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PARTY-APPOINTED EXPERTS IN INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION

IMPACT ON PROCEEDINGS, PROBLEMS AND SOLUTIONS

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the tribunal needs to evaluate the value of a specific asset, set of goods or a company, quantum (valuation) experts are the type of experts, such as cost engineers, accountants and financial experts.[287]

287. Simmons, 'Valuation in Investor-State Arbitration: Toward a More Exact Science', 208 ff.; White, *The Use of Experts by International Tribunals*, 128; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 183.

In investor-state arbitrations, generally, if the investor prevails partially or fully on his or her claims, damages are awarded. An UNCTAD study reviewing cases concluded in 2014 found that only 2% of cases concluded that year found a breach but did not award damages to the investor. UNCTAD, 'Recent Trends in IIAs and ISDS' (2015) 8 http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (accessed 5 July 2022). Similar statistics were found for cases concluded in 2015; *see* UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2015' (2015) http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf (accessed 11 July 2022).

CHAPTER 2

Party-Appointed Experts

2.1 LEGAL BASIS

Besides limitations in a few jurisdictions, overwhelmingly, international conventions, statutory provisions of countries and arbitration rules permit the parties to appoint and rely on their own experts,[288] sometimes explicitly and sometimes implicitly, relying on the party autonomy principle.

Nevertheless, unlike rules applicable to tribunal-appointed experts, the most prominent arbitration rules mentioned below in section 2.1.2 do not address the role, qualifications, or ethical duties of party-appointed experts.

2.1.1 International Treaties

Although international conventions are not expected to include rules on experts and their procedures, some regional and bilateral treaties have provisions that authorise parties to rely on party-appointed experts. Below, some examples of these are analysed.

2.1.1.1 The United States-Mexico-Canada Agreement

The United States-Mexico-Canada Agreement (*USMCA*) is a comprehensive convention with provisions, *inter alia*, on free trade and investment. The USMCA entered into force on 1 July 2020, replacing the North American Free Trade Agreement (*NAFTA*).

288. Starting from this section to the end of this script, the terms 'party-appointed expert', 'party expert' and 'expert' are used interchangeably, referring to the same concept. Where explanations related to specifically tribunal-appointed experts are provided, this will be explicitly specified.

USMCA Chapter 14, Article 14.D.11, permits the appointment of party-appointed experts:

> Without prejudice to the appointment of other kinds of experts when authorized by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

2.1.1.2 Comprehensive Economic and Trade Agreement

The Comprehensive Economic and Trade Agreement (*CETA*) between Canada, the European Union, and its Member States is a progressive trade agreement between the EU and Canada, which entered into force provisionally in 2017.[289]

In addition, indirectly, the agreement also enables the disputing parties to rely on their own experts. Chapter 8 Article 8.37(1) provides that '[a] disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section'.

2.1.2 Arbitration Rules

UNCITRAL Arbitration Rules and leading institutional arbitration rules generally provide provisions for experts. However, these are not specific and leave a large margin for determination by the arbitral tribunal.

2.1.2.1 ICSID Arbitration Rules

On 21 March 2022, the Administrative Council of the ICSID approved extensive amendments to its Regulations and Rules. There are various provisions in the ICSID Arbitration Rules (as well as the Additional Facility Rules) regarding the use of party-appointed experts. ICSID Arbitration Rule 38 regulates the adducing of witness and (party-appointed) expert evidence. ICSID Arbitration Rule 38(7) provides that Rule 38 paragraphs (1)–(5) regarding witnesses shall apply, with necessary modifications to evidence given by a party-appointed expert.

Accordingly, the provisions provide that a party intending to rely on evidence given by an expert shall file a written statement by that expert, which shall identify the expert, contain the expert report, and be signed and dated (ICSID Arbitration Rule 38(1)).

The party-appointed expert may be called for examination at a hearing in which the tribunal determines how the examination will be conducted, but in any case, before the

289. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en (accessed 28 September 2023).

tribunal, by the parties, and under the control of the chair of the tribunal (ICSID Arbitration Rule 38(2–4)). The expert shall be examined in person unless the arbitral tribunal determines that another means, such as video conferences, of examination is appropriate in the circumstances (ICSID Arbitration Rule 38(5)). The experts must make the following declaration before giving evidence: 'I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.' (ICSID Arbitration Rule 38(8)). The ICSID Additional Facility Rules on the subject (Rule 48) are similar to the Arbitration Rules with respect to experts.

Phillip Morris v. Uruguay is an example case where party-appointed experts were heavily relied upon, including experts on law, on the marketing of cigarettes and on public health.[290]

Additionally, in ICSID Arbitration practice, the tribunal (president) may wish to retain an assistant for additional support. Such an assistant may only be appointed with the prior consent of both parties to the dispute. The parties should be informed about the assistant's *curriculum vitae*, tasks to be performed, and fee-related issues.[291]

For instance, in *Coropi Holdings et al. v. Serbia*,[292] the tribunal retained a Public International Law professor. The tribunal ruled in the First Procedural Order as follows:

> it would benefit the overall cost and time efficiency of the proceedings if the Tribunal had an assistant. By letter of 6 March 2023, the presiding arbitrator, with the approval of the other Members of the Tribunal, proposed that Professor Philippa Webb be appointed as Assistant to the Tribunal.
>
> Professor Webb will (i) undertake only such specific tasks as are assigned to her by the presiding arbitrator, such as the marshalling of evidence, research of specific issues of law, organisation of case documents, monitoring of the case correspondence, and similar matters; (ii) assist the Tribunal during its deliberations; (iii) undertake such tasks in support of the ICSID Secretary of the Tribunal as the Secretary of the Tribunal and the presiding arbitrator may consider appropriate. Professor Webb will not undertake any functions incumbent upon a Member of the Tribunal, nor duplicate the tasks of the ICSID Secretary of the Tribunal.
>
> Professor Webb shall be subject to the same confidentiality obligations as the Members of the Tribunal and sign a declaration to that effect.
>
> The Parties approved the appointment of Professor Webb as Assistant to the Tribunal.
>
> Professor Webb shall receive: (a) US$ 250 for each hour of work performed in connection with the case or pro rata; and (b) reimbursement of reasonable expenses related to the hearing on the same basis as applies to Members of the

290. *See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf (accessed 9 December 2023); Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay', 413.

