

**IBN HALDUN UNIVERSITY
SCHOOL OF GRADUATE STUDIES
DEPARTMENT OF PRIVATE LAW**

PH.D. THESIS

**PARTY-APPOINTED EXPERTS IN INTERNATIONAL
ARBITRATION: IMPACT ON PROCEEDINGS,
PROBLEMS AND SOLUTIONS**

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**THESIS SUPERVISOR
PROF. ALİ YEŞİLIRMAK**

ISTANBUL, 2024

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PROBLEMS AND SOLUTIONS**

by

ÖMER FARUK KAFALI

**A thesis submitted to the School of Graduate Studies in partial
fulfillment of the requirements for the degree of Doctor of
Philosophy in Private Law**

**THESIS SUPERVISOR
PROF. ALİ YEŞİLIRMAK**

ISTANBUL, 2024

APPROVAL PAGE

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Doctor of Philosophy in Private Law.

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I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

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ÖZ

ULUSLARARASI TAHKİMDE UZMAN GÖRÜŞÜ: YARGILAMAYA
ETKİLERİ, SORUNLAR VE ÇÖZÜMLER

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Bu tezde, uluslararası ticari tahkim ve yatırım tahkiminde karşılaşılan, hem hakem tarafından atanan bilirkişiler hem de taraflarca sunulan uzman görüşü derinlemesine incelenecektir.

Bu tezin amacı, uygulamada taraflarca sunulan uzman görüşünün kullanımından kaynaklanan sorunların altında yatan nedenleri tespit etmek, uygulamada uzman görüşünün kullanımından kaynaklanan sorunlara çözüm önerileri getirmek ve sonuç olarak, uzman görüşü ile ilgili sorunlar nedeniyle hakem kararlarına karşı kanun yoluna başvurulmasını ve hakem kararlarının tanınması ve tenfizinin reddedilmesini önlemektir.

Bu çalışmada teorik, karşılaştırmalı ve nitel araştırma gibi birden fazla araştırma yöntemi kullanılacaktır. Bu kapsamda uluslararası tahkim yargılamasına ilişkin kaynak ve unsurlar olan; ulusal tahkim kanunları, uluslararası tahkim kuralları, mahkeme ve tahkim kararları, kılavuzlar, anketler ve doktriner eserler yararlanılacaktır. Tüm bu veri setleri analiz edildikten sonra, taraflarca seçilen özel bilirkişilerin daha etkin ve verimli kullanılmasına hizmet edecek sorunlar ve unsurlar teorik ve pratik olarak belirlenecektir.

Birinci bölümde, tezin konusu, amacı, kapsamı ve sınırları ile araştırma metodolojisi ve literatür taraması açıklanacaktır. İkinci bölümde, hem hakemler tarafından atanan hem de taraflarca sunulan uzman görüşü milletlerarası tahkim yargılamasında kullanımı, önemi ve etkisi belirtilecektir. Üçüncü bölümde, uzman görüşü analiz edilecektir. Dördüncü bölümde, milletlerarası tahkim yargılamasında uzman görüşünün kullanımından kaynaklanan sorunlar tespit edilecektir. Son bölümde, sorunlara yönelik halihazırda önerilen çözümler analiz edilecek ve eleştirel bir değerlendirmeye tabi tutulacaktır. Uygulamada karşılaşılan ve yargılamaların verimsizliğine yol açan eksikliklere yönelik çözümlere işaret edilecektir.

Son olarak tez, uzman görüşünün yazılması ve eş zamanlı sorgulama için bir davranış kuralına ve önceden kararlaştırılmış bir usul akışına bağlı kalmanın, uzman görüşü kullanımından kaynaklanan ve tahkim süreçlerinin verimsizliğine yol açan sorunların üstesinden gelmek için gerekli olduğunu ileri sürerek sonuçlandırılacaktır.

Anahtar Kelimeler: Bilirkişi, Delil, Etik İlkeler, Tahkim, Tarafsızlık, Uzman.

ABSTRACT

PARTY-APPOINTED EXPERTS IN INTERNATIONAL ARBITRATION: IMPACT ON PROCEEDINGS, PROBLEMS AND SOLUTIONS

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In this thesis, experts, both tribunal-appointed and party-appointed experts, confronted in international commercial and investment arbitration will be examined and explained in depth.

The thesis aims to determine the underlying reasons that lead to problems in practice originating from the use of party-appointed experts, suggest solutions to the issues in practice arising from the use of party-appointed experts, and prevent recourse against arbitral awards and the denial of recognition and enforcement of arbitral awards, because of issues relating to party-appointed experts. In this study, more than one research method, such as theoretical, comparative and qualitative research, will be used. In this context, sources and elements of international arbitration proceedings like statutes of states, international arbitration rules, court and arbitration decisions, guidelines, surveys and doctrinal works will be used. After analysing all these data sets, the problems and the elements that will serve a more effective and efficient use of experts will be determined theoretically and practically.

In the first chapter, the subject, the aim of the thesis, its scope and limits, as well as the research methodology and literature review, will be explained. In the second chapter, the use, importance and impact of tribunal-appointed and party-appointed experts in international arbitration proceedings will be stated. In the third chapter, party-

appointed experts will be analysed in depth. In the fourth chapter, the problems resulting from the use of party-appointed experts in international arbitration proceedings will be identified. In the last chapter, already proposed solutions to the issues will be analysed and critically assessed. Solutions to shortcomings encountered in practice that led to the inefficiency of the proceedings will be emphasised. Last but not least, the thesis will conclude by asserting that adherence to a code of conduct and a pre-agreed procedural flow for the creation of the party-appointed expert opinion and concurrent examination is necessary to overcome the flaws resulting from the use of party-appointed experts that lead to the inefficiency of the proceedings.

Keywords: Arbitration, Bias, Code of Conduct, Evidence, Experts, Party-Appointed Experts.

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LIST OF SYMBOLS AND ABBREVIATIONS

§	Paragraph
&	and
AAA	American Arbitration Association
ABA	American Bar Association
ADR	Alternative Dispute Resolution
AF	Additional Facility
AO	Cap. 609 Arbitration Ordinance of Hong Kong
ARB	Arbitration
Art.	Article
BCLP	Bryan Cave Leighton Paisner Law Firm
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (Official Collection of the Decisions of the Swiss Federal Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BIT	Bilateral Investment Treaty
CCP	Code on Civil Procedure
CEPANI	Belgian Centre for Arbitration and Mediation
CETA	EU-Canada Comprehensive Economic and Trade Agreement
Ch.	Chapter
CIArb	Chartered Institute of Arbitrators
CJEU	Court of Justice of the European Union
Co.	Company
CPR	UK Civil Procedure Rules 1998
DCF	Discounted Cash Flow
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. (German Arbitration Institute)
e.g.	Exempli Gratia (for example)
EAA	English Arbitration Act 1996
ECT	Energy Charter Treaty
Ed	Editor
Eds.	Editors

Et al.	Et Alia (and Others)
Etc.	Et Cetera (and so on)
EUVIPA	EU-Vietnam Free Trade Agreement
EWCA	Court of Appeal of England and Wales Civil Division
EWHC	High Court of England and Wales, the High Court of Justice
FAA	Federal Arbitration Act US
ff.	And the Following Pages or Lines
fn.	Footnote
FTA	Free Trade Agreement
GAI	Generative Artificial Intelligence
GAR	Global Arbitration Review
GmbH	Gesellschaft mit beschränkter Haftung (Limited Liability Company)
HKIAC	Hong Kong International Arbitration Centre
HMK	Hukuk Muhakemeleri Kanunu (Turkish Code on Civil Procedure No. 6098)
HTTP	Hypertext Transfer Protocol
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICrC	International Criminal Court
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILA	International Law Association
Inc.	Incorporation
INCOTERMS	International Commercial Terms
Int'l	International
ISDS	Investor-State Dispute Settlement
ISTAC	Istanbul Arbitration Centre
ITLOS	International Tribunal for the Law of the Sea
i.e.	Id Est (That Is)
İTOTAM	İstanbul Ticaret Odası Tahkim ve Arabuluculuk Merkezi (Istanbul Chamber of Commerce Arbitration and Mediation Centre)

