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The Keenest Condiments: the Spectrum of Experts Across Traditions in Construction Arbitration

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Abstract: This paper will explore the role of expert witnesses in international construction arbitration across legal traditions. The focus will be to highlight the differences between the two types of experts. For the purposes of this paper, we will draw a spectrum with two extreme examples of expert witnesses. On one extreme of the spectrum, there is the expert who makes a living out of expert work and thus is seen to be closer to the client. On the other extreme of the spectrum, there is the expert who is providing an opinion on something that is his or her life's work, this expert might never have given an expert report before. Both ends of the spectrum are heavily criticized. The goal is to distinguish both sides of the spectrum, considering the aspects of Civil Law and Common Law traditions.

Keywords: International Construction Arbitration. Expert Witness. Comparative Law. Procedure.

> *(...) were only like keen condiments in a choice dish: their presence was pungent, but their absence would be felt as comparatively insipid.*
>
> Charlotte Brontë, Jane Eyre

1 Introduction

The construction and infrastructure industry are present in all countries. Construction projects are an essential contributor to the economic growth of a nation, whether a highly developed or a developing one. From the construction of small buildings to major projects involving complex engineering work – such as the

construction of nuclear plants – the sector moves large amounts of money both nationally and internationally.[1]

International Construction Arbitration has a specific set of demands since they are often more complex than International Commercial Arbitration cases. Some important aspects of it are, first, that it is riskier than any other commercial transaction due to its nature and typically long duration. Second, it has strict deadlines (*e. g.* an Olympic Games stadium needs to be delivered before the games start) that when at risk results in very complex delay and causation questions. Third, it involves a larger number of parties with different capacities and interests (Employer, Contractor, Subcontractors, Project Manager, Engineers, Architects, Experts, Consultants, Lenders, Insurers, Suppliers, etc.) sometimes even involving third-party participation arguments in the procedure. Fourth – and this one is quite specific – the construction sector uses a variety of standard forms such as the FIDIC conditions of construction contracts, which demands from practitioners an expertise on how to deal with such contracts and also specific statutory laws. At last, due to its technical complexity, international construction arbitration requires productive and organized management of documents and evidence, which can be a challenging process that may include a large set of documents, expert reports and attachments, analysis of the program, and the calculation of damages.[2]

The construction sector demands expertise since before the works start. Not surprisingly, the Queen Mary University London (QMUL) Survey[3] has concluded that the main causes of disputes were late performance and poor contract management. Those results confirm the known difficulty of completing complex engineering works in fixed schedules.

Part of the reason why it is a complex activity was summarized by E.J Rimmer. The English civil engineer and barrister explained that "(...) the works are to be carried out (...) under unstable conditions with material and labor of varying quality; (...) the conditions of excavation and foundation cannot be entirely foreseen until the ground is opened up; (...) execution of the works may result in damage to property belonging to other persons; (...) works of specialists may have to be carried out concurrently with work done by the general contractor; (...) the period of the contract may extend over several years; and (...) the amount of money involved is often such as to imperil the financial resources of a contractor who has made an unwise tender."[4]

[1] BREKOULAKIS; BRYNMOR, 2017, p. 1.
[2] BREKOULAKIS; BRYNMOR, 2017, p. 2-3.
[3] Survey 7 (QMUL; MASONS, 2019).
[4] RIMMER, 1939.

Therefore, construction projects involve several risks and often give rise to disputes. The vast majority of these disputes go to alternative dispute resolution (ADR) and international arbitration instead of national courts.[5] One of the main reasons behind such preference relies on the nature of the activity. The construction needs to move forward and as soon as possible.

ADR and arbitration procedures allow solving disputes in a cost-efficient way with decision- makers that have experience in both the complex world of construction with its many specific contracts, documents, and technical aspects. Also, case management skills are needed to deal with the amount of evidence and players these disputes usually involve.

Construction arbitration is very complex and thus the assistance provided by experts may be of help to the parties and the tribunal. In one hand, the parties can use expert opinions as to fully present their cases to the tribunal and it is handy for the counsel, since the number and the complexity of the documents are summed up in a report that is expected to be written as to be understandable by legal practitioners. On the other hand, the tribunal receives some help in managing the volume of documents since, even though some construction arbitrators have expertise, sometimes the caseload is too heavy, which makes the deliberation slower.

This paper will explore the role of expert witnesses in international construction arbitration across legal traditions. The focus will be to highlight the differences between the two types of experts. For the purposes of this paper, we will picture a spectrum of two extreme examples of expert witnesses. On one extreme of the spectrum, there is the expert who makes a living out of expert work and thus is seen to be closer to the client. On the other extreme of the spectrum, there is the expert who is providing an opinion on something that is his or her life's work, this expert might never have given an expert report before. Both ends of the spectrum are heavily criticized. The former because he or she is supposedly providing a report that can be seen to be biased because this person does that for a living and he or she wants to please the client. The latter because he or she is an expert that is providing an opinion on something very specific, his or her life's work and thus the decision making is ultimately being delegated to him or her instead of the appointed tribunal. The goal is to distinguish both sides of the spectrum, considering the aspects of civil law and Common Law traditions.

