

# CONSULTING ENGINEERS AS EXPERT WITNESSES

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# The Expert Witness

## The Consulting Engineer as Expert Witnesses / Assessor

- **The Role of the 'Expert'**
  - Acting for the adjudicator not the client party
  - Acting as an expert can 'offend' against your nature as an engineer
- **Credibility as an Expert**
  - Professionalism, Training, Practice, Experience, Recognition, ~~Retired & Old~~

**I ♥ MY  
LAWYER**



# The Role of the Expert Witness

In this presentation the term **Adjudicator** is used to refer to a High Court **Judge** in civil action proceedings, or an **Arbitrator** in arbitration proceedings, etc.

Many disputes in the engineering industry are highly technical in nature

Understanding these matters requires specialised skill and/or knowledge

For such matters, the adjudicator may be reliant on the testimony of expert witnesses:

- Court judges & lawyer-arbitrators are generally not familiar with the technical details
- Engineer arbitrators, however, can be well informed on such matters

The Expert, therefore, must be capable of:

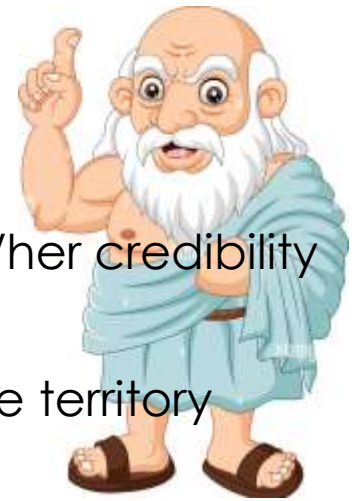
- **explaining the technical aspects** of an issue to the 'layman' adjudicator
- expressing a well **reasoned and relevant opinion on the technical merits** of an issue
- and, as such, act for the benefit of the adjudicator and not the party client

It is helpful to the expert if he/she has a basic knowledge and understanding of:

- The procedural law of South Africa (understanding the legal processes)
- **Contract law** and the **law of delict** (the law's take on damage or harm)
- Standard **engineering contracts** and their core clauses
- The **law of evidence** (what you can and cannot say as a witness)

# Credibility . . .

Acting as expert exposes the consulting engineer to scrutiny of his/her credibility  
This can be both a humbling and very unpleasant experience  
Thus a certain amount of **thick skin** and **composure** comes with the territory



Remember, it is opposing counsel's duty to question your credibility  
As long as this is done without malice, it is fair play & necessary for due process

Credibility stands on five pillars:

1. **Professionalism:** to be honest, unbiased, impartial, composed & courteous
2. **Training:** academic or other relevant subject specific qualifications
3. **Practice:** your own experience in putting theory to practice
4. **Experience:** knowledge of the state-of-the-art in customs/practice of discipline
5. **Recognition:** peer acknowledgement, both locally and internationally
- ~~6. **Old & Retired:** generally experts are best at the peak of their professional career~~

The expert does not necessarily have to be a 'registered professional'

