

## **USE OF EXPERTS IN ARBITRATION: ALTERNATIVES FOR IMPROVED EFFICIENCY<sup>±</sup>**

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Complex, technical disputes in arbitration often require expert analysis, to assist an arbitration tribunal in understanding the issues to be resolved, and to answer specific questions required for a fair and accurate resolution of a dispute. The expense, burden and time commitment required for expert analysis, however, represent potential limits on the efficiency of the arbitration process. This article addresses some of the alternatives available to parties, their counsel, and the tribunal, in structuring expert analysis to maximize efficiency.<sup>1</sup>

### **I. GOALS IN EXPERT ANALYSIS**

An arbitral tribunal (individual arbitrator or arbitrator panel) often needs help in understanding technical issues in a case (accounting, engineering, valuation and more, depending on the case). The tribunal's mission is to decide the matter, fairly and efficiently. The role of an expert thus generally is not to opine on the ultimate issues in the case (that is the tribunal's function), but to address subsidiary questions (such as the proper accounting for certain transactions; the engineering implications of a particular design; the alternative potential valuations for a particular asset—again depending on the needs of the case). An expert may also perform specific functions (such as review of voluminous data sources, and on-site or laboratory testing of conditions) that are beyond the ken of the tribunal, or otherwise not suited to conventional evidentiary submissions. Experts may also be called

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<sup>1</sup> For additional suggestions (not confined to experts) regarding cost and time-saving procedures in arbitration, see generally Albert Jan van den Berg, *Note—Time And Costs: Issues and Initiatives from an Arbitrator's Perspective*, 28 ICSID Rev. 218 (2013).

upon to explain complex technical issues, or to summarize points of foreign law.<sup>2</sup>

Experts, even if engaged by the parties (or, more often, their counsel) are generally assumed to act with professionalism and independence, for the benefit of the tribunal. An expert opinion that is pure advocacy, with experts in substance serving as mere mouthpieces for the party (or counsel) that hired them, may undermine the search for fair and efficient resolution, in that, with “dueling” experts, a tribunal may be well-informed as to alternative theories, but not necessarily well-equipped to choose one theory over another. The question thus becomes: are there methods that a tribunal can use to discourage a pure clash of expert advocates, or (at very least) to focus the clash on only the points that matter most to a fair and efficient resolution?

An additional element of efficiency in the process of expert submissions concerns the form and timing of such submissions. Lengthy proceedings strain the ability of a tribunal to evaluate expert evidence fairly and completely. Reducing the time required for expert testimony, and focusing such testimony on the most important matters, that are actually in dispute, can enhance the ability of the tribunal to reach a just and accurate result. Further, ensuring that complete expert submissions are provided the tribunal, prior to the close of hearings, avoids the risk that the arbitrators must speculate, due to an incomplete record, or direct post-hearing submissions on open issues, thus extending the time and expense of the hearing process.

Efficiency is a “bang for the buck” question. More time spent in receiving expert submissions does not necessarily yield more useful information (or understanding) for the tribunal. Shaping the process to serve a fair and effective search for truth is the true goal. The tribunal, working with the input of the parties and counsel, must direct the form and manner of expert submissions to accomplish that goal, within the resource limitations (time, expense and burden) that attend to the particular case.

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<sup>2</sup> See generally Bernd Ehle, *Practical Aspects of Using Expert Evidence in International Arbitration*, 2 Y.B. on Int'l Arb. 75 (2012) (summarizing potential uses of experts in arbitration, and procedures for obtaining expert evidence and assistance); Michael Feutrill & Noah Rubins, *The Preparation of Expert Evidence in International Commercial Arbitration: Practical Aspects*, 2009 Int'l Bus. L.J. 307 (2009) (same).

## II. CONTRASTING COMMON LAW AND CIVIL LAW MODELS

Historically, the practices of arbitrators and advocates, with regard to the use of experts, have tended to mirror the procedures adopted by the national court systems with which they are most familiar. The use of party-appointed experts is common in American civil litigation (and in many other common law jurisdictions). In parallel, American arbitration rules generally provide for the possibility of expert submissions, subject to the control of the tribunal.<sup>3</sup> American arbitration practices generally do not contemplate (although they do not exclude) the appointment, by the tribunal itself, of an expert to aid the tribunal.

By contrast, outside the United States, the appointment by an arbitration tribunal of an independent expert, to produce an expert report on issues identified by the tribunal, is a relatively frequent occurrence. Thus, although it is widely accepted in international arbitration that parties maintain rights to call their own experts in support of their positions,<sup>4</sup> international arbitration rules and norms also generally permit a tribunal (after consultation with the parties), to select its own expert, and to give the expert directions.<sup>5</sup>

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<sup>3</sup> See, e.g., AAA Commercial Arbitration Rules, P-2(a)(xi) (suggesting subjects for discussion at a preliminary conference with the tribunal to include “whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports”); R-34(a) (parties may offer evidence as is “relevant and material” to the dispute; conformity to “legal rules of evidence shall not be necessary”); R-34(b) (arbitrator shall determine admissibility, relevance and materiality of evidence offered, and may exclude evidence deemed to be cumulative or irrelevant); JAMS Comprehensive Arbitration Rules & Procedures, R-17(c) (as they become aware of new documents or information, parties are obligated to provide documents and “supplement their identification of witnesses and experts”); R-20(a) (pre-hearing submissions to include “a list of witnesses” to be called, “including any experts”); R-22(d) (“Strict conformity to the rules of evidence is not required[.]”).