This paper will be divided into two sections. Firstly, experts will be analyzed with the optics of Common Law and Civil Law traditions. For this essay, English and Brazilian law will be considered as main examples. Secondly, a spectrum of

[5] Survey 9 (QMUL; PINSENT MASONS, 2019).

experts will be drawn, to better evaluate both sides of the criticism this type of evidence received by practitioners of international construction arbitration as well how the two sides of the spectrum connect with the different legal backgrounds.

2 Choices that Matter

The employment of experts to assist in a construction case happens often and tribunals must administer this process efficiently, paying attention to differences between the instructions they receive and what the terms of reference establish.[6] That is one of the challenges an arbitration faces when experts are involved, which has a close connection to the case management concern, which, according to the QMUL Survey is where most criticism resides.[7]

It is reasonable for the parties to appoint a tribunal with expertise on the substance of the dispute.[8] However, tribunals with little expertise might be appointed and that is one of the reasons why they might decide to appoint an expert to assist them. Another scenario is when the tribunal has the expertise but understands that the assistance of an expert might be of good use (to evaluate and analyze the volume of documents and evidence, thus expediting the procedure). As far as a tribunal-appointed expert is concerned, it is often easier for the tribunal to manage the communications between his or her and the parties. Also, it is easier for him or her to have his or her work delimited, which grants the tribunal with a straight to the point analysis of the matter at hand.[9]

Differently, party-appointed experts have a direct contact with the party who appointed him or her (and who is paying for the report). Although it is true that (i) it is possible to challenge an expert, (ii) rules and guidelines have been put in place to guide the experts on how to manage their work[10] and (iii) the tribunal has the authority to exclude an expert,[11] the parties have a strong argument to protect their choice of expert: the right to be heard and to fully present their case the way they understand needed for their defense.[12]

Therefore, although arbitration rules around the world have a similar treatment towards expert witnesses, there are differences between the role of experts in Common Law and civil law traditions. While the Common Law approach understands that the expert serves the Tribunal, the civil law tradition views it as

[6] LLOYD, 1990; Survey 23 (QMUL; PINSENT MASONS, 2019).
[7] Survey 8 (QMUL; PINSENT MASONS, 2019).
[8] VERBIST; SCHAEFER; IMHOOS, 2015, p. 131-132.
[9] VERBIST; SCHAEFER; IMHOOS, 2015.
[10] BORN, 2015.
[11] SCOTLAND, 2018; CANADA, 2015; ENGLAND AND WALES, 2005; US, 1991.
[12] Part I: "Policy and Principles", Chapter 2: "Powers, Rights and Duties of Arbitrators" (WAINCYMER, 2012, p. 85-100).

someone to serve the interest of the party who contracted that expert, respecting a scientific reasoning that a professional.[13] has to provide in its report. Besides, because international arbitration lacks a statutory procedural code sets out how the witnesses should be examined by the tribunal, it is up to the parties and the tribunal to agree on how the taking of evidence will happen, which can be tricky when the practitioners come from different legal backgrounds.[14]

When discussing the differences between the common and civil law traditions, the terms "adversarial" (Common Law) and "inquisitorial" (civil law) are often used. Those are referring to the way of gathering the facts of the case during the procedure and subsequent deliberation. The reason behind such wording comes from the idea that in the civil law tradition, the judge is generally the one who administers the taking of evidence, while the parties only provide testimonies to present their cases, which will then be questioned mainly by the judge. Only after the judge is finished the parties can request additional questions to the witness at the stand. Plus, it is not uncommon to see civil law judges interrupting the questioning by counsels to the witnesses. Therefore, in the civil law tradition, the judge takes on a more active role while the counsel takes on a passive role.[15]

In a different direction, the so-called "adversarial system" of the Common Law tradition works differently. Here, the idea is that the facts of the case should be unveiled by statements and questioning by both parties. That means that different than in the "inquisitorial system", the judge takes a passive role. He or she will listen more and speak less. Not only he or she have to be neutral, but also should be seen to be neutral. At the same time, the parties have more power to investigate the documents that are in possession of the counterparty then in the context of the civil law tradition. One unique aspect of the Common Law tradition is the cross-examination of witnesses to test the value of the report provided by them. This process is driven by the counsel, which follows the idea of the counsel to take on a more active role in the proceedings. Therefore, in the Common Law tradition, the counsel takes a more active role while the judge takes on a more passive role.[16]

Even though there are still many differences between both traditions, in the context of international arbitration, practitioners are each day more "well rounded" with regards to both legal backgrounds. Therefore, it is not surprising to see a civil law trained lawyer having vast experience in cross-examination of witnesses, for example.

