The Second Annual Energy Arbitration Conference

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Expert Evidence in Commercial Arbitration

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"This court tries no criminals, but it sees and hears many appraisers."[1]

Introduction

Arbitration is a consensual process. Arbitration agreements are embedded in documents that define the future business relationship between two or more persons or corporations that they intend will be harmonious and mutually profitable. The arbitration clause is inserted, almost as an afterthought, with little or no thought about what it actually means. If the parties are fortunate, one of the "standard" arbitration clauses is used rather than one drafted by a lawyer unused to the processes and pitfalls of the arbitration process.

Sometime later, a dispute erupts, litigation counsel are retained, and the problem to be solved becomes a fight to be won. The process takes on all of the aspects of a courtroom trial: witnesses testify under oath; endless procedural issues are argued; the parties learn, belatedly, that the consequences of the process they agreed to may be unappealable. All too frequently, the promise of a cost-effective resolution to their dispute goes unfulfilled.

One of the factors contributing to this unhappy state of affairs, not only in arbitral processes but also in litigation generally, is the increasing use of expert evidence. A graphic example of the extent to which expert testimony has become a problem is illustrated by *Newton v. Marzban et al*,[2] a 65-day trial concerning a claim by a divorcee alleging incompetence by the legal and accounting advisors whom she had retained in her matrimonial action. In addition to the advisors, eight experts were called; in addition, three or four more prepared reports but were not asked to testify. The 247-page judgment took almost one year to complete; the claim was dismissed except for a $1,000 finding against a solicitor. The total costs will be well in excess of $1 million.

My co-panelist, Mr. David Taverner, and I have been asked to comment on some aspects of the "expert problem" and to suggest some practical approaches to minimize them.

The Arbitrator Who Is an Expert in the Subject Matter of the Dispute

The rationale for appointing arbitrators who are experts in their own right, but not necessarily legally trained, is set out in *Randhawa v. 420413 Ltd. et al* as follows:[3]

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[1] Mr. Justice Mahoney (as he then was) in *Sheraton Warehouses Limited v. R*, 83 DTC 5095 [1983]
[2] 2008 BCSC 328
[3] 2006 BCJ No1638 at para. 40

> Among the reasons for appointing referees and arbitrators who are knowledgeable about the theoretical, scientific, or professional underpinnings of issues in dispute is an expectation that such appointees should be able to understand the technical evidence more quickly than those whose knowledge of the topic derives from the proof of a particular fact or state of affairs. The practical objective of the appointment of such persons is to reduce hearing time otherwise devoted to prove facts generally known within the referees' calling but not among the public at large.

As Mr. Taverner points out in his paper on this issue, the appointment of "expert arbitrators" can be contentious, particularly when the reference is to an arbitrator sitting alone. "Expert arbitrators" may not be familiar with the imperatives of arbitration itself or with procedures designed to ensure the entitlement of the parties to present their respective cases based on evidence led at the hearing.

Mr. Taverner's concerns are supported in *Amos Investments Ltd. v. Minuo Enterprises Ltd.*,[4] a judgment of the British Columbia Supreme Court released on March 20, 2008. In that matter, a chartered accountant/business valuator was appointed as an arbitrator but independently sought out evidence that he used in arriving at his decision. The award, involving millions of dollars, was set aside.

In *Morbuild Inc. and Binod Singh, Lourdes Singh and HSBC Bank Canada*,[5] the parties could not agree on an arbitrator, and an application was brought to the court to determine the appointment. Each party put forward an architect and agreed between them that both were equally qualified in their profession; however, one had extensive experience with arbitrations whereas the other did not. The expert with the arbitration experience was selected for that reason.

UNCITRAL Model Law provides, at Article 12, as follows:

> An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, *or if he does not possess qualifications agreed to by the parties*.... (my emphasis)

The same provisions are to be found in provincial commercial arbitration legislation.

It follows, then, that *all* arbitrators should be expert in the dominant factor influencing the outcome of a dispute. In those cases where the facts are generally settled and the decision will depend on the interpretation of one or more points of law, then legally trained arbitrators are the obvious choice. If, however, the facts are *in dispute*, and the determination of those facts depends on a recognized profession or discipline, then arbitrators selected from that profession or discipline should be considered.

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[4] 2008 BCSC 332

[5] [2007] O.J. No. 2117**;** 65 C.L.R. (3d) 296

In short, I think that it is as inappropriate for someone who has practised exclusively as a criminal lawyer to sit as an arbitrator on a complex case involving accounting principles as it is for an accountant to sit on a matter that turns on the conflict of laws between jurisdictions.