Long periods of inactivity in the field of the dispute is not recommended

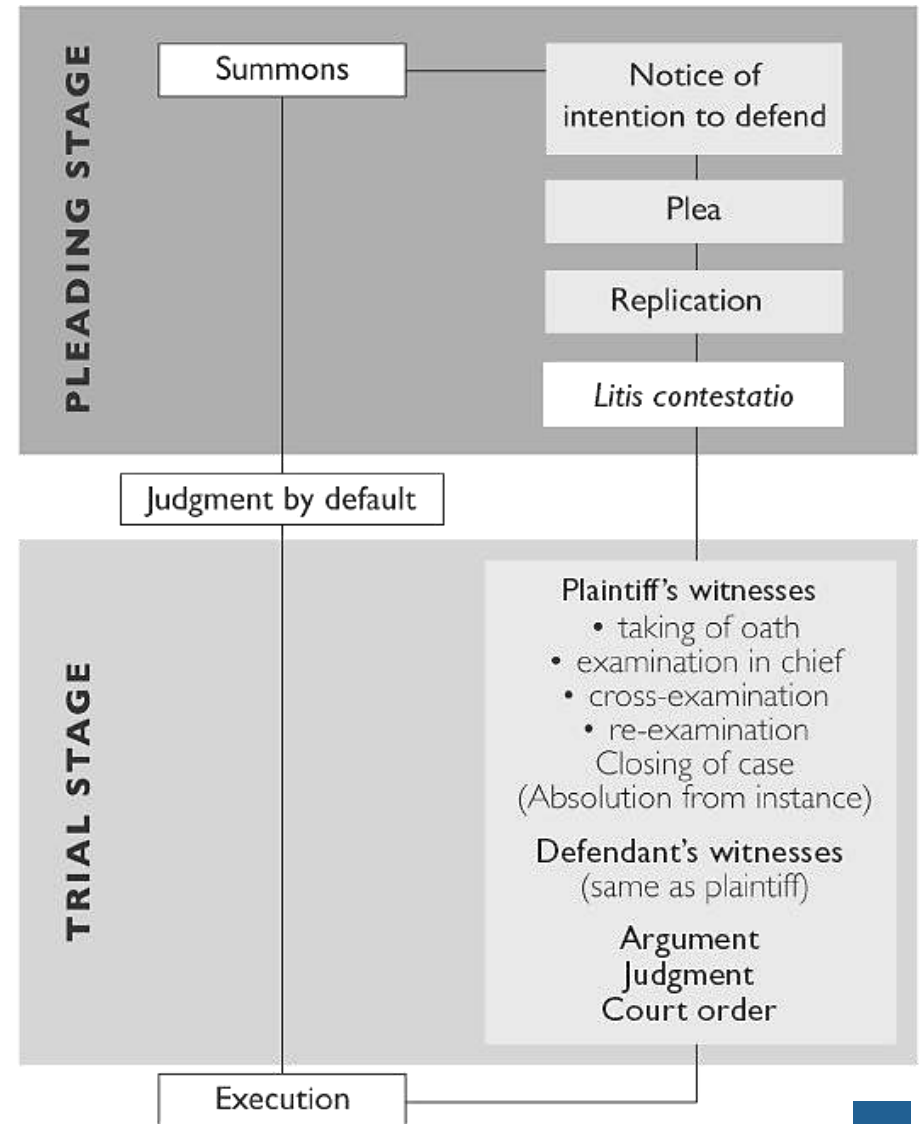
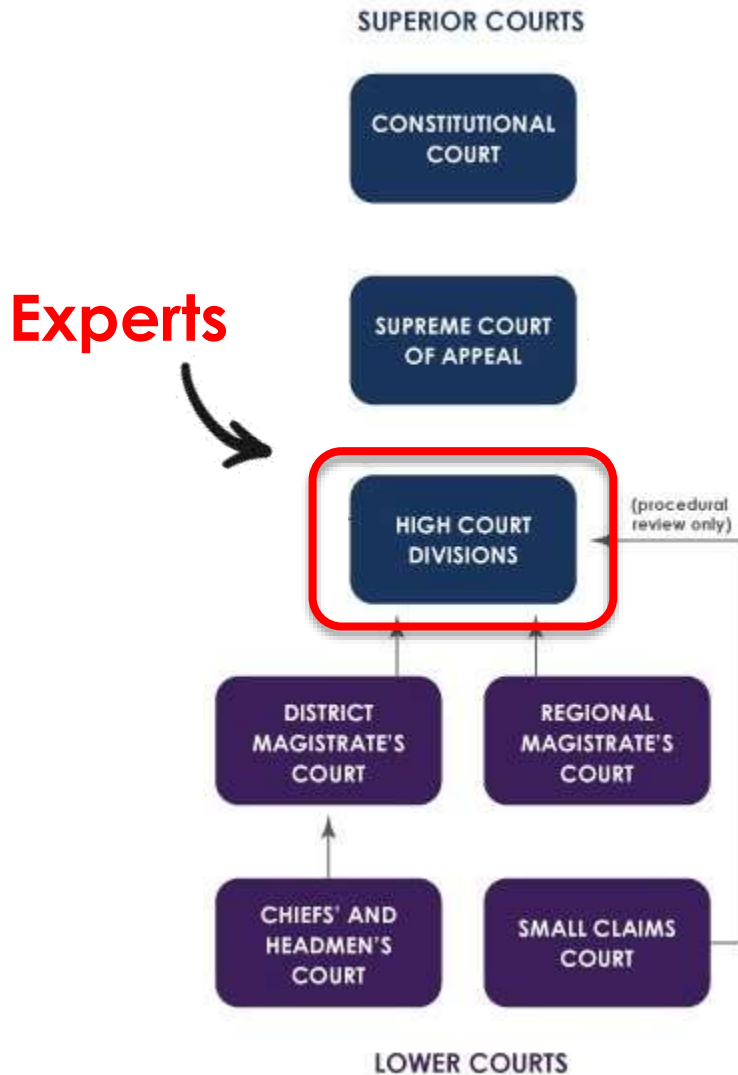
# Court v Alternative Dispute Resolution