[13] KANTOR, 2010.
[14] HARBST, 2015, p. 6; STEPHENS-CHU; SPINELLI, 2014, p. 8.
[15] HARBST, 2015, p. 12.
[16] HARBST, 2015, p. 13.

In order to evaluate how both traditions treat expert witnesses, this paper will now consider examples of English Law for the Common Law tradition and Brazilian Law for the civil law tradition, analyzing the relation between experts across legal traditions in a spectrum.

3 The Common Law Tradition: the English Example Within the Spectrum of Experts

The Common Law tradition was created in England. Back in 1990, there was a perception that experts were being hired in England and Wales courts as "guns for hire".[17] However, as previously explained the 'adversarial system' of Common Law puts the party representatives in a rather active role of presenting the case to the tribunal (*e. g.*, by presenting the case and questioning the witnesses). It is safe to say that hearings where the judge (or for our purposes, the tribunal) takes on a more passive role in the assessment of evidence takes longer. An extreme example: the Bank of England case[18] hearing in 1993 broke records when counsel for Claimant took eighty days to deliver his opening statement, followed by counsel for Respondent, who took one hundred nineteen days to deliver his. The influence that hearings have for English judgments have effects on the weight put on oral evidence. Although they are aware of the imperfections of such testimony, Common Law lawyers follow the Common Law oral tradition of investing in the oral testimony when presenting its case to the tribunal. To better assess it, they use cross-examination and direct-examination.[19]

Not only was English law an inspiration to many other jurisdictions, like the United States of America, but also the English tradition has influenced the development of international arbitration as well. Not surprisingly, English law is the preferred choice of law among international arbitration practitioners. Also, London is the preferred seat of arbitration.[20] Therefore, the importance of such legal sphere is undeniably of the utmost importance for the context of the present study.

The Common Law lawyers acknowledge that party-appointed witnesses have an inherent conflict of interest with the party who appointed them. Thus, they trust the power of a strong cross- examination to unveil any inconsistency or rational attempts to lead the tribunal with the side of the facts of the party who this person is closest connected to. English practitioners have assets such as the CIArb Protocol and the IBA Guidelines to guide them on how to prepare their witnesses.

[17] KANTOR, 2010; Part II: "The Process of an Arbitration", Chapter 12: "General Witness and Expert Evidence" (WAINCYMER, 2012, p. 945).
[18] ENGLAND AND WALES, 2006.
[19] NEWMAN, 1999, p. 30-31.
[20] Survey 11 (QMUL; PINSENT MASONS, 2019).

Hence, the English law tradition could be seen as a double-edged sword: on one hand, counsels are trained and prepared to deliver strong cross-examination skills to unmask the truth and present all facts to the tribunal. On the other hand, the preparation of witnesses by the counsel is allowed.

As a matter of English Law and the English Arbitration Act (EAA), parties in an arbitration can agree to use expert witnesses. If no agreement was previously made, the authority of such shall be decided by the tribunal.[21] The EAA provides in its Arts. 37 and 44[22] specific provisions about how an expert witness is to be appointed, administered and paid.[23] In English Law, before appointing an expert, the parties may engage in discussions with candidates in a privileged manner, meaning that the other party will never know what was discussed and shown to the expert that will provide an opinion to the party who appointed him or her.[24] In English Law, the expert is expected to owe a duty to the tribunal, even when they are party-appointed experts, which means that the opinion should be independent and the experts should not advocate for the party that hired them.[25] That is coherent with the expectation that Common Law lawyers have a similar duty to the tribunal.

Experts are widely accepted in England even when the tribunal is silent concerning their use. When preparing their submissions, parties sometimes understand that they could better present their case with the support of an expert witness. This use is accepted, since the tribunal has a duty to make sure that the parties are given a full opportunity to present their case before them and that they feel like they did.[26] Although some tribunals have been facing difficulties to administer arbitrations because of a due process paranoia, the concern is justifiable. That is because practitioners want an enforceable[27] award since the whole idea is to have an award that suits its purpose of being complied with as soon as possible.

[21] I.1(b) (ENGLAND, 1996); Chapter 24: "Expert Evidence" (BOR, 2013, p. 504).

[22] "Art. 37. Power to appoint experts, legal advisers or assessors (1) Unless otherwise agreed by the parties (a) the tribunal may (i) appoint experts or legal advisers to report to it and the parties, or (ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and (b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person. (2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part."; "Art. 44. Court powers exercisable in support of arbitral proceedings. (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) The matters are (a) the taking of evidence witnesses (...)."

[23] ENGLAND, 1996.

