

THE  
EXPERT  
IN LITIGATION  
AND ARBITRATION

D. MARK CATO

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# THE EXPERT

IN LITIGATION AND ARBITRATION

*by D Mark Cato*

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*I have gathered a posy of other men's flowers  
and nothing but the thread that binds them is my own.*

Montaigne

---

I dedicate this book to my beloved grandson, “Freddy”,  
born on 5 October 1998—may he never require the services  
of an expert. Also to that legion of friends and colleagues  
who are Life Members of *The Twisted Arm Club*,  
of whom a number have contributed to this book

Over the years, since I launched into authorship,  
I have been proud to enlist the assistance of those very many eminent academics  
and practising arbitrators and lawyers whom it is my privilege and pleasure to know.

# THE EXPERT IN LITIGATION AND ARBITRATION

by

*The Right Honourable The Lord Howe of Aberavon, CH, QC  
Former Foreign Secretary and Deputy Prime Minister of the United Kingdom*

Kosovo, Tiananmen, Chernobyl, Pinochet, CNN. Increasingly we all share the same worldwide satellite-borne vocabulary. Trade, travel, tourism, television, technology—all these are competing with each other in the demolition of time and distance.

Politics and technology alike have been boosting rather than obstructing the growth of transnational business. Sometimes the obstacles for trade have been demolished by conscious political decision: in the European Union or in NAFTA, for example. Elsewhere the process has been triggered by near-revolutionary upheaval: with the displacement of Maoism by Deng Xiaoping's "socialist" marketplace or with the Gorbachev disintegration of the Soviet Empire. Very often it has been (in Keynes' words) the "animal spirits" of the entrepreneur that have been the driving force for change.

So we have grown used to the idea of a single world marketplace. Not just for goods but for capital and cash as well—whisked across frontiers invisibly and, literally, at the speed of light. We think less often perhaps of the global marketplace of law and legal thinking that must accompany the growth in trade and investment. Yet inevitably there has been a corresponding increase in transnational disputes. So too there has grown a corresponding need for skill and guidance in avoiding and resolving such disputes.

Multinational trade is inevitably multijurisdictional. Very often the choice of jurisdiction is the most difficult question of all. So more and more it makes sense to create what is in effect a unique jurisdiction, through a tailor-made pattern of alternative dispute resolution. Sometimes even, in truly "adventurous" territories, one has almost literally to take one's own law with one.

And ADR, in whatever form and in whatever mix of territories, means more work not just for lawyers but for experts of every kind—and in a variety of roles. Perhaps too often we see ourselves as primarily involved in what Sir Mackenzie Chalmers, the Victorian jurist, described as the pathology of trade and commerce—in the forensic determination of head-on conflict. But the expert's role is now seen to be much wider than that. Even where disputation has already broken out, the expert's input to mediation, conciliation, to other means of dispute resolution—very often by the removal of technical or linguistic misunderstandings—will continue to grow.

So too in helping to shape relationships, to settle agreements, to formulate codes of practice that will make disputes less likely. And nowhere more than in the cross-frontier transactions—where often there can be significantly different perceptions of the role and standing of the expert himself. As between the United States, for example, and many other

## FOREWORD

common law jurisdictions, there are differences—or so it is often thought—between the balance that has to be struck between duty to one's client and duty to the court or tribunal. Almost by definition, the scope for misunderstanding between Anglo-Saxon and Continental systems is different again.

And all the more so, when one is concerned with inter-cultural as well as intercontinental relationships. The contributors to this book, drawn as they are from Australasia as well as from China, from Continental Europe as well as from the United States and the United Kingdom itself, offer a broad perspective of advice on all these issues.

Yet even the most eminent professionals, said one commentator the other day, be they accountants, engineers or surgeons, can be reduced to simpletons in the witness box. That is why this is more than a book about experts, by experts, for experts. "The more a man looks at a thing," said G K Chesterton, the master of paradox, "the less he can see it, and the more a man learns about a thing, the less he knows it. . . . He goes on seeing less and less of its significance. In the same way, alas! we all go on every day, unless we are continually goading ourselves into humility."