## Significant Differences that affect the Expert Witness

- **Procedural – Court v Arbitration**
  - Court: minimalist and vague pleadings, full discovery, strict rules of evidence
  - ADR: informative pleadings with document support, flexible evidence rules
  - Court judgement open to appeal, Arbitration award is final
  - Arbitration can be much more effective with international disputes
- **Rules of the game - High Court v Arbitration Rules**
  - Court proceedings will be governed by the *Uniform Rules of Court*
  - ADR proceedings should not be run under the ~~*Uniform Rules of Court*~~
- **The ‘opinion’ of the expert**
  - Technical = **YES**, legal opinion = **NO!!**, what is right or wrong = **NO!!**



# Civil Proceeding in Court



# Civil Proceedings in Court

## ACTION PROCEEDINGS

- **Plaintiff** Summons: parties, facts, claim, relief sought
- **Defendant** Notice of Intention to Defend  
*Plaintiff* Pleadings containing the Particulars of Claim  
statement of material facts  
*Defendant* Plea  
admit/deny allegations, present the facts  
Counterclaim if applicable  
*Plaintiff* Replication to the defendant's plea  
admit/deny allegations, present the facts  
Plea to the counterclaim  
etc.
- **Discovery** Full discovery of 'documents' as evidence
- **Pre-trial conference** Finalise factual evidence, factual witnesses & expert witnesses
- **Trial** Both parties present their factual Evidence (witnesses)  
Both parties present their legal Arguments (counsel)  
Judgement
- **Appeal** If a party is not satisfied with the findings in fact or law
- **Review** If a party is not satisfied with the procedure followed