<sup>4</sup> See Chartered Institute of Arbitrators, *International Arbitration Practice Guideline: Party-Appointed and Tribunal-Appointed Experts*, Art. 1, Cmts. (2016), available at <http://www.ciarb.org>.

<sup>5</sup> See, e.g., UNCITRAL Arbitration Rules, Art. 29 (tribunal may appoint expert to report on specific issues determined by tribunal); ICDR International Arb. Rules, Art. 25 (same); JAMS International Arb. Rules, Art. 27.7 (same); ICC Arb. Rules, Art. 25 (tribunal may hear experts appointed by the parties, and tribunal may appoint one or more experts, define their terms of reference and receive their reports); IBA Rules on Taking of Evidence in International Arbitration, Arts. 5-6 (same).

These contrasting models essentially represent the differences between a Common Law approach to dispute resolution (party-appointed experts, in support of the advocacy of the parties, with the clash in positions ultimately resolved by the decision-maker) versus a Civil Law model (tribunal-appointed experts, in support of an inquisitorial investigation by the ultimate decision-maker).<sup>6</sup> Taking these two positions as polar opposites (although they are not, *per se*, opposite in all respects), the question becomes whether it is possible to describe circumstances where one or the other model is most efficient, and whether there are circumstances where a “blending” of the two models most serves the cause of fair and efficient dispute resolution. The remainder of this Article addresses those questions.

### III. PARTY-APPOINTED EXPERTS

The American system of party-appointed experts embodies, as a principal advantage, relatively little work for the tribunal. The parties decide whether they will proffer experts. They decide what subjects the experts will address. They (often) decide on the forms, and the timing, of disclosures regarding expert opinions (subject to applicable arbitral rules, contract terms—if any—regarding experts, and the direction of the tribunal). And, ultimately, the parties generally decide whether and how they will present their experts’ opinions to the tribunal. Since strict rules of evidence (such as the *Daubert* expert qualification standard)<sup>7</sup> do not usually apply, the role of the tribunal can, in broad terms, be described as passive recipient of whatever the parties choose to present. And, given the possibility (even if distant) of vacatur of an award for refusal to hear evidence,<sup>8</sup> arbitrators may

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<sup>6</sup> See generally Michael McIlwrath & Henri Alvarez, *Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives*, in Paul E. Mason & Horacio A. Gregera Naron (eds.), *International Arbitration: 21<sup>st</sup> Century Perspectives*, Chap. 2 (2010); Ruth Fenton, *A Civil Matter for a Common Expert: How Should Parties and Tribunals Use Experts in International Commercial Arbitration*, 6 *Pepperdine Disp. Resol. L.J.* 279, 289 (2006) (summarizing differences between civil law and common law traditions regarding dispute resolution).

<sup>7</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>8</sup> See George Ruttinger, Joe Meadows & April Ham, *Using Experts in Arbitration*, Chapter 31 in *AAA Handbook on Arbitration Practice* (2d ed. 2016) (noting that counsel have flexibility in presenting experts as “failure to admit relevant evidence may be a ground for reversal or modification”).

have an incentive to “take the evidence for what it’s worth,” even where there are serious questions about its provenance or usefulness.<sup>9</sup>

But, to loosely quote a famous phrase: a tribunal is “not a potted plant.”<sup>10</sup> It is the task of the arbitration tribunal to exercise its “discretion,” to conduct proceedings “with a view toward expediting the resolution of the dispute[.]”<sup>11</sup> A tribunal may direct the order of proof in a proceeding, and may exclude evidence “deemed by the arbitrator to be cumulative or irrelevant.”<sup>12</sup> Thus, even though the parties and their counsel may hire and direct the experts in the matter, a tribunal may channel the process, to improve the efficiency of the proceedings.

One simple form of tribunal direction is a request that the parties “focus their presentations on issues the decision of which could dispose of all or part of the case.”<sup>13</sup> Such a direction essentially asks that the party-appointed experts answer specific questions, or address specific issues, that the tribunal deems most relevant to a full understanding of the dispute. The tribunal may also give direction on the form of the reports to be provided by experts.<sup>14</sup> The earlier such direction can be given, the more efficient the process. Thus, for example, a tribunal might give directions at a pre-hearing conference, after review of the pleadings in the case. More likely, the tribunal might give directions after review of the expert reports (if produced in advance of the hearings). During the course of the hearings, the tribunal may pose

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<sup>9</sup> Ronald W. Haughton, *Running the Hearing*, in Arnold Zack (ed), *Arbitration in Practice* 44 (1994) (suggesting arbitrator may use the “for what it’s worth” ruling on evidence, and that arbitrator should apply “common sense” and remind the parties that the goal of arbitration is to “let the parties have their problem heard and resolved without excessive technicalities”).

<sup>10</sup> See *Iran-Contra Hearings: Note of Braggadocio Resounds at Hearing*, N.Y. Times, July 10, 1987, available at <https://www.nytimes.com> (quoting lawyer Brendan Sullivan, attorney for Colonel Oliver North, on the attorney’s right and obligation to object).