291. *See* https://icsid.worldbank.org/resources/content/arbitrators/tribunal-assistants (accessed 20 September 2023).

292. *Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia*, ICSID Case No. ARB/22/14.

Tribunal. The fees and expenses of Professor Webb will be paid from the advance payments made by the parties.[293]

2.1.2.2 UNCITRAL Arbitration Rules

UNCITRAL Arbitration Rules are a comprehensive set of procedural rules upon which parties may agree to conduct arbitral proceedings arising out of their relationship. They are widely used in investment, commercial, ad hoc, and administered arbitrations.

The UNCITRAL Arbitration Rules explicitly stipulate that parties may rely on their own experts. Unless otherwise directed by the arbitral tribunal, statements by an expert (Expert Report) may be presented in writing and signed by them (UNCITRAL Arbitration Rules Article 27(2)). The provision states that experts could be any individual party or any individual related to a party; however, there is nothing specific about the qualification of party-appointed experts.[294]

The tribunal may require experts to attend hearings but may also allow attendance by video conference, or the proceedings can be conducted on the basis of documents and other materials (UNCITRAL Arbitration Rules Article 17(3)).[295]

2.1.2.3 ICC Arbitration Rules

The ICC Arbitration Rules do not have detailed provisions for party-appointed experts. The ICC Arbitration Rules provide for party-appointed experts in a provision that regulates the hearing. Accordingly, the arbitral tribunal may decide to hear experts appointed by the parties in the presence of the parties or in their absence, provided they have been duly summoned (ICC Arbitration Rules Article 25(2)).[296]

2.1.2.4 Istanbul Arbitration Centre (ISTAC) Arbitration Rules

The ISTAC Arbitration Rules foresee the appointment of party-appointed experts under a simple provision. ISTAC Arbitration Rules Article 29(3) provides that:

> [t]he Sole Arbitrator or Arbitral Tribunal may hear the experts appointed by the parties, as well as, after consulting with the parties, if it deems necessary, may appoint an expert and define the scope of duty. At the hearing, the Sole Arbitrator or Arbitral Tribunal or the parties, may directly ask questions to any such expert(s).

293. *Corapi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 1, 31 March 2023 (para. 8).
294. Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 459.
295. Bor, 'Expert Evidence', 505; Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 445.
296. Reiner and Aschauer, 'ICC Rules', 135; Bor, 'Expert Evidence', 506.

2.1.2.5 Istanbul Chamber of Commerce (ITOTAM) Arbitration Rules

Contrary to other institutional rules, the ITOTAM Arbitration Rules are rather detailed when it comes to provisions concerning experts. Article 28(2) stipulates that the arbitral tribunal may require the parties to submit their expert reports and evidence together with their translations in the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 34(1) foresees that the arbitral tribunal may decide to hear party-appointed experts in the presence of the parties or in their absence only if such parties have been duly summoned but failed to appear without stating any valid excuse.

Article 35 is a great example that regulates the framework of party-appointed experts. Article 35(1) explicitly states that the arbitral tribunal, instead of appointing itself an expert, may request the parties to bring an expert opinion. This is a novel provision since, as will be elaborated on in the coming chapters, it diminishes the problem of an arbitral award being set aside on the ground that the tribunal did not appoint an expert.

According to Article 35(2), the parties and the arbitral tribunal may examine experts at the hearing. Article 35(3) regulates the binding nature of expert evidence. The provision stipulates that the arbitral tribunal will freely evaluate both the party-appointed and tribunal-appointed expert opinions.

Finally, Article 53(2) obliges experts involved in the arbitration administered by ITOTAM to keep the arbitral proceedings confidential.

2.1.2.6 The LCIA Arbitration Rules

The LCIA Arbitration Rules have detailed provisions regarding party-appointed experts, which it refers to as 'witnesses'. The tribunal has exercised broad discretion in relation to experts in the rules.

Before any hearing, the Arbitral Tribunal may order any party to inform in writing the identity of each expert that the party wishes to rely on, as well as the subject matter, content and relevance to the issues of that expert's opinion and testimony (LCIA Arbitration Rules Article 20(2)).[297]

In principle, the expert will provide a written opinion, either as a signed statement or a document. However, the tribunal can direct the expert otherwise (LCIA Arbitration Rules Article 20(3)).

The Arbitral Tribunal will decide the time, manner, and form in which the written materials shall be exchanged between the parties and presented to the Arbitral Tribunal, and it may allow, refuse, or limit the written and oral testimony of experts (LCIA Arbitration Rules Article 20(4)).

One of the essential powers of the tribunal is that if it orders the other party to secure the attendance of that expert and the expert refuses or fails to attend the hearing without good cause, the tribunal can infer adversely and limit the weight of the written

297. Bor, 'Expert Evidence', 506.

expert opinion or exclude all or any part thereof altogether, as it considers appropriate in the circumstances (LCIA Arbitration Rules Article 20(5)).[298]

The LCIA Arbitration Rules allow expert shopping, which means that any party or its authorised representatives can interview any potential expert for the purpose of presenting an opinion to the tribunal, subject to the mandatory provisions of any applicable law, rules of law and any order of the arbitral tribunal otherwise (LCIA Arbitration Rules Article 20(6)).

LCIA Arbitration Rules do not require a sharp independence and impartiality requirement for the party-appointed expert and allow any individual who is even a party to the arbitration or was, remains or has become an officer, employee, owner, or shareholder of any party or is otherwise identified with any party, to become a party-appointed expert, subject to any order by the Arbitral Tribunal otherwise (LCIA Arbitration Rules Article 20(7)).