[24] Chapter 24: "Expert Evidence" (BOR, 2013, p. 511).

[25] KANTOR, 2010; Ikarian Reefer Case (ENGLAND AND WALES, 1995); Polivitte Ltd. Case (ENGLAND AND WALES, 1987).

[26] Section 37 (ENGLAND, 1996).

[27] The New York Convention (NEW YORK, 1958).

Here, the solicitor must not "attempt to deceive or knowingly or recklessly mislead the court"[28] or be "complicit in another person deceiving or misleading the court". Hence, in the case that a solicitor finds out that for any reason he or she mislead the court in any way, the solicitor has the duty to inform the court immediately, after seeking consent from the client. If the client does not consent, the solicitor shall cease to act on behalf of the client.[29] Likewise, solicitors shall cease the representation of a client that they become aware that has acted in such a way to mislead the court or has acted in perjury – unless the client consents to unveil the truth to the court.[30] Solicitors must also refuse to continue acting for a client if they become aware that the client has committed perjury or misled the court or attempted to mislead the court in any material matter, unless the client agrees to disclose the truth to the court.

More specifically, as briefly mentioned before, the Charter Institute for Arbitrators, based in London, published the CIArb Protocol[31] which the parties and/or the tribunal may use as guidance on how to manage the taking of expert evidence. Heavily influenced by the English Law, the guidelines "addresses the issues that arbitrators should take into account when considering how to deal with expert evidence". In the Common Law tradition, experts are most frequently used as party-appointed experts, where each party choose to appoint their own expert.[32]

However, the experts have a duty to the tribunal and must objectively direct his or her opinion to the tribunal. Otherwise, experts can end up facing conflicts that may lead to a challenge. When we think about party-appointed experts, the connection between each one of them to the party that is appointing his or her is closer than to the counterparty. Examples of possible conflicts involving party-appointed experts are when, for example, the appointed professional is basing his or her analysis on different in different factual bases (so it is challenging for the tribunal to compare opinions). Another example is when one or both is apparently striving to please the party who appointed him or her in the report. Finally, when the expert reports differ too much, it raises a red flag to the tribunal. These issues are to be resolved by the tribunal and the solution varies depending on the case. Either by asking clarifications, joint meetings, using their own expertise (when that

[28] Outcomes 5.1 and 5.2 (THE LAW SOCIETY, 2011).
[29] Indicative Behaviour 5.4.
[30] Indicative Behaviour 5.5.
[31] CIArb Protocol (CIArb, 2011).
[32] CIArb Protocol 2 (CIArb, 2011).

is possible) or appointing a tribunal-appointed expert, the tribunal must make sure that the parties have the right to be heard and properly present their case.[33]

The tribunal's main duties are to administer the proceedings and to give a final decision. Thus, accepting the presentation of party-appointed experts should not mean to delegate the decision – making to one or the other expert opinion. The High Court has dealt with this issue in Price *v.* Carter, when a challenge was put alleging that the tribunal had delegated the decision-making to an assessor and had refused to allow the parties to present their comments on the assessor's report. The case was originated from a construction contract based on the JCT Minor Works Building Contract 2005 edition Revision 1 (2007). The appointment of the tribunal was based on the Construction Industry Model Arbitration Rules, which provides for the tribunal's right to appoint experts or legal advisors.[34] The challenge claim was that the arbitrator had enough expertise to decide and did not need the assistance. In deciding, the High Court stated that although that might have been the case, it did not disallow the arbitrator from seeking the assistance of an assessor and that the assessor's appointment was a reasonable exercise of the tribunal's discretion of understanding what it was needed to the cost-effectiveness of the case. Further, the fact that the tribunal decided the case by adopting the assessor's discoveries does not necessarily mean that the tribunal simply took them "at face value without giving them any consideration".[35]

Tribunals must decide and must not delegate the responsibility to experts or assessors. Likewise, arbitrators must assess the expert reports presented instead of avoiding deciding on a conflicting expert evidence.[36] Instead, when that is the case, the arbitrator has several actions to take (*e. g.*, hot- tubbing or appointment of a tribunal expert).

Therefore, the English tradition widely accepts experts, more specifically party-appointed experts. That might be because of the duty the solicitors and the experts have towards the tribunal. Also, the jury tradition that has perpetrated until today and is now translated to detailed cross- examination during the hearing phase. In English practice, the practitioners believe on the power of cross-examination to unveil the truth although the close connection of experts with their clients.

[33] Chapter 24: "Expert Evidence" (BOR, 2013, p. 517); para. 2-857 (TACKABERRY; MARRIOTT, 2003); Section 33(1) (ENGLAND, 1996).

[34] CIMA Rule 4.2; Section 37 (ENGLAND, 1996).

[35] Paragraph 33 (EWHC 1451, TCC, 2010).

