

# **"Experts: Neutrals or Advocates"**

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## **I. Introduction**

1. The subject I have been asked to address centres on the independence and impartiality of experts. The way the subject is formulated – "Experts: Neutrals or Advocates" suggests that we are talking exclusively about party-appointed experts. It would be odd to ask this question if we were talking about tribunal-appointed experts; they are rarely being perceived as advocates. The situation is different when it comes to party-appointed experts where one is often faced with complaints that their evidence is of little value because it advocates too much in the interest of the party presenting it.
2. Hence, the question behind my topic is whether it has become a given in international arbitration practice that expert evidence should be provided only by party-appointed experts? Or, is there still a case to be made for using a tribunal-appointed expert, in particular regarding technical and financial issues?
3. Before answering this question, I will first look into the various national laws and institutional rules governing the taking of expert evidence in arbitration proceedings.
4. In a second step, I will briefly point out the differences between party-appointed and tribunal-appointed experts and address some of the perceived advantages and disadvantages of both types. This paper addresses points of criticisms which have been expressed in literature but also in informal discussions among my colleagues, and which I have encountered in my own practice as counsel or arbitrator.
5. In a third step, I will shortly address some of the remedies which have been introduced in international arbitration proceedings, such as "pre-hearing conferences", "expert conferencing" and "codes of conduct". It will be shown that these remedies may help to reduce the disadvantages commonly connected with party-appointed experts, but that they can not always do away with them.

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6. For all these reasons, in a final step, I will describe an alternative approach to expert evidence which may be referred to as “expert teaming”. Instead of remedying potential disadvantages connected with the use of party-appointed experts, the concept of “expert teaming” rather seeks to address the concerns commonly expressed with regard to tribunal-appointed experts.
  
7. But before proceeding with my presentation, I would like to quote an English Court of Appeals judge's statement as to the importance of experts for our activity. Her words are as simple as they are accurate: “*Without them we could not do our job*”<sup>2</sup>. While such statement hints at the importance of experts, it also hints at the frequency with which they are used. The fact that there is such strong tendency for counsel and arbitrators to revert to expert advice has led an engineer to make the following statement which, although it does not contradict the first quote, is said with a certain tongue-in-cheek: “*Lawyers prefer expert’s opinion over common sense*”<sup>3</sup>.

## II. Regulations

### *a. National Laws*

8. It is true that arbitration practice still reflects a certain divide between the common law and the civil law approach to expert evidence: In arbitration proceedings involving parties and counsel from a common law background, as a general rule, expert testimony is provided by party-appointed experts. By contrast, in proceedings involving primarily civil law representatives, tribunal-appointed experts are still the rule, although there is a certain trend towards using party-appointed experts<sup>4</sup>.
  
9. One may be surprised, however, that such difference in practice is not foreseen in law:

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<sup>2</sup> Elizabeth Butler-Sloss, *Expert witnesses, courts and the law*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1279987/>.

<sup>3</sup> Michael E. Schneider, “Technical experts in international arbitration”, *ASA Bulletin* 11/1993, pp. 446 *et seq.* at p. 446.

<sup>4</sup> For the different approaches, see Alexandra Weiss and Karin Bürgi Locatelli, “Der vom Schiedsgericht bestellte Experte – Ein Überblick aus Sicht eines Internationalen Schiedsgerichts mit Sitz in der Schweiz”, *ASA Bulletin*, 3/2004, pp. 479 *et seq.* at pp. 480-482; Martin Hunter, “Expert Conferencing and New Methods”, Albert Jan van den Berg, *International Arbitration 2006: Back to basics?*, ICCA International Arbitration Congress 2007, at pp. 820-825; Jens-Peter Lachmann, *Handbuch Schiedsgerichtspraxis*, 3<sup>rd</sup> ed. 2008, at p. 381.

