Expert Evidence in International Arbitration – What Can Be Done to Save the Party-Appointed Expert? BCLP International Arbitration Survey 2021

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The role of party-appointed experts in the arbitration process has been the subject of debate for many years. This debate is set to continue, given the increasing volume of cross-border transactions and growing number of organisations and industries embracing arbitration as a dispute resolution mechanism. As a result, disputes submitted to arbitration have become increasingly technical, with substantive and procedural issues requiring expertise in a broad range of disciplines. This raises questions over whether party-appointed experts are being used efficiently and effectively and whether parties and tribunals are leveraging the inherent flexibility of arbitration sufficiently when it comes to expert evidence.

Is Expert Evidence Necessary?

The starting point for considering the effectiveness and efficiency of the use of

expert evidence is to stop and analyse if expert evidence is really necessary for the outcome of a particular dispute.

The ICC Commission report, Techniques for Controlling Time and Costs in Arbitration (2018), states that there should be a presumption that expert evidence is not required, which should be departed from only if expert evidence is necessary to inform the tribunal on "key issues in dispute" (paragraph 62). Despite this recommendation, party-appointed experts are very frequently appointed, often as a matter of course in arbitration proceedings, without close consideration as to their scope of work and whether the evidence really is required in order to determine the outcome of the dispute. The LCIA's note on Experts in International Arbitration (2018), for example, states that "*Most, if not all* [of the LCIA's registered cases], *involve the use of experts*."

This topic has been the subject of recent judicial commentary, for example in the design case *Rothy's Inc v Giesswein Walkwaren AG* [2020] EWHC 3391 (IPEC). In this case, the Court granted an order permitting the parties to adduce evidence from one expert each in relation to one issue (the design corpus of a shoe as at a particular date) (the "Order"). However, neither party complied with the Order. Each party's expert opined on issues beyond the scope of the Order, which both parties conceded were matters for the Court to determine.

In relation to the expert evidence that fell outside the scope of the Order, the Court commented that it had been assisted by that evidence, but that the same could have been achieved more cost effectively if it had received an agreed, brief primer on the subject from the parties, which would have saved significant costs and Court time. Ultimately, although the Court did not formally exclude the expert evidence that went beyond the scope of the Order, the Court did not consider itself bound by that expert evidence and did not give it any weight. Although the experts had given evidence beyond what was necessary or proportionate for the determination of the case, the Court did not criticise the experts for that, indicating that the fault lay with those instructing the experts.

This case demonstrates that even where expert evidence is deemed unnecessary in respect of a particular issue, parties can be easily tempted to adduce expert evidence in any event, particularly where an expert has already been instructed in respect of other issues. What can be done to prevent this?

Leverage the Flexibility and Innovation of Arbitration

A key benefit of arbitration is its inherent flexibility, which enables parties and tribunals to tailor the proceedings to the unique aspects of the dispute at hand. If expert evidence is necessary in a particular case, parties and tribunals should adopt more innovative procedures to handle the expert evidence process, rather than fall into the trap of following more traditional approaches.

One idea is for expert evidence to be brought forward in the procedural timetable in order to give experts a much longer period to agree and narrow issues between them. This is something that the tribunal could be more involved in, or it could ask the parties to consider this more carefully. It is likely that in a rush to produce a list of agreed issues, many issues will remain un-agreed, simply because the experts ran out of time to properly consider them.

Another idea is for arbitrators and parties to streamline expert evidence, so that the issues considered by the experts are, and remain, relevant to the issues and material to the outcome of the arbitration. For example, quantum experts often prepare evidence for issues that may fall-away if liability is not made out, which can be expensive and wasteful for clients.

BCLP International Arbitration Survey 2021

This year, BCLP's International Arbitration Survey considers the use of expert evidence in arbitration, focussing on that of party-appointed experts. It considers measures that tribunals and parties could adopt to ensure that the expert evidence process remains efficient, effective and of value to the outcome of the dispute. In addition, the survey considers the delicate line the party-appointed expert walks in balancing his/her contractual duties to the appointing party and his/her duty to remain independent and assist the tribunal. It poses questions around the measures that could be taken in order to promote greater independence and objectivity on the part of experts.

We hope this topic will spark a lively debate and provide practical ideas for the future of party-appointed experts in international arbitration. We would like to

obtain the views of our professional colleagues on this topic by requesting their responses to our survey questions. All responses will be treated as confidential and a report and editorial on the results of the survey will be circulated to all participants.

To participate in the survey please follow this link.