[36] CLY 206 (1994). "Each party had presented expert evidence on technical issues. The arbitrator, however, dismissed the claim without referring to the expert evidence. The court allowed the appeal. In so doing, it stated that: It was fundamental for the [arbitrator] to have adjudicated upon the conflicting evidence of the experts and to reach a finding as to which expert's opinion he preferred in relation to the issues raised in evidence. A tribunal cannot therefore simply 'sit on the fence' but must be prepared to engage and take a decision on the expert evidence before it, or at least explain why it has been impossible to do so" (BOR, 2013, p. 521-522, "Chapter 24: Expert Evidence").

4 The Spectrum: Closer to the First Extreme

Now moving forward to the spectrum once presented in the introduction of this paper. Although it recognizes that there are all sorts of experts and it is difficult to define them, for the purposes of this essay, we will consider a line with two extreme points. On one side of this spectrum, we have client-based experts. On the other side of the spectrum, we have experts who are science-based. As explained in the first section, the Common Law and the civil law tradition differ in what concerns the treatment given to experts. While English lawyers take on a more active role of assessing the evidence presented by experts, Brazilian lawyers take on a more passive role. That is because England believes in the power of cross-examination and Brazil is more skeptical about party-appointed experts independence. The position taken by this paper is that English experts are closer to the first side of the spectrum (client-based) and that Brazilian experts are closer to the opposite side of the spectrum (science-based) for the reasons presented below.

In Common Law jurisdictions more often than in civil law jurisdictions, counsels seek the assistance of experts to better present their case to the tribunal. Because of the tradition to work on strong cross-examination, it is possible to challenge the expert witness to unveil any hidden truth within their opinion, which can be heavily influenced by their clients. The client-based expert would be this person that had the opportunity to be close to their client into preparing the report and even being prepared for the hearing by the party who appointed him or her. That expert would be on the side of the spectrum closer connected to the party, that is, the client who paid him or her in full. Thus, tackling with his or her independence.

Having the opportunity to appoint experts and to have a close contact with that person to align strategies, present a report and prepare for the hearing is a valuable tool into presenting their point of view to the tribunal and having the right to be heard.

On the other hand, the presence of experts may be seen as a threat in particular cases where the substance of the dispute deals with high technical areas, where the expert can – by choice or chance – become the final decision maker. Sometimes the technical matters of the dispute are so complex that even a tribunal with some expertise in the subject will end up having to put heavy reliance upon expert evidence. It is exactly in those cases where even the specialist tribunal finds tricky to untangle the evidence without an expert report that the expert witness is more than necessary. Nevertheless, practitioners are concerned “that the pendulum had swung too far towards expert witnesses performing something closer to

an advocacy function rather than an investigatory expert review".[37] Put differently, there was the concern that experts were providing reports based on what the party who was his or her client was instructing them to find rather than letting the expert find the results in an impartial sense.[38]

Lord McMillan has once stated that "no scientific man ought ever to become the partisan of a side", but at most be "partisan of an opinion in his own science", otherwise it would be to "prostitute science".[39] In other words, an expert should never accept to be put in a position to entertain an opinion that is partisan of one side and not his or her science and honest scientific opinion.

The relation between this type of expert is closest connected to the Common Law tradition because of the system itself. The adversarial system allows for a proximity between the expert and the party who appointed him or her, but that does not mean that the opinion will be frauded. On one hand, the system allows for proximity and preparation, which allows the expert to be molded into the confines of what will be needed for that client to present the best defense possible (not to mention the fact that the party-appointed expert will have access to one's side evidence and point of view). On the other hand, the expert knows that he or she needs to rise above that and look objectively to the facts and documents and make a balanced judgment –[40] and that is also part of the culture of the Common Law system.

5 The Civil Law Tradition: the Brazilian Example Within the Spectrum of Experts

In the 1900s, it was said that civil lawyers had difficulty to trust evidence delivered by witnesses.[41] The belief was based on the concern that evidence provided by experts is often not objective or even biased or too connected to the party who appointed him or her. Not to mention the variable of memory, all making this type of evidence imperfect to be granted so much attention. Instead, the civil law tradition puts more confidence in documentary evidence.[42] However, that does not mean that expert testimony is not used in civil law jurisdictions. Although they are used, they are treated differently if compared to Common Law jurisdictions.

[37] HORNE; MULLEN, 2013.
[38] HORNE; MULLEN, 2013.
[39] LORD MCMILLAN, 2015.
[40] REYNOLDS, 2002, p. 2.
[41] REDFERN, 1994, p. 347.
[42] HARBST, 2015, p. 6.