<sup>11</sup> AAA Rules, R-32(b); see generally Patricia D. Galloway, *Using Experts Effectively & Efficiently in Arbitration*, 67 *Dispute Resol. J.* at 2 (2012) (suggesting that arbitration rules generally give a tribunal “flexibility in handling the proceeding, but the overriding goal is efficiency and lower costs”).

<sup>12</sup> AAA Rules, R-34(b).

<sup>13</sup> AAA Rules, R-32(b).

<sup>14</sup> The form may also be specified in the arbitration agreement, or the arbitral rules chosen by the parties. See, e.g., International Bar Association, *Rules on the Taking of Evidence in International Arbitration* (2010), Art. 5.2 (listing required contents of expert reports).

specific questions to experts, and (if the answer cannot be given immediately), ask that the experts provide additional submissions on the specific issue, prior to the close of hearings.

If the experts are asked to provide additional submissions late in the hearing process, however, the schedule for hearings may need to be extended, to preserve the right of the parties to conduct cross-examination of the witnesses. One solution to that problem might be the conduct of limited cross-examination (if not waived altogether by the parties), through the use of video or telephone conferencing.<sup>15</sup> The tribunal, having already heard the experts testify in live sessions, may have less concern about the ability to gauge the credibility of the experts through live interaction. Alternatively, the parties might waive any further oral testimony of the experts, and have the experts submit responses to the tribunal's questions in the form of written statements, with an opportunity for reply.<sup>16</sup>

Another simple method to improve the efficiency of expert presentations is an agreement (or direction) that the experts' written reports will stand as their direct testimony at the hearing, and that, in effect, their live testimony at the hearing will begin with cross-examination.<sup>17</sup> That solution is not perfect, however, in that issues may arise (between the completion of the report and the conduct of the hearing) that require supplementation of the expert report. A tribunal could permit written supplementation of expert reports, or replies to the main reports of opposing experts, on an agreed schedule; or, the tribunal might permit brief supplementation at the outset of a witness' live appearance to address any last-minute questions. The report-first, then cross-examination method, moreover, generally requires that the tribunal invest some time, in advance of the hearings, to become familiar with the submissions of the experts. In a very complicated case, with many exhibits and experts on multiple subjects,

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<sup>15</sup> See AAA Rules, R-32(c) (alternative means of presenting evidence must "afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination").

<sup>16</sup> See AAA Rules, R-35(c) (parties may agree, or arbitrator may direct that documents or other evidence be submitted "after the hearing," but "[a]ll parties shall be afforded an opportunity to examine and respond to such documents or other evidence").

<sup>17</sup> See AAA Rules, R-35(a) (permitting written witness statements, subject to tribunal's right to "disregard" the statement if the witness does not appear at the hearing, to be questioned).

that preparation may be burdensome, and not particularly productive (as tribunal members may have difficulty absorbing the full meaning of complex expert analysis from written submissions). Thus, the parties may agree, or the tribunal may direct, that each expert give some brief overview testimony (essentially summarizing the expert's report) before cross-examination begins. The parties, in consultation with the tribunal, can best determine whether anything in excess of the expert reports is required.

#### IV. JOINT EXPERT PRESENTATIONS

Hybrid (blended) forms of expert analysis may proceed from the fundamental Common Law assumption that parties determine when and how experts will be chosen and directed, but with a recognition that the needs of the tribunal can often be best served through modifications of the schedule of expert presentations, and through cooperation between the experts. These hybrid techniques may improve efficiency by reducing hearing time, and focusing expert submissions on the most significant points in dispute.

The simplest hybrid form involves little more than a scheduling modification. Conventional approaches to the presentation of expert witnesses can produce a disconnect, as one set of witnesses and evidence is presented by the claimant, and then days, weeks or even months later, another set is presented by the respondent. The tribunal must attempt to recall the substance of the claimant's earlier expert testimony, and compare it with respondent's expert submission. One increasingly common solution is to set aside an "expert day" (or days), where experts for each side testify, *seriatim*, providing the tribunal an opportunity to compare their methods and conclusions in close temporal proximity. In some instances, the expert portion of the hearings may be conducted at the very end of the process, when the tribunal has heard testimony from lay witnesses, has received other evidence, and is prepared to consider the technical issues in the case. Where there has been some bifurcation of the proceedings (*e.g.*, liability and damages), the process might include essentially two (or more) mini-hearings, capped in each instance by expert testimony.

One potential advantage of this *seriatim* approach to expert testimony is in efficient scheduling of expert testimony. Experts are often busy people, and squeezing them into a hearing calendar may be difficult, especially where the hearings are expected to be lengthy, and the vicissitudes of travel and business conflicts may make the availability

of experts uncertain. Setting a specific day (or days) when the experts will testify, *seriatim*, means that the experts can plan to be available and dedicated to the hearing appearance, for that specified period. The expert day(s), moreover, need not necessarily be contiguous with days of hearing lay testimony. Indeed, some separation of time between the main hearing and the expert hearing may avoid the scramble of last-minute adjustment of presentations, to address unexpected developments during the factual presentations of the hearing. For a concentrated, set period of time, the experts may dedicate themselves to giving testimony, answering questions and responding to each other's opinions.<sup>18</sup>

