EXPERT TEAMING – BRIDGING THE DIVIDE BETWEEN PARTY-APPOINTED AND TRIBUNAL-APPOINTED EXPERTS

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It appears to be a given in international arbitration that expert evidence is provided by party-appointed experts. This is despite the fact that one increasingly hears complaints that such evidence is of little value because it advocates too much in the interests of the party presenting it and tribunals often have to decide between diametrically opposite opinions and irreconcilable conclusions. While techniques such as "pre-hearing meetings" and "witness conferencing" seek to address these concerns, international arbitral practice has shown that these techniques are not always sufficient to combat the disadvantages of party-appointed experts. Fewer efforts have been made to remove the concerns expressed with regard to tribunal-appointed experts. This article describes a technique which seeks to combine the advantages of party-appointed and tribunal-appointed experts. The technique has been successfully applied in several International Criminal Court arbitration proceedings and has become known as "expert teaming" as well as the "Sachs Protocol".

As you will all know from your own practices, our world has become so complex that a significant number of commercial disputes cannot be resolved without the assistance of one or more experts. The same is true for international arbitration proceedings. For example, expert knowledge is crucial for the resolution of nearly all construction disputes. However, specific expertise may also be required to quantify a party's loss of profits. Other examples are gas or oil price revision disputes. These disputes typically require the assistance of an expert to determine the appropriate price formula once arbitrators have held that the old formula is no longer appropriate.

In litigation as well as in arbitration proceedings, two types of expert evidence are typically employed: evidence by party-appointed experts and evidence by tribunal-appointed experts. Both types provide for certain advantages, but are far from perfect and have provoked substantial criticism by parties, counsel and arbitrators.

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Here, I present a third method for obtaining expert evidence, a method which is fairly new in arbitration and which seeks to combine the advantages of party-appointed and tribunal-appointed experts. The method will be referred to as "expert teaming". It was used for the first time in two International Criminal Court (ICC) arbitrations chaired by Dr Klaus Sachs, a current Vice-President of the ICC. Dr Sachs and I described the method in more detail in an article written in 2010.[1]

I will proceed in four steps. First, I will very briefly identify the legal framework governing the taking of evidence by experts in international arbitration proceedings. Second, I will summarise the concerns often expressed and disadvantages often encountered with regard to the taking of evidence by party-appointed and tribunal-appointed experts. Third, I will point out some of the remedies which have been introduced in recent years to respond to the critiques expressed in relation to party-appointed experts. Last but not least, I will describe in more detail the instrument of "expert teaming" itself and highlight the advantages which this instrument might bring to arbitration.

I LEGAL FRAMEWORK

The legal framework for the use of expert evidence in arbitration proceedings is set down by:

(1) the set of ad hoc or institutional rules chosen by the parties to the arbitration agreement, if any;

(2) the national arbitration laws applicable at the place of arbitration; and

(3) so-called "standards of best practice" frequently relied on by arbitral tribunals when exercising their discretion as to how to conduct the arbitration.

Neither ad hoc and institutional rules nor national laws on arbitration provide much guidance when it comes to the taking of expert evidence. The content of these rules can be summarised as follows: they all allow for the taking of evidence by party-appointed and by tribunal-appointed experts, but leave it up to the tribunal and the parties to decide which method of expert evidence they want to rely on and how the taking of evidence by the chosen method shall be conducted. Relevant considerations include: how the expert is selected, what his tasks are, what his rights and duties are, what the form and content of the expert report is, and how and by whom the expert will be examined at the hearing.

A much more detailed description of the proper use of party-appointed and tribunal-appointed experts is set forth by arts 5 and 6 of the 2010 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules).[2] While the IBA Rules do not qualify as a "law" in the technical sense, and, in principle, only apply in cases where the parties have

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1 Klaus Sachs and Nils Schmidt-Ahrendts "Neutrals or Advocates" (2010) 15 ICCA Congress Series 135.

2 For a detailed discussion of these rules, see Klaus Sachs and Nils Schmidt-Ahrendts "Expert Evidence Under the 2010 IBA Rules" (2010) 13 Int ALR 216.

specifically agreed upon them, they are universally recognised as so-called "standards of best practice" and many tribunals treat them as a yardstick when deciding on the rules for the taking of evidence in a given arbitration.

While I will not discuss arts 5 and 6 in further detail, it shall be pointed out that these IBA Rules indeed provide parties, counsel and arbitrators alike with useful guidance as to how to take party-appointed or tribunal-appointed expert evidence in a successful and efficient manner without expressing any preference for either one of the two methods.

