert’s role in international arbitration proceedings; I then highlight the goal and importance of the cross-examination portion of those proceedings and present the various types of cross-examination. Having described the process, I subsequently discuss in detail

the key success factors for a good cross-examination exercise, from my perspective as quantum expert.

The expert’s role in an international arbitration proceeding

During an international arbitration proceeding, it is common for expert witnesses to be appointed by the respective parties to provide an expert opinion. The expert witnesses can also be appointed by the tribunal, but I have come across this less often. The nature of the involvement of an expert during the proceedings varies from one arbitration case to the other.

Although systematic intervention does not occur during the entire procedure, the services rendered by the expert can generally be summarised in three main steps.

In the first step, the expert who has been appointed by the Claimant usually reviews documents which are relevant from a financial perspective, and sets out an assessment of the quantum in an expert report. On the other side, the expert who has been appointed by the Respondent will typically review the Claimant-appointed expert's report, provide commentary and criticism and, if necessary, offer a counter-valuation of the quantum in a responding expert report.

In the next step, there is usually a second round of expert reports, in which the experts will provide additional comments and potentially update their valuations in light of points made by the other expert or any information made available since the issuance of their respective first reports.

In the last step, both experts can be asked to provide oral testimony during the hearings, in order to explain their perspectives and points of disagreements. The cross-examination phase occurs during this last step.

In international arbitration, it is also possible that expert witnesses who have submitted written reports are not called to provide oral testimony at the hearing. This may happen for various reasons, for example if the opposing party believes that it might not gain or it might even lose from the cross-examination of the opposing expert.

In my experience, quantum is usually an area of interest during the hearing phase, with quantum experts being called for oral testimony more often than not. This is particularly true as cases brought to international arbitration become more and more complex.

The goal and importance of the cross-examination of experts during the hearings

I understand that the main goals of the cross-examination are to confirm or clarify if needed the expert's position and assessment of losses, to test the expert's credibility and to determine if the expert testimony is truthful, free of mistake and independent; this is the reason why an American jurist and law expert once said that "[c]ross-examination is the greatest legal engine ever invented for the discovery of truth".¹ In this respect, the testimony of the expert during cross-examination is of prime importance, since it is the main opportunity for the tribunal to form an opinion on the expert, beyond reviewing the written evidence.

In my experience, it is true that the testimony of an expert can significantly influence the tribunal's understanding of the financial issues, and it can therefore have a large impact on the outcome of the decision. As the issues at stake in commercial and investment disputes become more and more complex, the parties tend to make increasing use of experts to assist them.

Methods of cross-examination

Rules that regulate cross-examination vary from jurisdiction to jurisdiction, and they are not always written.

The "traditional cross-examination"

In practice, the cross-examination process in international arbitration has begun to standardise. In my experience, the most common method of hearing oral testimony from each party's appointed expert is for the expert (i) to be questioned briefly by the counsel for the appointing party ('direct examination'); (ii) to be cross-examined by the examining counsel ('cross-examination'); (iii) possibly another short questioning by the counsel for the appointing party ('re-direct'); and finally (iv) to be questioned by the arbitrators.

In the direct examination, the questioning by the counsel for the appointing party is generally limited to a few questions introducing the expert and key points of the reports. This questioning can often be replaced and supplemented by a presentation by the expert of the key points of the written testimony.

The parties that question the expert do not share the same objectives and will therefore ask different questions. Further, each counsel has his or her own style and will set up a specific environment for the questioning, from the most friendly, to the most aggressive, passing by more neutral style. I will come back to the expert's attitude in facing those different counsel styles later in this article.

The tribunal will also generally ask questions to the expert. I have observed that the practice of questioning by the tribunal varies from one case to the other. In some cases, the tribunal is very active throughout the whole cross-examination session, interrupting the examining counsel if needed, in order to get answers to its own list of questions. In other cases, the tribunal is less engaged and asks very few, if any, questions, generally at the end of the expert's testimony.

In the recent cases I have been involved in, I have encountered a fairly significant involvement by the tribunal members in the examination² of quantum experts, the only exception being in a context where the tribunal had decided to appoint its own quantum expert and therefore did not engage in the quantum discussion during the hearing. I personally appreciate this involvement as it gives us, experts, the opportunity to address directly the tribunal's questions.

Witness conferencing

Although direct and cross-examinations still prevail, the examination of experts in international arbitration has gained more flexibility in recent years with "witness conferencing" (also known as "hot-tubbing"), in which both party-appointed experts are examined simultaneously.

This approach, if it occurs, generally occurs in addition to the traditional cross-examination. The counsel or tribunal question both (or more) experts at the same time. This system

allows the tribunal to hear both experts answering the same question, in turn. It is therefore much more interactive and dynamic than the traditional cross-examination.