One solution is for arbitrators to engage counsel, perhaps even having the lawyer attend the hearing and sit beside the arbitrator. As Mr. Taverner points out, another useful and sensible solution would seem to be viable: three-person panels—a lawyer to chair, and at least one of the wingers to be from the profession relevant to the matter. A difficulty with both of those solutions is that, even in a panel situation, each arbitrator is meant to make up his or her own mind and must not be seen to rely on the expertise of his or her co-analysts. As a practical matter, given arbitrators' entitlement to deliberative secrecy, it is difficult to see how matters of communication among panel members would ever come to light.[6]

The practical solution is for counsel to take the time to carefully examine prospective appointees as to their familiarity with arbitration processes, the law, and their capacity to cope with the subject matter of the case.

Official Facts and Law for the Lay Arbitrator

Two issues that "expert" arbitrators must address are the extent that they can rely on their own training and learned writings in their field, and, lacking formal legal training, how to cope with the rulings that are part of every hearing.[7]

I have attached, as an appendix a paper that I gave in 2004 that sets out the processes that I have developed to deal with these two issues.

Admissibility

I take a very conservative view of admissibility.

Some years ago, I was engaged by counsel for a party to an arbitration involving a very complicated joint venture agreement. Counsel for both parties were senior and had a high regard for one another; a similar situation prevailed between the experts. At the commencement of the hearing, counsel agreed to the relaxation of the requirement that experts give opinion evidence only within their own acknowledged expertise. As the case progressed, the experts began to testify not only as to how the agreement should be interpreted but also what was in the minds of the parties when they signed it. When one side began to feel that his case was deteriorating, he objected to a continuation of testimony that was clearly beyond the witnesses' expertise. The inevitable argument ensued as to the

[6] Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999), para 13.8, and *Noble China Inc. v. Lei et al* (1998), 42 O.R. (3rd), 4677
[7] "Official notice" is the arbitral equivalent to "Judicial notice".

retroactive effect of any ruling barring such testimony. It would have been more cost effective to have followed the rules from the outset.

If the parties agree to a major departure from the traditional evidentiary conventions, then that agreement should be enshrined in an administrative order and referenced in the final award.

Presentation

Although I am an enthusiastic supporter of the use of technology, such as conference calls, e-mails, and the like when they can expedite resolution of the preliminary matters between counsel and the arbitrator, I am less enthusiastic about its use at the hearing. PowerPoint presentations used to illustrate and highlight a complex report can be of assistance to the arbitrator's understanding of the issues during the hearing. However, when the hearing is over and the arbitrator is alone with a complex report, hard copies of the PowerPoint presentation, and a confusing transcript of the witnesses' explanation of the PowerPoint presentation, the probability of ambiguity and misunderstanding increases.

Some time ago in British Columbia, when expert reports were presented pursuant to section 10 of the *Evidence Act*, experts were not permitted to testify in chief except to clarify technical words and phrases. I have always liked that approach; expert reports should generally stand on their own. The combination of skilled cross examination, clarifying questions from the arbitrator, and a re-examination should, together with the report itself, provide all of the information that is needed. With regard to this matter, I hope to hear the views of the attendees at this conference; as you can see, Mr. Taverner and I have somewhat differing views.

Appointment of Experts

In British Columbia, a committee co-chaired by the Chief Justice of the Supreme Court and the Deputy Attorney General of B.C. is in the process of drafting new Supreme Court rules, including a greatly expanded section on experts.[8] The B.C. Working Group seems to have examined similar issues and solutions as was done in Alberta some years ago.[9] Alberta appears to have abandoned many reforms proposed in the early stages of its work, and British Columbia, in its March 2008 release, is doing likewise.

A few of these initiatives, together with my reaction to them, are as follows:

- There is a suggestion that a conference between the experts before testifying might reduce the incidence of bias. Several impediments to that suggestion have arisen. First, experts in the same profession do not always get along. Second, clients who

[8] See www.bcjusticereview.org/

[9] Tania M. Bubela, *Expert Evidence*: *The Ethical Responsibility of the Legal Profession*, (2004) 41 Alta. L. Rev. 853 - 870

have paid a substantial sum to obtain an expert opinion are unlikely to be pleased with their expert who, after a brief meeting with his or her colleague, makes concessions amounting to many thousands of dollars. Third, experts in the health professions will not willingly add this extra time to their onerous schedules.

I believe, however, a conference with a specific agenda early in the proceedings can be productive. An equally useful alternative is for the arbitrator to obtain a commitment from one party to prepare a report and, through counsel, to deliver it along with working papers and supporting documents to an opposing expert who will prepare a rebuttal report confined to issues with which he or she disagrees. I find that conflict between experts is significantly reduced by this process, particularly when the arbitrator takes an active role in identifying those matters with which she or he wants assistance.