As previously explained, while party-appointed experts are considered to be the rule in Common Law jurisdictions, in civil law countries the tribunal-appointed expert is more commonly used. As a matter of fact, civil law countries usually place less weight to the party-appointed expert evidence.[43]

The Brazilian Arbitration Law provides that besides the parties' right of being represented by legal counsel, they have the right to appoint someone to assist them to present their case and that this right "will always be respected".[44] Also, the tribunal "either ex officio or at the parties' request, may hear parties' and witnesses' testimony and may rule on the production of expert evidence, and other evidence deemed necessary".[45]

Tribunals are empowered to request and rely on expert reports as they understand necessary to reach a conclusion. However, the reliance on expert evidence will not always be needed and arbitrators must know that it is not because they can that they should.[46] That power and the dilemma that it follows is very common in civil law jurisdictions, since the tradition preaches that tribunal-appointed experts are to be used more often instead of party-appointed experts.

One of the criticisms that this approach takes is based on the concern of an increase of the expense and time of the proceedings. The civil law tradition does not put the same trust in party-appointed expert witnesses, but it also grants broad permission to party-appointed experts. By not focusing the expert support into one or the other, it increases the cost and time frame of the proceedings, which goes against the whole idea of opting to go to arbitration to handle construction disputes, since the sector demands quick technical solutions for its issues.

Another common criticism is the delegation of the decision making from arbitrators to the appointed expert. Considering the appointment of a tribunal-appointed expert, even when the parties choose to appoint their own experts (because they have the broad right to do so), the person appointed by the tribunal is more likely to have its opinion followed. Further, in the case where the parties choose not to appoint their own experts, the tribunal will not even have the opportunity to hear two different approaches of the technical question at hand.

In Brazil, it is the tribunal who asks the questions to the experts, instead of the party representatives, thus taking the active role of assessing the evidence. Therefore, lawyers in Brazil and in other civil law countries do not have the same training of Common Law lawyers in cross- examination. While that would not be a problem in a domestic case, when Brazilian parties and Brazilian lawyers are facing

[43] ROSEN, 2014, p. 381.
[44] Article 21, §3, Brazilian Arbitration Law.
[45] Article 22, Brazilian Arbitration Law.
[46] SWINEHART, 2017, p. 38.

an international arbitration where cross-examination will be needed, the lack of training on that ability might mean that either the party will have to hire an international law firm with experience in cross-examination to assist in the hearing or try their best to take on the active role of questioning the witnesses, even though that is not something they are trained to do.

Therefore, the Brazilian tradition also widely accepts experts, but more specifically tribunal- appointed experts. That is due to the tradition of trusting evidence from documents over the ones provided by an expert that is being paid by one party only. Since this tackle with the independence of those professionals and cross-examination is not used in Brazil, tribunal-appointed experts are more commonly used. The criticism that the civil law approach gets from the 'inquisitorial' expert treatment goes along with the concern of delegating the decision making to the expert.

6 The Spectrum: Closer to The Other Extreme

On the other side of the spectrum, there is the person who is there to provide an opinion on something that is his or her life's work. That means that this person is less likely to be an advocate for the one who appointed him or her. This person might never have given an expert report before and might never give another one again. The level of distance in relation to the particular issue puts that person in the other side of the line, against the extreme client-based expert explained before.

Since it is not expected that a party would submit to the proceedings a report that would not be helpful for its case, that type of expert is more likely to be appointed by the tribunal (as a tribunal- appointed expert or a joint expert). Also, considering the backgrounds and differences between the Common and the Civil Law traditions, it makes sense that this type of expert would be more easily found in civil law jurisdictions, where the parties should not have the same interaction with the experts. Also, in Common Law countries, when a scientist expert is appointed, even if the parties try to have some insight on the report, it is expected that it would not be changed, since in this case, the expert is not even used to working as an expert and is not expected to accept changing his or her approach to please the client.[47]

However, that extreme faces the temptation of alienating themselves from direct contact with the parties. Moreover, they sometimes take that distance further and avoid taking any instruction that has not been explicitly written down, forgetting

[47] HORNE; MULLEN, 2013, p. 29-30.

that part of their work is to provide a thorough report. That is why practitioners understand that "too little contact is almost certainly as bad as too much".[48]

The Court of Appeal in Stanley v Rawlinson supported that vision of lack balance of having too little contact with the parties. Lord Justice Tomlinson thus said that the impartiality of an expert is not undermined by the detailed investigation through contact with the parties, but the conclusions that might be reached by the way this expert carries out the information provided. Further, he stated that the expert witness should reach for providing a report with significant forensic elements and the lack thereof – sometimes because of fear of getting too close and treating their impartiality – can cause the report to be flawed. The consequence of that extreme of not wanting to have contact with the parties is to provide an expert opinion that will not even assist the tribunal. The expert should immerse in the facts of the case and provide an impartial conclusion of the overall investigation. In the end of the day, it is not about the scale of the contact with the parties, but how the expert will conduct him or herself in finding a conclusion.[49]

On the other hand, when you have an expert that has a lot of expertise in the area and provide the tribunal with a detailed expert report – then not being too close to the extreme of the spectrum – the criticism lies on the delegation of the decision making from the tribunal to the expert.