Another increasingly common form of interaction between expert witnesses is a meet-and-confer process (often called a "conclave"), in advance of the hearings, to determine points on which the experts agree, and to identify actual issues in dispute. Such conclaves could be conducted before the experts prepare their reports, but, most commonly, occur thereafter. The general purpose of a conclave is to have the experts compare their views on the expert issues in the case, with an aim toward reducing the need for duplicative presentations regarding issues on which the experts agree. Such a conclave may be conducted "without prejudice," meaning that communications between the experts during the conclave cannot be used as evidence during any hearings (thus freeing the experts to engage in more candid discussions).<sup>19</sup> The conclave may also be conducted out of the presence of counsel (again, lessening the incentive toward posturing, pure advocacy, or obfuscation).<sup>20</sup> The net result of the conclave, typically, is a form of "joint" report of the experts, noting areas of

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<sup>18</sup> The parties and tribunal may also consider imposing a "chess clock" limitation on expert presentations, to ensure that the time spent is equally allocated between the experts. See Raymond A. Garcia, Nicole Liguori Micklich, & Michael V. Pepe, *Chess Clock Arbitration*, June 22, 2011, [www.americanbar.org](http://www.americanbar.org).

<sup>19</sup> See Bell Gully, *Expert Witness Conferencing—How Can We Get The Best Outcomes?*, Nov. 1, 2012, available at [www.lexology.com](http://www.lexology.com) (suggesting that experts may seek the ability to communicate with their clients and counsel, so that they "should not worry about drafting precise wording" in any joint statement that may come from the witness conclave).

<sup>20</sup> A more elaborate form of conclave would involve the use of a neutral facilitator, who might put the experts at ease during the process, and serve to encourage agreement between the experts. See *infra*, footnotes 34-35 and accompanying text.



agreement between them, and (often) outlining the specific issues on which they disagree.<sup>21</sup>

The hoped-for result of the conclave process is a reduction in hearing time, as agreed-points need not be addressed in detail (and certainly not repeated by each expert), and the tribunal can more carefully focus, during the hearings, on the essential disagreements between the experts (and the bases for those differences). At a minimum, the conclave process may avoid the “ships passing in the night” problem, where experts talk past each other, never fairly meeting each other’s positions, to the consternation of the tribunal.<sup>22</sup>

Perhaps the most unique form of joint expert presentation is “concurrent expert evidence” (colloquially known as “hot-tubbing”).<sup>23</sup> The procedure has been embraced in Australian courts,<sup>24</sup> but is not generally used in the United States.<sup>25</sup> International arbitration service providers and sponsoring associations have begun to experiment with this technique.<sup>26</sup> The essence of the process (which may be combined

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<sup>21</sup> The joint report of the experts may be drafted by the experts themselves, or may be drafted with the assistance of counsel.

<sup>22</sup> See *Issues For Arbitrators To Consider Regarding Experts*, Vol. 21 No. 1 ICC International Court of Arbitration Bulletin (2009), available at [www.iccwbo.org](http://www.iccwbo.org) (noting risk that “experts may differ in the structure of their respective work product, their basic underlying data, or their methodology,” which can be “particularly challenging for the tribunal to resolve where the tribunal cannot find flaws in the experts’ methodologies or findings that would enable the tribunal to conclude that one expert’s conclusions are more likely to be correct than the other’s”).

<sup>23</sup> The image of the “hot tub,” where professional colleagues can discuss a subject in an informal, collegial manner, addresses the central impetus for this procedure: to encourage experts to agree on non-controversial points, and to permit a give-and-take process that allows the tribunal to examine the points of difference between the experts with greater understanding and efficiency. See generally Francis P. Kao et al., *Into the Hot Tub . . . A Practical Guide to Alternative Witness Procedures in International Arbitration*, 44 Int’l Lawyer 1035 (2010).

<sup>24</sup> See Hon. Rachel Pepper, *‘Hot-Tubbing’: The Use of Concurrent Expert Evidence in the Land and Environment Court of New South Wales and Beyond* (2015), available at [www.lec.justice.nsw.gov.au](http://www.lec.justice.nsw.gov.au).

<sup>25</sup> See Adam Elliott Butt, *Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for Hot Tubbing*, 40 Houston J. Int’l Law 1 (2017).

<sup>26</sup> See, e.g., International Bar Association, *Rules on the Taking of Evidence in International Arbitration* (2010), Art. 8.3(f) (tribunal may “vary” the order of proceeding, “including the arrangement of testimony by particular issues or in such a manner that witnesses may be questioned at the same time and in confrontation with each other (witness conferencing)”); Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2007), Art. 7.1 (“The

with the “conclave” process in advance of hearings) is that experts for each side are called to give evidence at the same time; they are sworn in together; they may give explanation of their own opinions, but they may also ask each other questions, may comment on each other’s opinions, and may concurrently answer questions from the tribunal. The right of the parties’ counsel to conduct cross-examination is preserved, but the focus of the process is interaction between the experts, to highlight areas of agreement, and the bases for any significant disagreements.

Proponents of the hot tub process suggest that it can improve efficiency in a variety of ways.<sup>27</sup> Like the conclave process, it can reduce the need for duplicative testimony on non-controversial points. It can focus the testimony given on points of actual (and significant) disagreement.<sup>28</sup> It can permit the tribunal to hear answers to critical questions contemporaneously, making it possible for the tribunal to compare, in real time (versus through recall or review of transcripts) the conflicting positions of the experts. In writing an award, moreover, the tribunal will have expert testimony available for review in a relatively condensed form.