LCIA	London Court of International Arbitration
Ltd	Limited
m.	<i>Madde</i> (article)
ModG	<i>Modellgesetz</i> (UNCITRAL Model Law)
MÖHUK	<i>Milletlerarası Özel Hukuk ve Usûl Hukuku Hakkında Kanun</i> (Turkish Private International Law Act No. 5718)
MPI	Max-Planck Institute
MTK	Milletlerarası Tahkim Kanunu (Turkish International Arbitration Act No. 4686)
NAFTA	North American Free Trade Agreement
NJW-RR	NJW-Rechtsprechungs-Report Zivilrecht
No	Number
NYC	United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Dated 1958
OLG	<i>Oberlandesgericht</i> (Higher Regional Court)
Para.	Paragraph
PCA	Permanent Court of Arbitration
PILA	Private International Law Act
PRC	People's Republic of China
Pub.	Publication
R	Rule
Rep.	Report
s.	Section
SA/ S.A.	<i>Sociedade Anonima</i> (Joint-Stock Company)
SCC	Stockholm Chamber of Commerce
Sch	<i>Schiedsverfahren</i> (Arbitration)
SchiedsVfG	<i>Schiedsverfahrens-Neuregelungsgesetz</i> (Arbitration Amendment Act)
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren</i> (German Arbitration Journal)
SIAC	Singapore International Arbitration Centre
SICC	Singapore International Commercial Court
SPILA	Swiss Private International Law Act from 1989
TIAL	Turkish International Arbitration Act No. 4686
UK	United Kingdom
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
USMCA	United States-Mexico-Canada-Agreement
V	Volume
v.	Versus
VIAC	Vienna International Arbitral Centre
VSCA	Victoria Supreme Court of Appeal
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
www	World Wide Web
YCA	Yearbook Commercial Arbitration by ICCA
ZPO	Zivilprozessordnung (German Code on Civil Procedure)

CHAPTER I

INTRODUCTION

1.1. Introduction to the Problem

In adjudication, legal disputes are resolved by judges or arbitrators, considering the facts of the case (*Vakiâ, Sachverhalt*) and ascertaining the relevant legal rules to the specific case. This act of the adjudicator is called *subsumption*.¹

Establishment of facts² is the first step in any case, besides its criminal, civil or international law character. Arbitrators need the facts and the law to perform their decision-making duty.³ This is also true for international commercial arbitration⁴ and international investment arbitration⁵ disputes.⁶ With the rightly established facts, the corresponding legal position can be determined (*Da mihi um, dabo tibi ius*)^{7,8}.

¹ Pekcanitez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 356.; Erdönmez, ‘Pekcanitez Usûl’, 795.; Arslan et al., *Medenî Usul Hukuku*, 165.; Tanrıver, *Medenî Usûl Hukuku*, 2021, I:409. ;Spitzer, ‘Der Sachverständigenbeweis Im Österreichischen Zivilprozess’, 28.; Bernardino, ‘The Discursive Construction of Facts in International Adjudication’.; Özbek, *Tahkim Hukuku*, II:1349-1350.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 141.; Lew, ‘The Need for Expert Evidence?’, 246.; Yılmaz, *HMK Şerhi*, 2013, 371.

² I will use the phrase “establishment of facts” rather than finding the facts or fact-finding. For a critical evaluation of the term “facts” used in international adjudication, see Bernardino, ‘The Discursive Construction of Facts in International Adjudication’.

³ Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 174.

⁴ The term “International commercial arbitration” in this thesis refers to the resolution of a commercial dispute between real or legal persons from two different states via arbitration. The term “commercial” should be given a wide interpretation so as to cover not only matters arising from all contractual or non-contractual relationships of a commercial nature, but also ordinary relationships between non-commercial real or legal persons.

⁵ The term “international investment arbitration” in this thesis refers to the resolution of a dispute between a real or legal person who is qualified as an investor according to the relevant legal instrument (License, Statute, Bilateral Investment Treaty or Multilateral Investment Treaty) and a state via arbitration. For details see Dolzer, Rudolf, Ursula Kriebaum, and Christoph Schreuer. *Principles of International Investment Law*. 3rd ed. Oxford: Oxford University Press, 2022.

⁶ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 41.

⁷ Give me the facts and I will give you the law.

⁸ Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 142.

The duty of the arbitrator can only be diligently fulfilled if the facts have been concretely established.⁹

The facts in an arbitration case are principally derived from the submission of the parties.¹⁰ Additionally, if the relevant procedure allows so, facts may be inquired by the arbitrators.¹¹

In principle, the parties to a dispute need to prove the disputed relevant facts.¹² Proof is the act of convincing the arbitrator that the facts underlying the party's claim are genuine and honest.¹³ Additional to the facts, the law is also subject to proof in an international dispute.

To prove the facts, parties need evidence to prove.¹⁴ Evidence in arbitration is document evidence, witness evidence, expert opinion and sight or subject inspections.¹⁵

If the matters of the case are related to scientific, technical or complex legal knowledge, experts are used to understand the facts and enable the arbitrators to have

⁹ Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement*, 10–11.

¹⁰ Pekcanitez and Yeşilirmak, 'Tahkim', 2704.

¹¹ For German and UK law see Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 42–43.; Pekcanitez and Yeşilirmak, 'Tahkim', 2704.; Postacıoğlu and Altay, *Medeni Usul Hukuku Dersleri*, 1045.

¹² Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 142–43.; Sourgens, Duggal, and Laird, *Evidence in International Investment Arbitration*, 24.; Marriott, 'Evidence in International Arbitration', 281.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 10.

¹³ Atalay, 'İspat', 1585-86.; Atalay, 'Delil Kavramı Üzerine', 129.; Arslan et al., *Medenî Usul Hukuku*, 405.; Alangoya, Yıldırım, and Deren-Yıldırım, *Medeni Usul Hukukunun Esasları*, 294.

¹⁴ Atalay, 'Delil Kavramı Üzerine', 130.; Atalay, 'Pekcanitez Usûl', 2021, 1730.; Yeğengil, *Tahkim (L'Arbitrage)*, 302.; Akıncı, *Milletlerarası Tahkim*, 342.; Ağırman, *Milli & Milletlerarası Tahkim*, 455.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 318.

¹⁵ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 564.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114–15.; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 91.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 18.; Akıncı, *Milletlerarası Tahkim*, 342.; Korkmaz, 'Güncel Tartışmalar Ekseninde Tahkimde Tanık Delilinin Güvenilirliği', 647.; Bacanlı, 'Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arabuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi', 96.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 24–25.

a better understanding of them.¹⁶ The opinion of experts is a means of evidence that helps the tribunal to establish the facts of a case or understand complex issues.¹⁷

A significant part of the disputes encountered in international commercial and investment arbitration¹⁸ include factual situations which require special or technical knowledge.¹⁹ There are also complex legal issues that need to be exposed.

As a matter of fact, if arbitral tribunals want to assess facts to apply the corresponding legal rules correctly, the opinion of an architect and engineer in a construction dispute or an accountant in a financial dispute will be required unless the arbitrator has the required knowledge or understanding in the relevant subject.²⁰

As statistics lay down, a significant portion of arbitrators across the globe are lawyers with extended knowledge in one or more industries.²¹ Nevertheless, this knowledge

¹⁶ Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 169.; Karadaş, *Ulusal (İç) Tahkim*, 182.

¹⁷ Weigand and Baumann, *Practitioner's Handbook on International Commercial Arbitration*, para. 1.281.; Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', 41. "Sometimes the determination of facts is based on opinions — for example, the opinions of experts."; Meier, 'Germany', 1., para. 5.

¹⁸ This argument is not exclusive to arbitration but could be made for other international courts and tribunals, too.

¹⁹ Born, *International Commercial Arbitration*, 2448.; Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.135.; Schneider and Scherer, 'Art. 184', 2096.; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 92.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 281.; Proske, *Expert witness conferencing in Schiedsverfahren*, 1.; Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 165.

²⁰ Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.133.; Schütze, Tscherning, and Wais, *Handbuch Des Schiedsverfahrens: Praxis Der Deutschen Und Internationalen Schiedsgerichtsbarkeit*, 222.; Akıncı, *Milletlerarası Tahkim*, 339.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 181.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 189.; O'Malley, *Rules of Evidence in International Arbitration*, 174.; Ziya Akıncı and Ejder Yılmaz in Akıncı and Ekmen, 'Tartışmalar', 200–201.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 412.; Ağırman, *Milli & Milletlerarası Tahkim*, 459, 461.; Geisinger, 'Advocacy in International Commercial Arbitration: What For?', 15.; Meier, 'Germany', 3.1.2, para. 4.; Borris et al., 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 191.; Ashford, *Handbook on International Commercial Arbitration*, 295.; For instance, LMAA has a number of expert arbitrators in maritime dispute, see Erdoğan and Meral, 'Londra Deniz Ticareti Hakemleri Birliği(LMAA) Tahkimi İlişkin Genel Bir Değerlendirme', 1073.