10. If one looks into the UNCITRAL Model Law – the mother of the modern arbitration laws – one can read in Article 26 that “*unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal*”. By contrast, the Model Law does not deal expressly with party-appointed experts.
11. Accordingly, those national legislators which have either adopted the Model Law or been inspired by its content have also expressly provided for the tribunal’s right to appoint an independent expert. Notably, such provisions may not only be found in the arbitration laws of civil law countries, such as Austria, Spain and Germany, but also in Section 37 of the 1996 English Arbitration Act. While the German and English Arbitration Act, similar to the Model Law, do not expressly address the possibility for the parties to appoint their own experts, such provision may indeed be found in the more recent national arbitration laws of Spain and Austria<sup>5</sup>. However, also in Germany and England, parties are indeed entitled to appoint their own experts.
12. By contrast, the national laws on arbitration of France and Switzerland as well as the United States Federal Arbitration Act do not address the issue of party-appointed or tribunal-appointed experts at all. Nevertheless, also in these countries the admissibility of both types of experts is beyond doubt<sup>6</sup>.
13. Under all of the aforementioned national laws, the question whether or not the tribunal should appoint its own experts is left to the tribunal’s discretion<sup>7</sup>. However, the national laws offer no guidance as to how to exercise such discretion, i.e., as to when and under which circumstances the tribunal shall appoint an independent expert or as to whether such expert shall be appointed as an alternative to a party-appointed expert, or in addition to such expert<sup>8</sup>.

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<sup>5</sup> Section 32 alinea 3 Spanish Arbitration Act and Article 601 Austrian Arbitration Act.

<sup>6</sup> For Switzerland, Pierre A. Karrer/Peter A. Straub, "I. Switzerland", Frank-Bernd Weigand, *Practitioner’s Handbook on International Arbitration*, 2002, at p. 1064; for the United States, Thomas E. Carbonneau, "J. United States", Weigand, *Practitioner’s Handbook*, at p. 1064 and for France, Emmanuel Gaillard/Jenny Edelstein, "C. France ", Weigand, *Practitioner’s Handbook*, at p. 664 referring to Article 10 French Code of Civil Procedure.

<sup>7</sup> Unless the parties have come to a specific agreement on that issue, which is rarely the case.

<sup>8</sup> David Brown, "Oral evidence and experts in arbitration", *Dossiers of the ICC*, p. 83.

14. The aforementioned national laws do provide some guidance as to how tribunal-appointed experts shall prepare and provide their testimony. Although the laws differ in their specific wording, they all provide that the parties may be required to furnish a tribunal-appointed expert with the relevant document and information. In turn, the parties shall be entitled to comment on any information, opinion and advice offered by the expert, be it oral or in writing. Further, the laws foresee that after having delivered a written report, at the request of the parties or the tribunal, the expert may have to participate in an oral hearing. If the expert assists at an oral hearing, the parties are entitled to put questions to the expert.
15. By contrast, the aforementioned national laws offer virtually no guidance as to how party-appointed experts shall prepare and provide their testimony. Further, these laws offer no guidance as to how the tribunal is to examine and assess the expert's testimony, be it delivered by a tribunal-appointed expert or by a party-appointed expert.

*b. Institutional Rules*

16. Similarly, most of the major sets of institutional rules leave the decision whether to resort to tribunal-appointed and/or party-appointed experts to the discretion of the tribunal, subject to a diverging and mutual agreement of the parties. Such discretion is provided, for example, in the ICC Rules<sup>9</sup>, the international version of the AAA Rules, the International Dispute Resolution Procedures (the "IDRP")<sup>10</sup>, the DIS Rules<sup>11</sup>, the Swiss Rules<sup>12</sup> and the LCIA Rules<sup>13</sup>.
17. These institutional rules, similar to national arbitration laws, provide some guidance as to the preparation and delivery of testimony by tribunal-appointed experts, but they fail to provide any guidance as to the examination of party-appointed experts or as to

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<sup>9</sup> Article 20 ICC Rules. Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration*, at p. 279 pointing out that to provide for the possible appointment of an expert by the tribunal has become a "standard feature" of institutional arbitration rules but "the practice of appointing such experts in ICC arbitration is still much more prevalent among civil law lawyers than their common law counterparts, who are more accustomed to weighing expert evidence presented by each of the parties".

<sup>10</sup> See Article 22 IDRP.

<sup>11</sup> See Section 27 DIS Rules.

<sup>12</sup> See Article 27 Swiss Rules.

<sup>13</sup> See Article 21 LCIA Rules.

how the tribunal shall assess and evaluate the testimony of a party-appointed or tribunal-appointed expert.

18. For example, the ICC Rules in Article 20 merely provide that the tribunal “*may decide to hear [...] experts appointed by the parties*” and “*after having consulted the parties, may appoint one or more experts*” with the parties being given the “*opportunity to question [the experts] at a hearing*”<sup>14</sup>.

