

# P.R.I.M.E. Finance

## Panel of **R**ecognised **I**nternational **M**arket **E**xperts in **F**inance

P.R.I.M.E. Finance experts as expert witnesses – some thoughts and observations



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2015 P.R.I.M.E. Finance Annual Conference  
26 & 27 January, Peace Palace, The Hague

# P.R.I.M.E. Finance experts as expert witnesses

- Likely need to engage P.R.I.M.E. Finance experts as expert witnesses in disputes involving complex financial transactions
- This will likely also lead to increased (excessive?) expense and (increased?) complexity
- There is an expectation within P.R.I.M.E. Finance of increasing requests to its registry to provide names of P.R.I.M.E. Finance experts for expert witness services
- P.R.I.M.E. Finance panel has two sub-panels: dispute resolution experts and market experts
- Market experts are more likely to be used as P.R.I.M.E. Finance expert witnesses



# P.R.I.M.E. Finance experts as expert witnesses

- P.R.I.M.E. Finance panel of experts is a “college of expertise”
- There is not necessarily “one” P.R.I.M.E. Finance answer or opinion
- Fundamental characteristic of expert evidence in the P.R.I.M.E. Finance context is that it is opinion evidence
- We can expect that opinions of experts can reasonably and sensibly differ
- An often unstated fallacy, therefore, is that in expert evidence there is only one answer
- Often said that the court does not choose between experts, but uses differing views to assist it in reaching its conclusions



# P.R.I.M.E. Finance experts as expert witnesses

- Experience of P.R.I.M.E. Finance judicial training and education in several jurisdictions shows judges are interested in further education about disputes involving complex financial transactions
- That experience also shows that judges are concerned about expert witness evidence, and in particular about:
  - The arcane and specialised nature of many aspects of disputes involving complex financial transactions
  - Expert witnesses as hired guns delivering the best evidence money at the high end of town can buy (why pay for second or third tier witness or evidence?)



# P.R.I.M.E. Finance experts as expert witnesses

- Observing expert witnesses is often about observing human nature
- The temptation for the expert witness to be biased is strong:
  - The expert is paid by his client (and often very well paid too)
  - The expert sees documents that support his client's case
  - The expert may have given initially optimistic advice and so feel the need to support that advice
  - The expert attends meetings with his client's team and so becomes part of the "team"
  - The adversary nature of much litigation can lead to an expert "fighting" the other side



# P.R.I.M.E. Finance experts as expert witnesses

- However, judges repeatedly say that a so-called “battle of experts” makes their decisions much more difficult
- However also, there is widespread judicial (and market) cynicism about the impartiality of expert witnesses
- It is often said that too many expert witnesses cannot help acting as advocates
- Experience therefore shows that there are experts and there are “experts”
- Even so, P.R.I.M.E. Finance experts can be expected to place a high value on their reputation and integrity



# P.R.I.M.E. Finance experts as expert witnesses

- “In matters of science the reasoning of men of science can only be answered by men of science” (Lord Mansfield, *Folkes v. Chadd* (1782))
- There are numerous examples of undoubted experts or men of science who reasonably and sensibly hold different opinions
- Expert witnesses and courts must bear in mind potential changes and corrections of mistakes



# P.R.I.M.E. Finance experts as expert witnesses

- Courts must also bear in mind that:
  - expert witnesses are very much creatures of their time, place and experience (viz, bleeding or cupping by doctors in mediaeval times)
  - and hence that science and opinions must be expected to change and develop over time
- Newton may have seen further because he stood on the shoulders of men ...
- ... but so did Einstein, who sometimes described light as a continuous field of waves and sometimes as a stream of particles ...
- ... and yet today, physicists accept the dual nature of light





# P.R.I.M.E. Finance experts as expert witnesses

- A complicating factor in the P.R.I.M.E. Finance context is the primacy of the London/New York axis arising out of:
  - the dominance internationally of those two markets in derivatives and complex financial transactions
  - the ubiquity of the ISDA Master Agreement (which is in the vast majority of transactions governed by English or New York law)
- But many P.R.I.M.E. Finance and derivatives experts, and particularly legal experts, do not practice in London or New York or are not qualified to do so
- It is common for non-English and -New York experts to give opinions and advice on English and New York law and derivatives and market practice



# P.R.I.M.E. Finance experts as expert witnesses

- Conflict of laws and foreign (i.e., English or New York) law issues are therefore likely to loom large in disputes involving complex financial transactions that arise and/or are litigated or arbitrated beyond the London/New York axis
- We should not be surprised and hence should expect that a P.R.I.M.E. Finance expert whose experience is principally outside the London/New York axis will have different opinions and give different advice on some issues than would a London or New York expert
- We need to take care not to accept without analysis that there is only one (London/New York) view or opinion on all issues



# P.R.I.M.E. Finance experts as expert witnesses

- For example, it is often said in Hong Kong and Singapore that the common law in those jurisdictions – e.g., in relation to so-called “Asian Values” and contract formation – is different to the common law in England ...
- ... and in England that the common law in England is different to that in New York (and *vice versa*)
- Moreover, derivatives markets while sharing many characteristics and practices do differ in various respects between among each other



# P.R.I.M.E. Finance experts as expert witnesses

- Improving the value and dependability of expert evidence is not a question just of the experts themselves
- It is necessary to consider also all those involved in the litigation, including the advocates who advance arguments that suit their case
- In particular, the judicial case-management of the use of expert evidence is an overarching principle
- It is often said that, once two experts give their reports and opinions on the basis of the same set of assumptions, differences of opinion become fewer



# P.R.I.M.E. Finance experts as expert witnesses

- The pre-trial conference between the experts leading to a joint statement on agreed issues and points of difference is a powerful means of ensuring that expert evidence is credible
- Equality of arms between expert witnesses is also a key element that helps ensure a higher quality and credibility of the expert evidence
- An expert witness knows both that he has to face another expert witness and that the other expert witness will brief the advocate who will cross-examine the first witness
- An expert witness is therefore not just an expert witness at trial – he can be invaluable in the pre-trial period



# P.R.I.M.E. Finance experts as expert witnesses

- Concurrent evidence (or “hot-tubbing”), where during the trial the opposing expert witnesses debate issues between themselves – and sometimes with the judge - with advocates asking questions once the debate is finished, is becoming more widely used – particularly in Australia
- Many take the view that concurrent evidence leads to a better quality of evidence than does the artificial and adversarial nature of cross-examination



# P.R.I.M.E. Finance experts as expert witnesses

- “Concurrent evidence is generally likely to produce more ounces of merit which will be worth more to a judge than pounds of charisma or demeanour”: Rares J, Federal Court of Australia and Supreme Court of Australian Capital Territory
- Concurrent evidence is likely to be well suited to P.R.I.M.E. Finance expert witnesses