Critics caution that the hot tub process may take control away from party counsel (who may be best placed to question experts, having extensively prepared for hearings), and that an ill-prepared or inarticulate expert may appear unconvincing (even though the expert’s opinion is sound), or that the process may be hijacked by the more aggressive expert (actually re-introducing, and perhaps even increasing, the adversarial bias that may detract from the value of genuinely

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manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert’s testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence.”), Art. 7.2 (“The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.”).

<sup>27</sup> See generally Kabir Singh, *The “Additional Weapon:” Practical Tips for Effective Expert Conferencing in Arbitration*, Mar. 28, 2016, available at [www.arbitrationblog.kluwerarbitration.com](http://www.arbitrationblog.kluwerarbitration.com) (suggesting that hot tubbing may produce an “increase in the speed of the proceedings,” and lead to “substantial savings for the parties,” as well as “[m]ore clarity” on technical issues, and may lead to a “higher likelihood that the matter will be settled”) (citing authorities).

<sup>28</sup> Proponents also suggest that hot-tubbing may help mitigate the problem of “partisan” experts. See David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 Rev. Litig. 1 (2013).

independent expert analysis). Because the process requires closer control by the tribunal, moreover, some of the efficiency saved in decreased hearing time may be offset by the need for the tribunal to spend substantial time, in advance of hearings, preparing for management of expert testimony.<sup>29</sup> One solution to these kinds of concerns involves a modified form of hot-tubbing, in which the experts provide their direct testimony (either through expert reports or live), and are subject to cross-examination; thereafter, the experts appear jointly for the tribunal to ask any clarifying questions that may have developed from the main presentations of the experts.

Whatever the overall merits (and specific method) of the hot tub process, proponents and critics generally agree that it is a procedure best addressed to more complex, technical disputes, especially those with multiple areas of expert testimony (such as construction projects, or matters involving sophisticated economic analysis). The increased use of the process, and the increased attention it has gained in dispute resolution literature, however, suggest that hot tubbing remains a viable tool for efficiency enhancement, at least in some cases.<sup>30</sup>

## V. TRIBUNAL-APPOINTED EXPERTS

On its face, the use of a tribunal-appointed expert may appear inefficient (duplicative), at least in circumstances where party-appointed experts are also to be used.<sup>31</sup> Yet, there is room for a tribunal-appointed expert to perform discrete functions that can enhance the efficiency of the process, even where other experts will appear. And there are occasions where parties and their counsel may recognize that a single, tribunal-appointed expert may most effectively help resolve specific issues in a proceeding.

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<sup>29</sup> See Jeffrey H. Dasteel, *Experts in Arbitration* (2013), available at [www.lacba.org](http://www.lacba.org) (suggesting that, in witness conferencing, “advocacy may overtake any real attempt to reach agreement,” and “counsel may appoint experts based on the expert’s willingness to understand and advocate” the party’s position; and hot tubbing “may extend the hearing time and make it difficult for counsel to control the examination”).

<sup>30</sup> See ICC Court of Arbitration Bulletin, *Issues for Arbitrators to Consider Regarding Experts* (2010), available at [www.library.iccwbo.org](http://www.library.iccwbo.org) (witness conferencing method is “increasingly used to resolve the differences between conflicting expert opinions, but requires the tribunal’s active participation and supervision” to maintain order at the hearing).

<sup>31</sup> Where one of the parties is reluctant to authorize a tribunal-appointed expert, moreover, delays and other uncertainties may adversely affect the usefulness of the process. See Robert Home & John Mullen, *The Expert Witness in Construction*, Chapter 4 (2013) (describing uses and limitations of tribunal-appointed experts).

One role for an expert involves service as a mediator/facilitator, to help the parties work through issues related to the conduct of the arbitration. An expert mediator, for example, might assist the parties in resolving disputes regarding disclosure matters, especially in large-document-volume cases, or in cases where difficult privilege or confidentiality issues might arise. The mediator would be available to guide discussions between the parties, suggest solutions, and encourage cooperation.<sup>32</sup> Discussions with the mediator would be “without prejudice;” and ultimate control of the disclosure process would be at the direction of the tribunal.

The role of the mediator might also involve guiding the conclave process between subject matter experts.<sup>33</sup> Again, on a “without prejudice” basis, the mediator might assist the experts in coming to agreement on issues not in dispute, and in determining the most efficient form for presentation of the experts’ analyses. If assumptions are to be built into expert models (algorithms), for example, the tribunal would probably most benefit from a shared list of assumptions, applied by each of the experts, to make comparison of their results more accurate. The mediator might also encourage experts to provide “sensitivity” analyses, making clear how changes in specific assumptions might affect the outcome of the experts’ analysis.<sup>34</sup> Where access to specific information is essential to fair and accurate expert reports on all sides, moreover, the mediator’s role in guiding the disclosure process could overlap with the facilitation of expert discussions. Ensuring that each expert has access to information may help prevent disruption to the hearing process, if it were to become apparent during the hearing

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<sup>32</sup> See generally Steven C. Bennett, *Mediation as a Means to Improve Cooperation in E-Discovery*, 24 Albany Law J. of Sci. & Tech. 251 (2014).

