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Legal Insights

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Use of Expert Evidence in International Arbitration -

Primary considerations

An expert witness is a person with specialized knowledge, who assists courts and arbitration tribunals in decision-making. For court proceedings, party-appointed experts are more common in common law jurisdictions, while court-appointed experts are the preferred approach in civil law jurisdictions. Whether the experts are party-appointed or court-appointed, their general role and purpose is the same, which is to assist the court and tribunal by giving evidence in their area of expertise, by providing their independent opinion and analysis, and clarifying complex issues, which are usually outside the court or tribunal's expertise.

Upholding its true flexible nature, international arbitration allows both party-appointed and tribunal-appointed experts. A tribunal cannot order either party in an arbitration to engage an expert. However, if neither party wishes to engage an expert, most arbitration rules allow the tribunal to appoint its own expert. Since counsels from both common law and civil law jurisdictions are increasingly relying on party-appointed experts in arbitration, this article will focus on the different factors that parties should consider while appointing experts.

Do I really need an expert?

Appointing an expert may result in considerable expense so it is natural to wonder whether you really need to appoint an expert. Whether you need one depends on the nature and complexity of your dispute. Common examples include appointment of chartered accountants for analysing the quantum of damages or for share valuation, delay and disruption experts for construction disputes, handwriting experts for document forgery

cases and lawyers for evidence on foreign law matters. A technical expert may also be necessary for disputes concerning faulty and defective machineries and vehicles to explain why a certain operation went wrong or why a vehicle failed.

Even if you are of the view that expert evidence is not required from your end, you may eventually have to appoint one if your counterparty or the tribunal has appointed one. In such cases, your appointed expert may have to give evidence on why and to what extent he or she rejects the analysis of the opposing expert or the tribunal's appointed expert.

When should I appoint an expert?

In addition to providing evidence during arbitration proceedings, experts can play a crucial role by advising behind the scenes at the pre-arbitration stage, which can help formulate a stronger claim and wean out the unmeritorious claims at an early stage. This is particularly relevant for disputes that involve technical issues and are heavily reliant on expert evidence. For such disputes, the expert should be appointed before arbitration is initiated to take advantage of their preliminary view. For other disputes, the search for the expert should commence as soon as the dispute becomes evident.

Acting early would give you more time to consider the different options available and appoint the expert with the most relevant experience and qualifications. Another important consideration is the jurisdiction of the dispute. If there are limited experts in your jurisdiction, your aim should be to get the expert of your choice before the counterparty appoints him or her.

What factors should I consider when appointing an expert?

An expert must always remain independent. It is important to remember that the expert does not owe a duty to the party that has appointed him or her and is paying his or her fees.

In choosing an expert, you should look for someone who has qualifications and experience that are relevant to the technical issues in the case. To narrow down your search, the best approach is to be clear about the precise expertise that is required for your case. Depending on the nature of your case, you may have to determine whether you would prefer an expert with strong academic credentials who has little practical experience or someone with substantial practical experience but less qualified academically.

It is also important to get a sense of how the expert might come across as a witness. Although qualifications and experience can be gauged from the expert's written profile, it is more challenging to assess whether the expert would be able to fluently explain his or her analysis and defend his conclusions in a way that is easily understood by the tribunal. In this regard, previous experience of acting as an expert witness may be an advantage. You may choose to set up an interview with the potential experts to get a better understanding of their communication skills and also their technical competence.

Another consideration, which can be easily overlooked is the expert's availability. Reputed experts are usually busy with multiple matters therefore it is recommended to check the potential experts' availability at an early stage so that you can engage the expert who is able to dedicate sufficient time to your matter. You should take steps to clarify the role the expert's assistants would play to ensure that the expert who will be signing off on the report is fully aware of the analysis and conclusions in the report so that he or she is able to testify effectively during the proceedings.

What is the end product?

The expert's opinion will be produced in a written report. Depending on the direction given by the tribunal, the report is usually exchanged between the parties and shared with the tribunal in advance of the final hearing. Usually, the expert would also have to produce a report in reply in response to the opposing expert's report. During the arbitration hearing, the experts will be called as witnesses and cross-examined on their analysis and conclusions. The tribunal is not bound by the findings made by the expert but needs to determine the appropriate weight to be given to the expert's report and testimony, especially when there are conflicting opinions between the party appointed experts. Some of the factors which the tribunal would consider include the expert's qualifications and experience, his/her impartiality, the facts considered by the expert, the methodology used in arriving at the opinion and his/her creditability as a witness.

What is the legal counsel's role?

As the legal counsels are better placed to understand the role of the expert in the dispute and have a better idea of the timelines, it is common for legal counsels to draft the instructions for the expert. In the instructions, the legal counsels will identify the scope of work and provide the specific questions that need to be analyzed with the appropriate assumptions that should be taken into account by the expert along with the relevant timelines.

Keeping in mind that the expert must provide his or her independent opinion in the report, the role of the legal counsels is to ensure that the report is prepared in line with the instructions and that the report is drafted clearly.

The legal counsels would also ensure that the expert's report complies with any rules or protocol that the parties have adopted.

Can I recover the expert's costs?

Arbitral tribunals usually enjoy wide discretion in determining what kinds of costs are recoverable and to what extent, although this is subject to the parties' agreement, law at the seat of arbitration and the applicable arbitration rules. Having said that, in most occasions, fees and expenses of the experts, provided they are reasonable, are considered recoverable costs. The outcome of the proceedings will usually indicate who is required to bear the costs. For example, if you win the arbitration, the losing side may be directed to pay your expert's costs (along with other costs). However this is not a fixed rule and the tribunal may take into account several other factors (like intentional delay, excessive costs) before ordering costs.

In short, depending on the nature and complexity of the dispute, the role of experts can become valuable to the outcome of your dispute thus careful planning at an early stage is required regarding the appointment and use of experts in arbitration.

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