This book aims to display humility and commonsense as well as expertise—and is all the better for that.

# ETHICS AND THE EXPERT

by

*The Right Honourable The Lord Saville of Newdigate  
Chairman of the Judicial Committee of The Academy of Experts*

*"The expert witness is not an advocate employed on behalf of a party."*

I take these words from the Guidance Note on Contingency Fees issued by the Judicial Committee of The Academy of Experts. That Committee (of which I was a member and am now Chairman) holds the view that any form of contingency fee arrangement is incompatible with the expert's duty of independence and impartiality.

The job of experts in litigation or arbitration is to give their independent, objective and unbiased opinions on the matter referred to them and falling within their area of expertise.

The job of advocates is to present the best case they properly can on behalf of their clients.

If an expert tries to adopt the advocate's role under the guise of giving expert evidence, then that expert will necessarily not be giving an independent, objective and unbiased opinion.

In truth such an expert will be attempting to deceive the court or tribunal.

Such attempts may succeed or they may fail. If they succeed, then the expert has perverted the course of justice. If they fail (and more often than not it is only too apparent to an experienced judge or arbitrator that the expert is not acting with independence and impartiality) then the result will be that the court or tribunal concerned will be likely heavily to discount the evidence that expert gives, which will mean that, so far from assisting the client, the expert will have done the client a great disservice.

In its Guidance Note the Judicial Committee also observed that "An Expert Witness must not only be independent, but must be seen to be independent". Hence the view of the Committee that contingency fees are not compatible with the duties of a true expert, since such fees could hardly fail to raise suspicions of partiality and lack of independence, even if in fact the expert was able to resist the temptation so to act.

There are those who do not share these views; indeed they regard them as idealistic and impracticable in the real world. However in my opinion unless they form the basis of the proper function and duties of experts, the argument that only court or tribunal appointed experts should be heard becomes very difficult indeed to rebut.

These points (and others of equal importance) are considered and discussed in detail in this book, which I would commend to all concerned with experts in litigation or arbitration.

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- *The Arbitration and Dispute Resolution Law Newsletter*
- *The New Law Journal*



# THE CONTRIBUTORS

The following are only brief notes about each of the contributors. For further information see the bibliographical notes at the end of their respective contributions.

**The Right Honourable The Lord Howe of Aberavon, CH, QC**

President of The Academy of Experts. Former Deputy Prime Minister, Foreign Secretary and Chancellor of the Exchequer of the United Kingdom.

**The Right Honourable The Lord Saville of Newdigate**

Chairman of the Departmental Advisory Committee on Arbitration Law (advising on the Arbitration Act 1996). Chairman of the Judicial Committee of The Academy of Experts.

**Andrew Bartlett, QC, FCI Arb**

Arbitrator and Queen's Counsel working in building and civil engineering; professional negligence; insurance and reinsurance, and product liability. General editor of Emden's *Construction Law*.

**Aldo Berlinguer**

Attorney. Arbitrator. Associate Professor of Comparative Private Law at the University of Cagliari. Member of the Italian Association of Comparative Law. Member of the Italian and Spanish Bar.

**John Bolton, MSc(Eng), MBA (Hons), FCI Arb**

Partner in Eversheds, the national law firm of solicitors. International construction lawyer. Lecturer and Assessor for the Woolf Report, *Access to Justice*.

**Michel Brisac**

An *Expert Agrée* by the *Cour de Cassation*. *President d'Honneur Fondateur* of the *Compagnie Nationale des Ingenieurs Diplômés Experts près les Cours judiciaires ou administratives d'appel* (CNIDECA).

**Eur Biol Michael Chapman**

Arbitrator, practising expert and expert witness and arbitrator. *Expert près le Comité Nationale Français de la Chambre de Commerce Internationale*. Chartered Biologist and a European Registered Toxicologist practising in France. Author.

## THE CONTRIBUTORS

### **Nicholas Cheffings, FCIArb**

Partner and Head of Property Litigation at Lovell White Durrant, City of London solicitors. Specialises in property litigation. Lecturer and author.

