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.

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.
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


- 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.
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.
• 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.
• 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.
Thank you for your attention.