²¹ Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.135.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 412.; Industries such as energy, environment, intellectual property; ICC, ICC Arbitration and ADR Commission Report Resolving Climate Change Related Disputes through Arbitration and ADR, 2019, 19, para 5.8 <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> ; In the construction industry, engineers and architects who have appropriate arbitral practice training, are also being appointed as arbitrators; O'Malley, *Rules of Evidence in International Arbitration*, 174.;

rarely goes beyond a general understanding of industry-related issues.²² Thus, at this stage, arbitrators will need to make use of the opinions of the experts in the form of a report while resolving the issues in the case and rendering the award since they will not have the relevant expertise to decide on the matter.²³

Despite having the possibility to research themselves from various sources or ask a fellow from the field, arbitrators are expected to rely on something other than their own information, save exceptional situations.²⁴ In most arbitration laws and in practice, it is mandatory for an award to have reasoning included.²⁵ Since arbitrators will have to indicate, inter alia, the *ratio* on which the award is based, a firm ratio will only be possible with the help of an expert opinion.²⁶

Therefore, it is clear that experts are assisting arbitral tribunals in the adjudication process and, even indirectly, possess the potential to influence the proceedings and impact its outcome imperatively.²⁷

Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 183.; Reiner and Aschauer, 'ICC Rules', 135.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 48–49.; Uluç, *Corruption in International Arbitration*, 163.

²² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 281.; Munday, *B*, 541.

²³ See Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 88.; Proske, *Expert witness conferencing in Schiedsverfahren*, 1.; for the same view for quantum issues see Jones, 'Redefining the Role and Value of Expert Evidence', 39. See Lee, 'Selecting the Expert Witness as an Arbitrator in Patent Arbitrations'.

²⁴ Reiner and Aschauer, 'ICC Rules', 135.; Schäfer and Wilson, 'ICC Bulletin', 2009, 20:23 ff.; This can cause problems as in in *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 Jan 2016, para. 240 available at <https://jusmundi.com/en/document/decision/en-adem-dogan-v-turkmenistan-decision-on-annulment-friday-15th-january-2016> (accessed: 03.12.2022): "Indeed, the Tribunal offered contradictory reasons when it rejected the FMV standard for lack of sufficient evidence to assign value to the Claimant's investment, and then applied its own artificial valuation method not supported by evidence."

²⁵ Direnisa, 'Hukuk Muhakemeleri Kanunu Çerçevesinde Tahkimde Hakem Kararlarının Gerekçesi Üzerine Düşünceler', 1551.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:420.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 142.

²⁶ Schütze, Tscherning, and Wais, *Handbuch Des Schiedsverfahrens : Praxis Der Deutschen Und Internationalen Schiedsgerichtsbarkeit*, 222.

²⁷ Respondents in the recent 'Evidence in International Arbitration Report' released on 6 September 2023 overwhelmingly (82%) considered that experts have a significant impact on the outcome of the case. See Australian Centre for International Commercial Arbitration and FTI Consulting, 'Evidence in International Arbitration Report'.; Tanrıver, *Hukukumuzda Bilirkişilik*, 26.; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 98; O'Malley, *Rules of Evidence in International Arbitration*, 168; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 313; Weiss and Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz', 499.

Moses argues that even after the nomination of the arbitrator(s), choosing the expert is regarded as the second most crucial aspect of the proceedings.²⁸ The 2022 Queen Mary and Pinsent Masons survey revealed that 76% of the respondents selected technical expertise (tribunal/counsel/experts) as the most crucial procedural element once an arbitration commenced.²⁹

A diligent arbitral tribunal would care about the personality and qualifications of the expert. For this reason, there is a strong argument that the experts and their reports should be impartial, independent and objective, just like arbitrators or judges themselves are. However, as will be demonstrated below, in most scenarios, this is a challenging task to achieve for the experts appointed by the parties.

Just like in litigation, in international commercial arbitration, experts are either appointed by the arbitral tribunal *ex officio* or, upon request, by parties. International commercial arbitration is a field where the civil and common law legal traditions collide, and question marks appear in some areas.

Currently, in international arbitration proceedings, on average, experts are involved in two-thirds of arbitrations, and there is a tendency to rely more on party-appointed experts.³⁰ Experts are appointed by the parties in 90% of arbitrations and 10% of

²⁸ *Moses, The Principles and Practice of International Commercial Arbitration*, 197.

²⁹ '2022 International Arbitration Survey: Future of International Energy Arbitration Survey Report', 32.

³⁰ For statistical proof see '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process', 26.; Ünüvar, 'Experts: Investment Arbitration'.; O'Malley, *Rules of Evidence in International Arbitration*, 145.; Wilske and Markert, *Beck'scher Online-Kommentar ZPO*, § 1049 para. 9-10.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 182.; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 445.; For reasons see Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 421, 449, para. 29-04.; Trittmann and Kasolowsky, 'Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions', 330-40.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 2.; Proske, *Expert witness conferencing in Schiedsverfahren*, 26.

arbitrations by the tribunal.³¹ In particular, the expert opinion submitted by the parties brings along some problems (*party-appointed experts*).³²

Where the experts are appointed by parties, realistically, the relevant party selects an expert who will strengthen their hand in terms of their case.³³ Naturally, there is a beneficial relationship since the party will directly pay the expert. It is likely that this situation causes the expert to preserve its opinion and, as argued by practitioners and scholars, engage in some advocacy, which could lead to the expert not being impartial or independent and the report not being objective.³⁴

Blackaby et al. assert that “one of the most unsatisfactory features of procedure in international commercial arbitration is the prevailing practice whereby the parties present conflicting expert evidence on matters of complex technical opinion”.³⁵

The use of party-appointed experts is deemed a crucial part of international arbitration and not something that can be ostracised from the procedure.³⁶ Contrary to procedural rules specific to evidence at state courts, the absence of regulations regarding the burden of proof, the standard of proof, admissibility of or the weight to be given to expert opinion and factors affecting admissibility or weight are the reasons for issues.³⁷

³¹ ‘2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process’, 29.; In another recent survey, %96 of respondents argued for a right to rely on party-appointed expert evidence in ‘BCLP 2021 Survey’, 9.(“BCLP Survey”); For similar results see IBA Arbitration Guidelines and Rules Subcommittee, “Report on the Reception of the IBA Arbitration Soft Law Products, (International Bar Association, 2016), para. 45. (https://res.cloudinary.com/lbresearch/image/upload/v1474620896/soft_law_products_report_238116_954.pdf); Similarly Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 170.;

³² To be dealt in detail in Chapter IV; For critiques see Mosk, ‘The Role of Facts in International Dispute Resolution (Volume 304)’, 21.

³³ The BCLP Survey shows that party-appointed expert is preferred in arbitration, since parties and their representatives know more about the dispute and are more comfortable to select the appropriate expert to assist them and the tribunal on expertise required issues. The BCLP Survey was conducted with 289 international respondents where majority (75%) of respondents were from a common law background and 44% of respondents were experts from various fields. See ‘BCLP 2021 Survey’, 17.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 280–81.

³⁴ Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 214.

³⁵ Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 6.138.;

³⁶ Nessi, ‘Expert Witness: Role and Independence’, 72.; Roney, ‘Cross-Examination of Experts’, 111.

³⁷ Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 451.; Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Ankara: Seçkin, 2020), 88.

A common framework that predictably regulates the use of party-appointed experts and their roles and duties in the process is needed.³⁸ Due to the problems described above, the focus is to improve and strengthen the effective use of party-appointed experts via rules and methods.

In the United Nations Commission on International Trade Law (UNCITRAL) Model Law, statutory laws of states, ICSID Convention and Rules, UNCITRAL Arbitration Rules and the rules of many arbitral institutions, provisions are minimal and mostly non-existent.³⁹

Only the ICC and Belgian Centre for Arbitration and Mediation (CEPANI) stand out in the world of international dispute resolution in terms of the level of a certain degree of specific rules governing expert nomination, selection and appointment, the factors to consider in selecting them and the procedures to be followed to ensure the use. Additionally, the Chartered Institute of Arbitrator's Protocol for the Use of Party-Appointed Experts Witnesses in International Arbitration (CI Arb Protocol) and the IBA Rules on the Taking of Evidence in International Arbitration (*IBA Rules*) also merit special attention for its detailed rules on party-appointed experts that is important and widely used in international disputes.⁴⁰

There needs to be coherence in practice governing different aspects of expert use, and clarity in the rules and practices to be followed in this respect.⁴¹ The main aim of establishing rules and methods is to ensure the neutrality and objectivity of the experts and cost-efficiency in the proceedings, hence a more qualified result.⁴² In this regard, some non-binding rules and methods have been proposed to overcome flaws regarding

³⁸ Nessi, 'Expert Witness: Role and Independence', 72; Ünüvar, 'Experts: Investment Arbitration', para. 57.

³⁹ Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1183 fn. 529; Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 656.; Waincymer, *Procedure and Evidence in International Arbitration*, 945; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 191; Nessi, 'Expert Witness: Role and Independence', 101; Jones, 'Redefining the Role and Value of Expert Evidence', 24.

⁴⁰ Only %35 of practitioners share the view, that the IBA Rules provide sufficient protection against party-appointed experts not being objective, in 'BCLP 2021 Survey', 9.

