Kluwer Arbitration Blog

Regulating Party-Appointed Experts: How to Increase the Efficiency of Arbitral Proceedings

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Arbitration proceedings most often involve complex disputes, where technical issues require specific technical, scientific, legal or financial expertise, leading parties to appoint one or more experts to support their position and assist the arbitral tribunal. The 2018 LCIA Note on Experts in International Arbitration reported that, out of some 300 new arbitrations registered each year by the LCIA, "[m]*ost, if not all, involve the use of experts*".

This post focuses exclusively on party-appointed experts and has been triggered by an observation of the lack of specific regulatory framework and the inefficiency to which it leads. The proposed solution is to have a series of specific duties and obligations applicable to party-appointed experts in order to enhance their role in international arbitration and increase said efficiency.

The Lack of a Regulatory Framework Applicable to Party-Appointed Experts

Most national laws and institutional arbitration rules set out specific provisions for *tribunal-appointed* experts but these rules do not apply to party-appointed experts.

Party-appointed experts are acknowledged by most arbitral institution rules, which either allow parties explicitly to appoint them or refer to this right implicitly, by reference to the possibility to have witnesses (*e.g.*, Article 27(2) of the 2013 UNCITRAL Rules, Article 25(2) of the 2021 ICC Arbitration Rules, Article 20(1) of the 2020 LCIA Arbitration Rules, Article 33(1) of the 2017 SCC Rules, Article 25(1) of the 2016 SIAC Rules 2016). However, such acknowledgement is not accompanied by a list of duties and obligations of party-appointed experts, offering no guidance as to how experts should be managed effectively.

National laws do not contain more detailed provisions on party-appointed experts either. They solely refer to tribunal-appointed experts (the 2006 UNCITRAL Model Law 2006, the Singapore International Arbitration Act 1995, or the UK Arbitration Act 1996).

The notable exception is Rule 35.3 of the UK Civil Procedure Rules which expressly states that

> 1. [I]*t is the duty of an expert to help the court on the matters within its expertise.*

> *2. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.*

Although the guidance offered by this provision is limited, to the best knowledge of the authors it is the most detailed national provision to date.

A Multitude of Soft Law Instruments containing Specific Provisions applicable to Party-Appointed Experts

By contrast, the above vacuum within arbitral rules and national laws is not mirrored within soft law instruments. Indeed, there are several soft law instruments which include more detailed provisions applicable specifically to party-appointed experts.

Among the most relevant such instruments are the 2021 IBA Rules on the Taking of Evidence (**IBA Rules**), the 2006 ALI / UNIDROIT Principles of Transnational Civil Procedure (**ALI/UNIDROIT Principles),** the 2007 CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (**CIArb Protocol**), the 2019 Code of Best Practices in Arbitration of the Spanish Arbitration Club (**SAC Code**).

Professional organizations to which experts belong have also been publishing code of conducts setting out ethical rules for their members when serving as witnesses in dispute resolution proceedings. For example, the Academy of Experts, the Expert Witness Institute and Euro Expert, have jointly promulgated 2001 Code of Practice for Experts, which imposes duties on experts, whether tribunal- or party-appointed, of "*impartiality, objectivity and integrity*" as well as the duty to "*take no act that would compromise the expert's duty to the arbitral tribunal*". Also, the American Society of Civil Engineers, the American Institute of Certified Public Accountants, the American Society of Appraisers have all published such codes of conduct.

Some of the most often encountered duties and obligations of party-appointed experts provided for in these soft-law instruments are detailed below.

Duty of objectivity and independence

Art. 22(4) of the ALI/UNIDROIT Principles states that "[a]*n expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed*." Equally, the Commentary to Article 3 of the CIArb Protocol, which closely follows the practice of the CPR Art. 35, states that "*experts should be instructed by the parties that their overriding duty is owed to the tribunal and not to the instructing party*". Article 4 then goes on to state that "[a]*n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party*", and that "[a]*n expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced*".

