P.R.I.M.E. Finance
Panel of Recognised International Market Experts in Finance

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

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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
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• 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?)
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• 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
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• 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
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• “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
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• 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
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• 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
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• 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
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• 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
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- 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.
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• 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.
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- 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
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• “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