*c. The IBA Rules on the Taking of Evidence*

19. It may not come as a surprise that the current 1999 version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules”) also provides for both possibilities, i.e., the taking of evidence by means of party-appointed experts and by means of tribunal-appointed experts. However, the IBA Rules are by far more detailed than the applicable national laws and institutional sets of rules<sup>15</sup>.
20. As regards party-appointed experts, Article 5 of the IBA Rules sets forth in detail the required content of an expert report, the general obligation of an expert to appear for testimony at an evidentiary hearing and the consequences of a failure thereof and the possibility for the tribunal to order the party-appointed experts, if they have submitted reports on related issues, to “*meet and confer on such issues*”. The purpose of such meeting is for the experts to “*reach*” and to “*record*” agreement on issues upon which they had disagreed in their reports.
21. As regards tribunal-appointed experts, Article 6 of the IBA Rules provides, among other things, that the tribunal shall consult the parties before selecting its expert and when establishing the expert’s terms of reference. The parties, in turn, are required to raise potential objections as to the competence or the independence of the expert without further delay. The expert is entitled to request any relevant and material information directly from the parties. In case of refusal by the parties, the tribunal shall decide upon such request. The expert is required to report in writing and to

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<sup>14</sup> As a consequence, Derains and Schwartz, *A Guide to the ICC Rules*, at p. 279 base their comments directly on the content of the IBA Rules on the Taking of Evidence.

<sup>15</sup> See Articles 5 and 6 IBA Rules as well the commentary on these articles of the IBA Working Party printed in Weigand, *Practitioner’s Handbook*, pp. 372 *et seq.*

indicate the method, evidence and information used. In addition to questions by the parties and the tribunal, the IBA Rules also foresee the right of the party-appointed experts to question the tribunal-appointed expert.

### III. Advantages and Disadvantages

#### *a. Party-appointed experts*

22. The most common concern expressed with regard to party-appointed experts is that their expertise is often tainted by a lack of impartiality. Party-appointed experts are accused of acting like “hired guns”<sup>16</sup>. Their statements often resemble arguments made by the party which appointed them. In particular, party-financed reports on issues of quantum tend to come to extreme conclusions<sup>17</sup>. In fact, such view may hardly come as a surprise since party-appointed experts are expected to help and support the party appointing them and are not subject to challenge procedures<sup>18</sup>.
23. A second concern which is often expressed is that the reports and testimonies submitted by these experts suffer from a lack of clarity. With the obvious aim of justifying the immense amount of costs involved in the production of such reports, they tend to be too long and too complex<sup>19</sup>. In addition, since the experts preparing the reports have been instructed by the party and not by the tribunal, the reports tend to have a different focus than the tribunal has<sup>20</sup>.
24. A third concern is the lack of coordination among the party-appointed experts. In particular, if the reports are submitted simultaneously, they do not correspond to each other. They are often based on different facts, different scientific approaches and different assumptions, and they address different issues, at least as regards the focus of the report. In other words: it is often difficult, if not impossible, for the tribunal to

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<sup>16</sup> See Bob Davis and Damian Wilkinson, *High noon for hired guns and charlatans - The duties and standard of expert witnesses*, [http://www.armstrongdavis.co.uk/downloads/ADA\\_high\\_noon\\_for\\_hired\\_guns.pdf](http://www.armstrongdavis.co.uk/downloads/ADA_high_noon_for_hired_guns.pdf); see also Doug Jones, "Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last", *Arbitration International*, Vol. 24, No. 1, pp. 137 *et seq.* at p. 138.

<sup>17</sup> Rolf Trittman and Boris Kasolowsky, "Taking Evidence in Arbitration Proceedings between Common Law and Civil", *UNSW Law Journal*, Vol. 31, pp. 330 *et seq.* at p. 338.

<sup>18</sup> Klaus Sachs and Torsten Lörcher, *Arbitration in Germany – The Model Law in Practice*, Sec. 1049, paragraph 19.

<sup>19</sup> Jones, "Party Appointed Expert Witnesses", p. 138.

<sup>20</sup> Wolfgang Peter, "Witness ‘Conferencing’", *Arbitration International*, Vol. 18, No. 1, pp. 47 *et seq.* at p. 49.

bridge the gap between the reports without the help of another expert. As a consequence, actual or potential points of agreement remain unclear.