Subject to the mandatory provisions of any applicable law, the tribunal can administer any appropriate oath or affirmation to any expert at any hearing before the oral testimony of that expert (LCIA Arbitration Rules Article 20(8)).

The rules permit the examination of the expert by the tribunal and by each of the parties under the control of the tribunal (LCIA Arbitration Rules Article 20(9)).

Finally, Article 30.1 of the LCIA Arbitration Rules establishes that the confidentiality obligation is not only on the tribunal or the parties but also extends to party-appointed experts.

2.1.2.7 *SIAC Arbitration Rules*

Before any hearing, the Tribunal may require the parties to give notice to the identity experts whom the parties intend to produce, the subject matter of their testimony, and its relevance to the issues (SIAC Arbitration Rules 25.1).

The Tribunal may allow, refuse, or limit the appearance of experts to give oral evidence at any hearing (SIAC Arbitration Rules 25.2). The experts who provide oral testimony may be questioned by each of the parties, their representatives and the Tribunal in the manner that the Tribunal may determine (SIAC Arbitration Rules 25.3).

The Tribunal may direct the testimony of experts to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 25.2, any party may request that such expert attend for oral examination. If the witness fails to attend an oral examination, the Tribunal may place such weight on the written testimony as it thinks fit, disregard such written testimony, or exclude such written testimony altogether (SIAC Arbitration Rules 25.4).

It is permitted for any party or its representatives to interview any experts or potential experts (that may be presented by that party) prior to their appearance to give oral evidence at any hearing (SIAC Arbitration Rules 25.5).

298. *See* Amaral, 'Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart', 27.

The SIAC Investment Arbitration Rules of 2017 have a different provision than the SIAC Arbitration Rules of 2016. Accordingly, the written statement of the claimant and respondent shall include any expert report supporting the claim or defence (SIAC Investment Arbitration Rules 17.2.c. and 17.3.c.).

2.1.2.8 *Swiss Rules*

The Swiss Rules are rather conservative regarding the explicit regulation of party-appointed experts. The rules only directly prescribe provisions for tribunal-appointed experts in Article 28.

Nevertheless, tacit provisions can be found in Articles 26 and 27. Article 26(2) foresees that, at any time during the arbitration proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within a time limit set by the arbitral tribunal. Party-appointed experts could be 'other evidence' in the sense of this provision.

Article 27(1) of the Swiss Rules states that at any stage of proceedings, the tribunal may hold a hearing for the presentation of evidence by experts or for oral argument.

Article 27(4) foresees that, before a hearing and within the time limit set by the arbitral tribunal, expert evidence may be presented in the form of written statements or reports. Experts may be heard and examined at the hearing. The arbitral tribunal may direct that experts be concerned through means that do not require their physical presence at the hearing, such as videoconference (Article 27(5)).

2.1.2.9 German Arbitration Institute (DIS, *Deutsche Institution für Schiedsgerichtsbarkeit*) Arbitration Rules

The DIS Rules Arbitration Rules do not have an explicit provision that regulates party-appointed experts. However, the DIS Arbitration Rules allow for both party-appointed and/or tribunal-appointed experts. The 2018 DIS Arbitration Rules encourage the parties and the arbitral tribunal to consider early on in the proceedings how to best deal with possible expert input in the arbitration, including in Article 27.7 and Articles 28.1, 28.2 and 28.3, 32 as well as Annex 3A of the Rules.

Article 28 sets the ground rules according to which the arbitral tribunal may appoint an expert on its own initiative. Article 28 does not provide for comparable restrictions concerning the party-appointed experts. Especially, there is no requirement for impartiality and independence. The arbitral tribunal is, however, advised to safeguard a certain standard by conducting proper briefings or requesting confirmation that the witness is impartial and has no prior involvement in the respective dispute.[299]

According to DIS Arbitration Rules Article 28, the arbitral tribunal, if it deems necessary, appoints an expert. The arbitral tribunal's appointing competence is not ultimate but restricted under Article 28.3. The provision requires the arbitral tribunal's

299. Trittmann and Schardt, 'The Proceedings Before the Arbitral Tribunal, Article 28: Establishing the Facts', 464.

consultation with the parties before appointing an expert (Article 28(3)). The provision further requires that the expert appointed by the arbitral tribunal shall be impartial and independent of the parties. The arbitral tribunal is obliged to discuss with the parties in the case management conference or, in subsequent meetings, whether to employ experts and, if so, how to efficiently conduct the procedure as per Article 27.7.[300] Article 28.3 implements a mechanism to challenge such tribunal-appointed experts, similar to the challenge of arbitrators. The purpose of these limitations is said to safeguard due process and guarantee the validity of the award.

The DIS Arbitration Rules Annex 3 foresees measures for increasing the procedural efficiency of the arbitral proceedings. Accordingly, the arbitral tribunal is urged to discuss with the parties during the case management conference the length or the number of submissions of any expert reports provided by the parties (Annex 3A).

2.1.2.10 PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA Environmental Rules) provide for the establishment of a specialised list of arbitrators who are considered to have expertise in the area of natural resources and the environment. The Environmental Rules also provide for the establishment of a list of scientific and technical experts who may be appointed as experts pursuant to these Rules. Parties to a dispute are free to choose the experts from these Panels.

The PCA Environmental Rules Article 24(4) provides that the arbitral tribunal may order:

> may request the parties jointly or separately to provide a nontechnical document summarising and explaining the background to any scientific, technical or other specialised information which the arbitral tribunal considers to be necessary to understand fully the matters in dispute.

2.1.3 UNCITRAL Model Law

The UNCITRAL Model Law foresees both tribunal-appointed and party-appointed experts. Accordingly, if the parties have not excluded in their agreement the power of the tribunal to appoint experts, the arbitral tribunal may appoint one or more experts (UNCITRAL Model Law Article 26(1)).