⁴¹ de Chazournes et al., 'The Expert in the International Adjudicative Process: Introduction to the Special Issue', 339.

⁴² Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 92; Nessi, 'Expert Witness: Role and Independence', 101; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 4.

experts. For example, the expert's impartiality and objectivity declaration, the experts joining together to prepare a joint opinion instead of a unilateral written report by each expert or expert conferencing.

However, more than non-binding rules and methods is required to ensure the effective functioning of the expert mechanism. In the absence of formal rules of evidence in arbitration, the lack of a code of conduct and the procedures governing experts vary between cases, which leads to critics even discussing the legitimacy of arbitration as a dispute resolution mechanism between investors and states.⁴³ Hence, much more detailed legal provisions are needed in arbitration laws to strengthen the framework.

Additionally, a mandatory examination procedure is needed to prove that the rules and methods are working correctly. This procedure will be operated by the arbitral tribunal and the parties during the hearing phase. First of all, the arbitral tribunal should always examine the experts' competencies and experiences and whether they understand the issues of dispute in the case, the facts, and the subject for which a statement of expertise is sought. Subsequently, in the cross-examination process, the attorneys of the parties will cross-examine the expert presented by the opposing party and their opinion and will want to create a negative opinion before the arbitral tribunal regarding the competence, impartiality and objectivity of the expert and, ultimately the opinion he⁴⁴ presented. Thus, it is a must to have an examination when Party-Appointed Experts have been relied on.

At its thirty-eighth session, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III requested the Secretariat to consider how possible work on “damages and compensation” could be undertaken, stressing the role of experts (A/CN.9/1004, para.104). Accordingly, the Working Group declared, among others, “*to consider whether to undertake work on the development of **treaty provisions, guidelines, or standards** for tribunals to address the following issues ...viii. The issue of selections of experts and their ethical regime...*”

⁴³ See Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 458.

⁴⁴ For better readability, the male form will be used in the text. Nevertheless, all information in this document refers to members of both genders on equal terms.

Thus, the question this thesis will try to answer is: “What principles, rules or methods can solve the issues arising out of the use of party-appointed experts?”

Considering sources encountered in international arbitration, only some provisions refer to party-appointed experts and no clear duties and obligations are codified in institutional rules and national laws. Thus, remedies against experts appointed by the parties are limited, and tribunals are left with the challenging task of assessing their competence to decide such issues, as well as assessing disqualification requests or, primarily, the weight of two different professional opinions. This leads to both the parties’ efforts being wasted and the tribunal putting in a difficult position, which in the end induces to be timely and costly.⁴⁵

1.2. Aim

This thesis aims to examine the importance and impact of both tribunal-appointed and party-appointed experts in the realm of international arbitration proceedings (**Chapter II-III**), identify the problems resulting from the use of party-appointed experts in international arbitration proceedings (**Chapter IV**), examine the already proposed solutions to the issues (**Chapter V**) and critically assess which solutions would overcome the shortcomings to the problems encountered in practice, especially to the problems that lead to inefficiency of the proceedings (**Chapter V-VI**).

In particular, the thesis aims to achieve the following objectives:

- Determining the underlying reasons that lead to problems in practice originating from the use of party-appointed experts,
- Suggesting solutions to the issues in practice arising from the use of party-appointed experts,
- Contributing to more effective use of party-appointed experts in international arbitration proceedings,

⁴⁵ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282.

- Preventing the annulment of arbitral awards and the denial of recognition and enforcement of arbitral awards due to issues relating to party-appointed experts.

1.3. Scope and Limits

In this thesis, both tribunal-appointed and party-appointed experts who have an essential place in international commercial and investment arbitration, their qualifications, functions and roles, impact on proceedings, problems and possible solutions will be discussed within the scope of modern international commercial and international investment arbitration rules and practice. In principle, the comparison between court-appointed and tribunal-appointed experts and the use of experts before courts will not be included in the scope of the study. The liability of experts in international arbitration will not be examined either.

The author is conscious that experts are being encountered in the proceedings at domestic courts in litigation, many other international courts and tribunals such as the Court of Justice of the European Union (CJEU)⁴⁶, World Trade Organization (WTO)⁴⁷, International Court of Justice (ICJ)⁴⁸, Permanent Court of Arbitration (PCA), International Criminal Court (ICrC) the International Tribunal for the Law of the Sea (ITLOS)⁴⁹ and Iran-United States Claims Tribunal, however, will in principle not include those aspects, as it would enlarge the thesis to a multi-volume study. Nevertheless, references will be made in the footnotes as deemed fruitful since similarities can be drawn and applied uniformly in international dispute resolution.⁵⁰ For convenience reasons, while referring to investment and commercial arbitration, the term “international arbitration” will be used.

⁴⁶ See Van Damme, ‘The Assessment of Expert Evidence in International Adjudication’, 402.

⁴⁷ See Valles, ‘Different Forms of Expert Involvement in WTO Dispute Settlement Proceedings’, 367–78.; Plant, ‘Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement’, 464–72.

⁴⁸ See Bennouna, ‘Experts before the International Court of Justice: What For?’, 345–51.; White, *The Use of Experts by International Tribunals*, 109.; See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* where the court made use of, among other, naval experts. <https://www.icj-cij.org/en/case/1> (accessed: 03.06.2022)

⁴⁹ See Gautier, ‘Experts before ITLOS: An Overview of the Tribunal’s Practice’.

⁵⁰ Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 434.

The relationship of the experts with the arbitral tribunal and the parties, their role in the proceedings and their contribution to the formation of the arbitral award will be evaluated, considering various legislations, arbitration rules and soft law instruments. Additionally, problems in practice will be discussed, and solutions will be proposed. Furthermore, after the arbitral award, the effect of the expert and the expert opinion on set-aside and recognition and enforcement procedure will also be examined.

In this direction, international rules and practices, as well as legislation, case law and practices of many jurisdictions such as Turkey, Germany, Switzerland, England, USA, France, and Singapore, will be analysed and examined within the scope of the study. In this respect, the court practices of experts in countries subject to different legal systems will be mentioned only in a limited way and to the extent necessary in order to understand the notion of experts, analyse similarities and draw conclusions to propose solutions to the problems.

1.4. Research Methodology

In this study, more than one research method, such as theoretical, comparative and qualitative research, will be used. In this context, sources and elements of international arbitration proceedings like statutes of states, international arbitration rules, court and arbitration decisions, guidelines, surveys and doctrinal works will be used.

Considering, researching and analysing all these data sets, the problems and the elements that will serve a more effective and efficient use of experts will be determined theoretically and practically. In other words, possible issues in laws and rules will be determined from the relevant texts, expert-sourced problems in the arbitration practice will be determined by court decisions and arbitral awards published in free and paid databases, and suggestions will be presented to these problems both on the basis of norm (i.e., principles, guidelines, rules) and practice (i.e., method).

1.5. Literature Review and Gap

Among others, *Schneider, Jones, and Kantor* have been addressing the issues of experts in international arbitration for more than 30 years.

Kantor argues that “no protocol or code can regulate the ability of a party to hire an expert who is just a good actor or actress”⁵¹ and “who is able to appear objective while delivering fundamentally partisan evidence.”⁵²

Although the IBA Rules and the CIArb Protocol have concretely tried to prevent the problems over the years, they have left unanswered how an expert can, in fact, be independent and not merely show independence.⁵³ The IBA Rules require the report to contain a statement on the party-appointed expert’s independence. It is not clear from the language of Article 5 whether any lack of independence in that regard would disqualify or discredit the conclusions submitted by the party-appointed expert.

Thus, there appears to be significant disagreement on certain aspects of the use of party-appointed experts in the arbitral procedure, while certain vital legal concepts relevant to experts have different meanings for different individuals involved in the same legal system. Disagreements range from the roles played by party-appointed or tribunal-appointed experts, the use of invisible experts, admissibility, the burden of proof and the merits of methods such as cross-examination to the definitions of terms such as independence, impartiality and neutrality.

⁵¹ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 335.

⁵² Kantor, 335.

⁵³ Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 7.

CHAPTER II

USE OF EXPERTS IN INTERNATIONAL ARBITRATION

2.1. Overview

The *civil* and *common law* divide clearly appears once again when it comes to the usage of experts in international arbitration. As naturally expected, arbitrators and counsel bring their legal culture to the proceedings.⁵⁴

There are observable differences in the use of experts depending on which tradition is followed. There might even be various usages within the tradition.⁵⁵

⁵⁴ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 77.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 554.; Kaufmann-Kohler, 'Globalization of Arbitral Procedure', 1330. ; C Mark Baker and Lucy Greenwood, 'In Search of an Exemplary International Construction Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, vol 6 (Brill | Nijhoff 2013) 181.; Bernard Hanotiau, 'The Conduct of the Hearings' in LW Newman and RD Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (Third, Juris Publishing, Incorporated 2014) 636.; LW Newman and RJ Klieman, *Take the Witness: The Experts Speak on Cross Examination* (Juris Pub 2006) 55.; Jörg Risse and Heiko Haller, 'Die „IBA-Regeln“ Zur Beweisaufnahme in Der Internationalen Schiedsgerichtsbarkeit' in Walter Eberl (ed), *Beweis im Schiedsverfahren* (1., Nomos 2015) 118.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 554.; Uluç, *Evidence-Taking in National and International Arbitration: The Reconciliation of Civil Law and Common Law Traditions*, 25.; Allen, Jr., 'Overview: The Common Law Systems', 20.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 173.; Geisinger, 'Advocacy in International Commercial Arbitration: What For?', 9.