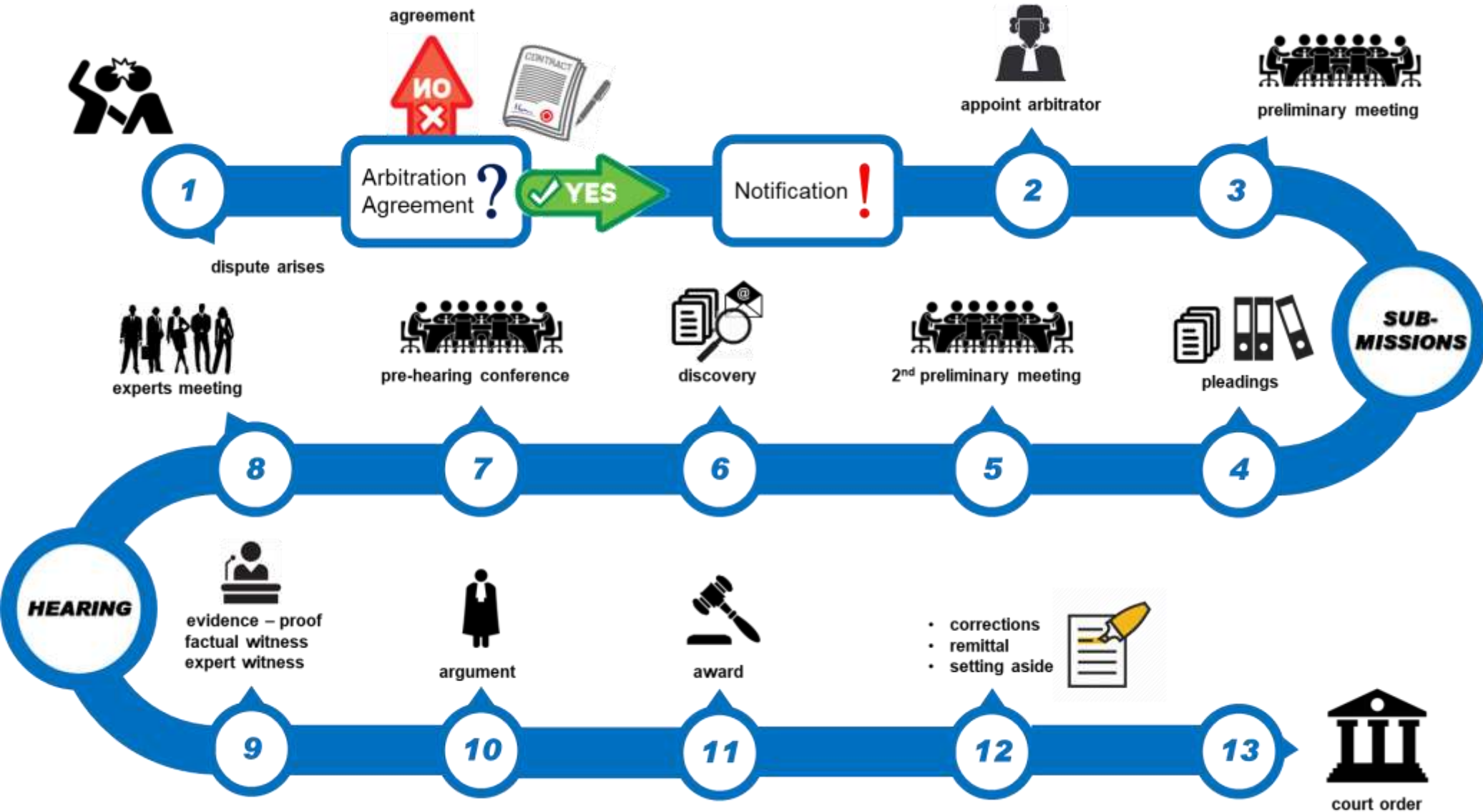


# *COURT PLEADINGS*

*can at times seem like high Vulcan that  
only lawyers and Mr Spock can  
understand*



# Arbitration Proceedings in a nutshell



# Arbitration Proceedings

- **Reference**

*Claimant*

Notice of Referring an Issue to Arbitration  
parties, facts, claim, relief sought

*Respondent*

Response

- **Formation of the Tribunal** Appointment of the tribunal = one or more arbitrators

- **Preliminary Meeting** Procedural directive – how the reference will proceed

- **Pleadings**

*Claimant*

Statement of Claim – Particulars of Claim + **Documents**

*Respondent*

Statement of Defence with Reasons + **Documents**

Counterclaim

*Claimant*

Replication and Statement of Defence on Counterclaim

*Respondent*

Replication on Counterclaim

- **2<sup>nd</sup> Preliminary Meeting** Clarification of issues in dispute

- **Discovery (Redfern)** Relevant documents only, not included in the pleadings

- **Case Review Conference** Identify material issues, evidence, witnesses

- **Meeting of the Experts** Joint Experts Report – common cause → reduce issues in dispute

- **Hearing** Both parties present their factual Evidence (witnesses)

Both parties present their legal Arguments (counsel)

Award

- **Correction / Remittal** If not satisfied with findings in fact or law

- **Set aside / Enforce** By court order if justified, either way

# Arbitration vs Court Proceedings

*Advantages and Disadvantages compared to court litigation*

## Advantages

- *Best for* – **Technical disputes**: construction
- **Speed** - both in availability and in procedure
- **Economy** – due to speed, especially on interest
- *Flexibility* – choice of arbitrator, venue & format
- *Expertise* – judges are ignorant of tech aspects
- *Representation* – not obliged to get legal help
- **Finality** – **Award is final & binding, no appeal**
- **Privacy** – reputation and trade secrets
- *Jurisdiction* – parties can choose Rules (Law)
- *Delay* – less opportunity for dilatory actions

