Kluwer Arbitration Blog

Contradicting Party-appointed Experts: German Perspective on the Obligation of Arbitral Tribunals to Appoint a Neutral Expert

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As in most jurisdictions, Germany based arbitral tribunals and German state courts assessing challenges to arbitral awards are often confronted with questions regarding the conflict between the parties' right to be heard and the denial of the parties' requests for evidence. In recent years, the German Federal Court of Justice *(Bundesgerichtshof – BGH)*[1)] and several Higher Regional Courts *(Oberlandesgerichte – OLG)*[2)] rendered numerous decisions relating to this topic.

This post analyses this case law and addresses in particular the aspect of contradictory party-appointed experts: Does German arbitration law provide for an obligation of the tribunal to appoint a neutral expert in case of contradictory party-appointed experts? Does the inquisitorial approach oppose international arbitration practice where such an obligation is generally negated?

Contradictory findings of party-appointed experts pose a day-to-day issue in arbitration proceedings. On the one hand, parties tend to request a tribunal-appointed expert as soon as they realise that they have an unfavourable case in the eyes of the tribunal. On the other hand, the arbitral tribunal – and, naturally, the other party – is regularly convinced that the tribunal is able to render the award based on the established contradictory expert reports. If the tribunal proceeds without appointing an own expert, the opposing party will often rely on their right to be heard and seek to challenge the award before state courts.

Therefore, it is a decisive factor whether or not tribunals are obliged to appoint their own neutral expert. Tribunals, parties or jurisdictions which are shaped by an adversarial approach recognise party-appointed experts by default. Thus, they deny such an obligation and a challenge of the arbitral award on this ground.

No Obligation if Arbitral Tribunal Deems itself Capable of making a Determination on its Own

In my opinion,[3] under German Law arbitral tribunals are permitted to deny and disregard a request to appoint their own neutral expert if they consider themselves capable of making a determination of the respective factual issue themselves. In an arbitration featuring contradicting party-appointed experts, arbitral tribunals are both allowed to base this determination on either of the conflicting party-appointed experts or take a completely different position. Consequently, in that situation, an obligation of the tribunal to appoint a neutral expert has to be denied. The latter result is different from the predominant opinion in relation to state court proceedings. This follows from structural differences between arbitration law and German civil procedure law leading to the following eight arguments:

First, arbitral tribunals have discretion as to the appointment of neutral experts pursuant to the relevant legal authorities.[4]

Second, arbitral tribunals have discretion about the assessment of their own expertise. According to the BGH, it is a state court's decision whether or not it is capable of rendering a judgment based on its expertise.[5] This is even more the case for arbitral tribunals. Furthermore, the tribunal can gain own expertise in the very proceedings – even through the party-appointed experts.

Third, in arbitral proceedings, party-appointed experts, like tribunal-appointed experts, are recognised as evidence. Although the prevailing opinion under sec 1049 para 2 s 2 ZPO and some under art 6.5–6.7 Prague Rules[6] attributes less evidential value (convincing power) to them, they are nevertheless recognised as evidence. The latter status is to be differentiated from their qualification in state court proceedings. There, party-appointed experts are merely seen as a "qualified" party submission *(qualifiziertes Parteivorbringen)* and can thus serve as proof of facts.

Fourth, arbitrators generally have broad discretion on what to recognise as evidence, i.e. the tribunal's decision on disputed facts does not need to be proven by those means holding evidentiary status. On the contrary, facts can be established as, and are allowed to form the basis of, the award through every source of knowledge. For example, written witness statements and witness statements by phone or affidavits do not constitute means of evidence according to German civil procedural law. In arbitration, they can be used to base the award's facts. That is also why party-appointed experts – at least initially (regardless of their ultimate evidential value) – hold the same status as tribunal-appointed experts (in addition to the third argument above).

Fifth, arbitration allows for an anticipated assessment of evidence *(vorweggenommene Beweiswürdigung)* to a certain extent (e.g. OLG Cologne case no 19 Sch 6/17). Arbitral tribunals are permitted to disregard a request for evidence, if they are adequately informed and thus capable to come to a determination contradicting the request (in their own view, see seventh argument below).[7] They can base that opposing determination on all sources of knowledge already produced – not only the evidence already produced – arbitrators are generally free in their assessment of evidence (see fourth argument). In contrast, before German state courts

such an assessment which prejudges the results of taking of evidence is illegal.