If a tribunal-appointed expert delivers his written or oral report and a party requests or the arbitral tribunal considers it necessary, the expert shall participate in a hearing where the parties have the opportunity to examine him and to present their party-appointed experts in order to testify on the points at issue, unless otherwise agreed by the parties (UNCITRAL Model Law Article 26(2)).[301]

300. Trittmann and Schardt, 465.
301. *Kesikli* argued that the UNCITRAL Model Law does not explicitly regulate party-appointed

Article 24(3) of the Model Law provides that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

2.1.4 Statutes

Statutes in various countries permit the usage of party-appointed experts with a clear provision in their provisions that regulate (international) arbitration.

States also have provisions in civil procedure laws regarding party-appointed experts; however, caution must be exercised when exporting the evidentiary practice of national courts to international arbitration, whether under common law or civil law.[302]

2.1.4.1 Türkiye

Turkish International Arbitration Law[303] Article 12(A)(2) and national arbitration provisions encoded in the Code of Civil Procedure[304] ('HMK') Article 431(2), as statutes based on the UNCITRAL Model Law, both provide the parties with the opportunity to appoint their experts.[305]

There are no detailed provisions similar to the Model Law other than the possibility of appointing experts:

> Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

According to the provisions of the Turkish Code of Civil Procedure, the arbitrator or the arbitral tribunal may appoint experts to report on the issues they determine. However, the authority granted to arbitrators by this provision should not be perceived as an absolute obligation. Indeed, in Turkish judicial practice, not consulting an expert,

experts, *see* Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 215.
302. Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay', 422.
303. Law No. 4686 of 21 June 2001, published in OG No. 24453 of 5 July 2001. For the English version, *see* https://turkisharbitrationacademy.com/eng/laws (accessed 24 September 2025).
304. Law No. 6100 of 12 January 2011, published in Official Gazette No. 27836 of 4 February 2011.
305. Pekcanıtez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 626; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1892; Pekcanıtez and Yeşilirmak, 'Tahkim', 2713; Yılmaz, *HMK Serhi*, 2021, 4:5482; Akıncı, *Milletlerarası Tahkim*, 339; Sanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 337; Sanlı, Esen, and Ataman-Figanmeşe, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 787; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 93; Karslı, *Medeni Muhakeme Hukuku*, 914; Karadaş, *Ulusal (İç) Tahkim*, 181–182; Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 75; Ekşi, *Hukuku Muhakemeleri Kanunu'nda Tahkim*, 170; Dayınlarlı, *Milletlerarası Tahkim Rehberi*, 33; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Degerlendirilmesi*, 83; Yılmaz, *HMK Serhi*, 2013, 1758; Nomer, Ekşi, and Öztekin Gelgel, *Milletlerlarası Tahkim Hukuku*, I:27; Görgün, Börü, and Kodakoğlu, *Medenî Usûl Hukuku*, 741.

if required, is seen as a deficiency that leads to the reversal of a (first or second instance) court decision.[306] Contrary to the domestic litigation practice, Turkish arbitration practice favours the appointment of experts by the parties.[307]

2.1.4.2 *Germany*

The German arbitration law provisions are to be found in the tenth book of the Code of Civil Procedure (*ZPO*), which contains sections 1026 to 1066. The provisions are almost a literal adaptation of UNCITRAL Model Law Article 26, with a few deviations.

ZPO § 1049(2) foresees that parties can appoint their own experts as follows:

> Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present their own experts in order to testify on the points at issue.[308]

The wording of the article seems to permit a party-appointed expert only when: (i) the tribunal appointed an expert; (ii) during oral hearings (but not in the preliminary proceedings); and (iii) through mere statements on disputed questions (instead of a comprehensive written opinion).[309]

Wach/Petsch argued that expert evidence in German arbitration is only possible through a tribunal appointment. In principle, there is no party-appointed expert; at least, it is technically not 'expert evidence'.[310]

However, as § 1049 provides, parties can, in a hearing, put questions to the tribunal-appointed expert and present (party-appointed) expert witnesses in order to testify on the points at issue.[311] Nevertheless, the reasoning of the legislation allows discarding the treatment of party-appointed experts as 'expert evidence':

> The German legal system is not familiar with the option provided for in Article 26 (2) of the Model Law to provide 'party-appointed experts', so that a waiver of the provision on expert evidence would have left open how this question is to be assessed under the new law … However, there are no objections to the adoption

306. Aktepe Artık, *Medeni Usûl Hukukunda Hakem Kararlarının İptali Sebepleri*, 379.
307. Pekcanıtez and Yeşilırmak, 'Tahkim', 2713; Akıncı, *Milletlerarası Tahkim*, 339; For contrary view *see* Eroğlu, *Tahkimde Yargılamanın Yenilenmesi*, 146–147.
308. The original text: 'Haben die Parteien nichts anderes vereinbart, so hat der Sachverständige, wenn eine Partei dies beantragt oder das Schiedsgericht es für erforderlich hält, nach Erstattung seines schriftlichen oder mündlichen Gutachtens an einer mündlichen Verhandlung teilzunehmen. Bei der Verhandlung können die Parteien dem Sachverständigen Fragen stellen und eigene Sachverständige zu den streitigen Fragen aussagen lassen.' *See* https://www.gesetze-im-internet.de/zpo/__1049.html (accessed 4 October 2022).
309. Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274–275.
310. Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren: Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 111; For the argument that § 1049 does include party-appointed experts, *see* Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 38, 39.
311. Schwab and Walter, *Schiedsgerichtsbarkeit*, Chapter 15, para. 19; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 186, 274–275; Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, 11:595.