25. A fourth concern is that the traditional method of examining party-appointed experts by direct and cross-examination often proves to be inefficient. At the same time, experts guided by counsel may develop points which are not decisive for the tribunal's decision.
26. In his presentation at the 2006 ICCA Congress in Montreal, Martin Hunter summarized such view by his comment that the main disadvantage of the party-appointed expert (characterized by him as "the common law system") is that the expert evidence presented to the tribunal is "*bought by the party presenting it*"<sup>21</sup>.

*b. Tribunal-appointed experts*

27. In light of these criticisms, the obvious response appears to be that, instead of basing their findings on the assertions and conclusions of party-appointed experts, tribunals should rather seek to appoint and pay their own "neutral" experts. However, such approach also has to deal with a number of perceived disadvantages.
28. One of the disadvantages of relying on tribunal-appointed experts is that the parties have difficulties in developing sufficient trust as to the personal and professional qualities of someone they have not chosen<sup>22</sup>. Experience shows that businessmen, lawyers and technical experts need a certain amount of time in order to fully comprehend their respective views and positions. When choosing their own expert, parties have the feeling that they are provided such time in the preparation of the expert report. However, once the expert is chosen by the tribunal, parties fear that they will not be granted sufficient opportunity to explain to the expert their view and position as they see fit for the expert to render his report. In other words: counsel distrust the expert because they feel that they are unable to control the manner in which what may be the most critical element in their case will be presented<sup>23</sup>.

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<sup>21</sup> Hunter, "Expert Conferencing", pp. 820-825.

<sup>22</sup> See Laurence Craig, William Park and Jan Paulsson, *ICC Arbitration*, p. 442 pointing out that it may well be that the expert chosen by the tribunal is neutral but "*by unfortunate mistake, may turn out to be incompetent*".

<sup>23</sup> Hunter, "Expert Conferencing", pp. 820-825.

29. This initial concern is closely connected to the further concern that tribunal-appointed experts render a report despite a potential lack of factual information. Undisputedly, the flow of factual information between the party and the corresponding party-appointed expert is usually much smoother than between a party and the tribunal-appointed expert, who, at least in case of non-compliance, has to obtain the assistance of an intermediary, i.e., the arbitral tribunal.
30. Third, the reports prepared by tribunal-appointed experts are equally as likely to suffer from a lack of clarity as those prepared by party-appointed experts. At times it appears that although talking about the same set of facts, lawyers and experts use different languages.
31. The fourth, and probably most important, disadvantage of a tribunal-appointed expert is the concern of the parties that their dispute is eventually decided by the expert instead of the tribunal. It has been said that: “*When appointing an independent expert, an arbitral tribunal seeks to obtain technical information that might guide it in the search for truth*”<sup>24</sup>. Yet, in practice, in many cases the expert’s tasks have gone well beyond. In some cases, tribunals have assigned to experts the task of “*establishing the facts of the case by identifying the evidence provided and assessing its probative value*”. In other cases, experts have been asked to express their “*opinion on a claim*” without identifying any specific aspects to be addressed<sup>25</sup>.
32. Although a tribunal-appointed expert has to be competent and neutral and is subject to the same standards of impartiality and independence as the tribunal, he is not the person chosen by the parties to resolve their dispute. Suggestions that the expert should be called in and included in the tribunal’s deliberations and the preparation of the final award<sup>26</sup> are therefore highly problematic and are likely to raise further suspicion as to tribunal-appointed experts in general.

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<sup>24</sup> Schneider, "Technical experts", p. 449.

<sup>25</sup> The corresponding examples from cases are reprinted as abstracts and cited in Schneider, "Technical experts", p. 450.

<sup>26</sup> Karl Spühler and Myriam A. Gehri, "Die Zulassung von Experten zur Urteilsberatung: Neue Wege für Schiedsverfahren?", *ASA Bulletin*, 1/2003, pp. 16 *et seq.* at p. 24.



33. The possibility of selecting the person who will resolve the dispute is one of the major reasons why parties choose to submit their disputes to arbitration<sup>27</sup>. Therefore, one may expect special efforts by the tribunal to resolve the dispute itself. Thus, while the perception that a dispute is – in fact – decided by someone else may raise substantial concerns in state court proceedings, it is unacceptable in arbitration, or expressed in Latin: *delagtus non potest delegare*<sup>28</sup>.