Finally, one has to remember that arbitrations involve disputes, and counsel have not only the right but the obligation to manage their respective clients' interests in the litigation. That process is not enhanced by experts meeting and inevitably chatting about the merits of their client's case when instructing lawyers are not present. If counsel *are* present, such meetings turn into a rehearsal for the trial.

- Jointly appointed experts can be useful from a cost perspective, particularly when the initiative comes from counsel. There are, however, hazards. One is that the expert, when reporting to each lawyer, might inadvertently learn or disclose otherwise privileged material. Another is that jointly-appointed experts will think of themselves as having arbitral constraints instead of performing their own tests and investigations. If the parties do appoint a joint expert, the terms of reference must be set out in writing and expressly state that the expert is *not* an arbitrator and that he or she has unfettered access to information, individuals, and documentation.

- As a general proposition, I do not favour the appointment of a specific joint expert by order of the court or the arbitrator. At a minimum, this process triggers the engagement of a "shadow expert" by each party, thereby eliminating one of the reasons for the joint appointment in the first place. An exception is the appointment of what is called in British Columbia a special referee. Such appointees are arbitrators by another name and still require the parties to engage their own experts. The special referee should be able to expeditiously assimilate and understand the technical aspects of expert evidence; because of their ready access to directions from the court, their lack of legal training is of less importance than it might be under different circumstances.

Conclusion

In my experience, the "expert problem" can be largely resolved by a few practical steps:

- The experts should be invited to at least one, and probably a second, prehearing conference attended, of course by legal counsel and, ideally, the parties. At the first

conference, each party's lawyer will set out his or her intention for delivering primary and rebuttal reports, including the scope of the work, relevant dates, and information and documentary requirements. This process provides an opportunity for arbitrators to hear directly from the experts if they foresee problems with any of the instructions that they receive. A second, work-in-progress, meeting may be appropriate with the same attendees, at which the arbitrator can learn of timing and disclosure problems and, if necessary, issue administrative orders as to both.

- Arbitrators should resolve objections as to qualifications and admissibility prior to the hearing and issue a short administrative order to that effect. Generally speaking, a more co-operative atmosphere exists in the prehearing phase than in the hearing.

- The arbitrator should be explicit about what he or she hopes to see in the report by way of issues addressed and the extent to which calculations and documentary support should be included in or accompanying the report. For example, I always request that the hard copy exhibit be accompanied by an unprotected Excel file as well as a Word file. In addition, I think that expert reports should be preceded by an executive summary stating (in valuation-related disputes) the property interests being valued, the methodology employed, and the final conclusion.

- At the hearing, arbitrators should freely communicate when they feel that they have adequately absorbed a particular issue or when particular testimony is not helpful. Of course, care must be taken to ensure that such interventions cannot be perceived as restricting a party's ability to put forward his or her full case. If the lawyer insists on continuing the extraneous line of questioning, consideration should be given to such behavior when costs are being addressed.

- Arbitrators should be forthright in expressing their opinions as to the helpfulness of a particular expert's testimony, including commenting on which if any of the *Mohan* imperatives have been ignored. Although arbitration awards are private unless appealed, such commentary should be helpful to experts and counsel alike, and, if the flawed behavior of an expert is seen to have contributed to the lack of a party's success, the expert might get an expensive lesson when he or she attempts to collect fees.

As a final comment, we arbitrators must keep in mind that we, too, make mistakes. The parties and their experts come to us looking for resolutions to real, and frequently expensive, problems. Arbitral arrogance has no place in any part of the proceedings.

ISSUES CONCERNING THE SPECIALIST ARBITRATOR

by
Clayton G. Shultz, C.Arb, FCA
for the
Business ADR Conference
November 19, 2004 in Vancouver, B.C.

This little paper will focus on the extent to which arbitrators selected for their specific expertise may properly rely on their education and experience in conducting their proceedings and preparing their awards. It will also touch on an approach to the dilemma faced by non-lawyers who must decide difficult legal issues during the hearing or while crafting their awards.

At the outset of this discussion, it is useful to reflect on the reasons that parties agree in advance to submit future differences to arbitration rather than relying on the court system. The (frequently wrong) perception that an arbitrated solution will be less costly than full court proceedings is a major motivator. In order to achieve this expected economy, it is common for them to identify a class of person with specialized talents to adjudicate disputes in the specific area that the agreement covers: engineers for construction issues; professional accountants for profit sharing determination; business appraisers for shareholder buyout matters and so on. It is in their minds that such persons will use their expertise to quickly isolate the relevant issues and solve their problem so that they may continue their endeavour in harmony or part company as friends. In short, at the agreement stage, all problems are remote and solvable with a bit of common sense.