> of Article 26 (2) of the Model Law in this respect either because the statements of such an expert, due to his proximity to the party, do not carry comparable weight to the statements of the expert appointed by the court.[312]

Knoblach shares the contrary view and argues that the party-appointed expert should be appointable even: (i) if no expert has been appointed by the tribunal; (ii) at any time during the proceedings; and (iii) with a comprehensive written opinion.[313]

Parties may agree on a neutral and objective expert, who will be appointed by the arbitral tribunal.[314] According to § 1049(1) of the ZPO, parties may exclude (party-appointed or tribunal-appointed) experts from the proceedings with an express agreement, however, the arbitrator cannot order such exclusion.[315] This is not contradictory to the right to be heard envisaged in the German Constitution Article 103; since the parties have the autonomy to decide how to conduct the proceedings, and with the agreement of the parties not to have an expert, this exclusion affects the burden of proof and does not limit the right to be heard.[316]

If the tribunal considers issues to be unsolvable without expert opinion, it is obliged to appoint one, as per § 1042 paragraph 4 of ZPO.[317]

Wach/Petsch argued that, as soon as there is an agreement between the parties to appoint a joint expert, the tribunal cannot base its decisions on party-appointed experts' opinions.[318] This does not prevent the parties from submitting expert opinions but prevents the tribunal from relying solely on that advice rather than appointing itself as an expert.[319]

312. *See* Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahrens-Neuregelungsgesetz – SchiedsVfG):

> 'Hinzu kommt, daß die in Artikel 26 Abs. 2 ModG vorgesehene Möglichkeit der Beibringung von " Parteisachverständigen" dem deutschen Rechtssystem nicht geläufig ist, so daß ein Absehen von der Vorschrift über den Sachverständigenbeweis offengelassen hätte, wie diese Frage nach dem neuen Recht zu beurteilen ist … Der "Parteisachverständige" ist dem deutschen Recht wie gesagt bislang fremd. Gegen die Übernahme des Artikels 26 Abs. 2 ModG auch insoweit bestehen jedoch keine Bedenken, weil den Ausführungen eines solchen Sachverständigen wegen seiner Nähe zur Partei kein den Ausführungen des vom Gericht bestellten Sachverständigen vergleichbares Gewicht zukommt.' available at https://dserver.bundestag.de/btd/13/052/1305274.pdf (accessed 29 September 2022).

313. Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 275–276.
314. Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren: Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 110.
315. Wach and Petsch, 106, 108; Schwab and Walter, *Schiedsgerichtsbarkeit*, Chapter 15, para. 19; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 266.
316. Thomas et al., *Thomas/Putzo ZPO*, § 1049 para. 2.
317. Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren: Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 103.
318. Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren: Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 111.
319. For the argument that ZPO § 1049 does preclude party-appointed experts, *see* Schlosser, *Kommentar zur Zivilprozessordnung: ZPO, Band 10: §§ 1025–1066*, § 1049, para.1.

As iterated, according to German law, party-appointed expert opinion is classified by some scholars as unique evidence that has no relation to 'expert evidence' according to ZPO § 1049.

2.1.4.3 *Switzerland*

Swiss International Arbitration provisions in the Federal Act on International Private Law (SPILA)[320] do not directly regulate the matter of evidence. Article 184 of the SPILA only states that '[t]he arbitral tribunal *takes the evidence* itself'.[321] (emphasis added)

Before Swiss courts in litigation, a private expert opinion (*Privat-gutachten*) was not considered evidence, but merely a party allegation.[322] However, in arbitration proceedings, the statements, opinions, and conclusions of an expert appointed by a party are considered evidence. *Berger and Kellerhals* argued that a party-appointed expert is essentially subject to similar treatment as fact witnesses.[323]

2.1.4.4 *UK*

The UK is one of the top countries leading in arbitration law and practice. The English Arbitration Act (EAA)[324] is a comprehensive code and the principal statute regulating both national and international arbitration for arbitrations seated in England or Wales.[325] In England, 'there are no overarching rules or standards for the evaluation or admissibility of evidence which parties are obliged to abide by in such an arbitration'.[326] The reason for this is largely due to leaving great discretion to parties and the tribunal on how to construct the arbitration.

The EAA section 37 stipulates that, unless otherwise agreed by the parties, the tribunal may appoint experts, legal advisers or assessors.[327] The provision entails that such an expert, legal adviser or assessor may attend the proceedings, and the parties

320. Federal Act on Private International Law (PILA) of 18 December 1987, available at https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en (accessed 2 April 2022).
321. *See* Voser and Mueller, 'Appointment of Experts by the Arbitral Tribunal: The Civil Law Perspective', 73; Weiss and Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz', 479.
322. Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 493; *see* Girsberger and Voser, *International Arbitration*, 287.
323. Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 493–494.
324. Available online: https://www.legislation.gov.uk/ukpga/1996/23/contents (accessed 3 April 2023).
325. Nairn, Szymanski, and Lekakis, 'National Report for England and Wales (2021 Through 2023)', 1; Rawding, Fullelove, and Martin, 'International Arbitration in England: A Procedural Overview', 361; Flannery, 'The English Statutory Framework', 208.
326. Tirado, Petit, and Keen, 'Factual Evidence', 483.
327. Nairn, Szymanski, and Lekakis, 'National Report for England and Wales (2021 Through 2023)', 31; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 185; Rawding, Fullelove, and Martin, 'International Arbitration in England: A Procedural Overview', 382; Flannery, 'The English Statutory Framework', 213; *see also* 'Protocol for the Instruction for Experts to give evidence in Civil cases' published by the UK Civil Justice Council.

shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.[328]

Although the provision does not explicitly mention the opportunity for the parties to appoint their own experts, such a proposal is also not forbidden and should be permitted according to procedural fairness reasons.[329]

Section 33(a) of the EAA provides that parties have an opportunity to make a fair case. This is related to procedural fairness and indicates that parties may rely on expert evidence where appropriate.[330]

EAA section 34(2)(f) provides that it is for the tribunal to decide whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented.[331]

Although not directly applicable to arbitration, under the UK Civil Procedure Rules 1998 (CPR), Courts in the UK have broad discretion to restrict or exclude expert evidence.[332] In the UK, experts who are found to violate their duties may be subject to disqualification.[333] However, the EAA has the power to restrict expert evidence, in contrast to the CPR.[334]

Where English law governs the arbitration, the duties owed by a party-appointed expert are often considered those set out in the *Ikarian Reefer* case. The *Ikarian Reefer* case summarises the main obligations of the party-appointed experts. The case foresees that the expert's work should be an independent product, uninfluenced as to form or content by the exigencies of the adjudicative process.[335]

