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The Use of Expert Witness in Arbitration from the Perspective of SHIAC

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The use of expert witness is common in international arbitration. Recent discussions amongst Chinese practitioners have centered on the case related to the world-famous Chinese athlete Sun Yang in which the WADA's expert opinion was believed to be material to the ruling of the CAS tribunal ("*WADA vs. Sun Yang*").¹⁾ However, it is less common in China-seated arbitrations since the majority of arbitration rules of Chinese arbitration institutions do not provide for rules on expert witness.

This article intends to explore questions over the appointment and use of expert witnesses in China under the framework of both international arbitration rules and the arbitration rules of the Shanghai International Arbitration Center ("SHIAC"), and to discuss the practice of SHIAC arbitration in using expert witnesses.

Overview of Appointment of Expert Witnesses

There are two main types of [expert witnesses](#) in international arbitration: [party-appointed expert](#) and [tribunal-appointed expert](#).

There is generally no requirement of a written declaration of independence or impartiality from an expert witness. For example, a written declaration of independence or impartiality by the party-appointed expert is not required under R44.1 and R44.2 of the [Code of Sports-related Arbitration](#). According to [Article 27.2 of the UNCITRAL Arbitration Rules \(2010\)](#), the opinions given by a party-appointed expert are treated as evidence submitted by the appointing party. However, the tribunal may in practice consider the independence of a party-appointed expert when evaluating such expert opinions, which is largely due to the influence from the rules of conduct on party-appointed expert made by international organizations such as the [IBA](#),²⁾ as well as from guidelines and practices influenced by English court procedures such as the [Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses](#).

Under a number of international arbitration rules,³⁾ a party-appointed expert will not be disallowed from giving opinion for the sole reason that the expert is party-appointed or have a link with the

appointing party, though it is clear that such experts must not be partisan advocates or ‘hired guns’ who may tailor their evidence to favor the appointing party. By way of example, in *WADA vs. Sun Yang*, the fact that WADA’s appointed expert was employed as WADA’s Deputy Director did not lead to rejection of his expert opinion. Rather, his evidence was to be assessed by tribunal and under cross-examination by opposing counsel.

A tribunal-appointed expert is on the other hand generally required to submit a written statement of impartiality and independence.⁴⁾ The opinions of the tribunal-appointed expert may be examined and heard in oral hearing, sometimes with the aid from a party-appointed expert. In contrast, R44.3 in the [Code of Sports-related Arbitration](#) also allows the tribunal to appoint experts when it deems appropriate, though a signed statement of impartiality and independence is not required but such expert’s independence from the parties is required throughout the proceedings.

In comparison, Articles 37 and 39 of the [2015 SHIAC Arbitration Rules](#) (“SHIAC Rules”) on appointment of expert and use of expert evidences do not specify the accepted form of evidence to be submitted to the tribunal, and this may be interpreted that written opinions or reports given by party-appointed experts are acceptable. We observed that the opinions of the party-appointed expert are usually annexed to parties’ submissions as exhibits. The SHIAC Rules also permit the arbitral tribunal to appoint one or more experts on its own initiative for clarification on specific issues as it considers necessary under Article 39.

Similar to other international arbitration rules, there is no requirement under the SHIAC Rules for written declaration of independence and impartiality by a party-appointed expert. In practice, we observed arguments on lack of impartiality or independence is raised in almost every case where a party-appointed expert is engaged and where their opinions are submitted. Although the SHIAC Rules do not list detailed procedures on dealing with these challenges, they allow the tribunal discretion to decide on whether to accept such expert opinions or reports as Article 29 of the Rules stipulates that the tribunal shall examine the case in any manner that it deems appropriate under the circumstance that it shall act impartially and fairly, and shall provide reasonable opportunities to all parties for them to present and argue their cases.

Examination of Party-Appointed Experts in SHIAC Arbitrations

Firstly, the parties submitting the opinions of their appointed experts are responsible for ensuring the availability of such experts for cross-examination in oral hearings. Further, in SHIAC arbitration practice, the opinions given by the party-appointed experts are treated as document evidence produced by the submitting party. As such, the documented opinions will have to be cross-examined in oral hearing.

The jurisprudence behind this practice is largely derived from the relevant provisions of the Chinese Civil Procedural Code.⁵⁾ However, such requirement is generally not mandatory since a number of arbitration rules under Chinese institutions remain silent on how document evidence should be treated in proceedings. This is in line with the general idea that the tribunal has discretion on determining evidence is suitably treated. The extent of the cross-examination on documented expert opinions will be further addressed below.

In an unpublished case administered by the SHIAC in 2016, an insurance underwriter sought

remedies from a sea shipper for compensation over losses caused to the underwritten cargo shipped from China to Germany, which was silicon with high purity and limited scope of industrial application. In order to document the status of the contaminated cargo arrived at the destination port, the cargo owner engaged a well-known assessor to assess the losses caused to such cargo. The assessment report was later used by the underwriter in SHIAC arbitration proceedings against the sea shipper, following a letter of subrogation issued by the cargo owner. In response, the sea shipper engaged an expert with chemistry background to issue an expert report on calculation of losses of the cargo value.

In an oral hearing, the sea shipper questioned the independence of the assessor as the assessor was solely appointed by the cargo owner, and pleaded inadmissibility of the assessment report as a whole. The sea shipper also argued that the assessor should be summoned to testify before the tribunal. The insurance underwriter on the other hand argued that it is a rare practice to summon a reputable assessor to testify before the tribunal, and that it would not be economical as the assessor was based in Germany. The insurance underwriter maintained that the authenticity of the assessment report should not be doubted as any misconduct that would give rise to concern over authenticity of the assessment report would be detrimental to the assessor's reputation which would be extremely unlikely in the competitive assessment industry.