However, the issues surrounding the impartiality concern are connected to the importance given from the tribunal to experts witnesses in providing evidence. The issues surrounding construction disputes are getting more complex, which makes it uneasy for the tribunal to untangle the truth at sometimes. The concern is that the expert will be the one providing the analysis and the conclusion, finally becoming "judge and jury", since the expert will be likely to be the only person who is familiar with the complex facts in dispute.[50]

Even though both legal traditions differ in what concerns the appointment of experts, it is known that the appointment by tribunals in major international construction arbitration cases are rare. The biggest reason for that could be the challenge of finding one person who both parties would agree to be acceptable.[51] Especially considering that the main function of the expert should be to assist the tribunal the technical and scientific matters of the dispute so that the arbitrator can fully understand the facts and issues that led the parties to the arbitration. The role of the experts is of a witness, but in a different since they are in a category of providing a singular expertise that may be persuasive to the tribunal.[52]

[48] HORNE; MULLEN, 2013.
[49] HORNE; MULLEN, 2013.
[50] HORNE; MULLEN, 2013, p. 26-27.
[51] BREKOULAKIS; THOMAS, 2017, p. 112.
[52] REYNOLDS, 2002, p. 1.

7 Where the Traditions Meet

Besides the differences, the two traditions are getting closer each day. That is because the international atmosphere allows practitioners to have at their disposal guidelines such as the ones provided by the International Bar Association (IBA) and ethical rules of their profession,[53] for example.

Besides, considering the flexibility of international arbitration and the permissive nature of both English and Brazilian Arbitration Acts (like most of the Model Law inspired), allows practitioners to get creative and try different methods on the assessment of expert witnesses – some of which will be better explained in this section.

The dichotomy between both traditions made the international community demand for a set of rules that could at some degree reach a consensus to deal with evidence in international disputes. That is why the IBA dedicated some time to developing its Guidelines on Party Representation in International Arbitration,[54] which was published in 2013. The rules address issues such as (i) the relationship between fact witnesses and experts and counsel; (ii) the preparation of witnesses; (iii) the document production and preservation; (iv) the submission of evidence,[55] For the purposes of this paper, we will focus on Guidelines 18 to 25, which is dedicated to the interactions between party representation and expert witnesses.

It is a fact that the IBA Guidelines bring rules that are closely connected to the reality of Common Law jurisdictions.[56] For example, Guideline 24 on the preparation of experts for cross-examination demonstrates a concern that could easily be underestimated by civil law lawyers that are not used to having to take on the active role of examining witnesses.[57] Although this is not necessarily an issue, it can be a challenge for its application in civil law countries, especially considering that the Guidelines are not necessarily binding.

Further, party representatives should respect the principle that dictates that they should not encourage a witness to change his or her testimony or intrude on what that person has to say and that is beyond dispute. However, the allowed contact that a witness can have with the party that appointed him or her and their counsels varies from one country to the other. The law and the ethical norms of the profession are a sensitive variable in international disputes involving parties from different backgrounds.[58]

[53] KANTOR, 2010.
[54] IBA Council, 2014a.
[55] STEPHENS-CHU; SPINELLI, 2014, p. 80.
[56] STEPHENS-CHU; SPINELLI, 2014, p. 49.
[57] STEPHENS-CHU; SPINELLI, 2014, p. 44; IBA Council, 2010, p. 15.
[58] IBA Council, 2010.

As previously demonstrated, while in Common Law countries cross-examination is the rule and the counsels have the right to prepare their experts and to test to the maximum the opposing party's experts, in many civil law countries, witness preparation is viewed as suspicious.[59] In Switzerland, for example, the ethical rules prohibit any discussion with the witness providing a testimony for the case.[60] Such strict approach was stretched in France. In 2008 the Paris Bar affirmed that it would not consist of a violation to prepare the witness for arbitral proceedings, aligned with the idea of allowing the lawyers to defend their client equally if compared to other international players that allow this type of contact between witnesses and parties.[61]

The countries that follow the Common Law tradition have a greater intimacy with the possibility of preparing the witness and also assessing them which may give those lawyers a benefit when facing an international dispute with civil law lawyers. In practice, what might happen is to hire international counsel for the hearing phase of the proceedings, which adds to the cost of the procedure.