⁵⁵ "On the other hand, one must acknowledge the danger of supposing that there is a single, uniform 'common law approach'-to anything. The daily local practice experience of the Edinburgh attorney is likely to share little with that of her counterpart in Walla Walla. And even within the framework of a single jurisdiction and a single specialty practice area, each case is unique. Just as one can never step twice into the same river, no lawyer in any jurisdiction, whether grounded in civil or common law, will or can behave in precisely the same way in two different matters. The realisation that varying responses may be possible not only in different cases but also within a single case means that it is not really credible to speak confidently about an unswerving 'French approach' or 'American approach' in any given procedural arena" See Allen, Jr., 'Overview: The Common Law Systems', 15.; See for details of court practices of court and party-appointed experts in various countries Proske, *Expert witness conferencing in Schiedsverfahren*, 13–25.; Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 265.

In the *common law* legal tradition, which is followed by states like Australia, England⁵⁶, Singapore and the United States, expert opinion is generally adduced in an adversarial system where the parties bring their experts.⁵⁷ The appointment of a court or tribunal-appointed expert is relatively rare.⁵⁸ Some of these jurisdictions also permit court or tribunal-appointed experts.⁵⁹

In this approach of expert usage, the party engages early with an expert, provides all necessary documents, instructs the expert, outlines issues to be addressed, prepares the expert for testimony and examination, and pays his fee.⁶⁰

This kind of expert is preferred over tribunal-appointed experts primarily to have greater control of the evidence since the party is consciously engaging a specific expert who he believes would have a positive impact on the claim and is preparing the expert for examination to make sure the party's arguments succeed.⁶¹ Additionally, despite their opposing positions, the party-appointed experts bring diverging views⁶², and hence, the authors argue that this creates a better picture for the tribunal when rendering a decision.⁶³

⁵⁶ Although it is part of the common law, the revised Code of English Civil Procedure has adopted a more civil law approach by encouraging single joint experts and promote the neutrality of experts. See for details CPR 35 in justice.gov.uk/courts/procedure-rules/civil/rules/part35; Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu Ile Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması', 84.

⁵⁷ Allen, Jr., 'United States', 289.; Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 61.; Schiau, 'An Arbitration Dilemma', 335.

⁵⁸ Allen, Jr., 'Overview: The Common Law Systems', 19.

⁵⁹ Elsing and Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration', 59–65.; Lim, 'Tribunal-Appointed Experts in International Arbitration', 208; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 1.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274.; Proske, *Expert witness conferencing in Schiedsverfahren*, 13.; Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu Ile Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması', 80.; See Toraman, 'Anglo-Amerikan Hukukunda Mahkeme Tarafından Tayin Edilen Bilirkişiler Court-Appointed Experts in Anglo-American Law'; Allen, Jr., 'United States', 289.

⁶⁰ Liebscher, Mosimann, and Schmidt-Ahrendts, 'Handbuch Schiedsgerichtsbarkeit', 403.; Proske, *Expert witness conferencing in Schiedsverfahren*, 28.

⁶¹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282.; Proske, *Expert witness conferencing in Schiedsverfahren*, 27, 48.; Hoffmann and Shetty, 'Evidence and Hearings', 215.

⁶² Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 577–78.

⁶³ Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 154.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 283.

Civil law jurisdictions like Türkiye, Germany, Switzerland, Austria and France, where the adjudicators bear to a certain degree of investigative responsibilities, adopt a lesser adversarial system of taking evidence, compared to the stark adversarial approach in most common law countries.⁶⁴ In this approach, arbitrators are endowed with broad powers.⁶⁵ As a result, court or tribunal-appointed experts are the leading practice in this approach.⁶⁶

Although arbitral statutes and rules foresee the appointment of party-appointed experts, in countries like Germany and Switzerland, these are seen as part of the party's own submissions and have far less value, in contrast to a court or tribunal-appointed expert.⁶⁷

International arbitration is a melting pot where the different legal traditions collide and merge to a certain degree, at least in some aspects.⁶⁸ As a result, both the tribunal and party-appointed experts are foreseen in the UNCITRAL Model Law, international agreements, arbitration rules, and guidelines and applied in practice.⁶⁹ As a result, common law tools such as the use of party-appointed experts and cross-examination became ordinary procedures even in an international arbitration case where the tribunal and parties both have a civil law background.⁷⁰

⁶⁴ Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.; Reiner, 'Austria', 67.

⁶⁵ Reiner, 'Austria', 21.

⁶⁶ Poudret and Besson, *Comparative Law of International Arbitration*, 560.; For instance in Türkiye and France, experts are being appointed from a formally qualified list of independent experts.; Proske, *Expert witness conferencing in Schiedsverfahren*, 14.; For Austria see Reiner, 'Austria', 75.; Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 61.

⁶⁷ Lim, 'Tribunal-Appointed Experts in International Arbitration', 208.; Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 79.

⁶⁸ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 81.; Van Houtte, 'Party-Appointed Experts and Tribunal-Appointed Experts'.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 1; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 45.

⁶⁹ Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 271.; Proske, *Expert witness conferencing in Schiedsverfahren*, 25.; Ferhan Yıldızlı, *Uluslararası Tahkimde Zaranın Değerlendirilmesi* (Ankara: Seçkin, 2020), 87.

⁷⁰ Proske, *Expert witness conferencing in Schiedsverfahren*, 27.; Atlı, 'Uluslararası Tahkim Sempozyumu', 142.; Patocchi arguing in the same direction in Uşan, *Uluslararası Tahkim Sempozyumu 25-26 April (Nisan) 2019*, 194.

Numbers show that experts are appointed more regularly in common lawyers' arbitrations (77%) than in civil lawyers' arbitrations (57%).⁷¹ Stakeholders in international arbitration find party-appointed experts more effective (43%), while a slightly smaller number finds (31%) tribunal-appointed experts more effective. In support of the former, some argue that tribunal-appointed experts are exceptional in ICC Arbitration practice.⁷² Consistent with domestic litigation practice and culture, more civil lawyers (43%) than common lawyers (19%) find tribunal-appointed experts more effective.⁷³

A survey shows that parties and lawyers with knowledge of the dispute are better placed than the tribunal to select the appropriate experts.⁷⁴ Some argue even that tribunal-appointed experts are exceptional in ICC Arbitration practice.⁷⁵

Appointed either by the tribunal or by the parties in international arbitration, experts can be categorised based on the subject they provide expertise on as technical (scientific), legal and quantum (valuation) experts.

The general function of experts is to provide a well-reasoned, objective, and impartial opinion.⁷⁶ Each of these experts clarify disputed or related issues that have a material outcome of the case, which the arbitrators are not able to do due to lack of special and technical knowledge. Thus, they support arbitral tribunals in the decision-making process.⁷⁷

⁷¹ '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process', 29. The interviewees who preferred tribunal-appointed experts, said that party-appointed experts often act as partisan advocates for the party who appointed them, which regularly results to the appointment of a third (tribunal-appointed) expert. According to them, a system whereby an expert is appointed by the tribunal from the outset would bring a more neutral expert opinion, as well as save time and money; See Lim, 'Tribunal-Appointed Experts in International Arbitration', 207–8.

⁷² István Varga, *Beweiserhebung in Transatlantischen Schiedsverfahren: Eine Suche Nach Kompromissen Zwischen Deutscher Und US-Amerikanischer Beweisrechtstradition* (Nomos 2006) 212.

⁷³ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457.; Nessi, 'Expert Witness: Role and Independence', 73–74.

⁷⁴ 'BCLP 2021 Survey', 17.

⁷⁵ Varga, *Beweiserhebung in Transatlantischen Schiedsverfahren: Eine Suche Nach Kompromissen Zwischen Deutscher Und US-Amerikanischer Beweisrechtstradition*, 212.

⁷⁶ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 492, 495.

⁷⁷ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 95; O'Malley, *Rules of Evidence in International Arbitration*, 171; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 182.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 265.