II POINTS OF CRITIQUE COMMONLY EXPRESSED IN RELATION TO PARTY-APPOINTED AND TRIBUNAL-APPOINTED EXPERTS

For critiquing purposes, it is useful to look at both methods separately.

A Tribunal-Appointed Experts

A major disadvantage of relying on tribunal-appointed experts is that the parties often do not place sufficient trust in the personal and professional qualities of an expert they have not chosen. Parties rightfully believe that they know their case best and, thus, are in a better position than a tribunal to select the right expert. Further, businessmen, lawyers and technical experts often need a certain amount of time in order to fully comprehend their respective views and positions. When appointing their own expert, parties feel that they are provided sufficient time for the preparation of the expert report. However, once an expert is appointed by a tribunal, parties fear that they will not be granted sufficient opportunity to explain their view and position to that expert.

Further, parties are often opposed to the use of tribunal-appointed experts, simply because they feel or know that they need a party-appointed expert anyway to properly present their case. In such a case, yet another expert appears to be a waste of money.

The third – and probably most important – concern vis-à-vis tribunal-appointed experts is that parties fear that their dispute will eventually be decided by the expert instead of the tribunal. In theory, tribunals should appoint experts to obtain information that might guide the tribunal in the search for truth. Yet in practice, in many cases the experts' tasks have gone well beyond. In some cases, tribunals have assigned to experts the task of "*establishing the facts of the case by identifying the evidence provided and assessing its probative value*".[3] In other cases, experts have been asked to express their "*opinion on a claim*"[4] without identifying any specific aspects to be addressed. The possibility of selecting the person who will resolve the dispute is one of the major reasons why parties choose to submit their disputes to arbitration. Thus, while the perception that a dispute is – in

3 The quote stems from an ICC award which is reprinted in part in an article by Michael Schneider "Technical experts in international arbitration" (1993) 3 ASA Bulletin 446 at 450 (emphasis added).

4 Ibid (emphasis added).

fact – decided by someone else than the judge or arbitrator already raises substantial concerns in State court proceedings, such perception is strictly unacceptable in arbitration.

B Party-Appointed Experts

The most common concern expressed in relation to party-appointed experts is that their expertise is often tainted by a lack of impartiality. They are accused of acting like "hired guns". Their statements often resemble arguments made by the party that appointed them. In fact, this may hardly come as a surprise since party-appointed experts are expected to help and support the party appointing and paying them. A second concern is that the reports and testimonies submitted by party-appointed experts often suffer from a lack of clarity. They tend to be too long and, as the expert has been instructed by the party and not by the tribunal, the reports tend to have a different focus from that of the tribunal and sometimes do not even cover the issues upon which the tribunal intends to base its decision. A third concern is the lack of coordination among the party-appointed experts. In particular, if the reports are submitted simultaneously, they often do not correspond with each other. They are often based on different facts, different scientific approaches and different assumptions, and address different issues. Tribunals have to compare apples to oranges and are often unable to bridge the gap without the help of another expert. The fourth concern is that the use of party-appointed experts combined with extensive cross-examination during the oral hearing is often very costly and time-consuming.

III REMEDIES FOR PARTY-APPOINTED EXPERTS

Currently, the standard approach in international arbitration proceedings is to rely on party-appointed experts. Thus, it is not surprising that recent efforts to improve the taking of expert evidence all focus on party-appointed experts. Two techniques have proven particularly useful and shall be briefly described.

The first technique is known as "pre-hearing meetings".[5] The technique seeks to respond to the critique that the reports and the testimony of party-appointed experts are not responsive to each other, and are based on different facts and scientific approaches. To avoid having to compare apples to oranges, it is suggested that the tribunal orders the party-appointed experts to meet after or, if possible, even before they render their first report. At such meetings the experts shall attempt to reach agreement on as many issues as possible and record such agreements in writing, for example in a joint report. By contrast, for the issues on which they are unable to agree, the experts shall render separate reports indicating, inter alia, the reasons for their disagreement.

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5 Compare art 5.3 of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 with art 6 of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration 2007.

The second technique is commonly referred to as "witness conferencing".[6] This technique seeks to address concerns of a lack of neutrality and efficiency. Accordingly, instead of examining the party-appointed experts individually, the tribunal examines them at the same time, comparing and contrasting them with each other. The main advantage of this approach is that it avoids the potential for a biased party-appointed expert to lecture a tribunal that does not have the expertise to challenge the testimony – at least not before it has heard the other expert. Being placed next to their peers, experts tend to present their opinions more independently and objectively.