#### IV. “New Techniques” for party-appointed experts

34. Although national laws, institutional rules and other sets of rules, such as the IBA Rules, do not favour one type of expert testimony over the other, there is no doubt that, as of today, the standard approach in international arbitration proceedings is to rely primarily on the testimony of party-appointed experts, with tribunal-appointed experts being used in exceptional circumstances<sup>29</sup>.

35. With the aim of responding to the criticisms and complaints related to the use of party-appointed experts, certain techniques have been proposed and introduced in international arbitration proceedings which seek to address some of the concerns and perceived disadvantages. Three techniques shall be mentioned: “pre-hearing meetings”, “witness conferencing” and “codes of conduct”<sup>30</sup>.

36. It is interesting to note that similar techniques, for similar reasons, have been introduced in English and Australian state court proceedings: In England, the techniques were introduced as a consequence of the so-called “Lord Woolf reforms”<sup>31</sup>. In Australia, such techniques were introduced by reforms adopted by the Federal Court of Australia and the State Supreme Courts<sup>32</sup>.

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<sup>27</sup> Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 5<sup>th</sup> ed. 2009, at p. 246 referring to such possibility as one of the “*unique distinguishing factors of arbitration*”.

<sup>28</sup> Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 3<sup>rd</sup> ed. 2009, at p. 324.

<sup>29</sup> See Trittmann and Kasolowsky, “Taking Evidence”, p. 338. See also Craig, Park and Paulsson, *ICC Arbitration*, at p. 442.

<sup>30</sup> The terms attributed to such techniques vary and shall not be regarded as fixed terms.

<sup>31</sup> Right Hon. Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996). See, for example, CPR Rule 35.12.

<sup>32</sup> The Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia were produced in 1998 and last amended in June 2008.

37. Since these techniques have been carefully and comprehensively explained in scholarly contributions by esteemed colleagues<sup>33</sup>, this paper shall be limited to a brief summary of the content and put an emphasis on the evaluation of the techniques.

a. “Pre-hearing meetings”

38. The instrument is expressly foreseen by Article 5.3 of the IBA Rules which reads as follows:

*“The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement”.*

39. It lies in the discretion of the tribunal and the parties to amend and/or further specify such provision.

40. A much more detailed description of how “pre-hearing meetings” shall be conducted is contained in Article 6 of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration which was issued by the Chartered Institute of Arbitrators in September 2007 (“CI Arb Expert Protocol”)<sup>34</sup>. The foreword to the protocol provides that the protocol has “*been aligned with*” and “*expands upon*” the IBA Rules.

41. For example, different from the IBA Rules, the protocol requires the experts to meet before they prepare their first report, to agree on issues, analysis and methods and also to record the issues on which they disagree and indicate the reasons of their disagreement<sup>35</sup>.

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<sup>33</sup> See, Peter, “Witness ‘Conferencing’”, p. 49; Hunter, “Expert Conferencing”, pp. 820-825. See also Trittman and Kasolowsky, “Taking Evidence”, pp. 330 *et seq.*

<sup>34</sup> For a detailed analysis of the protocol and its background, see Jones, “Party Appointed Expert Witnesses”, pp. 137 *et seq.*

<sup>35</sup> See Article 6 of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

b. “*Witness conferencing*”

42. A second instrument, which ideally builds upon the results of “pre-hearing meetings”, has been introduced under the label “witness conferencing”. As already indicated by the term “witness conferencing”, the technique is not limited to expert witnesses, but also extends to fact witnesses. According to the definition given by my colleague Wolfgang Peter, it consists of “*the simultaneous joint hearing of all fact witnesses, expert witnesses, and other experts involved in the arbitration*”<sup>36</sup>.

43. It is for that reason that the instrument is not foreseen by Article 5 of the IBA Rules, which deals with party-appointed experts, but rather by Article 8.2 of the IBA Rules, which provides rules for the evidentiary hearing and thus applies to all types of witnesses. In its relevant part, the provision reads:

*“The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other”.*

44. However, there is agreement that witness conferencing is particularly useful for examining party-appointed expert witnesses<sup>37</sup>.

45. In sum, this approach may elicit much clearer evidence than having a single expert more or less lecture the tribunal. Being placed next to their peers may well compel experts to present their opinions more independently and objectively<sup>38</sup>. The approach has also been successfully introduced in the national court systems in England and Australia where it has colloquially become known as “*hot tubbing*”.