## Disadvantages

- *Court is best for* – **Legal disputes**
- *Speed* – loss of control by Arbitrator
- *Economy* – loss of control by Arbitrator
- *Flexibility* – if High Court Rules are followed
- *Expertise* – judges highly trained & exp in Law
- *Representation* – heavy legal representation
- *Finality* – no option to appeal, only set aside
- *Privacy* – no case records to set precedent

# Rules: High Court v Arbitration

## Arbitration Rules are generally more flexible and efficient than High Court Rules:

- Promotes efficiency of due process for the parties
- Due Process: "rules of natural justice" - equal, fair and just treatment of both parties
- Strict rules of evidence do not apply although due process should always be followed
- Arbitration can overcome the **Three English Diseases**:
  - **uninformative pleadings**, i.e. inflated claims and tactical defences;
  - **abuse of the procedure** for the discovery of documents (information overload); and
  - **excessive reliance on oral proceedings** (dilatatory cross-examination)
- Arbitration pleadings are far more transparent than court pleadings:
  - allow for earlier definition of the real issues in dispute;
  - contain the supporting documentary evidence; and
  - allow for more effective preparation by parties and **briefing of experts**.
- Parties & Tribunal can agree procedure to best suit the nature of the dispute
- 'Special Arbitration Proceedings':
  - **Documents only hearings** – no oral presentations
  - **Restricted Representation Rules** – no legal representation, simpler and faster resolution, but not suitable of references with substantial claims

**!! Don't let counsel turn Arbitration into High Court proceedings !!**

# Opinion

## Opinion, as a rule, is reserved for the Court or Tribunal

- **Factual witnesses** testify on the facts relevant to the case (oral evidence)
- **Counsel** argues the legal merits of the case and attempt to sway the court's opinion
- **Expert witnesses** are allowed a reasoned opinion on the technical merits
- Note that in some cases the adjudicator can appoint his/her own independent expert

The Expert's opinion is fettered to **relevant technical matters** in the dispute

Such an opinion is not allowed:

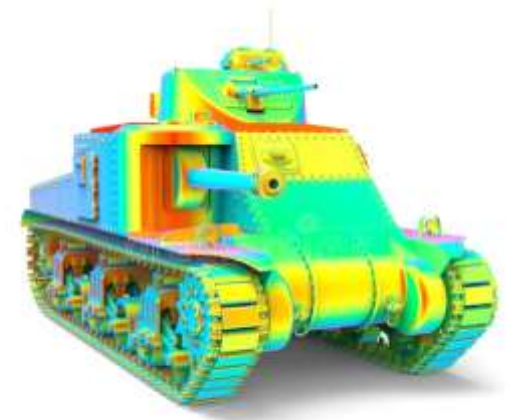
- on the **legal merits** of the case
- on the **general merits** of the case, i.e. what is 'right' or 'wrong'
- based on inadmissible or irrelevant evidence:
  - **Hearsay**: typically referring to text books without personal knowledge
  - **Privileged evidence**
  - Barred by **confidentiality**

**!! Do not get drawn into a sparring match with counsel on non-technical issues !!**

# Pre-hearing

## Assisting Counsel and Preparing for the Hearing

- **Rules of Natural Justice**
  - No surprises – its not Hollywood-style justice
- **Angels and Demons**
- **Witness Statement**
  - ‘Summary’ statement
- **Witness Report**
  - Description of the issue, relevant facts, opinion, and reasons for the opinion
- **Jones’ Rules**
  - Recommendations to overcome some of the expert challenges in arbitration



# Rules of Natural Justice – ‘Due Process’

## THE CORNERSTONES OF OUR LEGAL SYSTEM

### 1. ‘*Audi alteram partem*’

‘hear the other side’ or ‘to hear both sides’

### 2. ‘*Nemo iudex idoneus in propria causa est*’

‘no one is fit to be judge in his own cause’

### 3. *Transparent Justice*

**justice must be done and must be seen to be done**

In short, the first rule requires that the parties must be - :

- **fully informed** of the case against them in order to prepare for the hearing
- be given proper **opportunity of presenting their cases** to the adjudicator; and
- be given **opportunity to hear the opposing party’s case**

