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« Use of Experts: Strategic &
Procedural Aspects »

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Experts in International Arbitration

- Focus on experts in international arbitration since most EPC power plant disputes are finally decided in international arbitration
- Experts also in State litigation, expert determination, dispute avoidance/adjudication boards
- Focus on party-appointed experts since this is the norm

Factual matters in EPC contracts

- A high proportion of disputes in EPC contracts relate to factual matters on which expert evidence may be helpful to the Tribunal in deciding a case, and therefore helpful to a party in making the case

Technical matters :

1. Whether there is a defect
2. Cause of a malfunctioning
3. Causation in relation to delay
4. Causation in relation to damages

Damage calculations :

1. Cost of repairs or replacements
2. Loss of profit

Appointing experts

- Generally in arbitration, it is the **parties** who retain the experts
- It can also occur that the **Tribunal** alone appoints them, or in addition to party experts
 - Where the Tribunal appoints the experts it will usually involve the parties in their selection, and it may resort a neutral agency to find them, such as the ICC International Centre for ADR

Role of experts

- Their principal duty is to **assist the Tribunal**, even if appointed by a party
- It is therefore crucial that they be **independent** – unlike factual experts they only give their opinion so cannot perjure themselves, and they are paid
 - Same requirements of independence as with arbitrator themselves

Choice of expert

Imbalance of knowledge between owner and EPC contractor in relation to technical matters:

- Often owner struggles to comprehend the technical problem and therefore experiences difficulty in identifying the appropriate expert
- For EPC contractors, often the concern is to avoid divulging information to the market and in particular to a competitor as expert about what may have gone wrong

How do owners identify experts?

1. Obtain information from the EPC contractor

- Substantive contractual rights to information
- Procedural rights to information – burden of proof, orders for production, duty to cooperate

2. Expert agencies

3. Contact EPC competitors

4. Law firm's network

5. Internet

Discussing the issues with the expert

Generally no rule against the party itself having contact with an expert rather than counsel, but especially in common law world, it is counsel that instructs the experts

1. Dangers – i) parties less aware than counsel about procedural requirements, ii) also parties often less detached than counsel so risk of bias
2. Advantages – parties knowledgeable about facts, often complex

Solution: involve both counsel and party in instructing experts including identification of experts

The right expert

- Highly important for counsel and technical personnel with client to meet the expert in person
- Before meeting, ensure non-disclosure agreement in place
- Provide crucial documents and briefing in advance of meeting and obtain expert's full CV and list of publications, speeches etc.
- Discuss issues, ask potential expert for confirmation he or she is expert in the relevant area(s) and why, and ask to identify area(s) where not expert
- Explain that physical presence of expert for examination will almost certainly be required and identify general dates and location
- Assess not just knowledge, manner of thinking and presenting views, general presentation, and ability in the relevant language

Instructions to experts

- Assume instructions will be discoverable to the other side
- Scrupulously avoid any influence over the expert's involvement such as suggesting conclusions they should reach
- Do not define issues in the instructions as the issues may evolve
- Contractual requirement that expert will attend hearing for examination and generally be available for additional reports and consultation
- When expressing factual assumption state they are just assumption and variations on the facts will also need to be considered
- If not one but a team of experts from a particular entity will be retained, such as an EPC contractor, identify the expertise and role of each expert

Instructions to experts

- Orally instruct the expert that his or her first duty is to the Tribunal and that he or she must provide evidence in accordance with his or her belief
- Involve the experts in assessing the facts as may be useful,
- for example site visits and consultation with others
- Ensure expert and you keep a clear record of all sources
- of information on which expert relied
- Involve the expert in reviewing submissions and even in preparing cross-examination of the other side's experts, but be aware of appearance of bias

The expert's report

General requirements as set out in the IBA Evidence Rules

- Identification of expert
- Description of instructions
- Statement of independence
- Statement of facts
- Opinion with reasons
- Affirmation of “genuine belief”
- Signature and place and date

Unless legal expert no comment on law, but may comment on industry practice

Neutral tone

Comment on areas of doubt as relevant

Preparing the expert for examination

- Familiarise the expert with the process and structure of examination
- Familiarise the expert with the members of the Tribunal and opposing counsel
- If possible, have the expert stay at the hotel where the hearing will take place
- Let the expert know that if inconsistencies in small matters are detected they should not consider their entire credibility to be compromised but should accept there are small inconsistencies
- Let the expert know that if questions relate to matters the expert has not considered it is legitimate to say so and decline to answer
- Advise expert to remain calm and objective

Examination at the hearing

- Avoid interfering in cross-examination
- Clarify as necessary in re-direct examination
- Use expert conferencing where there is real confusion

Conclusions

- Crucial to identify the right expert – substantive knowledge but also general credibility
- Be clear that the expert must give his or opinion in accordance with his belief, and that the first duty is to the Tribunal
- Involve expert in other aspects only where clear need to rely on expert knowledge (or else appearance of bias arises)
- Once the expert has been instructed, leave the expert to do his or her work, especially at the hearing

Thank you for your attention!

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