The attorney may prepare the expert, examine, and advise him/her on additional matters to be included in the report.[336]

Even in England, where the Woolf reforms introduced independence as a requirement for the party-appointed expert, the lack of impartiality of a party-appointed expert affects the weight of his/her opinion in the assessment of evidence more than the admissibility.[337]

328. Rawding, Fullelove, and Martin, 'International Arbitration in England: A Procedural Overview', 382; Nairn, Szymanski, and Lekakis, 'National Report for England and Wales (2021 Through 2023)', 29.
329. Bor, 'Expert Evidence', 504.
330. Bor, 504.
331. Rawding, Fullelove, and Martin, 'International Arbitration in England: A Procedural Overview', 381; Nairn, Szymanski, and Lekakis, 'National Report for England and Wales (2021 Through 2023)', 30.
332. Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 212.
333. Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457; Nessi, 'Expert Witness: Role and Independence', 77–78.
334. Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457, fn. 22.
335. Referencing *Whitehouse v. Jordan*, [1981] 1 WLR 246 at p. 256, per Lord Wilberforce.
336. Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 187.
337. Proske, *Expert Witness Conferencing in Schiedsverfahren*, 23.

2.1.4.5 USA

The USA has developed extensive procedures for the qualification of experts and allows judges to act as gatekeepers to exclude questionable expert testimony.[338] Party-appointed experts are classified under the category of witnesses according to the Federal Rules of Evidence Rule 702.[339]

Traditionally, in US law, the main role for obtaining and presenting expert opinion is given to the parties because the US adopts an adversarial system. In this system, the judge as a decision-maker should be impartial and passive; the proceedings are administered by the parties and their lawyers.[340] Experts are commonly produced and paid for by the parties. The court shall decide the admissibility of such evidence.

2.1.4.6 Singapore

The Singapore International Commercial Court (SICC) Practice Directions[341] contain certain rules for the provision of expert evidence. It provides rules regarding the appointment, method of obtaining evidence and examination.[342]

In cases where expert witnesses will be called to give evidence, counsel for each party intending to call experts shall write to all other parties and inform the other parties of the name(s) of the expert(s) in which that party intends to engage, set out the areas or issues which the expert(s) will be opine on and attach the curriculum vitae of the expert(s) (n. 87(1)). The counsel for each party is to inform all other parties of any objections to the experts that will be called (n. 87(2)). The Counsel may raise objections about the experts at or before a Case Management Conference (n. 87(3)).

As a default practice, experts are directed to meet before hearings to discuss their respective opinions and to determine where they are in agreement on the issues, and where they do not agree, the extent of their disagreement. If not directed by the court otherwise, the parties and their lawyers will not be permitted to attend these expert meetings. The experts will then be expected to prepare a joint expert report.

The report must set out a list of the issues, areas/issues where experts agreed, areas/issues where they disagree, reasons, nature and extent of their disagreement, and any other helpful information (n. 88(1)). Although this report per se does not bind

338. Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457.
339. Budak, 'Anglo: Amerikan Medeni Yargılama Hukukunda Bilirkişilik (Uzman Tanıklar)', 828–829; Demirkapı, 'Anglo: Amerikan Hukukunda Bilirkişilik Kurumunda Yeni Eğilimler', 50.
340. Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', 21; Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 64–65; Teomete Yalabık, 'Questioning Expert Witnesses in Litigation and International Arbitration: How to Prevent Partisan Expert Reports and "Battle of Experts"', 141.
341. Singapore International Commercial Court Practice Directions, https://www.judiciary.gov.sg/docs/default-source/amendments-docs/2022/sicc-pd_2022_v1.pdf?sfvrsn=4d986e38_2 (accessed 19 January 2023); O'Malley, *Rules of Evidence in International Arbitration*, 145.
342. For similar practice in Australian courts, *see* Jones, 'Redefining the Role and Value of Expert Evidence', 33; Federal Court of Australia, *Expert Evidence Practice Note*, 25 October 2016, https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt (accessed 19 October 2022).

parties without express agreement, the court has the discretion to take cognisance of the experts' agreement (n. 88(2)).

Experts are generally expected to testify after fact witnesses and may be examined concurrently as a panel (expert conferencing) (n. 89(3)).

The SICC also established a specialist Technology, Infrastructure and Construction list dealing with complex disputes in these areas, which also contains similar provisions for experts.[343]

2.1.4.7 Hong Kong

Cap. 609 Arbitration Ordinance (AO)[344] is the arbitration law applicable to arbitration, whose place of arbitration is Hong Kong (AO Article 5(1)). The AO is based on the UNCITRAL Model Law, and the provisions for experts are thus the same. As stipulated above, the UNCITRAL Model Law foresees both tribunal-appointed and party-appointed experts. Accordingly, the arbitral tribunal may appoint one or more experts (UNCITRAL Model Law Article 26(1)). Additionally, the parties have the opportunity to present their party-appointed experts (UNCITRAL Model Law Article 26(2)).[345]

2.1.5 International Guidelines and Practices

As demonstrated in the first section of this chapter, international treaties, arbitration rules, the Model Law, and statutes of various countries usually have fewer provisions concerning party-appointed experts.

However, there is no confusion whether it is permissible for the parties to appoint experts in international practice. On the contrary, even the tribunal expects the parties to bring their experts.[346]

Professional organisations like the International Bar Association, CIArb as an international centre for the practice and profession of arbitration (and alternative dispute resolution), and LCIA as an arbitration institution have each developed some set of non-binding rules that foresee how to handle issues regarding party-appointed experts in more detail than statutes or arbitration rules.