As such, there can be no surprises or  
The Expert should show his hand upfront  
and allow opposing expert to review and comment on the same



moments during the hearing



# Angels and Demons

Disputes almost never arise due to the fault of one party only

It is usually a combination of several 'problems' that aggregate into an actionable dispute

The expert must keep in mind that he/she is not 'defending' the party that pays him/her

This can be difficult as it is against human nature, hence the requirement of **professionalism**

A list of 'angels and demons' can be useful for preparing for a hearing or for negotiations

As the expert reviews the case material, he/she should compile and update a list of:

- **ANGELS** – technical facts in support and in favour of the party represented; and
- **DEMONS** – technical facts against the party represented.

These should be translated into model questions and the expected answers for counsel

The expert's declared answer to a particularly 'demon' question from opposing counsel may be enough to sway the party to settle the dispute, or not to call the expert to witness



# Witness Statement

## Expert Witness Statement

- Written statement of the expert's evidence, i.e. his/her opinion on relevant matters
- Contains the facts on which the opinion is based and the reasons for the opinion
- Confirmed by affirmation or on oath to be true and the expert's own account
- Can be accepted by the Adjudicator as **evidence-in-chief** (modern development)
- The expert witness may still be asked to expand/clarify certain aspects
- Can speed up the time required for the hearing but can be abused when drafted as professional legal documents drafted by counsel, instead of an honest account by the expert witness

## Exchange of statements by experts prior to hearing

- Simultaneous exchange of statements by the witnesses before the hearing
- Assists the parties to prepare for the hearing and can save a lot of time
- Statements can be amended before the hearing based on:
  - Common cause
  - Concessions based on the reply/comment of an opposing expert
  - etc.

# Expert Report

Whereas the statement by the expert is intended to be concise and to the point, the expert's report is usually quite comprehensive.

The report is structured to deal with each disputed issue under the following headings:

- **Description of the issue** (including an explanation of the technical aspects)
- **Facts relevant to the issue** (from the factual evidence and investigations etc.)
- **The experts opinion on the issue** (technical merits)
- **Reasons for the opinion** (justification for the opinion beyond the facts in evidence)

The report can also contain:

- Background information
- Observations during an inspection of the site or thing (**inspection in loco**)
- A review of various other documents and reports:
  - Relevant of legislation, standards and codes of practice
  - Investigation reports
  - Design reports
  - Specifications and drawings
  - Construction or manufacturing records
- The experts own investigations, analyses, models and simulations

**!! Avoid turning expert testimony in the Battle of Finite Element Analyses !!**

# Jones' Rules



## Jones' objections to current practice:

- Experts are often appointed as '**hired guns**' for the parties
- Such an appointment overlooks the requirements of impartiality and objectivity
- Parties brief their experts at an early stage when the issues in dispute are still vague
- Opposing experts can get divergent instructions from their respective parties
- Experts have to rely on information provided by their own parties only
- Expert reports are compiled before the meeting of the experts – no concessions

## Jones' recommendations for improvement – less control by the parties:

- The Adjudicator should identify the disciplines/issues that require expert testimony
- The Adjudicator drafts the instructions to the experts in consultation with the parties
- Once all factual evidence is available, the experts draft their reports undisclosed
- The experts then meet without legal counsel and produce the Joint Report (minutes)
- The expert reports are updated to deal with the disputed issues only
- The expert reports are then exchanged and experts reply to each other

**Doug Jones (international arbitrator)**, *Order of Australia, Australian Reserve Force Decoration*

Jones, D. (2020) Party appointed experts in international arbitration – asset or liability?, 86, *Arbitration*, 2-21

# The Meeting of the Experts

## Without Prejudice Discussions among the Experts

- Open discussion to try to come to agreement on some issues
- The role of the Scott Schedule
- The Joint Report of the Experts, **with prejudice**



# The Meeting of the Experts

After pleadings and reports have been submitted, experts may be required to meet to discuss their reports and the points on which they **agree** and **disagree**