Like witnesses of fact, experts are being examined and cross-examined on their opinions.⁷⁸

2.2. Definition

Starting with the literal definitions, Merriam-Webster Dictionary defines an expert as “one with the special skill or knowledge representing mastery of a particular subject.”⁷⁹

The Oxford Dictionary defines an expert as “a person with special knowledge, skill or training in something.”⁸⁰ The Cambridge Dictionary defines an expert as “a person with a high level of knowledge or skill relating to a particular subject or activity.”⁸¹

The Black’s Law Dictionary defines an expert as “a person that had knowledge and skills learned over years of experience in a subject. Their opinion can be helpful in problem-solving.”⁸²

Thus, an expert differentiates himself from a non-expert with a high level of special knowledge, skill, training or experience in a particular subject or activity.

Experts are, in essence, qualified, impartial, objective, and reputable individuals or organisations who have special training, education, skills or knowledge and experience falling within their expertise, which can be consulted for the resolution of a dispute before a court and/or tribunal.⁸³

In the international arbitration context, an expert is someone who gives his opinion on specific matters before an adjudicated case to help the arbitrators solve the issues in a case with the help of the given opinion.⁸⁴

⁷⁸ Wilske and Gack, ‘Expert Evidence in International Commercial Arbitration’, 79.

⁷⁹ Merriam-Webster.com Dictionary, “expert,” accessed July 3, 2022, <https://www.merriam-webster.com/dictionary/expert>.

⁸⁰ Oxford Learner’s Dictionaries, “expert”, accessed July 3, 2022, https://www.oxfordlearnersdictionaries.com/definition/english/expert_1

⁸¹ Cambridge Dictionary, “expert,” accessed July 3, 2022, <https://dictionary.cambridge.org/dictionary/english/expert>

⁸² The Law Dictionary, “expert”, accessed July 3, 2022, <https://thelawdictionary.org/expert/>.

⁸³ Tanrıver, *Hukukumuzda Bilirkişilik*, 25.; See Çayan, *Medeni Usul Hukukunda Bilirkişilik Müessesesi*, 3 ff.; Van Damme, ‘The Assessment of Expert Evidence in International Adjudication’, 402; Mosk, ‘The Role of Facts in International Dispute Resolution (Volume 304)’, 126.

⁸⁴ O’Malley, *Rules of Evidence in International Arbitration*, 145.

Experts explain special factual situations in which the arbitrator cannot thoroughly rely on their own knowledge derived from the case.⁸⁵ The expert contextualises the facts and the evidence.⁸⁶

Experts should not only have extended experience and track records in the field but also a good understanding of how to engage with adjudicative bodies and how to prepare a proper readable opinion directed at an average adult person.⁸⁷

A negative definition also helps to reinforce the understanding; thus, stating what an expert is conceptually not might diminish confusion. Since an expert does not, in principle, identify, clarify or interpret the law, opine on how the law is to be applied to the facts, take into account and weigh the evidence, he is not an adjudicator.⁸⁸ Additionally, the expert does not frame legal claims, develop legal arguments or present evidence, which is the role of the legal counsel. Hence, he is not a lawyer representing the client in the case.⁸⁹

Although the expert will highly likely testify before the arbitral tribunal, the expert is not a witness. A witness is someone who makes representations to the adjudicators about the veracity of facts.⁹⁰ Notwithstanding the frequent use of the term “expert witness”, the role of a witness and the role of an expert are distinct and should not be confounded.⁹¹ The witness will testify on knowledge of a fact that he/she has been witness to through his/her sense organs, whereas the expert will state an opinion based on his experience and knowledge on a particular matter.⁹²

⁸⁵ Tanrıver, *Hukukumuzda Bilirkişilik*, 25.

⁸⁶ Flett, ‘When Is an Expert Not an Expert?’, 355.

⁸⁷ See Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 662.

⁸⁸ Flett, ‘When Is an Expert Not an Expert?’, 354.

⁸⁹ Flett, 354.

⁹⁰ Also See Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 411.

⁹¹ See Taşdemir, ‘İngiliz ve Amerikan Medeni Yargılamasında Uzman Tanıklık’.

⁹² Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 411–12.; Akıncı, *Milletlerarası Tahkim*, 341.; See Sandifer, *Evidence Before International Tribunals*, 382–402.

2.3. General Function, Role and Position of Experts

Experts are primarily appointed to clarify disputed issues that have a material outcome to the case, which the arbitrators are not able to do due to a lack of special and/or technical knowledge and thus support tribunals in the decision-making process.⁹³ Experts do generally not relate to the direct reconstruction of past events, although they may elucidate causes and effects and can establish facts.⁹⁴

If the arbitrator on its own can access the required knowledge to decide the matter, no expert is needed, with the condition that parties have been given a fair opportunity to address the issues on which the arbitral tribunal relies.⁹⁵ However, this does not mean that the arbitrator should act as both expert and arbitrator (“in camera expertise proceeding”).⁹⁶ The contrary position would mean to out-source the adjudicatory

⁹³ Lew, ‘The Need for Expert Evidence?’, 249.; Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 95.; See D’Aspremont and Mbengue, ‘Strategies of Engagement with Scientific Fact-Finding in International Adjudication’.; O’Malley, *Rules of Evidence in International Arbitration*, 171.; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 182.; White, *The Use of Experts by International Tribunals*, 163.; Kamyra-Lukoda, ‘Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues’, 79.; Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 1.; Proske, *Expert witness conferencing in Schiedsverfahren*, 3.

⁹⁴ Erdoğan and Üçüncü, ‘Bilirkişilik Kurumu ve Bilirkişi Raporunun Delil Değerine İlişkin Bazı Sorunlar’, 359–60.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 169.; Meier, ‘Germany’, 1., para. 5.

⁹⁵ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 95.; O’Malley argues that even if an arbitrator is an expert in a field relating to the dispute since the role of the arbitrator is evaluating the evidence and not producing it, he cannot act as an expert itself. See O’Malley, *Rules of Evidence in International Arbitration*, 175–76. Similarly, Theune, ‘DIS Rules’, 266.; The ICC Commission on Arbitration and ADR foresees in its report on “Resolving Climate Change Related Disputes through Arbitration and ADR” that any technical knowledge or understanding by a non-lawyer arbitrator who is an expert in other scientific or technical fields would nevertheless need to be provided to the parties for comment on the relevant matter, before being applied in making any award or decision. See ‘ICC Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR’, 20, para. 5.8.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 290.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 218.; See Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration*, 110, para. 5.2.

⁹⁶ Theune, ‘DIS Rules’, 266.; Lachmann, *Handbuch Für Die Schiedsgerichtspraxis*, para. 1533.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 219.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 286; Schäfer and Wilson, ‘ICC Bulletin’, 2021, 65.:

“If the dispute involves specialized knowledge other than the applicable law (which falls squarely within the tribunal’s duties) and only one member of a three-arbitrator tribunal possesses the required expert knowledge, the situation becomes more complex because of the need to avoid a de facto in camera expertise proceeding. In other words, unless the parties expressly agree, it is neither expected nor recommended that one arbitrator will perform an independent expert investigation or evaluation on which the other arbitrators would rely in making their decision. Many problems exist with this approach, not the least of which is that it reduces the parties’ ability to comment on, ask questions about and, if appropriate, challenge what the expert has done.”

mandate⁹⁷ and harm not only the cost-efficiency of the proceedings, but the right to due process.⁹⁸ This should, however, be differentiated if the specific arbitrator was chosen intentionally as someone who is an expert on a subject, e.g. construction engineering.⁹⁹

The expert should help the tribunal to form a proper legal decision.¹⁰⁰ “The experts’ role cannot be considered in isolation but is always relative to the overriding competence and function of the tribunal.”¹⁰¹ “The parties’ confidence factor in the arbitrators’ ultimate award can be greatly enhanced by the belief that crucial issues have been given the benefit of exposure and analysis by an independent expert.”¹⁰²

Experts may assist the tribunal in identifying the proper sources and offer additional support for a factual assertion, opine on conflicting legal rules and conflicting evidence, help the tribunal in selecting from the available facts or evidence, and express views on the burdens of proof along with the weight of other evidence relative to applicable legal standards.¹⁰³ (Tribunal-appointed) experts may evaluate and summarise the opinions of party-appointed experts and add further interpretations for the tribunal.¹⁰⁴

Furthermore, the expert can be the original source of facts in the sense that the expert observed, assessed and organised the facts after an inspection on sight.¹⁰⁵

⁹⁷ Liebscher, Mosimann, and Schmidt-Ahrendts, ‘Handbuch Schiedsgerichtsbarkeit’, 403.

⁹⁸ Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 412; Zuberbühler et al., *IBA Rules of Evidence*, 154.; O’Malley, *Rules of Evidence in International Arbitration*, 167.

⁹⁹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 219.; Schütze, ‘Beweisaufnahme Nach Civil Law’, 31, 33.; Musielak and Voit, *ZPO*, § 1042, para. 22.