Among them, the Chartered Institute of Arbitrator's Protocol for the Use of Party-Appointed Experts Witnesses in International Arbitration (CIArb Protocol)[347]

343. *See* Singapore International Commercial Court Practice Directions, Part XXIV Technology, Infrastructure and Construction List, https://www.judiciary.gov.sg/docs/default-source/amendments-docs/2022/sicc-pd_2022_v1.pdf?sfvrsn=4d986e38_2 (accessed 19 January 2023).
344. [1 June 2011] L.N. 38 of 2011 https://www.elegislation.gov.hk/hk/cap609?pmc=0&m=0&pm=1&xpid=ID_1438403520837_004 (accessed 19 January 2023).
345. *Kesikli* argued that the UNCITRAL Model Law does not explicitly regulate party-appointed experts, *see* Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 215.
346. O'Malley, *Rules of Evidence in International Arbitration*, 145.
347. Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf (accessed 24 October 2025). The CIArb Protocol applies only to party-appointed experts, not to tribunal-appointed experts or single-joint experts.

from 2007 has been the most specific and comprehensive on the issue of rules concerning party-appointed experts.

Additionally, the Rules on the Taking of Evidence in International Arbitration (IBA Rules) have detailed provisions regarding the appointment and use of party-appointed experts in international arbitration. The 2013 IBA Guidelines on Party Representation in International Arbitration (IBA Guidelines) also have provisions that are more specific and directed towards counsel and their relationship to party-appointed experts.

Moreover, the UNCITRAL Notes on Organizing Proceedings (UNCITRAL Notes) from 2016 have some provisions, among others, related to experts and their usage.

These rules may be incorporated into the agreed procedural rules governing the conduct of a particular arbitration or may provide guidance to parties or tribunals concerning various aspects of expert evidence.

2.1.5.1 *IBA Rules on the Taking of Evidence*

The IBA Rules on the Taking of Evidence, which have their roots in 1983 and were modernised in 2020, are the most widely known and frequently used soft-law instrument in arbitral practice.[348] The IBA Rules are frequently consulted as non-binding guidelines.[349] The IBA Rules are not directly applicable unless the parties adopt them. As there are no detailed regulations on taking and evaluating evidence in the Arbitration Rules, it is evident that the IBA Rules fill a crucial gap in the submission and evaluation of evidence in the field of international arbitration. But in order to apply the IBA Rules, parties need to agree on their application or the arbitrators should set their application in the first procedural order.[350]

The IBA Rules, *inter alia*, provide a detailed description of the appointment procedure of a party-appointed expert, the contents of the expert report, and the examination of the party-appointed expert (Article 5).[351] However, they do not review the qualifications of experts or challenging experts. Rather, the focus is on the rights of parties to examine information drawn upon in the drafting of a report and to permit any party the opportunity to respond to a tribunal-appointed expert.

Although the IBA Rules are a result of good practices developed and generally accepted over the years, serious criticism in relation to party-appointed experts can be made. The IBA Rules are not clear on the duties that a party-appointed expert has, specifically, no explicit reference to the party-appointed expert's duty to assist the arbitral tribunal exists,[352] only a mere declaration of the expert to express his/her

348. '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', 35.
349. Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 447.
350. Esen, 'Violation of the Right to a Fair Trial in Arbitration', 113.
351. Ünüvar, 'Experts: Investment Arbitration', paras 22–24.
352. Waincymer, *Procedure and Evidence in International Arbitration*, 946; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 304–305.

genuine belief is required.[353] Some authors criticise the independence requirement and say that it is unclear since the party-appointed expert is hired by one side, closely works with them to prepare the report, and is paid by that party.[354] Other authors have deemed the statement of independence as a mere self-assessment of limited value.[355]

Some realistically looked beyond the independence requirement and suggested that the focus should be on the 'impartiality' of experts, whether the expert is capable of reaching the same conclusion based on the same criteria, irrespective of the instructing party.[356]

2.1.5.2 *IBA Guidelines on Party Representation in International Arbitration*

The IBA Guidelines on Party Representation in International Arbitration were drafted with the idea of having a coherent practice of counsel from various jurisdictions, all with different professional cultures.

The Guidelines are not intended to displace applicable mandatory laws, professional or disciplinary rules or agreed arbitration rules that may be relevant or applicable to matters of party representation, but to accommodate legal and cultural differences among counsel of multinational backgrounds. The Guidelines foresee specialised practices and procedures that have been developed in international arbitration over time.

Relevant principles regarding party-appointed experts are provided for in the Guideline paragraphs 11, 20, 22, 24, and 25:

> 11. A Party Representative should not submit Expert evidence that he or she knows to be false. And in case, take remedial measures, which may include one or more of the following:
> (a) advise the Expert to testify truthfully;
> (b) take reasonable steps to deter the Expert from submitting false evidence;
> (c) urge the Expert to correct or withdraw the false evidence;
> (d) correct or withdraw the false evidence;
> (e) withdraw as Party Representative if the circumstances so warrant.
> 20. A Party Representative may assist Experts in the preparation of Expert Reports.
> 22. A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion.
> 24. A Party Representative may, consistent with the principle that the evidence given should reflect the Expert's own analysis or opinion, meet or interact with Experts in order to discuss and prepare their prospective testimony.
> 25. A Party Representative may pay, offer to pay, or acquiesce in the payment of:
> (a) expenses reasonably incurred by an Expert in preparing to testify or testifying at a hearing;

353. Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration: Can One Be Found?', 332; Waincymer, *Procedure and Evidence in International Arbitration*, 945; Burianski and Lang, 'Bibliographic Reference "Challenges" to Party-Appointed Experts', 15:277.
354. Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 447.
355. Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314, 318.
356. Cerrahoglu Balssenn, 'Instructions to Party-Appointed Experts Should Focus on Impartiality', 28; Michell and Mandhane, 'The Uncertain Duty of the Expert Witness', 648.

(b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and
(c) reasonable fees for the professional services of a Party-appointed Expert.

2.1.5.3 *CIArb Protocol and Guidelines*

The CIArb Protocol for the Use of Party-Appointed Experts Witnesses in International Arbitration is a single set of rules that provides a complete regime for adducing party-appointed experts in proceedings.

