

# ENVIRONMENTAL DISPUTE RESOLUTION AND SMALL STATES

## Expert Evidence in Litigation and Arbitration

6 September 2018

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## Litigation vs Arbitration

### Litigation

- Litigation varies depending on the jurisdiction but generally more rigid rules and standards apply to the qualification and consideration of expert evidence
- Courts' role as gatekeeper to expert evidence can have a significant practical impact on the development of issues concerning environmental disputes
- Who decides? Based on what standard? (Preponderance of evidence?)



## Litigation vs Arbitration

### Litigation

- Civil law systems:
  - Only court-appointed experts may be permitted and parties have limited rights of participation (cannot participate in the selection and have limited rights to comment)
  - Court may decide questions for expert and whether the expert can make own inquiries
  - Parties may not be able to use party-appointed experts and/or expert testimony will not be considered evidence and cannot be relied on (at least solely and without corroboration)



## Litigation vs Arbitration

### Litigation

- Common law systems:
  - Courts may be able to appoint their own experts, but primary approach is party-appointed experts
  - Usually strict rules on qualification of expert witnesses and experts can be challenged based on admissibility grounds
    - in England, based on whether there is an acknowledged “body of expertise” and whether the expert evidence is reasonably required to resolve proceedings and genuinely “helps” the court
    - in the US, based on whether the expert has relevant qualifications and/or whether certain Daubert criteria are met.



## Litigation Standards

### US law

- US litigation – *Frye* and *Daubert* standards:
- Under *Frye*, scientific evidence is only admitted when the method relied on by the expert is based “generally accepted” within a relevant scientific community.
- Under *Daubert*, new scientific methods are not excluded for not yet being “generally accepted.” Admissibility depends on whether:
  - the theory or technique in question ***can be (and has been) tested***
  - it has been ***subjected to peer review and publication***
  - its known or potential ***error rate*** and the existence/maintenance of ***standards controlling its operation***
  - it has ***attracted widespread acceptance*** within a relevant scientific community



## Litigation Standards

### US law

- *Daubert* in practice:
  - The court's focus is to remain on the expert's methodology and techniques, and not on his/her conclusion
  - The criteria are not a fixed "checklist"
- Standard of review for admissibility decision is "abuse of discretion"
- *Daubert* applies in US federal courts, but not in all US state courts



## Litigation Standards

### US law

- Federal Rule of Evidence 702 – Testimony by Expert Witnesses:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.”

- Qualification process (*voir dire*)
- Who is the decision-maker? Jury?



## Litigation vs Arbitration

### Arbitration

- Arbitration generally involves less stringent (or no formal) application of evidentiary rules (may not apply national law rules of evidence)
- Generally allows for greater freedom to introduce expert witnesses
- Tribunal-appointed experts are also an option (recognized in arbitration rules) – as well as possibility of joint experts





## Litigation vs Arbitration

### Arbitration practice

- Experts may or may not be bound by rules of independence and duties to tribunal
- Increasingly common to use procedural techniques for expert evidence: e.g., (1) pre-trial meetings; (2) joint statements; (3) witness conferencing/hot-tubbing. Some of these techniques are used in litigation.
- Approach to disclosure/discovery usually very restricted – particularly when compared to US litigation where drafts, work product and communications between expert and counsel may be subject to discovery – and experts may be deposed before trial



## Litigation vs Arbitration

### Decision-makers

- Litigation:
  - Judges (or jurors) will not often have any particular experience or expertise
  - Judges are state-actors?
  - Local bias/political interest?
- Arbitration:
  - Party choice and role in selecting presiding arbitrator?
  - Possible to appoint arbitrators with relevant experience or expertise (and can require in arbitration agreement) – although query whether this is done



## Litigation vs Arbitration

### Potential benefits of arbitration?

- Choice of law – may permit choice of more developed body of law on environmental or climate change issues
- Enforceability – where dispute has a cross border element and enforceability is a key consideration, arbitration has obvious advantages
- Standard of proof and standard of review
- Finality and availability of appeal – speed vs second instance review – is appeal particularly important in technical/policy cases?



## Litigation vs Arbitration

### Potential issues with arbitration?

- Admissibility of claims
- Arbitration requires consent – need an arbitration agreement or an international instrument which provides for arbitration
  - Issues of intervention, joinder and consolidation
  - Mass/group/class actions
  - States may not have rights or desire to counterclaim in treaty disputes with investors



## Litigation vs Arbitration

### Potential issues with arbitration?

- Issues about who can participate:
  - Confidentiality
  - Access for “third parties” – environmental disputes may involve the interests of parties beyond the parties to the arbitration
  - Some steps to increase transparency, right to comment/participate but limits
- Beyond quantum issues, do arbitral tribunals actually engage with scientific evidence in a meaningful way?
- Lack of publication/availability of awards and lack of precedential value