Then the dispute erupts. A problem to be solved becomes a fight to be won – lawyers are retained and the matter proceeds to a hearing. The hearing takes on all of the characteristics of a courtroom trial: witnesses testify under oath; procedural objections are presented by both sides in 75 page bound briefs of the settled decisions on the topic, and all of the evidentiary aspects of the matter must be presented as though the arbitrator were a judge. Such parties now find themselves at the mercy of arbitrators who appear to

be unable to apply the specialized expertise for which they were appointed and lacking the legal knowledge that the process assumes they have.

These two issues may, however, be addressed with more authority and comfort than is generally understood.

The concept of adjudicators considering materials that are not proven at the hearing is called "judicial notice." The "facts" so considered are called "notorious facts". Both are defined as follows[1]:

> Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

Facts described at (a) are "facts which are known to intelligent persons generally" and the convention of accepting them is necessary to prevent trials from becoming mired in endless testimony that advances neither case; it needs no further discussion.[2]

But those referred to at (b) are the more controversial. As one author put it: "The border-line between judicial notice and evidence is peculiarly ill defined."[3] Wigmore sets out the ability or perhaps even the obligation of the tribunal to resort to referring to "indisputable authority": as follows:[4]

> But whether the matter is so accepted, or what its tenor is if accepted, may not be within his recollection, or even may not ever have been known to him. Hence, he is entitled to aid himself in reaching a decision by consulting *any sources* of information that serve the purpose – official records, encyclopedias, any books or articles, or indeed any source whatever that suffices to satisfy his mind in making a ruling. (emphasis in the original)

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[1] Sopinka, Lederman, and Bryant: *The Law of Evidence in Canada*, 2nd Ed. 1999, p 1055
[2] *ibid*
[3] GD Nobes *The Limits of Judicial Notice*, LQR Vol 74 No 203 Jan 58

[4] *Wigmore*, Vol IX, p. 720

As to whether these techniques are available to arbitrators, useful guidance is to be found in the *Statutory Power Procedures Act* (SPPA) which provides as follows: [5]

16. A tribunal may, in making its decision in any proceeding,
    a. take notice of facts that may be judicially noticed; and
    b. take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

The SPPA does not have general application to proceedings under the *Arbitration Act* of Ontario, but at s 2, the *Arbitration Act* expressly includes s 16 of the SPPA.

Finally, Article II of the United States' *Federal Rules of Evidence* provide a succinct, understandable summary of the topic. It is appended to this paper in its entirety.

Two important restraints on the wholesale use of this technique must be emphasized. First, the "facts" that the tribunal intends to include in its deliberations must be obtained from publications and sources that

> …are indisputable and can be ascertained from sources to which it is proper for the judge to refer. These may include texts, dictionaries, almanacs, and other reference works, previous case reports,… [6]

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The second restraint is that the parties must know what notorious facts the tribunal plans to refer to and be given an opportunity to refer it to additional or, perhaps more importantly, later references that should be considered. Clauses (e) and (f) of the attached excerpt from the *Federal Rules of Evidence* provide helpful guidance as to the process to be followed.

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[5] R.S.O. 1990, c22
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My approach to this issue is as follows; When the statements of claim, defense and counterclaim are in my hands along with the parties' expert reports, I review them to ascertain the supplemental reference sources, including websites, that I *might* wish to consult. Before the hearing starts, I circulate the list and invite comment, additions or objections. If, in the crafting of my final award, I find it desirable to refer to materials not previously identified, I (now) write to the parties and advise them of my intentions and, again, invite comment.

Disputed legal issues can be particularly troublesome to the lay arbitrator. The problems are of two types: those where interim rulings are required and those that arise during the award drafting stage. An example of the former is an objection to the admissibility of an expert report or to the capacity of the expert to give opinion evidence. The arbitrator must make the ruling without delay but must consider and understand leading cases and principles that are second nature to experienced counsel. In complex technical cases the financial and time consequences of a ruling of inadmissibility can be huge. It is equally frustrating for lay arbitrators to find themselves with a lack of understanding of the differing positions of counsel after the hearing has terminated.

The techniques that I employ to address these challenges are as follows:

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I hope this paper will encourage ADR practitioners to be creative in applying imaginative and non-traditional techniques to give the parties and their clients the full benefit of the flexibility of an arbitration process that they expected when they initially agreed to it.

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ADDENDUM

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It was subsequently published in

The Canadian Arbitration and Mediation Journal (Winter 2004), The ADR Institute of Canada, Inc.

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