<sup>33</sup> See Eugene Romaniuk, Bruce Smith & Miiko Kumar, *The New Default: Expert Witness Conclaves* (June 24, 2016), available at [www.lawyersweekly.com](http://www.lawyersweekly.com) (summarizing results of a survey (in Australia), suggesting that the “overwhelming majority” of expert conclaves achieve “sensible results,” with the cost of a facilitator for a conclave “more than saved by the efficiency of the process”); but see Karen Stott, *Expert Witness Conclaves for Joint Report—5 Tips and Observations by a Facilitator*, Apr. 8, 2018, available at [www.linkedin.com](http://www.linkedin.com) (cautioning that conclave process can be “extremely” labor intensive, and noting that the process may require “a number of conclaves if the issues are lengthy and complicated”).

<sup>34</sup> See Richard Boulton, Joe Skilton & Amit Arora, *The Function and Role of Damages Experts*, Chapter 2 in John A. Trenor (ed.), *The Guide to Damages in International Arbitration* (2017) (sensitivity analysis useful in allowing the tribunal to establish which of the experts’ assumptions or areas of disagreement have a material effect on the damages calculation).

that some additional (previously-undisclosed) information is vital to meaningful expert analysis.

The appointment of a single expert (with no individual party experts), to address a particular task, could save the parties and the tribunal considerable time and burden. Discrete tasks might include: valuation of a specific asset, opinion on a particular issue of foreign law (not otherwise known to the tribunal), site inspection or forensic testing, and many others.

The efficiency of a single tribunal-appointed expert need not be adversely affected by the fact that the parties may have their own experts, even on related issues. Thus, for example, the valuation of a specific asset (by the tribunal expert) might be incorporated into the economic analyses (of the party experts), and that hybrid process could avoid overlap and inefficiency. Alternatively, such as on an issue of foreign law, the parties might determine that, since there probably is just one “right answer” to the specific legal question, there is no need for overlapping party-appointed experts on the same point. The parties, moreover, generally retain the right to pose questions to a tribunal-appointed expert at an evidentiary hearing;<sup>35</sup> thus, if an expert’s analysis requires some further explanation or context, the parties may have it, without the need to engage their own experts.

## VI. OTHER FORMS OF EXPERT ANALYSIS

At the far end of the adversarial-inquisitorial spectrum we find systems where the expert effectively becomes a decision-maker in the dispute. One of the more controversial, though highly efficient, processes involves the appointment of an individual arbitrator (or individual member of a three-member arbitral tribunal) with specific expertise in an area relevant to the dispute. At its core, the notion is simple—parties often choose arbitration (at least in part) in order to obtain access to expert decision-makers who do not require tutorials or other background education to understand the context of a specific case. Specialty arbitration-sponsoring institutions (such as the WIPO

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<sup>35</sup> See, e.g., International Centre for Dispute Resolution, International Dispute Resolution Procedures, Art. 25.4 (“At the request of any party, the tribunal shall give the parties an opportunity to question the [tribunal-appointed] expert at a hearing.”); IBA Rules, Art. 6.6 (“At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert”).

Arbitration and Mediation Center, or the AIDA Reinsurance and Arbitration Society), offer rosters of specially-trained arbitrators, with extensive background knowledge of issues and common practices in their industry. So, too, many of the major arbitration centers offer specialty rosters of arbitrators familiar with construction, labor and other particular types of disputes. An arbitrator steeped in the background of a particular industry or professional field may much more quickly absorb the facts of a particular dispute, and may more quickly appreciate the significance of the technical issues presented by the dispute, as compared to a relative novice. In that sense (and more) the expert arbitrator may be highly efficient.<sup>36</sup>

But what of arbitrators who might do more than simply apply their background knowledge related to the dispute? What if an arbitrator applies knowledge, not developed within the confines of the arbitration process, to reject the submissions of one party or another? What if an arbitrator concludes that both parties have failed to adduce essential evidence, and the arbitrator proceeds to conduct an independent investigation (*e.g.*, by visiting a construction site, or consulting professional literature to obtain the “correct” answer)?

In the context of court proceedings, it is generally understood that a judge should not investigate the facts of a case, and that a judge must give parties notice if the judge wishes to take “judicial notice” of a particular fact.<sup>37</sup> So, too, in the context of arbitration. An arbitrator is not necessarily considered “partial” or “prejudiced” by having acquired

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<sup>36</sup> For an argument for the appointment of an economist expert as an arbitrator, in cases involving complicated damages analyses, *see* J. Gregory Sidak, *Economists as Arbitrators*, 30 *Emory Int'l L. Rev.* 2105, 2111, (2016) (suggesting that economist arbitrator may “hold the party economic experts to a higher standard of economic rigor,” and more easily detect “error and bias in the economic testimony”).