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<sup>36</sup> Peter, “Witness ‘Conferencing’”, pp. 47 *et seq.*

<sup>37</sup> Id. at p. 49; *see also* Trittman and Kasolowsky, “Taking Evidence”, p. 339.

<sup>38</sup> Robert Macpherson, Richard Smith and Roy Mitchell, “Innovations in Arbitration: Improving the Presentation of Evidence in Construction Arbitration”, *Dispute Resolution Journal*, August/October 2003, p. 1 *et seq.* at p. 3.

c. *“Code of conduct”*

46. National laws and institutional sets of rules are silent as to the duties and obligations of party-appointed experts. Although the IBA Rules, in Article 5, provide for some obligations closely related to the expert’s duties in preparing the report, they do not contain any provisions dealing with the general duties and obligations of party-appointed experts.

47. In response to the criticism that party-appointed experts have the tendency to view themselves as assistants to the party appointing (and paying) them, rather than as assistants to the tribunal in determining the objective facts, the Australian and English<sup>39</sup> legislators decided to introduce certain rules of conduct applicable to party-appointed experts in state court proceedings. The above-mentioned CIArb Expert Protocol has expanded on this idea. In Article 4 it sets forth specific rules of conduct which, among others, provide that:

*“An expert’s opinion shall be impartial, objective, unbiased and uninfluenced [...]. An expert’s duty [...] is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced”.*

d. *Preliminary assessment*

48. There can be no doubt that the above-mentioned instruments are highly beneficial to the process of taking evidence by means of party-appointed experts. Since it is standard practice in international arbitration proceedings for the parties to appoint experts, there is also no doubt that these instruments have already had and promise to continue having a significant and very positive impact on the way international arbitration proceedings are conducted.

49. The instruments “pre-hearing meetings” and “witness conferencing” are particularly useful in the effort to (i) clarify technical and factual issues, (ii) outline areas of agreement and disagreement, (iii) focus on relevant points, (iv) diminish the differences between expert reports, (v) encourage scientific debate and, as a

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<sup>39</sup> The Civil Justice Council drafted a Protocol for the Instruction of Experts to give Evidence in Civil Claims which applies since 5 September 2005 and replaces the Code of Guidance on Expert Evidence.

consequence, (vi) render the taking of expert evidence more time and cost efficient. Further, the duties for party-appointed experts laid out in Article 4 and the proposal for a declaration of such experts in Article 8 of the CI Arb Expert Protocol will surely have a positive impact on the impartiality of the experts and thus on the objectivity and quality of their work<sup>40</sup>.

50. Nevertheless, from my own practice as an arbitrator and from many discussions I have had with my colleagues, I have to acknowledge that in some cases, the instruments so far described are not sufficient to ensure an efficient (measured in terms of time and costs) and successful (measured in terms of clarity, quality and objectivity of the expert's finding before the tribunal) process of taking expert evidence.

51. As long as an expert is appointed and paid by a particular party, there will always be an incentive to sympathize with such party's position. There will always be a reluctance to cooperate with the expert appointed by the opposing party. Counsel will always try to control the evidence submitted by their expert and to prevent him from making statements which might turn out to be unfavourable to the client.

52. Expressed in a picture: "pre-hearing meetings" and "witness conferencing" might downsize the ring in which experts confront each other, coached by the counsel who appointed them and, thus, make it less burdensome for the arbitrators as referees to oversee the fight and to detect fouls and lack of sportsmanship. However, they will not take the gloves from the experts' hands.

## **V. Expert teaming**

53. We have seen that the standard approach in international arbitration proceedings is the use of party-appointed experts. By contrast, tribunal-appointed experts are being used only in exceptional circumstances due to the strong remaining scepticism of many of my colleagues, in particular those with a common law background, as to the benefits compared to the disadvantages of this form of expert evidence.

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<sup>40</sup> For the advantages and benefits of such techniques, *see also* Peter, "Witness 'Conferencing'", p. 49, and Jones, "Party Appointed Expert Witnesses", pp. 141 and 143.

54. At least from my knowledge and review, few efforts have been made in practice or literature to address and remove the concerns expressed in relation to tribunal-appointed experts. Although I share the concerns of my colleagues, I find such omission regrettable in light of the fact that the taking of expert evidence remains a common concern.

55. Therefore, the final part of the paper is dedicated to the description of an instrument which seeks to respond to the concerns expressed in relation to tribunal-appointed experts. In fact, the instrument provides for an effort to combine the advantages of party-appointed and tribunal-appointed experts. As far as my review has shown, this instrument has not been described in greater detail in the literature and, for the purpose of this paper, shall be referred to as “expert teaming”.