The most elaborate provisions in this sense are found Arts. 133 – 134 of SAC Code which requires that "[e]*xperts must be objective and independent*", explaining further that "[*t]he qualities of objectivity and independence require that experts possess the willingness and capability to perform their role, are guided by the truth and report, not only aspects that are favourable to the party that has appointed them, but also those adverse to it, and maintain an objective distance from the appointing party, the dispute, and other persons involved in the arbitration*".

Duty to submit a declaration of objectivity and independence

Article 5 (2) of the IBA Rules lists the elements that should be contained in the expert report, among which, letter c) "*a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal*" clarified in the Commentary to the IBA Rules "*for example in the sense that he or she has no financial interest in the outcome or otherwise has relationships that would prevent the expert from providing his or her honest and frank opinion"*.

The template for the expert declaration in Article 8 of the CIArb Protocol also requires that the party-appointed expert submits a declaration attesting to the latter's objectivity. The SAC Code also refers to the party-appointed expert's 'declaration of objectivity and independence' (Article 137) and contains a template statement.

Duty of disclosure

Under Article 5.2(a) of the IBA Rules, a party-appointed expert is required to describe "*his or her background, qualifications, training and experience"*, and also to disclose "*any and all relationships he or she may have with the parties, their legal advisers and the arbitral tribunal*". In similar terms, Article 4.4(b) of the CIArb Protocol also requires that the expert should "*state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration*".

The disclosure obligations in SAC Code are particularly elaborate and are contained in Articles 139-145. Party-appointed experts must "*disclose any circumstance which … may give rise to justifiable doubts as to their objectivity and independence*" (Article 140). Such duty is "*ongoing*" (Article 141), requires that experts "*carry out an inquire into their past and present relationships with the persons involved in the arbitration and with the dispute*" (Article 144), and there is a preference in favour of disclosure should an expert be "*unsure whether a circumstance can reasonably give rise to justifiable doubts about his or her objectivity and independence*" (Article 143).

Mandatory elements to be included in the expert report

A minimum set of elements to be included in the expert report is identified in Article 4(4) of the CIArb Protocol (elements numbered from (a) to (l)), Article 5.2 of the IBA Rules (elements numbered from (a) to (i)), and Article 146 of the SAC Code (elements numbered (a) to (g)).

An obligation of confidentiality

An obligation of confidentiality is also imposed in Articles 152-153 of the SAC Code, which oblige party-appointed experts to "*keep confidential any information that they learn in the arbitration proceedings*".

References to Fees

The ALI/UNIDROIT Principles include the party-appointed expert's fees in the costs of the arbitration which may be awarded to the winning party (Article 25.1). From a different perspective, Article 4(2) of the CIArb Protocol specifies that "[p]*ayment by the appointing Party of the expert's reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert's impartiality*.", while under Articles 150-151 of the SAC Code the professional fees which the parties pay to the party-appointed expert shall in no case "*have a variable component that depends upon the outcome of the arbitration*".

Available Remedies against Party-appointed Experts

The role of party-appointed experts is to assist the arbitral tribunal in its reasoning and ultimately its decision-making process. Although one could assume that on technical issues there could hardly be any room for interpretation, in practice each party appoints an expert able to reach a different conclusion than the expert of the other party. Parties have an opportunity to test the other party's expert during the cross-examination at the hearing, but the arbitral tribunal is left with the delicate and often challenging task of assessing the value of two wildly different professional opinions on the same nucleus of operative facts.

If a party intends to formally challenge an expert appointed by the other party, in the absence of any specific duties and obligations, the grounds upon which it may mount a successful challenge are unclear; it is ultimately left to the arbitral tribunal to assess the evidence brought by the parties and decide if a disqualification measure is appropriate. As a matter of fact, and to the best knowledge of the authors, there are no successful disqualifications of expert witnesses in the public record.