¹⁰⁰ Senogles, ‘Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle’, 363.

¹⁰¹ White, *The Use of Experts by International Tribunals*, 164.

¹⁰² Allison and Holtzmann, ‘The Tribunal’s Use of Experts’, 282.

¹⁰³ Tanrıver, *Hukukumuzda Bilirkişilik*, 25.; Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 418.; White argues that the expert should not identify which facts are relevant and significant, nor assess and weigh them. White, *The Use of Experts by International Tribunals*, 165.

¹⁰⁴ Van Damme, ‘The Assessment of Expert Evidence in International Adjudication’, 402.; O’Malley, *Rules of Evidence in International Arbitration*, 174.

¹⁰⁵ Tanrıver, *Hukukumuzda Bilirkişilik*, 25. ; Van Damme, ‘The Assessment of Expert Evidence in International Adjudication’, 402.; O’Malley, *Rules of Evidence in International Arbitration*, 186.; Özbek, *Tahkim Hukuku*, II:1448.

The expert can be relied upon in support of the validity and general acceptance of using a specific (scientific) methodology and of the results of its application to the facts in the case.¹⁰⁶

While this is the general rule and application, there are circumstances where experts have other roles. For instance, some party-appointed experts may help to construct the pleadings of the case, even before the proceedings start.¹⁰⁷

The expert is appointed not only to present the position of the appointer but also sometimes to oppose the counterparty's expert opinion or even the opinion of the tribunal-appointed expert.¹⁰⁸

Experts (ought to) merely present their professional opinions in a case. It would be inappropriate to accept that the expert's conclusions are the truth or even the fact itself, but the tribunal will establish the facts based on the expert's opinion and might even draw separate conclusions based on legitimate reasons.¹⁰⁹

So, the presence of an expert does not in itself mean that the arbitrator will directly, without weighing and assessing the opinion, incorporate the opinion into the award. This would be delegating its function as adjudicator to the expert, which is not permitted in international arbitration.¹¹⁰ The arbitrator will have the final word on how

¹⁰⁶ Proske, *Expert witness conferencing in Schiedsverfahren*, 3; Van Damme, 'The Assessment of Expert Evidence in International Adjudication', 403.

¹⁰⁷ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 578.; Parlett, 'Parties' Engagement with Experts in International Litigation', 441.

¹⁰⁸ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 94–95.

¹⁰⁹ Bennouna, 'Experts before the International Court of Justice: What For?', 345–46.

¹¹⁰ Blackaby et al., *Redfern and Hunter on International Arbitration (Student Version)*, para. 6.135; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 97; Zuberbühler et al., *IBA Rules of Evidence*, 154; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 312; Schneider, 'Technical Experts in International Arbitration', 452; White, *The Use of Experts by International Tribunals*, 164.; See Suez, Sociedad General De Aguas De Barcelona S.A. And Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19) Decision On Argentina's Application For Annulment, para. 306:

"...endogenous factors amounted to a "significant" contribution within the meaning of Article 25(2)(b) and thus excluded the state of necessity defense. This, however, is a legal assessment on which neither of the economic expert reports could opine. In fact, if the Tribunal had looked for guidance on this legal question in any of the expert reports, it could have been found to have committed the same annulable error that the Enron committee found, i.e., deference to an economic expert report where the tribunal should have made its own legal assessment of a requirement under international law."

to assess the disputed issues and whether or not to rely on the expert's opinion.¹¹¹ Subsumption will be done by the arbitrators and not the experts.¹¹²

Investment arbitrators, counsel, and experts generally have the view that, regardless of whether the experts are acting on the instruction of the party or the tribunal, the expert's duty is owed to the tribunal in both cases.¹¹³

Despite practical differences, there is overall consensus on the principle that the general function of experts is to provide a well-reasoned, independent and impartial opinion.¹¹⁴ Nevertheless, there are positions that the party-appointed expert's additional role is to support the appointing party in its arguments.¹¹⁵

2.4. Types of Experts

In this section, the various types of experts encountered in international arbitration will be categorised, and information on their qualifications and peculiarities will be stated. Experts can be categorised based on the appointing authority (2.4.1) or based on the subject (2.4.2) on which they will give an opinion.

Based on the appointing authority, experts are either appointed/chosen by the parties (2.4.1.1.) or they are appointed by the arbitral tribunal (2.4.1.2). Based on the subject the expert will provide an opinion on, they can be classified as technical/scientific experts (2.4.2.1.), legal experts (2.4.2.2.) and quantum (valuation) experts (2.4.2.3.).

Generally, in international arbitration, more than one category of experts is used in a single case.¹¹⁶

¹¹¹ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 97.; Lörcher, 'Liber Amicorum Karl-Heinz Böckstiegel', 485.

¹¹² Tanrıver, 'Hukuk Yargısı Bağlamında Bilirkişilikle İlgili Temel Problemler ve Çözüm Arayışları', 576.

¹¹³ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 492, 495.

¹¹⁴ de Chazournes et al., 492, 495.

¹¹⁵ de Chazournes et al., 492, 495.

¹¹⁶ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.

2.4.1. Based on the Appointing Authority

2.4.1.1. Party-Appointed Experts¹¹⁷

The common law system is heavily adversarial in nature, which means that the parties of the case bear the primary responsibility to establish the facts of the case. Party-appointed experts are one of the characteristic elements of this legal culture.¹¹⁸

2.4.1.1.1. Definition

A party-appointed expert can be defined as a person or organisation appointed by a party in order to report on specific issues determined by the party (IBA Rules Definitions).¹¹⁹

As the definition indicates, this type of expert is an expert in the sense of the definition made in Section 2 of Chapter 2¹²⁰; however, he is instructed and compensated by a party to the dispute.¹²¹ This distinguishes it from the tribunal-appointed expert and has a different legal nature.¹²²

Parties in international arbitration practice generally desire to have control of experts from the selection until the cross-examination.¹²³ This is why parties appoint their own expert.¹²⁴ Parties, by choosing their expert, can put forward their case on why the evidence of their expert should be preferred to that of the counterparty.¹²⁵ This brings

¹¹⁷ As party-appointed experts will be comprehensively dealt in the next chapter, only the definition and function of party-appointed experts is mentioned in this part.

¹¹⁸ Nessi, 'Expert Witness: Role and Independence', 75.

¹¹⁹ Pekcanitez, 'Özel Uzman', 397.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 212.; For definitions in Turkish law see Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 30–31.; Aygül, *Milletlerarası Ticari Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 271.; Schneider, 'Technical Experts in International Arbitration', 447.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 124.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 22.

¹²⁰ See page

¹²¹ Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 67.

¹²² O'Malley, *Rules of Evidence in International Arbitration*, 145.; Atalay, 'Pekcanitez Usûl', 2021, 2958.

¹²³ Schiau, 'An Arbitration Dilemma', 335–36.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 20.

¹²⁴ O'Malley, *Rules of Evidence in International Arbitration*, 145.

¹²⁵ Bennouna, 'Experts before the International Court of Justice: What For?', 346.

much scepticism as to their objectivity and impartiality, which is expected from experts.¹²⁶

Party-appointed experts are criticised for not being objective and “cherry-picking” facts and information to ensure support for the party appointing them.¹²⁷

2.4.1.1.2. Function and Role

As it is the general function of experts in general, party-appointed experts function to present the arbitral tribunal with an opinion on certain expertise required in technical, scientific, or legal circumstances, plus helping the parties to construct and substantiate their arguments.¹²⁸ Another function of the party-appointed expert is to use it in negotiating and settling the dispute even prior to the initiation of the arbitral proceedings.¹²⁹

The reason why party-appointed experts are preferred over tribunal-appointed experts can be because the parties seek support for their arguments, and they help to construct the pleadings of the case, even before the proceedings start.¹³⁰

Party-appointed experts are also appointed by the parties to convince the tribunal that disputed facts occurred as they allege it, having a representative nature of the facts¹³¹, thus having an evidence-like function.

¹²⁶ Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 190.

¹²⁷ Flett, ‘When Is an Expert Not an Expert?’, 356.

¹²⁸ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274.; Proske, *Expert witness conferencing in Schiedsverfahren*, 29.; Roney, ‘Cross-Examination of Experts’, 111.

¹²⁹ Proske, *Expert witness conferencing in Schiedsverfahren*, 29.

¹³⁰ Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 61–62.; Atalay, ‘Pekcanitez Usûl’, 2021, 1958.; Pekcanitez, ‘Özel Uzman’, 399.; Tanrıver, *Hukukumuzda Bilirkişilik*, 31.; Akil, ‘Bilirkişi-Uzman Tanık Ayrımı’, 173.; Karlı, *Medeni Muhakeme Hukuku*, 622.; Sarısözen, ‘Özel Bilirkişi (Uzman Görüşü)’, 1703.; Çayan, *Medeni Usul Hukukunda Bilirkişilik Müessesesi*, 10.; Arslan et al., *Medenî Usul Hukuku*, 472. Özbek, ‘Uzman Görüşünün Yargılamada Değerlendirilmesi’, 136.; Budak and Karaaslan, *Medenî Usul Hukuku*, 2022, 311.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 578.; Parlett, ‘Parties’ Engagement with Experts in International Litigation’, 441.; Proske, *Expert witness conferencing in Schiedsverfahren*, 29.