*a. Characteristics*

56. In the following, I will briefly describe the characteristics and general functioning of the instrument:

57. After the parties have submitted their first briefs, the tribunal invites both parties to provide the tribunal and the opposing party with a list of three to five persons they consider to be fit to serve as an expert for the determination of a particular question. It then lies in the discretion of the tribunal to invite the parties to comment briefly on the experts proposed by the respective other party. In a second step, the tribunal will choose two experts, one from each of the two lists, and appoint these experts together as an “expert team”. Following such appointment, the tribunal will meet with the expert team and the parties in order to finalise the expert team’s terms of reference. These terms of reference shall provide for, *inter alia*, (i) the matters and questions which shall be submitted for determination by the expert team; (ii) the documentation and information required by the expert team and to be submitted by the parties; (iii) the form and mode of communication among the tribunal, the expert team and the parties; (iv) the remuneration of the expert team and (v) the duties of the expert team vis-à-vis the tribunal and the parties.

58. In a further step, the expert team will prepare a preliminary joint report which will be circulated to the tribunal and the parties. The parties and the tribunal will have the chance to comment on such preliminary report. The experts will review such comments and take them into consideration in preparing their final joint report which will also be distributed to the parties and the tribunal.
59. Finally, upon request by one of the parties or the tribunal, the expert team shall testify on its report and respond to any potential issues raised by the parties in their comments. During the hearing, the tribunal and the parties shall have ample opportunity to question the expert team on all points they find relevant.
60. As regards the duties and obligations of the expert team, it is advisable that the terms of reference provide, *inter alia*, that (i) both experts retained must be impartial and independent; (ii) the task of the expert team is to assist the tribunal in deciding the issues in respect of which expert evidence is adduced; (iii) the expert team shall only address issues identified in its terms of reference; (iv) the expert team is expected to submit a joint report providing only the joint and mutual findings; (v) each member of the expert team shall refrain from communicating separately with the parties, the tribunal or any third party; (vi) the expert team shall prepare its report “from scratch” and shall rely only on its own expertise; (vii) the expert team shall seek any input and assistance required from the parties; (viii) in preparation of the report, the expert team shall carefully examine all briefs and documents submitted by the parties and shall address the parties’ views and concerns; and (ix) the expert team shall be prepared to testify during an oral hearing and to respond to questions asked by the tribunal and the parties and their counsel and consultants.

*b. Advantages*

61. My experience has shown that the appointment of an “expert team” is likely to remove most of the concerns commonly connected with tribunal-appointed experts and at the same time respond to the perceived advantages and disadvantages of party-appointed experts.

*aa. Advantages compared to a single tribunal-appointed expert*

62. First, it removes the concern that the tribunal has to select a person although the parties, due to their better knowledge of the factual and technical details of the case, would be in a much better position to make such choice.
63. Second, it removes the concern that the tribunal selects a person whose personal and business-related expertise could not be carefully examined and tested by the parties prior to the appointment.
64. Third, it removes the concern that report is prepared by a single person who is not subject to supervision and control by someone possessing sufficient knowledge and technical expertise to oppose the technical findings and to correct potential errors of the expert. By appointing an expert team, the tribunal introduces a system of checks and balances.
65. Fourth, as regards the concern that, in the case of tribunal-appointed experts, the dispute is decided by the experts rather than by the tribunal, I submit that this concern rather relates to the issue of properly drafting the experts' terms of reference. It is the task of the tribunal and the parties alike to ensure that the expert team is provided with a clear mandate which precisely defines the issues which the expert team shall determine. In addition, it may prove helpful to set forth the limits of the expert mandate and to include a reference to issues and questions upon which the expert team shall not testify. Although my experience is that tribunals are usually able to distinguish between the findings of an expert covered by his expertise and others falling outside of such scope (for example, legal findings or contract interpretation), an express reference may prove helpful to remove parties' concerns in this regard. As a side note, it shall be pointed out that the concern regarding experts going beyond their task is not limited to tribunal-appointed experts; party-appointed experts also tend to extend their findings beyond their specific expertise and issue submissions on facts and law which should have been issued by counsel.