I believe that there are three main advantages to this approach. First, experts tend to be more forthcoming when tribunal directly asks questions; they feel as if they were being asked to assist, rather than being attacked by the opposing counsel. In this respect, the tribunal can obtain more forthright answers. Second, this method allows the tribunal to easily understand areas of agreement or disagreement between the party-appointed experts. Third, questions in these sessions usually deal with main issues and it gives the experts the opportunity to explain their position in a constructive environment.

While this approach has its advantages, witness conferencing also presents important risks for the expert. This procedure may favour experts who have a robust experience and a strong ability to react, and when the experts do not have a similar level of seniority, their respective statuses can affect the way the hot tubbing proceeds.

My experience of hot-tubbing sessions is that it is a helpful and more interactive process, which brings the focus of the debate on key issues and when the tribunal members engage in the discussion, after a sometimes less helpful cross-examination potentially focused on marginal points aiming at discrediting the expert.

Key success factors for a cross-examination

An expert witness's testimony does more than repeat and dictate written conclusions of the submitted report. Rather, an expert's oral testimony should be seen as an opportunity to bring the written submission to life. If the expert makes a favourable impression, the testimony may even have an immediate persuasive impact on the tribunal.

In my view, making an effective presentation to the tribunal requires the expert to (i) show intrinsic qualities; (ii) be well prepared; and (iii) have an appropriate communication style.

Intrinsic qualities of an expert

Experts are expected to be independent

It is the primary duty of an expert to provide the tribunal with an independent and objective expertise at all stages of the procedure.

This duty is for example highlighted in the Preamble of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, issued by the Chartered Institute of Arbitrators in 2007 (CI Arb Protocol), according to which “experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them”. Article 4 even declares 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”.

Lawyers sometimes try to challenge the independence of an expert. A well-experienced expert must stick to the objective facts on the case and not be biased by possible arguments of the appointing party.

Credibility is the expert's strongest asset

My experience has been that we experts want to preserve our credibility and reputation. To do so, we adopt an independent position that we believe to be correct based on the facts, regardless of which party hired us. Losing credibility is the worst thing that can happen to an expert as it can ruin his or her career.

To be credible, an expert opinion must therefore provide an objective assessment. It must also take account of the facts, regardless of whether or not those are in favour of the appointing party.

In any case, it is counterproductive for an expert to defend the position of the appointing party at the expense of providing clear explanations to the tribunal on certain issues.

My experience has also been that lawyers appreciate the independence of experts. It gives them comfort that the positions adopted by the expert are robust, as they are reasonable and based on objective facts. This limits the risk that the expert's cross-examination by the opposing party negatively affects the outcome of the case.

I have personally experienced difficult discussions with clients who were passionate about the alleged damages and had difficulty understanding that the loss they suffered was lower than they had thought. In those cases, it is very important for an expert to discuss the issue with the client and appointing counsel as soon as possible and to remain independent, as pleasing the client by adopting a biased position is a dangerous short-termist attitude that does not take into account the expert's duty of independence to the tribunal and can destroy the expert's credibility for the long-term.

The expert must show relevant expertise and credentials

It seems an obvious requisite but is worth noting: an expert must show relevant expertise and credentials in light of the issues at stake in the case. For example, accounting issues should be dealt with by qualified chartered accountants. Where specific industry expertise is key to the determination of the quantum, then the expert should have the relevant industry knowledge or make sure such expertise is brought to the case by another expert.

An expert must be well prepared for cross-examination

Expert's cross-examination preparation



A single sentence from the expert can ruin that expert's evidence as it can be used adversely by the examining counsels in their closing statement to support one of their positions. To avoid doing so, expert preparation is paramount before going on the stand, as the process can easily put the expert under a lot of stress and pressure.

A good preparation starts by delineating the exact perimeter in which the expert was asked to provide an opinion. This will help the expert to remain in his or her area of expertise and clearly state when the question is out of the bounds of this expertise. By doing so, the expert will preserve credibility and will not harm the position of the instructing party.

Although this may seem to be the most obvious point, the expert must have a perfect knowledge of the entire submitted report, including the core report, its appendices and exhibits: where the information came from, how the figures were calculated, and why such conclusion was logically drawn.

In practice, the hearing phase usually takes place a few months or even a year after the last expert report was submitted. It is therefore very important for the expert to refresh his or her mind with the full case details.

Mock cross-examinations are a very good exercise for the expert to get prepared. Lawyers preparing the expert can usually anticipate a significant portion of the questions that will be asked during cross-examination. To be effective, these mock cross-examinations should be as realistic as possible.