The tribunal allowed the evidence because it held that opinions given by a party-appointed expert should generally be treated as document evidence submitted by the filing party rather than as testimony from an individual witness, hence the expert was not required to testify before the tribunal either under the Chinese Procedural Code or the SHIAC Rules.

The tribunal further noted the well-recognized credibility of the assessor in the industry and found the likelihood of the assessor to falsify the opinions to be extremely low, provided that there was no counter evidence showing probable credibility concern over the authenticity of the documented opinions or the assessor himself.

As for the assessment on losses, the tribunal noted that the sea shipper had engaged its own expert witness residing in Guangzhou, China. Given that the credibility of such expert was not known to the Tribunal and that it was considered economically feasible to have such expert testify before the tribunal, an oral hearing was convened to examine the opinions given by the sea shipper-appointed expert.

Although the SHIAC Rules do not explicitly mention the use of party-appointed experts, such experts have been engaged in practice as shown in the aforementioned SHIAC arbitration. Often, credibility of a party-appointed expert is challenged by the opposing party with reasons varying from a mere allegation of lack of independence, to presenting evidence on pre-existing relationship between the expert and the appointing party. In this regard, it is observed that opinions of party-appointed experts would not be disregarded on the sole reason that they are partially appointed or not mutually agreed upon. Instead, without a probable cause shown and as long as both parties are treated fairly, the tribunal would likely consider and give weight to opinions made by the party-appointed expert.

Examination of Tribunal-Appointed Expert in SHIAC Arbitrations

Under Article 39 of the [SHIAC Rules](#), tribunal-appointed experts and their opinions are treated

similarly under an appraisal procedure commonly found in civil law jurisdictions.

In an unpublished case administered by the SHIAC in 2017, a purchaser of certain high-quality glass and an owner of the construction works for which the purchased glass were supposed to be installed by the third-party seller jointly filed an arbitration against the seller, claiming that the glass sold did not conform to contractual specifications. The contract specifications required glass with a trademark owned by a certain Fortune 500 company. At the oral hearing, both parties disagreed on whether the glass provided by the seller was the branded glass claimants had contracted for. In particular, the issue was what documents the seller had to show in order to prove that the specification of the glass provided. However, the parties failed to provide sufficient evidence to convince the tribunal on the issue and accordingly required consultation with an expert in licensing practice of the relevant trademark.

The tribunal decided to engage an expert witness to produce a report on the issue. After giving parties an opportunity to challenge the qualification and impartiality of the candidate appointee, the tribunal made an official appointment of the expert and directed the costs to be prepaid by the parties. The tribunal-appointed expert provided a signed statement of independence after which the tribunal prepared a list of questions, or referred to as terms of reference under the UNCITRAL Arbitration Rules, and consulted both parties on the completeness of the list before sending it to the tribunal-appointed expert. The expert promptly issued his report on the list of questions. Thereafter, the parties were again consulted and an oral hearing held during which the tribunal-appointed expert answered questions from both parties within the scope of list of questions based on the expert report. In that case, neither party appointed their own expert to assist with examination of the report issued by the tribunal-appointed expert. In the arbitral award, the tribunal adopted the analysis presented by the tribunal-appointed expert on the factual issues and rendered a final award ordering the costs of appointing that tribunal-appointed expert to be borne by both parties.

However, it is to be noted that the use of tribunal-appointed experts should be limited to the issues that are factual or technical, and should not interfere with the decision-making process which is to be conducted by the tribunal.

Conclusion


As Chinese arbitration institutions, such as the SHIAC, are increasingly involved in the administration of international arbitrations or domestic arbitrations with international elements, their institutional rules may have to adapt to the evolving needs and practices of arbitration users. SHIAC Rules provide for general rules on use of experts without identifying specific guidance for each type of experts. The logic of the current ambit for use of experts under the SHIAC Rules is to provide the tribunal with the most extensive flexibility in the conduct of arbitrations where experts, whether party-appointed or tribunal-appointed, are engaged since as shown in practice, the various legal backgrounds of arbitrators may play a decisive role on how the tribunal will approach on the expert witness procedure. However, familiarity with the practice of party-appointed and tribunal-appointed experts in the Chinese legal community remains to be enhanced, as one may observe from the hearing records of *WADA vs. Sun Yang*.

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References

^{?1} CAS2019/A/6148, *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation*.

^{?2} Article 5.2 of the IBA Rules on the Taking of Evidence in International Arbitration requires that a party-appointed expert must disclose “*his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal*” and provide “*a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal*”.

^{?3} See for example, the UNCITRAL Arbitration Rules, the Code of Sports-related Arbitration, the 2016 SIAC Rules, the 2017 ICC Rules and the 2018 HKIAC Rules.

^{?4} See for example Article 29 of the UNCITRAL Arbitration Rules, which sets out detailed rules for the appointment of tribunal appointed expert including the use of statement of impartiality and independence.

^{?5} Article 122 of the Judicial Interpretation on the Application of the Chinese Civil Procedure Law of the Supreme People’s Court sets out that, before the expiration of the time limit for providing evidence, the parties may, in accordance with the provisions of article 79 of the Civil Procedure Law, apply for one or two persons with specialized knowledge to give opinions on the professional issues involved in the facts of the case in the court. The opinion given by this person is considered as statement of the party.

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