*bb. Advantages compared to party-appointed experts*



66. The principal advantage lies in the general status of the experts. Although the experts have been proposed by the parties, they are appointed by the tribunal and, thus, under the applicable laws and regulations, qualify as tribunal-appointed. Consequently, they are subject to special duties of independence and impartiality<sup>41</sup>. Probably, even more important, the experts themselves regard themselves as facilitators to the tribunal and not as assistants to the party appointing them. In addition, the experts are not paid by the party who proposed the expert. Instead, the fees of each expert are shared by the parties and are subject to the final determination of costs by the tribunal in its final award.
67. A second advantage is that when making their proposals for their member of the expert team, the parties will be guided by different thoughts and concerns than when selecting their party-appointed experts. The parties themselves will ensure that the proposed expert's competence, independence and impartiality is beyond doubt since otherwise this person will have little chance of being selected by the tribunal. At the same time, the experts continue to benefit from the psychological advantage that they are the experts of the parties' choice.
68. Third, the fact that the parties and the tribunal meet with and instruct the experts also addresses the concern that reports of party-appointed experts always run the risk of missing the points which the parties and the tribunal regard as relevant and material for the outcome of the case. In other words, such procedure appears to be much more successful as regards effectiveness, time and ultimately costs. Of course, such procedure also eliminates the risk of multiple expert reports which come to completely contradictory results or, even worse, are not even responsive to each other.
69. Finally, for the avoidance of doubt, it should be reiterated that the parties, of course, remain free to comment on the expert team's report in writing and to question the experts during an oral hearing. In this regard, the parties are also entitled to seek the assistance of one or several experts of their choice, a so-called "expert consultant"<sup>42</sup>.

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<sup>41</sup> For example, according to Section 1049 (3) German Code of Civil Procedure and Article 27 (5) Swiss Rules, tribunal-appointed experts are subject to the same rules regarding independence and impartiality as the members of the tribunal.

<sup>42</sup> For a distinction between the different types of experts in international arbitration proceedings and their respective functions and duties, see "Issues for Experts Acting under the ICC Rules for Expertise or the ICC Rules of Arbitration", *ICC Bulletin*, Vol. 20/1, 2009, pp. 23 *et seq.*

The consultant shall be entitled to assist the parties in the same manner as they are assisted by their counsel in legal matters. Such consultant shall be entitled to be present at oral hearings and to question the expert team. He may also argue before the tribunal, but since the consultant does not testify, his submissions may only qualify as arguments, not as evidence.

70. It is correct that the appointment of additional experts by the parties would also lead to additional costs. Yet, since the focus of such experts' task is more precise and therefore the scope of their work is reduced, it is submitted that the overall costs for experts still will be significantly less compared to the costs if both parties had solely retained party-appointed experts.

## **VI. Conclusions**

71. It is a fact that experts are essential and indispensable for the process of dispute resolution in complex international proceedings. Thus, determining the most efficient and successful forms and means for the taking of evidence by expert witness testimony is essential for our branch. As a consequence, such issue has been, will be and should remain subject to constant thought and debate.

72. National laws on arbitration and national and international institutional rules provide for the possibility of taking evidence by party-appointed and tribunal-appointed experts, yet for very little guidance as to the details of such process. The IBA Rules contain much more detailed provisions relating to both forms of expert testimony but, similar to the laws and institutional rules, they do not address which form should be applied under which circumstances.

73. Evidence given by both party-appointed and tribunal-appointed experts has been subject to substantial concerns and has often led to frustration among arbitrators and counsel alike. Nevertheless, it has become standard practice in international proceedings to rely mainly on party-appointed experts. In recent years, substantial efforts have been made to address the concerns related to this technique and to minimize potential disadvantages. In particular, instruments such as "pre-hearing meetings" and "witness conferencing" have proven quite successful. The CI Arb Expert

Protocol issued by the Chartered Institute of Arbitrators probably best reflects today's standards of best practice for party-appointed experts in international arbitration.

74. Much fewer efforts have been made to remedy potential disadvantages relating to tribunal-appointed experts and to address the respective concerns, in particular those of practitioners and parties with a common law background. This is regrettable since practice has shown that, despite substantial efforts at improvement, the technique of party-appointed experts often still proves inefficient and unsuccessful for the tasks of the tribunal. This paper introduces the instrument of "expert teaming" which seeks to combine the advantages of party-appointed and tribunal-appointed experts and thus may serve as a fruitful basis for further efforts and discussions.