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Expert Evidence – how to handle party- appointed and tribunal-appointed experts

**Panel II – Taking of Evidence in Arbitration – War Stories, Challenges and
Perspectives**

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The Role of Experts

- Experts assist the arbitral tribunal in establishing the relevant facts with their expert knowledge. |
- Typical areas: technical expertise (technical defects etc.), damages calculation, delay analysis, company valuation.
- Party-appointed experts are the norm, tribunal-appointed experts are the exception.
- Criticism of the role experts in arbitration has led to various initiatives to improve the efficiency, reliability and fairness of the administration of expert evidence.

Tribunal-Appointed Experts

- **Examples of legal provisions regulating tribunal-appointed experts: Art 26 UNCITRAL Model Law, Art 25(4) ICC Rules, Art 6 IBA Rules on the Taking of Evidence in International Arbitration.**
- **The expert is appointed and instructed by the arbitral tribunal.**
- **The expert must be independent of the parties. Some rules and laws allow the challenge of experts in case of a lack of impartiality or independence.**

Tribunal-Appointed Experts: Characteristics

- **Cumbersome appointment process:**
 - Selection after one or more exchanges of written briefs by the parties.
 - The tribunal must dedicate appropriate time and resources to the definition of the expert's profile and the search for a suitable person.
 - Parties must be consulted on the profile and the proposed candidates.
 - Establishment of terms of reference requires an in-depth understanding of the case and is likely to be in dispute between the parties.
 - The selection process is vulnerable to dilatory or obstructive tactics.

Tribunal-Appointed Experts: Characteristics

- Procedure driven by the expert:
 - Expert often influences the tribunal in determining the assignment and the focus of the investigation.
 - Expert has wide powers of investigation: frequently requires parties to provide information, documents or access for inspections (sometimes *de facto* substitute to document production).
- Parties may comment on the content of the report only after it was established.

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Challenges / Criticisms

- Selection of suitable expert is key
- Parties face a formidable hurdle if they want to convince the tribunal the expert's conclusions are wrong.
- To appropriately comment, parties are likely to rely on party-appointed experts (duplication of efforts).
- Feedback and additional questions from the tribunal and the parties tend to delay the finalization of the report.
- Tribunal-appointed experts tend to increase time and costs.
- Tribunal-appointed experts may help to balance parties' unequal access to expert advice and evidence.

Party-Appointed Experts

- Few legal standards on party-appointed experts (Art 5 IBA Rules on the Taking of Evidence; CIArb Protocol for the Use of Party-appointed Expert Witness in International Arbitration).
- Expert receives instructions and information from one party only.
- Required standard of independence not defined. Party-appointed experts often informally advise parties on technical issues.

Party-Appointed Experts: Characteristics

- **Procedure driven by counsel:**
 - Selection of experts by parties and counsel.
 - Counsel establishes terms of reference.
 - Timing: selection usually at the beginning of the proceedings, submission of reports together with main submissions.
 - Communications between counsel and expert usually not disclosed.

Party-Appointed Experts: Characteristics

- **Establishment of facts is adversarial:**
 - Experts relied upon by the parties tend to reach fundamentally different conclusions.
 - Test of expert's conclusion during cross-examination is essential for the tribunal's establishment of facts.
 - Establishment of the facts requires an active tribunal that needs to understand the relevant technical issues in dispute.
 - Methods aiming at narrowing areas of disagreement (pre-hearing discussions, Scott Schedule etc.) tend to increase costs.

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Challenges / Criticisms

- Experts may be perceived as “hired guns” reaching extreme conclusions.
- “Expert shopping”: experts who support a party’s position are purposely searched.
- Experts sometimes have different ethical standards. It is, however, recognized that it is the primary duty of experts to assist the arbitral tribunal in establishing the truth.
- Terms of reference defined by the parties frequently do not overlap and make it difficult for tribunals to compare results and conclusions.
- Tribunals can often only with difficulty reconcile the expert’s results or propose a different methodology during the hearing.

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Assessment

- Dialectic approach of expert evidence by party-appointed experts neutralizes many of the perceived weaknesses.
- There are insufficient procedural safeguards to address weaknesses of expert evidence adduced by tribunal-appointed experts:
 - “Delegation” of decision-taking if the arbitral tribunal fails to engage with the technical issues in dispute.
 - A weak expert may derail an arbitration.
 - An arbitral tribunal is often unable to detect idiosyncratic methods departing from the scientific consensus in a specific field of expertise.

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Assessment

- Certain criticisms of procedures with party-appointed experts remain valid:
 - Unequal access to data is often inadequately counterbalanced.
 - Unequal access of parties to experts leading in their fields tends to distort the fact finding.
 - Attempts to mislead the arbitral tribunal undermine the confidence in the arbitral process.

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Thank you for your attention.

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