The CIArb Protocol identifies the issues to be dealt with by way of expert evidence, the qualification and identity of experts such as independence, what tests or analyses are required, the contents of the experts' opinions, privilege, meetings of experts and the manner of expert testimony.[357]

The CIArb Protocol further attempts to ensure an expert's credibility by specifically noting that the expert's duty is to assist the tribunal. Additionally, it expects the expert meeting and the preparation of a joint statement on the areas of agreement and disagreement between the party-appointed experts.[358]

The Protocol further provides that the tribunal can order the experts to confer and produce additional or revised expert reports or order a preliminary hearing with the experts before the main arbitration hearing.[359]

However, as with the other rules, it does not provide a mechanism for challenging experts' opinions. The Protocol is also criticised for following English judicial practice and may not have been widely adopted in international arbitration for that reason.[360]

Further, the International Arbitration Practice Guideline for the Party-appointed and Tribunal-appointed experts sets out the practice in international commercial arbitration on the appointment and use of party-appointed and tribunal-appointed experts.[361]

It provides guidance for: (i) Powers to appoint an expert (Article 1); (ii) Assessing the need for expert evidence (Article 2); (iii) Methods of adducing expert evidence (Article 3); (iv) Procedural directions of the expert(s) (Article 4); and (v) Testing the experts' opinions (Article 5).

In 2019, CIArb also published the Guidelines for Witness Conferencing in International Arbitration, which contains directions for the concurrent taking of evidence while still affording important flexibility to parties and tribunals in designing a procedure that befits their needs.[362]

357. CIArb Protocol Foreword.
358. Nessi, 'Expert Witness: Role and Independence', 79–80.
359. Bor, 'Expert Evidence', 507.
360. Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 285.
361. CIArb International Arbitration Practice Guideline for the Party-appointed and Tribunal-appointed experts available at https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf (accessed 24 October 2025).
362. CIArb Guidelines for Witness Conferencing in International Arbitration 2019, https://www.ciarb.org/media/c54lce1z/13-witness-conferencing-april-2019.pdf (accessed 24 October 2025).

2.1.5.4 *Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)*

The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) were drafted with the intention to provide a framework and guidance for tribunals and parties, with the aim to increase the efficiency of arbitration 'by encouraging a more active role for arbitral tribunals in managing proceedings'.[363]

Like the IBA Rules, the Prague Rules are not intended to replace the arbitration rules provided by various institutions. However, they are designed to supplement proceedings through the agreement of the parties or as otherwise applied by arbitral tribunals.

The Prague Rules provide limited guidance on party-appointed experts. It stipulates that despite the tribunal appointing an expert, the parties are not precluded from appointing their expert and submitting a report, and this expert can testify and be examined at the hearings (Prague Rules Article 6.5.).

The rules foresee that the tribunal has the authority to order the tribunal-appointed expert and the party-appointed expert(s) 'to establish a joint list of questions on the content of their reports, covering the issues that they consider necessary to be reviewed' (Prague Rules Article 6.6.).

The rules also authorise the tribunal, after the hearings, to instruct both tribunal and party-appointed experts to issue a joint report which indicates a list of issues on which the experts agree, a list of issues on which the experts disagree and reasons why the experts disagree (Prague Rules Article 6.7.).

The complexity of arbitral disputes and the need for expert opinion are some reasons that proceedings are lengthy and expensive. The Prague Rules appear to offer only a weak solution to the difficulty presented by conflicting expert opinions in Article 6.6 and 6.7.

Article 6 should have regulated the idea that a proactive arbitrator should convene a conference to discuss the parties' views with the experts before the second round of submissions on the merits or, in any event, before the hearing.[364]

2.1.5.5 *UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution*

The Secretariats of ICSID and UNCITRAL have collaborated on a draft Code of Conduct for Arbitrators in International Investment Disputes (IID). At its fifty-sixth session in July 2023, UNCITRAL adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution and the accompanying commentary.

The Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality, as well as the duty to conduct

363. Prague Rules Preamble; *see* Stampa, 'The Prague Rules', 221–244; Patocchi, 'Uluslararası Tahkim Sempozyumu', 147; For details and comparison with IBA Rules, *see* Mert and Türkmen, 'Milletlerarası Tahkimde Delil İkamesi Hakkında Prag Kuralları ve IBA Kuralları'nın Karşılaştırılması', 37 ff.
364. Patocchi, 'Uluslararası Tahkim Sempozyumu', 165.

PARTY-APPOINTED EXPERTS IN INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION

Impact on Proceedings, Problems and Solutions

ÖMER FARUK KAFALI

The increasing reliance on expert evidence in international commercial and investment arbitration, where disputes often hinge on highly specialised knowledge beyond the tribunal's expertise, creates many procedural question marks to be addressed both by the parties and arbitral tribunals. This important book addresses the problems arising out of the use of party-appointed experts and thoroughly examines the principles, rules, and methods that can overcome the shortcomings that arise. The author systematically addresses how experts appointed by parties can contribute to resolving complex factual and technical disputes, and how their involvement interacts with procedural fairness, efficiency, and tribunal control.

Among the issues and topics covered are the following:

- establishing impartiality, independence, and objectivity of party-appointed experts;
- rules and codes of conduct for party-appointed experts;
- the tribunal's role in evaluating conflicting expert evidence;
- cross-examination of experts presented by opposing parties;
- procedures for expert meetings, cooperation, and joint reports to resolve disagreements and achieve consensus;
- assessing disqualification requests; and
- effect of the expert and the expert opinion on set-aside and recognition and enforcement procedures.

International rules and practices and guidelines of major arbitral institutions are fully considered, as are legislation, case law, and practices of many jurisdictions.

By offering critical insights and practical solutions grounded in recent case law, doctrinal analysis, and institutional practice, the book will serve academics, practitioners, arbitrators, and policymakers engaged in enhancing the integrity and efficiency of expert involvement in arbitration proceedings. It will provide arbitrators and parties with practical tools to structure, scrutinise, and integrate expert testimony, helping to reduce procedural delays, ensure expert evidence is utilised effectively and impartially, and advance fair and well-reasoned awards.

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