### **Michael Cohen, LLB, FIBA, FCIArb, QDR, FAE, Barrister**

Registered arbitrator. Qualified mediator and practising insurance expert. Chairman Emeritus of The Academy of Experts.

### **Tim Cooper, BSc, FRICS, FCIArb**

Senior Partner of North Staffordshire firm of chartered surveyors. Registered arbitrator. Vice-President of the West Midlands Rent Assessment Panel. Experienced lecturer, expert witness and independent expert.

### **The Honourable Mr Justice Cresswell**

High Court Judge, Queen's Bench Division. As the author of what have become known as the *Ikarian Reefer* Rules he has been influential in raising experts' standards.

### **John Ellison, FCA, FBAE**

Chartered accountant. Expert witness. Chairman of KPMG Forensic Accounting.

### **Tony Ensom, FRICS, FCIArb, MAE**

Chartered building surveyor. Specialises in construction law, contract administration and dispute avoidance and resolution. Customer Services Director of Citex Consulting Limited in London. Acts as arbitrator, independent expert and adjudicator.

### **A A de Fina, OAM, FIArbA, FIE(Aust), FAIM, FRINA**

International arbitrator in commercial disputes. Widely experienced expert witness in engineering and naval architecture. Author and lecturer.

### **Richard Freeman, MA (Cantab), FCA, FCIArb, DipICarb, FAE, QDR**

Chartered Accountant. Expert witness, arbitrator and mediator. Head of Litigation Services at Horwath Clark Whitehill. Chairman of The Academy of Experts.

### **His Honour Judge John Frenkel**

Sits at the Bristol Civil Trial Centre and is consulting editor for the *Practical Civil Court Precedents*. He is particularly well placed to comment and speculate on the application of the new Rules to civil proceedings.

### **Jonathan Gaunt, QC**

Joint Head of Falcon Chambers in London. Specialises in property law.

### **Robert Goldspink**

Partner and Head of the International Litigation practice group of Morgan, Lewis & Bockius, LLP, of the USA, London, Brussels, Frankfurt, Tokyo and Singapore.

## THE CONTRIBUTORS

### **Marcus Harling**

A member of the Committee of TeCSA. He was responsible for the development of the TeCSA Expert Witness Protocol Version 1.0 and currently sits as a representative of TeCSA on the Lord Chancellor's Department's Working Group.

### **Nigel H Harris, MA, MB, BChir, FRCS, FAE, MCIArb**

Consultant orthopaedic surgeon. Experienced expert witness in professional negligence and personal injury. Author.

### **Gary R Hickinbottom, MA, DipICarb, FCIArb**

Partner in Cameron McKenna, City of London firm of solicitors. Specialises in multi-jurisdictional technical litigation, in particular group product liability claims. Recorder in the Crown Court and County Court. Author.

### **Doug Jones, AM, RFD, BA, LLB, LLM, FCIArb, FIA&MA**

International construction lawyer and arbitrator. Partner in Clayton Utz, Australian lawyers. Author.

### **Dr Albert Knott, PE**

Specialist in structural and mechanical failure analysis and accident reconstruction, Colorado, USA.

### **David Leonard, TD, MA(Cantab), FCIArb, FSIArb, FHKIArb**

Former High Court judge, Hong Kong. Non-practising solicitor. Arbitrator and mediator. Lecturer. Panel member of the Hong Kong International Arbitration Centre and of CIETAC.

### **John Leslie Livingstone, PhD, CPA, CVA, MAE**

Expert witness in accounting and economics in many significant cases over the past twenty years. Directs a national litigation consulting practice headquartered in West Palm Beach, Florida, USA.

### **Dr Roger J Maddrell, BSc, PhD, DiplDelft, FICE, FGS, FAE, QDR**

Chief Engineer with consulting civil engineers Halcrow. Specialises in the maritime field. Author.

### **Simon Morgans**

Solicitor and legal adviser to the Legal Aid Board, United Kingdom.