<sup>37</sup> *See* ABA Model Code of Judicial Conduct, Rule 2.9(c) (judge “shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed”); Fed. R. Evid. 201 (allowing court to take judicial notice of facts “not subject to reasonable dispute,” but recognizing that “a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed”). There is some controversy (at least within the judiciary) as to the authority of judges to conduct independent factual “background” research (and as to what “background” research includes). *See* Edward K. Cheng, *Should Judges Do Independent Research on Scientific Issues?* 90 *Judicature* 58, 61 (2006) (“Judges are deeply divided about the issue of independent research[.] To many judges, doing independent research when confronted with new and unfamiliar material seems the most responsible and natural thing to do. To others, it represents the worst kind of overreaching and a threat to long-cherished adversarial value.”).

some knowledge of “the parties, the applicable law or the customs and practices of the business involved” in the dispute.<sup>38</sup> Nor does an arbitrator violate the obligation of impartiality merely by “hav[ing] views on certain general issues likely to arise in the arbitration,” so long as the arbitrator does not “prejudge[e] any of the specific factual or legal determinations” to be addressed by arbitration.<sup>39</sup> But an arbitrator may risk the validity of an award by conducting independent factual research, without the knowledge or input of the parties.<sup>40</sup> In broad terms, the obligation of arbitrators to conduct proceedings in a manner “fair to all,” affording all parties the “right to be heard,” and a “fair opportunity to present evidence,”<sup>41</sup> suggests that, when an arbitrator believes that more information is required to decide the case, the arbitrator may ask questions, or call for additional witness testimony or other evidence, but must do so on notice to the parties.<sup>42</sup>

The arbitration process might, by agreement of the parties, become almost entirely inquisitorial. On consent of the parties, arbitrators may engage in abbreviated forms of dispute resolution.<sup>43</sup> Such abbreviated

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<sup>38</sup> AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon I, Cmt. 1 (“Arbitrators may also have special experience or expertise in the areas of business, commerce or technology which are involved in the arbitration.”).

<sup>39</sup> *See id.*

<sup>40</sup> *See Quesada v. City of Tampa*, 96 So.3d 924 (Fla. Dist. Ct. App. 2012) (award vacated where arbitrator conducted independent research on diet supplement at issue in proceedings, by reviewing manufacturer’s website and contacting a dietician). There is some controversy about the ability of an arbitrator to conduct legal research without the knowledge or approval of the arbitration parties. Compare Paul Bennett Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?* N.Y.S.B.A.J. 24 (May 2013) (suggesting that there are “good reasons” for an arbitrator to refrain from “unauthorized” legal research) with M. Ross Shulmister, *Attorney Arbitrators Should Research Law: Permission of the Parties to Do So Is Not Required*, 68 Disp. Resol. J. 29 (2013) (responding to, and criticizing, Marrow position; suggesting that attorney arbitrators are “actually under at least a moral obligation” to conduct independent legal research where necessary; yet, suggesting that it is “wise (although not required)” that an arbitrator advise parties of the results of any independent research, and “allow them to respond” to those findings).

<sup>41</sup> *See* AAA/ABA Code of Ethics, Canons I(D) and IV(B).

<sup>42</sup> *Id.*, Canon IV(E); *see generally* Thomas Sonneborn, *Conducting Independent Research: Should an Arbitrator Look Beyond the Record or the Law?*, 32 Ill. Pub. Emp. Rel. Rep. Nos. 3-4 (2015).

<sup>43</sup> Judge Richard Posner famously stated: “short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7<sup>th</sup> Cir. 1994).

forms may include paper-only submissions and on-line methods of dispute resolution.<sup>44</sup> More extreme forms of cost-savings might be obtained through the use of expert arbitrators, to review the specific (and limited) forms of information required to resolve a particular matter fairly. In certain trade goods disputes, for example, parties may select an arbitrator with specialized knowledge, providing the arbitrator with background documents (chiefly, on the specifications applicable to the goods) and the arbitrator may inspect the goods (in a process called “look-sniff” or simply “quality” arbitration) in the absence of the parties.<sup>45</sup> The expert arbitrator renders an award, without any further evidentiary hearing.<sup>46</sup> Although such a process surely is an extremely limited form of arbitration,<sup>47</sup> it does at least provide for some input by the parties, and thus might appropriately be termed a form of arbitration.<sup>48</sup> And the process might be expanded, to address

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The precise obligations of arbitrators to pursue a “decision-making process founded on a search for an accurate portrayal of the facts and the law,” however, is a matter of some considerable academic debate. See William W. Park, *Rectitude in International Arbitration*, 27 *Arb. Int'l* 473, 521 (2011).

<sup>44</sup> See Beth Trent & Colin Rule, *Moving Arbitration Online: The Next Frontier*, Apr. 3, 2013, N.Y.L.J., available at [www.cpradr.org](http://www.cpradr.org).

<sup>45</sup> See Sundra Rajoo, *Trade Disputes Solving Mechanisms* (2009), available at [www.sundrarajoo.com](http://www.sundrarajoo.com) (noting use of look-sniff system by commodity exchange organizations).

<sup>46</sup> See Sarika Tyagi, *International Commercial Arbitration: An Ultimate Remedy in Commercial Obligation, with Special Reference to India* (PhD dissertation, Feb. 2, 2015), available at <http://shodhganga.inflibnet.ac.in>.

<sup>47</sup> See Myles Stilwell, *One Law for All*, 8 *ADR Bull.* No. 8, Art. 5 (2006) (noting the “broad gulf” between look-sniff arbitration and more “court-based processes” in conventional arbitration, but noting possibility, “in the hands of agreeing parties,” for “lessening” of the scope of procedural steps in arbitration).