Also, the expert should remember all the cases in which he or she has previously testified, as well as the positions adopted, as the opposing party may try to demonstrate inconsistency of positions by referring to a previous case or an article written by this expert.

Adverse party's cross-examination preparation

The preparation phase usually includes our expert assistance to the lawyers in their drafting of cross-examination questions for the other side expert. The expert is best placed to understand the main flaws of the other side's positions, as he or she has already performed an in-depth review of the reports of the other side's expert and is thus familiar with those.

The expert must have the appropriate communication style

Ability to explain complex issues clearly and concisely

An expert needs to be able to be extremely clear and concise in expounding upon analyses and conclusions to the arbitral tribunal. The expert should be able to convince the tribunal that his or her view is reasonable, accurate and unbiased.

Often, the issues dealt with by the expert are complex. It is therefore key that the expert has the sufficient communication skills to use a language that the tribunal understands in order to convey the key messages, whether those are very technical or not.

The inability to explain technicalities or complex issues may even trigger a misunderstanding from the tribunal and affect the outcome of the proceedings. In my view, if one cannot explain clearly his or her position, assessment, assumptions, this might well be due to the fact that those are not understood by the expert him/herself.

Having the right attitude

When on the stand, the expert's posture, attitude and words chosen is carefully observed by the tribunal. These elements influence the tribunal's perception of the reliability of the expert's testimony.

Although each expert has his or her own personal style,

I believe that being excessively self-confident might cast some doubt on the seriousness of the expert's work. One cannot hide behind experience – as large as it might be – to answer all clarification questions regarding analyses performed for the case. In my view, staying humble and explaining the logical process behind each choice, while recognising the limits inherent to the analysis, sends a positive signal to the tribunal, causing it to become more disposed to listen to the expert's arguments.

Some questions asked during cross-examination are aimed at destabilising the expert in order to undermine his or her credibility. In these kinds of situations, the expert should stay calm and look confident rather than overreact. It is paramount that the expert shows a sense of serenity.

By showing the correct attitude, the expert conveys the message that he or she is at the tribunal's disposal to help its members resolve the complex issues they have been appointed to rule on; the expert must also convey that the best efforts were taken to provide unbiased and reasonable conclusions.

I also think that the role of the expert is not to put too much emphasis on the disagreements between the parties. The expert should not hesitate to clearly recognise when his or her views are in accordance with the other expert. Again, by doing so, the expert sends a positive signal to the tribunal, showing that he or she aims at helping the tribunal identifying the divergence issues it should focus on.

The hearings are generally recorded in transcripts that the tribunal will review when finalising its award. In this context, the words used by the expert must be chosen with care as they will remain after the hearing. They must be in line with the overall message of objectivity that the expert should convey.

Oral skills

Cross-examination is first of all an oral exercise. Therefore, giving successful expert evidence requires mastering communication skills.

Fluency in the agreed language of the arbitration is almost always required; technical expertise could be particularly difficult to explain and the credibility of testimony could suffer if the expert is not fluent in the language of the testimony.

Moreover, as the entire cross-examination will be transcribed by a court reporter as explained above, it is important that the expert makes an effort to speak as slowly and clearly as possible. The expert should also bear in mind that physical movements, such as nodding, cannot be recorded on the transcript.

Answering questions

It is essential for the expert to fully understand the question asked before beginning a response. Some questions might be confusing, and the expert should not hesitate to ask the opposing counsel to rephrase if necessary.

The expert should answer the question succinctly – and only the question asked. However, in case the answer might be misleading taken on its own, I believe that the expert should not hesitate to briefly explain the context in which the answer should be understood. Doing so will avoid out of context answers that could be seen as contradictory to the expert's position.

The role of the expert during cross-examination is not to guess at the answer. The expert must be clear about the instances in which he or she is unsure about an answer or does not know the answer. Also, the expert should stick to his or her area of expertise and clearly state when the question asked does not fall in this area of expertise.

When the examining counsel is referring to a document, it is important to have the document in front of the expert. It is the only way for the expert to see the context, and to answer precisely the questions.

Conclusion

The cross-examination of experts is a key phase of the international arbitration proceedings, all the more so from the expert point of view. Whether it is done in the traditional way or through witness conferencing, the primary duty of the quantum expert is to assist the tribunal in determining the losses suffered, if any, by the claimant. Experts aim at being independent, credible, with relevant expertise for the case. They will prepare for the cross-examination, by reviewing their assessment of the losses and anticipating to the extent possible the questions they could be asked. During the cross-examination, key success factors will be their ability to orally convey clear messages out of complex issues and their right attitude towards answering questions. My sense is that the increasing familiarity of tribunal with experts' work and the professionalisation of experts serve the purpose of helping tribunals extract the most value from cross-examinations.

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1 John H. Wigmore, quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999).