### **Paul Newman, MA, DipLaw, Barrister, FCIArb, RIBA and CIC Accredited Adjudicator, ADR Net Accredited Mediator**

Non-practising barrister and senior construction lawyer with Hugh James Ford Simey solicitors in Cardiff. UK legal adviser to a major national and international firm of claims consultants. Author and formerly a lecturer.

### **Fei Ning, BSc, LLM**

Partner in Haiwen & Partners, Beijing, China. Engineer.

## THE CONTRIBUTORS

### **Dr Bernard Peckels**

Expert appointed by the French Supreme Court of Appeal. Author.

### **Graham Perry, JP, MA, FCIArb**

Non-practising solicitor. International arbitrator in the commodity field. Fellow of the Chartered Institute of Arbitrators. Panel member, CIETAC, China.

### **Dr Heiko Plassmeier**

Lawyer at Döser Amereller Noack/Baker & McKenzie, Düsseldorf, Germany. Practises in German and international litigation and arbitration, general civil and commercial law and information technology.

### **Alan Redfern**

Barrister and arbitrator. Previously head of litigation and arbitration at Freshfields, international lawyers in the City of London. Specialises in international commercial arbitration.

### **Professor Faust Rossi**

Samuel S Leibowitz Professor of Trial Techniques at Cornell Law School, USA. Lectures internationally. Prolific author.

### **Phillippa Rowe, MA, FCII, MAE, QDR**

Chartered insurance practitioner. Involved in litigation support. Expert witness and adviser, arbitrator and author.

### **Keith Salmon**

Specialises in computer disputes and corporate fraud. Author. Leading UK expert witness.

### **Eur Ing Patrick Sheen, BSc, CEng, FIEE, FIFireE, FAE**

Electrical engineer, UK. Specialises in forensic engineering concerning industrial accidents on the civil side and in criminal cases deals with murder, manslaughter and arson.

### **George Staple, CB, QC, FCIArb**

Solicitor, partner in Clifford Chance, City of London international lawyers. Former Director of the Serious Fraud Office. Chairman of the Fraud Advisory Panel established by the Institute of Chartered Accountants in England and Wales.

### **Roger Trett, MInstCES, FLLA, ACIArb, FGS, MAssCostEng, FAE**

Chairman and Chief Executive of Trett Consulting, an international firm providing contractual services within the construction and engineering industries. Particular expertise in forensic delay analysis and *quantum*. Deputy Chairman of The Academy of Experts.

### **Dr Volker Triebel, FCIArb**

Partner at Boesebeck Droste, Düsseldorf, Germany and of the Inner Temple, Barrister. Practises in German and international arbitration, commercial and corporate law, mergers and acquisitions.

## THE CONTRIBUTORS

### **Andrew Tugwell, FRICS, FCI Arb**

Chartered surveyor and property litigation solicitor with Nabarro Nathanson, City of London. Fellow of the Royal Institution of Chartered Surveyors and the Chartered Institute of Arbitrators.

### **Professor Vincenzo Vigoriti, FCI Arb**

Professor of Law at the University of Florence. Author. Attorney. Italian Bar Association, Italian Association for Civil Procedure, Associazione Italiana Arbitrato, Fellow of the Chartered Institute of Arbitrators, American Arbitration Association, WIPO, Fellow of the American Bar Association, American Law Institute.

### **Ron Vince**

Consulting engineer. Director of Edon Liddiard Vince Limited, Marine Surveyors and Naval Architects. Expert witness on all aspects of ship hulls and machinery litigation and damage to refrigerated cargoes.

### **Lesley Webber**

Solicitor. Partner and Head of Property Litigation and Planning at Beachcroft Wansbroughs, City of London. Specialises in landlord and tenant disputes. Member of the Property Advisory Group to the DETR. Co-author, PACT Scheme. Lecturer.

### **Peter Wainwright, MA, FRICS**

Chartered surveyor. Formerly President of General Practice Division RICS, Manchester. Chairman and Director of Lambert Smith Hampton (Manchester). Specialises in landlord and tenant matters in arbitration, expert determination and acting as an expert witness. Lecturer.

*9 December 1998*

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