<sup>48</sup> The liberal provisions of the London Court of International Arbitration Rules (2014), available at [www.lcia.org](http://www.lcia.org), provide something of a road map for such an extremely abbreviated arbitration. The Rules provide each party a right to an oral hearing, “unless the parties have agreed in writing upon a documents-only arbitration[.]” Rule 19.1. An arbitral tribunal, moreover, has the power “to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties’ dispute[.]” Rule 22.1(iii). The parties may agree on methods for the conduct of the arbitration, Rule 14.2, and it is the obligation of the tribunal to “adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute[.]” Rule 14.4(ii). And, in the pursuit of these and other general duties, the tribunal “shall have the widest discretion to discharge these general duties[.]” Rule 14.5.



other forms of technical disputes that require rapid, cost-effective resolution.<sup>49</sup>

At some extreme point, however, an expert resolution of an issue must lose its potential status as arbitration.<sup>50</sup> Under New York law, for example, an agreement that a “question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected” by parties, may be enforced,<sup>51</sup> but such a process does not have the status of arbitration, and a determination, pursuant to such a process, cannot be enforced as an arbitration award.<sup>52</sup>

Yet, even at this extreme, one can imagine methods to foster the efficiencies of expert determination, and nevertheless maintain the benefits of an arbitration award.<sup>53</sup> Thus, for example, a dispute might

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<sup>49</sup> See *Tying Up Loose Ends, and Dispute Resolution, in ICT Contracts: Quicker, Simpler and Better Solutions?* (2004), available at [www.wigleylaw.com](http://www.wigleylaw.com) (presentation to New Zealand Computer Society And Technology Law Society) (suggesting use of similar procedure for resolution of “urgent decisions” on technology projects, “particularly those that are complex and expensive”); but see Adham Kotb, *Alternative Dispute Resolution: Arbitration Remains a Better ‘Final and Binding’ Alternative than Expert Determination*, 8 Queen Mary L.J. 125 (2017) (suggesting that “simplified arbitration can achieve the perceived cost and time benefits of expert determination without the need to jeopardize justice and fairness”).

<sup>50</sup> See Tomas Kennedy-Grant, *Expert Determination and the Enforceability of ADR Generally* (Aug. 2010), available at [www.aminz.org.nz](http://www.aminz.org.nz) (noting distinction between arbitration, as a “more or less formal adjudication,” where a court may exercise “a degree of supervision,” and an expert determination with “no such safeguards,” and the expert deciding “solely by the use of his eyes, his knowledge and his skill”) (quotation omitted); see also *Frydman v. Cosmair, Inc.*, 1995 WL 404841 (S.D.N.Y. July 6, 1995) (rejecting enforcement of “award” in French price appraisal, where procedure, rather than resolving a dispute, provided missing term in contract).

<sup>51</sup> Such a process is commonly used to resolve questions of business valuation, profit shares and capital account balances. See Daniel Djanogly, *Expert Determination: An Attractive ADR Solution for Business Disputes*, Oct. 11, 2016, available at [www.linkedin.com](http://www.linkedin.com).

<sup>52</sup> See N.Y. Civ. Prac. Law & Rules Sec. 7601; see also Steven H. Reisberg, *What Is Expert Determination? The Secret Alternative to Arbitration*, Dec. 13, 2013, available at [www.NYLJ.com](http://www.NYLJ.com) (New York provision “was enacted in order to provide for judicial enforcement of expert determinations as separate and distinct from arbitration;” in an expert determination, “there are very significant differences in procedure,” including the fact that “procedural restrictions do not automatically apply” in an expert determination).

<sup>53</sup> At the domestic level, an arbitration award can easily be turned into a court judgment, making collection on the award a less difficult process. See Federal Arbitration Act, Section 9. At the international level, one of the principal benefits of an arbitration award is broad enforceability, by virtue of multilateral treaties, such as the New York Arbitration Convention. See Marcin Tustin, *Do Awards From Expert Determination and Other Private Summary Dispute Resolution Mechanisms Fall Within the New York Arbitration Convention?* (2013), available at [www.nysbar.com/blogs](http://www.nysbar.com/blogs).

be submitted to an expert for resolution (through an inquisitorial process), but subject to potential review by an arbitrator. If the parties were satisfied with the expert's determination, the result might be memorialized in the form of a "consent" arbitration award (by a "backup" arbitrator, appointed for such a purpose).<sup>54</sup> If the parties were in conflict as to the expert determination, then the backup arbitrator could be employed to perform some review of that determination, with the input of the parties. Alternatively, the parties might each appoint experts to examine the particular issue; if the experts agreed, then again a consent award would be entered. If they did not agree, then some further arbitration process would ensue. The precise form of an expert determination (with or without elements of arbitration) is as flexible as the needs of the parties.<sup>55</sup>

## VII. CONCLUSION

The arbitration world does not divide neatly into Common Law and Civil Law camps. Arbitration, by virtue of its contractual basis, is subject to a wide array of variations, to suit the needs of the parties. Arbitrators, advocates and academics who originate in one or the other camp may benefit greatly from considering alternate procedures derived from other traditions. In the area of expert analysis (often one of the costliest elements of arbitration proceedings) the use of hybrid techniques may greatly enhance the efficiency of proceedings, while maintaining the essential elements of justice prized in both Common Law and Civil Law systems.

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<sup>54</sup> See, e.g., AAA Commercial Rules, R-48 (provision for "consent award" if parties settle their dispute during the course of arbitration).

<sup>55</sup> See generally John Kendall, *Expert Determination*, Introduction (3rd ed. 2001) (noting the "infinitely flexible" nature of expert determination processes).