

HOW TO HANDLE CONFLICTING OPINIONS OF PARTY-APPOINTED EXPERTS?

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I. THE TYPICAL PROBLEM

- Parties substantiate respective cases by reference to diametrically opposed expert reports
- Different experts address different issues
- Experts fail to address the opposing party's case and expert evidence
- Issues crucial to decision-making process not addressed
- Ships passing in the night

2. THE LIMITED GUIDANCE AVAILABLE

- Limited guidance for party-appointed experts in national laws and institutional rules:
 - preparation expert reports
 - oral evidence
 - relation with instructing counsel and client
- Art. 29 UNCITRAL Model Law:

“Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal”

3. THE ORIGIN OF THE PROBLEM

- Role of experts in civil law jurisdictions
 - Single court-appointed expert
 - Independent from parties
 - Focus on education on technical aspects
 - Apparent removal of bias
 - Cost efficient
- Role of experts in common law jurisdictions
 - Multiple party-appointed experts
 - Retained by the parties
 - Focus on convincing court of the better position
 - Risk of hired guns
 - Experts' duty to assist court
 - Duplication of expert costs

4. WHY PARTY-APPOINTED EXPERTS ARE USED MORE THAN TRIBUNAL-APPOINTED EXPERTS

- High stakes
- Parties desire to retain degree of control
- Parties ensure expert evidence on matters crucial to their case
- Reliance on and focus of expert evidence may develop over time:
 - counsel take time to comprehend technical aspects
 - arbitrators take time to digest the technicalities and identify the essential issues for their decision

5. THE REGULATION OF PARTY-APPOINTED EXPERT EVIDENCE

- Article 5 IBA Rules on Taking of Evidence; and
- Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (CIArb Protocol) address *inter alia*:
 - general duties of party-appointed experts
 - content requirements expert reports
 - expert meetings to reach agreement and record areas of disagreement
 - modalities of examination
 - privilege
 - expert declaration

6. THE IDEAL WORLD

- Experts' duty is to assist tribunal
- Absolute impartiality and objectivity
- Unbiased expert evidence
- Both expert reports to address all relevant aspects of the issue(s) in dispute
- No influence or pressure from:
 - instructing counsel
 - paying client

7. THE TECHNIQUES COMMONLY USED TO TACKLE CONFLICTING EXPERT EVIDENCE

- Codes of conduct
- Joint expert pre-hearing meeting
- Joint expert reports / summaries on areas of agreement and disagreement
- Expert conferencing / hot tubbing
- Expert teaming (Sachs Protocol)

8. IMPROVEMENT OF TECHNIQUES

- To ensure that expert evidence is timely adduced:
 - on matters of import to the tribunal
 - addressing alternative factual findings
- Early education of arbitrators of technical issues relevant to the dispute
- Tribunal to supervise instruction of experts:
 - on issues to be addressed
 - on factual scenarios
 - on assumptions made
 - on input/information provided
 - on scientific methodologies

9. THE KEY TO AN EFFICIENT USE OF PARTY-APPOINTED EXPERTS

- Early provision of information to identify technical issues
- Engagement of tribunal throughout the arbitral process:
 - at case management conference
 - at case review conference
 - at pre-hearing conference
- Tribunal follow-up with directions in procedural orders
- Efficiency of the process depends on:
 - communication between arbitrators, experts and counsel
 - the level of preparation of arbitrators and counsel