Among the grounds invoked by the parties in their requests are the following: access to confidential and privileged information (*Bridgestone v. Panama*, para. 8; *Flughafen v. Venezuela*, para. 13), and failure to disclose such access (*Bridgestone v. Panama*, para. 9), failure to disclose professional relationships (*Italba v. Uruguay*, para. 135, *Bridgestone v. Panama*, para. 6), bias (*Luxtona Limited v. Russia (PCA)*, para. 14), lack of qualifications (*Luxtona Limited v. Russia (PCA)*, para. 15*; von Pezold v. Zimbabwe*, para. 804), lack of independence (*von Pezold v. Zimbabwe*, paras. 804, 806; *Mobil Exploration v. Argentina*, para. 2), impartiality (*Mobil Exploration v. Argentina*, para. 2). The threshold of breach for each of these grounds is not yet clear, although in the case of challenges of bias, actual bias as opposed to apparent bias is required *(Luxtona Limited v. Russia (PCA)*, para. 26*)*.

Parties and tribunals found guidance in soft law instruments such as the IBA Rules Article 5(2)(a) and (c) *(Italba v. Uruguay*, paras. 135 and 156*; Bridgestone v. Panama*, para. 19*)* or reports – the claimant in *Flughafen v Venezuela* referred for example to the 2015 ICC report on Issues for Arbitrators to Consider Regarding Experts 2015 (*Flughafen v. Venezuela*, para. 18*)*.

In practice, arbitral tribunals either acknowledge their competence to decide on disqualification requests (often on general provisions such as ICSID Convention Article 44) or decide to tackle this issue as part of the assessment of evidence presented by the parties. Tribunals have based their competence to decide on requests for disqualification of expert witnesses under Rules 19 and 34(1) of the ICSID Arbitration Rules *(Flughafen v. Venezuela*, paras. 22 and 34, *see* also *Bridgestone v. Panama*, endorsing the approach adopted by the tribunal in *Flughafen v Venezuela*, para. 13*)*. However, one tribunal considered the disqualification of an expert witness to be a disproportionate measure *(Mobil Exploration v. Argentina*, para. 39*)*.

Most tribunals have opted to consider any parties' arguments related to party-appointed experts at the stage of assessing the evidentiary value of the experts' reports *(Bridgestone v. Panama*, para. 16*; von Pezold v. Zimbabwe*, para. 807*; Flughafen v. Venezuela*, paras. 34 and 40*)*. It is worth mentioning, at a different level, an interesting decision rendered by an ICSID Annulment Committee which annulled for the first time an award on grounds of improper constitution of the tribunal, finding that one of the arbitrators failed to disclose a relationship with the claimant's damages expert, creating a manifest appearance of bias (*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, paras. 225, 228, 256). Importantly, the Committee abstained from expressing any view on whether the expert owed a concurrent duty of disclosure, since even if the expert had done so, this would not have relieved the arbitrator from his disclosure obligations as an arbitrator (para. 228). A similar application for annulment was made in the case of *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, for which however the Annulment Committee's decision has not yet been made public.

Concluding Remarks

A few conclusions may be drawn from the above:

- the use of expert-witnesses is growing, as a result of the increased complexity and technicality of arbitral disputes;
- the role of party-appointed experts is to assist the tribunal in reaching a decision on complex and technical issues beyond its expertise;
- accordingly, experts – even when appointed by a party – should be objective and independent and present an unbiased view to the tribunal, otherwise tribunals risk grounding their decisions on flawed opinions or disregarding the expert report altogether;
- just like tribunal-appointed experts, party-appointed experts should therefore conform to certain standards of conduct. Few provisions however refer to party-appointed experts and no clear duties and obligations could be identified in the institutional rules or national laws. By contrast, many soft law instruments exist;
- as a result, the remedies against experts appointed by the parties are limited and tribunals are left with the delicate and often challenging task of assessing their competence to decide such issues, as well as assessing disqualification requests or the weight of two different professional opinions

against no clear duties and obligations;
- when in doubt, tribunals often prefer not to rely on experts' testimonies or reports, thus rendering fruitless the parties' efforts to resort to experts, both in terms of time and costs.

In this context, a clear body of rules addressing the duties and obligations of party-appointed experts would result in more remedies for the parties and as a consequence, strengthen their role and the value of their testimonies and reports which tribunals could safely rely upon.

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