- The meeting itself takes place without prejudice in open discussion
- **Without prejudice** – discussions cannot be used as evidence in the hearing
- Without the presence of counsel or the party representatives
- The objective is to reduce issues in dispute by identifying **common cause**
- A **Scott Schedule** (tabled summary) is useful where there are many issues
- The meeting concludes with a **Joint Report by the Experts** (minutes of meeting)
- The joint report is issued **with prejudice** and forms part of the case evidence
- Identifies the **common cause issues** and issues **that remain in dispute**

The meeting of the experts can be highly effective to:

- Reduce the time required for the hearing in reducing the issues in dispute
- Common cause issues require no evidence or argument at the hearing
- To inform possible negotiation or settlement discussions
- To develop an agenda for witness conferencing during the hearing

# At the Hearing

## Oral Testimony

- **Introduction**
  - Attendance, testimony, 'leading questions'
- **Hot-tubbing or witness conferencing**
  - Enter the battle arena
- **Chess-clock arbitration**
  - Tight programme
- **Remote hearing procedures and challenges**
  - The positive outcome of experienced during the COVID-19 lockdown



# Introduction

## Attendance of Experts v Witnesses of Fact

- **Witnesses of fact** generally only attend the hearing when they are in the stand
- Exceptions include party representatives that are also witnesses of fact
- **Expert witnesses** generally attend the entire or large parts of the proceedings:
  - It is expected of them to act with integrity
  - They need to hear the evidence presented by other witnesses to be prepared
  - They are expected to assist counsel with preparing questions
  - They are also expected to assist counsel with preparing argument

## Testimony:

- Evidence-in-Chief - expert's report as his/her evidence in chief
- Cross-examination - questioning ('attack') by opposing counsel
- Re-examination - 'damage control'

**'Leading questions'** – a question that prompts or encourages the answer wanted

- During Evidence in Chief, own counsel may not ask witnesses leading questions
- However, during Cross Examination, the opposing counsel may ask such questions.



# Witness Conferencing (Hot-tubbing)

- Expert cross-examination is the most expensive and time consuming part of the hearing
- It usually takes a long time between the opposing experts testimony on the same issue
- Counsel typically badgers experts, rather than focussing on their respective differences
- WC allows **simultaneous testimony by experts** from both sides on the same issues
- The conference is held against an **Agenda of Issues** rather than turn-based
- The adjudicator can draft the agenda or use the Joint Expert Report (**Scott Schedule**)
- Conference can be led by the adjudicator, by the experts or by counsel
- It is preferred that the **adjudicator leads questioning** with cross-examination by counsel
- Questions stimulate debate on facts & technical issues rather than badgering experts
- Experts are allowed to question and comment on each others testimony



# Chess-clock Arbitration



- Limited and **equal time allocated to each party** to present its case
- Preserves due process (fairness and justice)
- The time taken for any particular activity is deducted from the total allocation
- Requires a '**strong**' and **experienced arbitrator** to control the proceedings fairly

## Benefits

- Defines the cost of the arbitration in terms of the time for the hearing
- Overcomes difficulties in scheduling extended sessions not planned for
- A more reliable date of award is possible
- Tribunal and parties expected to familiarise themselves beforehand with the materials
- Hearing focusses on major points, clarification, witnesses and argument
- Requires a more active role for the arbitrator (interventionist role)
- The process can be flexible to suit the specific circumstances of the case

## Disadvantages

- Parties stealing each other's time by delay tactics



# Remote Hearing (post-COVID)

- COVID-19 showed resiliency in the industry regarding the possibility of remote hearings
- Post-COVID, remote sessions may still have a role to play for convenience and costs:
  - **Preliminary meetings**
  - **Pre-conference or pre-trial meetings**
  - Presentation of evidence by **witnesses abroad**
  - Even **argument hearings**
- Technical considerations include:
  - Stable and fast enough connectivity
  - Appropriate software - video, screen share, chat, recording, break-out rooms
  - Security – password for entering and secure connections
  - Documents share server with restricted access
  - Witnesses – the need for invigilators vs honesty on oath/affirmation
  - The need for interpreters and transcribers
  - IT support during hearings and other sessions
  - Backup power supply in South Africa
- Most local and international institutions now have Remote Hearing Protocols

?!?



QUESTIONS

# FIN