Sixth, making a determination is possible for the arbitral tribunal even in light of contradicting party-appointed experts. This is possible because contradictory findings can still convey knowledge or expertise on the issue (which can be acquired even in the current arbitration, see second argument). Through the underlying data, initial hypothesis and/or methodology tribunals are often able to achieve an understanding of the issue. In addition, being confronted with two opposing and adversarial positions, tribunals are forced to deal with the same. They will not be able to blindly follow one expert which is – not only from a common law perspective – a major concern regarding tribunal-appointed experts, as discussed also on the **blog**. Arriving at a decision is also legally possible because party-appointed experts hold evidentiary status (see third argument) and arbitrators are free in what they ultimately recognise as evidence (see fourth argument). In consequence, arbitral tribunals meet their obligation to take evidence and thus respect the parties' right to be heard.

Seventh, compared with state courts, arbitral tribunals possess extended grounds for rejecting requests for evidence. On the one hand, they can utilise private knowledge whereas state courts, in contrast, can only utilise common knowledge. On the other hand, tribunals are allowed to reject a request for evidence if they *subjectively* consider themselves to be adequately informed about the subject.[8)] The latter ground for rejection derives from the circumstance that the principle to exhaust all offers of evidence *(Grundsatz der vollständigen Beweiserschöpfung)* applies only restrictively in arbitration proceedings.[9)] In this regard, tribunals have to adhere to the requirements of the right to be heard by addressing, at least briefly, the request for evidence or the underlying factual question the request refers to in the award. In this context, meaningless phrases do not suffice.

Eighth, arbitral tribunals autonomously assess the relevance of a particular fact on the decision (e.g. OLG Cologne case no 19 Sch 6/17). A wrong assessment does not, in general, infringe the parties' right to be heard. It is only impaired if the tribunal's given assessment is solely intended to conceal that the tribunal did not engage with the parties' assertion in any way (e.g. OLG Munich case no 34 Sch 31/15). That is the case if the award's reasoning does not take note of or consider the assertion at all (e.g. OLG Cologne 19 Sch 6/17). The award's reasoning has to clearly prove the disregard of the assertion, i.e. treat disputed facts as undisputed, base reasoning on a submission not made by parties, not mention fundamental submissions in reasoning of the award (like contributory negligence, violation of contractual obligation to loyalty or cooperation or of statutory duty to mitigate damages). Due to this eighth argument, in 2017 the OLG of Cologne confirmed an arbitral award which rejected a request to appoint a tribunal expert in light of two contradicting party-appointed experts (e.g. OLG Cologne case no 19 Sch 6/17).

Conclusion

In contrast to the German state courts, arbitral tribunals are permitted to disregard a

request to appoint their own neutral expert if they consider themselves capable of making their own determination because of or despite the contradicting party-appointed experts. Overall, German arbitration law is surprisingly arbitrator-friendly and flexible when it comes to contradictory party-appointed experts – at least compared to German procedural law before state courts. There is no obligation of the tribunal to appoint a neutral expert in case of contradictory party-appointed experts.

This is very important to accommodate the practice – and thus most probably needs – of international arbitrations where party-appointed experts and awards based on contradictory party-appointed experts are common and accepted. I expect German arbitration law to further develop in this direction, mainly through future case law.

References

↑1 E.g. BGH case nos I ZB 70/17, I ZB 90/18, and I ZB 23/19.

↑2 E.g. OLG Hamburg case no 6 Sch 1/16, no free access, OLG Cologne case no 19 Sch 6/17, and OLG Munich case no 34 Sch 31/15.

↑3 For a more detailed assessment see Gramlich, *German Arbitration Journal (SchiedsVZ) 2019, 233–242*.

↑4 Sec 1049 para 1 s 1 German Code of Civil Procedure *(Zivilprozessordnung – ZPO)*, art 26 para 1 lit a UNCITRAL Model Law, sec 27.2 s 1 DIS Rules 1998, art 28.2 DIS Rules 2018, 25.4 s 1 ICC Rules, art 6 para 1 s 1 IBA Rules and art 6.1 Prague Rules.

↑5 E.g. BGH case no III ZR 65/06.

↑6 ***Khvalei, Global Arbitration Review 22 November 2018 – The Prague rules – dispelling misconceptions (part „Misconception 2"; Working Group Member of the Prague Rules)***. Not mentioned by Amarral in his blog **post**.

↑7 E.g. OLG Cologne case no 19 Sch 7/10.

↑8 E.g. BGH case no III ZR 44/89, and OLG Cologne case no 19 Sch 6/17.

↑9 E.g. OLG Frankfurt case no 26 Sch 24/12.

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