However, even across Common Law countries the rules of witness preparation varies. For example, in England barristers and solicitors may assist witnesses with the process of giving evidence by familiarizing them with the proceedings, but they cannot coach them on the content of their testimony. In the United States of America, witness preparation is extensive. Lawyers can discuss and even rehearse the witness testimony.[62]

Concerned with the differences in ethical norms and local practices, the IBA Guideline 24 tries to establish a comparable level of preparation of witness adopting the liberal approach of the USA. Even though the Guidelines follow this approach, they are said to be a compromise between the two traditions. Guidelines 9, 10 and 11 provide for the duty of honesty from counsels towards the tribunal and that should be respected universally in a way to avoid misconduct.[63]

New approaches that are not from one specific jurisdiction but rather a process that can overcome cultural barriers and traditions have been introduced by international arbitration practitioners. They are striving to test witnesses by employing different technics, like (i) hot-tubbing (or witness conferencing) and (ii) the Sachs Protocol.

The idea of the first is to let experts to test themselves at the same time, which allows a dialogue on issues that they have been hired to analyze. This is a flexible tool and can be tailored by the tribunal and/or agreed by the parties in the

[59] GAILLARD *et al.*, 1999, p. 700-701; WAINCYMER, 2012, p. 905; BLACKABY, 2011, p. 15.
[60] Art. 11 (formerly 13) (GENVA, 2018).
[61] CONSEIL DE L'ORDE DES AVOCATS DE BARREAU DE PARIS, 2018.
[62] STEPHENS-CHU; SPINELLI, 2014, p. 8.
[63] STEPHENS-CHU; SPINELLI, 2014.

best way for the specific necessity of the arbitration. One way that hot-tubbing can happen is by listening to the experts consecutively and letting them ask each other questions, followed by questions from the parties and the tribunal. This method is interesting because not only it is usually faster, but it also allows the evidence provided by experts to be explored in a full and to have a focused view by the parties and the tribunal. Although this approach does not fit in every case – and when that is the situation the parties might ask to stick to the traditional way of assessing the witness – hot-tubbing is an example of how flexible arbitration and how there is a middle ground between traditions.[64]

The Sachs Protocol creates a mixture of party-appointed experts and tribunal-appointed experts. The Protocol advises the parties to each create a list of experts that they would appoint and submit that list to the tribunal. Then, the tribunal shall name one from each list and appoint them as tribunal-appointed experts. Consequently, the experts would produce the report and present the evidence as decided by the tribunal. The biggest issue here is that it might increase costs and not be as effective as it should, especially when the opinions differ from each other.[65] However, it is a way to put the tribunal in front of different treatments of the same issue and avoid the fear of delegating the decision-making to the one tribunal-appointed expert, which ultimately has been agreed by the parties and the tribunal. Differently, the Scott Schedule is used for organizing the positions taken by the party-appointed experts in an effort to provide a structured document for easier assimilation of the case, helping the tribunal to decide upon the mirrored arguments of the parties.[66]

In sum, while the Common Law tradition parties usually present their own experts and the court hears them, in civil law countries the tribunal often appoints the expert "who is credible by the very source of his [or her] appointment".[67] The Guidelines do not choose one approach over the other, but rather allow for both.

Therefore, besides the differences between the two jurisdictions, both use the Guidelines provided by the IBA. Although the Guidelines are not binding, they are heavily used by tribunals and practitioners worldwide, which makes both legal traditions speak in a closer tone about the taking of evidence. Also, even though it is arguable that the experts should follow the ethics rules of their profession, those vary from country to country. Besides, it is difficult to determine whether or not the experts are aware and following said rules. Hence, the widely known IBA Guidelines are a significant step into unity among jurisdictions. Further,

[64] Chapter 24: "Expert Evidence" (BOR, 2013, p. 517).
[65] Chapter 24: "Expert Evidence" (BOR, 2013).
[66] BREKOULAKIS; THOMAS, 2017, p. 85.
[67] KAUFMANN-KOHLER, 2010, p. 290.

international arbitration is a field in constant evolution and it is known by its flexibility. That is proven by the new technics of treating witnesses, like hot-tubbing, the Sachs protocol and the Scott Schedule.

8 Conclusion

The present analysis shows that expert witnesses are treated differently in Common Law and civil law jurisdictions. In Common Law, the presence of a party-appointed expert happens more frequently due to the trust the system has towards cross-examination and the relation between counsels and the duty to present the truth to the tribunal even though it is something negative to their case. In civil law, the presence of tribunal-appointed experts is more common due to skepticism with regards to party-appointed witness. That goes hand in hand with the fact that civil law countries are not used to have an active role in assessing the witness, since this duty is left to the tribunal. Which leads the party representatives in a more passive role in preparing the witness and challenging the opposing parties witness. Especially in construction arbitration, the presence of experts is essential to deal with the amount of evidence and complexity of the subject. Hence this essay concludes that even though the presence of experts come with criticism on both extremes of the spectrum, therefore making the presence of experts sometimes pungent, but their absence could be felt as comparatively insipid.

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