

Expert Witnesses: the Good, the Bad and the Ugly

by Steve Devereux CEng FCI Arb MAE, Drilling Expert Witness & Arbitrator

steve@drilling-expert.legal <https://drilling-expert.legal>

Good experts provide a vital service to courts and tribunals in resolving commercial disputes by litigation or arbitration. There are two other classes of expert. The Bad Expert lacks the technical expertise to forensically analyse the issues in dispute. I won't deal further here with bad experts, nor with criminal cases where I have no experience.

The Ugly Expert acts to advocate the case of their appointing party to the extent that they do not provide honest expert opinion evidence. This gives counsel a false impression of the strengths and weaknesses in their case. Counsel have a disadvantage which won't be obvious until expert reports are exchanged. This makes it too late to appoint an alternative expert and hard to deal with the problem of opinions which can't be convincingly explained under cross examination.

Having often acted as a Drilling expert in litigations and arbitrations, I have worked opposite many experts in the same discipline. I would not class many of them as being Good. I have twice replaced a Bad one at fairly short notice who sensibly decided to quit before they got in too deep. It quickly becomes obvious when reading Ugly reports that it is not honest and I can explain the features which I commonly see in these cases.

First, the Ugly Expert Report provides assertions as opinions but does not explain, adequately or at all, on what that opinion is based. The IBA Rules on the Taking of Evidence in International Arbitration 2020¹ article 2(e) requires that expert opinions and conclusions include a "*description of the methods, evidence and information used in arriving at the conclusions*". Under litigation in the English courts, point 6 of the Civil Procedure Rules, Practice Direction 35² makes it clear that the Expert should give reasons for their opinions. The CI Arb guidelines³ and many other rules mandate an explanation of an expert opinion.

In drafting an expert report, I give a full explanation of how I arrived at my opinion. All source documents are referenced. In order to make it easy to follow the reasoning, I include screenshots of relevant parts of source documents. Anyone can read my report, see all the references used, follow the explanation (including investigative "blind alleys" where I consider other possible explanations) and understand (and challenge if necessary) how my opinion arose. I have also recently started to use a Reviewing Expert, whose job is to stress test my opinions. Are all calculations correct? Are all assumptions reasonable? All alternatives considered? Everything well explained to the non-expert reader? Any technical terms not covered in the Glossary? I've found this reviewing to be a valuable service, not least because I can discuss various points for a confidential draft report with someone of high technical expertise who is able to challenge my reasoning. For the avoidance of doubt, the Expert Report is mine alone and I will be cross-examined on it.

¹ <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>

² https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35

³ <https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf>

Second, the Ugly Report will sometimes include strange and unsupportable opinions which the Ugly Expert will try to defend to the end, rather than conceding that the opinion cannot be supported. I have to include my favourite here as an example. Drillpipe was in the well and the Blowout Preventer was closed with pipe rams, sealing the well around the drillpipe. The total mass of the drillpipe and equipment below it was 302,000 lbm. There was 4,000 psi of pressure trapped inside the well. The Blowout Preventer was opened without first bleeding off the pressure. Damage to the Blowout Preventer was later seen. The other Drilling Expert opined that the rush of fluid out of the well somehow lifted up the whole drillstring by 10 feet so that one of the drillpipe connectors, which was 10 feet below the closed blowout preventer unit, hit the rams and caused the damage. I calculated that the force necessary to support the weight of the drillstring and to accelerate it upwards in 3 seconds (before the blowout preventer opened sufficiently to allow the connector to pass through unimpeded) was 420,473 lbf (more than the weight of 4 empty Boeing 737 Max jets). Not only was this force not available but the recorded data showed that the drillstring did not move. While he did not dispute any of my calculations, at the start of the hearing he produced a strange theory that the drillstring connection had moved upwards by the force of drilling fluid flowing up an 18° tapered connection from the drillpipe body of 5½" to the connection outside diameter of 7½" and that this all happened, plus the drillpipe fell back to its original position in a 5 second gap between recorded data points. When cross examined, he did not know that the standard taper on the bottom part of a drillpipe connection is 18°, suggesting instead that it was "about 45°".

Third, Ugly Reports don't tend to find any fault with their appointing party. They will repeat things asserted in the Statement of Claim or Defence, without providing any independent explanation as to why that assertion might be correct. Many of the disputes I've been involved with as an Expert have mistakes on both sides but a mistake made by a contractor is greatly compounded by poor decision making leading to much higher cost than would have been the case. I dealt with one such issue where the time lost was around 21 days, when I showed how normal operations could have been resumed in about 84 hours.

Under cross examination, the Ugly Expert finds themselves in a high stress situation. They now have to try to justify what they wrote in their Expert Reports and convince those judging the case. The lawyer doing the cross examination has carefully planned this with the Expert appointed by the other side. At the centre of attention in the hearing, there is nowhere to hide and no way to "phone a friend". If extra stress is needed, this can be done by having both Experts on the stand at the same time, under concurrent cross examination. The Ugly Expert is now in serious difficulty as it becomes clear that they have not acted in accordance with their duty to independently advise the decision makers on evidential matters.

Ugly Experts are a liability, not an asset. One way to avoid such partial expert evidence is to have someone on the Tribunal who has technical expertise in the substantive issues in dispute because this will discourage any expert witness from trying to pass off unsupportable opinions as such evidence will be quickly discounted, with possible cost implications. Looking for accreditation by the Academy of Experts is another possible tool for avoiding the Ugly Expert.