On assessment, there can be no doubt that both techniques are highly beneficial to the process of taking evidence by means of party-appointed experts. Nevertheless, in some cases, these techniques do not ensure an efficient (measured in terms of time and costs) and successful (measured in terms of quality and neutrality) process. As long as an expert is appointed and paid by a party, there will always be an incentive to unduly sympathise with that party's position.

Expressed metaphorically: "pre-hearing meetings" and "witness conferencing" might downsize the arena in which experts, coached by the counsel appointing them, confront each other. This downsizing makes it less burdensome for the arbitrators as referees to oversee the fight and to detect fouls. However, these techniques will not remove the gloves from the experts' hands.

IV EXPERT TEAMING

The "expert teaming" instrument seeks to respond to the disadvantages and to combine the advantages of both party-appointed and tribunal-appointed experts. Essentially, it works as follows:

(1) Selection: after the parties have submitted their first briefs and have indicated which factual allegation they intend to prove by expert evidence, the tribunal invites both parties to come up with a list of three-to-five persons they consider fit to serve as experts. The tribunal will then invite the parties to briefly comment on the respective other parties' proposals. Following these steps, the tribunal will choose two experts, one from each of the two lists, and appoint these experts as an "expert team".

(2) Terms of Reference: thereafter, the tribunal will meet with the expert team and the parties in order to finalise the expert team's terms of reference. These terms of reference shall provide for, inter alia:

   (a) the issues to be determined by the expert team;

   (b) the information required by the expert team;

   (c) the mode of communication among the tribunal, the expert team and the parties;

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6 For a detailed description of this technique, see Wolfgang Peter "Witness 'Conferencing'" (2002) 18 Arb Intl 47.

(d) the remuneration of the expert team; and

(e) the duties of the expert team vis-à-vis the parties and the tribunal.

(3) Written Report: as a further step, the expert team will prepare a preliminary joint report which will be circulated to the tribunal and the parties. The parties and the tribunal will have a chance to comment on this preliminary report. The experts will review any comments and take them into consideration in preparing their final joint report which will also be distributed to the parties and the tribunal. In their final report, the expert team shall first set forth their joint and mutual findings. However, in addition they will also indicate where – despite their best efforts – they have been unable to agree on a certain point. With regard to these points, each expert shall identify his or her position as well as the reasons for his or her disagreement.

(4) Oral Hearing: finally, at the request of one of the parties or the tribunal, the expert team shall testify to its report and respond to any potential issues raised by the parties in their comments. During the hearing, the tribunal and the parties shall have ample opportunity to question the expert team on all points they find relevant.

In my view, the use of expert teams is apt to remove most of the concerns commonly connected with tribunal-appointed and party-appointed experts. It provides for at least five major advantages.

First, distinct from a single tribunal-appointed expert, the expert team is chosen by the parties who are, due to their better knowledge of the case, in a much better position to make such a choice than is the tribunal. This ensures that the experts are properly qualified.

Second, different from a party-appointed expert, the expert team is appointed and paid by the tribunal. This ensures the expert team's neutrality.

Third, different from a party-appointed expert and a single tribunal-appointed expert, the experts on the team can check and control each other. Further the experts are able to combine their expertise and thereby enhance the overall quality of their work.

Fourth, different from a party-appointed expert, the expert team's task is determined by the parties and the tribunal. This eliminates the risk that the experts miss out points which the tribunal regards as relevant and material to the outcome of the case. Of course, it also eliminates the risk of multiple expert reports which come to completely contradictory results or which, even worse, are not comparable to each other.

Finally, for the avoidance of doubt, it should be reiterated that the parties, of course, remain free to comment on the expert team's report in writing and to question the experts during an oral hearing. The parties are also entitled to seek the assistance of one or several experts of their choice – so-called "expert consultants". While the appointment of a consultant might lead to additional costs, it

is submitted that since the focus of all experts is more precise, the overall cost for all experts will be less than if both parties had solely retained a party-appointed expert.

V CONCLUSIONS

As indicated at the beginning, the "expert teaming" method has been successfully applied in several ICC arbitrations. In all cases, the experts were able to come up with a complete and convincing final report on which the tribunal could base its decision; and in all cases, the parties had ample opportunity to comment on and contribute to the experts' findings. The costs incurred by the expert evidence were significantly lower than those which I have seen in other cases, where the tribunal relied on the evidence of party-appointed experts. However, while I am convinced that the method is bound to have a very positive impact on the efficient resolution of a significant number of disputes, it is certainly not suitable for all types of dispute and I am sure that there are several amongst you who – despite my efforts – have remained sceptical and are not convinced of the benefits this method may bring to arbitration.