¹³¹ See Atalay, ‘Delil Kavramı Üzerine’, 131–32.

The party-appointed expert may be appointed to affect, for or against, the tribunal-appointed expert's opinion.¹³²

2.4.1.2. Tribunal-Appointed Experts

Tribunal-appointed experts are seen more often in countries following the civil law legal culture, as principally, the inquisitorial approach is accepted to establish facts in this system.

The inquisitorial system primarily burdens the court or tribunal to engage in the fact-establishing process.¹³³ That's why civil law adjudicators tend to rely on the experts appointed by them and give less weight to expert opinions provided by the parties.¹³⁴

2.4.1.2.1. Definition

A Tribunal-Appointed Expert is a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal.¹³⁵ These specific issues are matters that should be explained to the arbitral tribunal since it needs guidance due to a lack of special knowledge so that it can decide on the dispute.¹³⁶

The tribunal-appointed expert is an independent natural or legal person who is engaged by the arbitral tribunal to act in the present case for the sake of clarifying the missing knowledge that is needed for the tribunal to adjudicate the case and render an award.¹³⁷

¹³² Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 454; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 64.; Toraman, *Medeni Usul Hukukunda Bilirkişi İncelemesi*, 87. Pekcanitez, 'Özel Uzman', 407.; Ağırman, *Milli & Milletlerarası Tahkim*, 464.

¹³³ Nessi, 'Expert Witness: Role and Independence', 74.

¹³⁴ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 282.

¹³⁵ IBA Rules, Definitions.

¹³⁶ O'Malley, *Rules of Evidence in International Arbitration*, 169.; In an ICC case where the tribunal was composed of a lawyer with knowledge on Hungarian law, the tribunal rejected to appoint an expert on that matter. See Importer in the UK v Exporter in Hungary, Final Award, ICC Case No. 5418, 1987', in Van Den Berg, *ICCA Yearbook Commercial Arbitration 1988*, XIII:102.

¹³⁷ O'Malley, *Rules of Evidence in International Arbitration*, 169.; For appropriateness for legal persons to be an expert see Schneider, 'Technical Experts in International Arbitration', 456.

The tribunal-appointed expert has expertise in one more area and is expected to inform the tribunal in those areas in due course of the proceedings.

2.4.1.2.2. Legal Basis

The power of the tribunal to appoint experts is based on the UNCITRAL Model Law, international agreements, arbitration laws, arbitration rules, parties' agreements, and soft law instruments.¹³⁸

UNCITRAL Model Law Art. 26(1), EUVIPA Chapter 3 Section A Art. 3.52¹³⁹, TIAL Art. 12(A)¹⁴⁰, Turkish CPC Art. 431¹⁴¹ and ICC Arbitration Rules Art. 25(2)¹⁴² and IBA Rules Art. 6 and Prague Rules on the Efficient Conduct of Proceedings in International Arbitration Art. 6.1 ("Prague Rules") is an example of an explicit provision granting the tribunal the authority to appoint experts.

Even if there are no provisions in the applicable statute or the arbitration rules, the parties may agree to empower the arbitral tribunal to appoint such expert expressly in the arbitration agreement or during the proceedings. Nevertheless, even in the case of a lack of express authorisation, it is widely accepted that the tribunal has the inherent power to appoint an expert if the circumstances require it.¹⁴³

It is also possible that parties mutually wish to derogate the tribunal's power to appoint an expert despite the applicable law to the arbitration and the rules foreseeing the possibility.¹⁴⁴ Since the UNCITRAL Model Law Art. 19 and many following statutory

¹³⁸ See Lim, 'Tribunal-Appointed Experts in International Arbitration', 209–10.; Dayınlarlı, *Milletlerarası Tahkim Rehberi*, 80–81.; Dayınlarlı, *UNCITRAL Kurallarına göre Uzlaşma ve Tahkim*, 100.; Demir Gökyayla, 'Tahkimde Taraflarca Getirilme İlkesi ve Delil İkamesi', 85.

¹³⁹ "The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in the proceedings."

¹⁴⁰ "(A) The arbitral tribunal may; 1. appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal"

¹⁴¹

¹⁴² "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned."

¹⁴³ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 309; Nessi, 'Expert Witness: Role and Independence', 80; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 327–28.

¹⁴⁴ Konrad and Hunter, 'LCIA Rules', 466; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 311.

provisions regulate party autonomy as a fundamental principle in conducting the proceedings; parties can expressly exclude the power of the tribunal to appoint experts.¹⁴⁵ In such a scenario, tribunals shall refrain from appointing experts.¹⁴⁶ Such agreement brings the risk of not establishing the facts and proving arguments, which the parties have to endure. Nevertheless, parties could still be able to engage with a party-appointed expert.¹⁴⁷

When analysing the above provisions that foresee the appointment of tribunal-appointed experts, there are two conditions that enable (or even require) the tribunal to appoint an expert when there is a 1) specific technical issue and 2) the opinion of an expert is necessary.¹⁴⁸ Both conditions must be present at the same time, as the contrary approach would violate the duty of the tribunal to assess and weigh the evidence and render its decision.¹⁴⁹

The tribunal should inform the parties explicitly, consult them on whom to appoint and then appoint the expert.¹⁵⁰ This would be in line with the international arbitration

¹⁴⁵ Zuberbühler et al., *IBA Rules of Evidence*, 156.; Poudret and Besson, *Comparative Law of International Arbitration*, 560.; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 311.; for circumstances for disregarding such agreement see Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 497.

¹⁴⁶ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 328.

¹⁴⁷ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 311.; If the party-appointed experts are not able to help the tribunal understand the expert-required issue, the parties risk, in such an occasion, that the tribunal rules against the party bearing the burden of proof. If not precluded by the parties, the claiming party might have succeeded in its claim if the tribunal had been able to appoint an independent expert to clarify the matter.

¹⁴⁸ Lim, 'Tribunal-Appointed Experts in International Arbitration', 216; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 285; ICC, 'ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration', para. 62; Schäfer and Wilson, 'ICC Bulletin', 2021, 64.

¹⁴⁹ See Contractor (European Country), Contractor (Middle Eastern Country) v. Owner (Middle Eastern Country) (Final Award), ICC Case No. 4629, 1989 in Van Den Berg, *ICCA Yearbook Commercial Arbitration 1993*, XVIII:15.: "The arbitral tribunal 'may appoint one or more experts, define their Terms of Reference, receive their reports and/or hear them in person' (Art. 14(2) Rules of the ICC). The arbitrators are at liberty to decide whether such an appointment is necessary for the solution of the case. Such an expert may be useful or even necessary for technical questions. In the present situation, such utility is in no way established. On the contrary, the questions which are typically in the field of activity of an expert have already been covered by the [first expert's] report. This report describes the work done by the defendant party and is necessary for the determination of the payment claimed by the claimants. Other questions such as the ones quoted by respondent are to be resolved by the arbitrators. Moreover, it is their duty to interpret the contractual documents and evidence filed by the parties. Appointing a second expert would lead to a replacement of the arbitrators by an expert. Therefore, independently from the question of the cost of an expertise, the request of respondent is to be dismissed."

¹⁵⁰ O'Malley, *Rules of Evidence in International Arbitration*, 166–67.; Reiner/Aschauer argues that in practice some tribunals engaged an unofficial or behind-the-scenes expert, described as *phantom expert*.

culture, where the proceedings are generally planned and conducted with the participation and views of the parties discussed in case management conferences. The tribunal-appointed expert is appointed and constructed by the arbitrators and paid, in principle, by both parties under arbitration costs.¹⁵¹ In the arbitration proceedings, the arbitral tribunal concludes a work contract with the expert on behalf of the parties so that the fee claim is directed against the parties.¹⁵²

2.4.1.2.3. Qualifications, Function and Role

Before officially appointing and assigning the expert with his task, the expert should submit to the tribunal and the parties a curriculum vitae indicating qualifications and proving that he has the required expertise to fulfil the assigned duty.¹⁵³

Besides expertise, the expert is required to be impartial and unbiased, like an arbitrator, and must submit a declaration thereto, generally prior to the appointment.¹⁵⁴ This declaration has to indicate that he is independent of the parties, their attorneys, advisers and the tribunal and disclose any existing facts or circumstances which may give rise to doubts as to his independence and impartiality.¹⁵⁵

This is a problematic approach, because of procedural fairness and the probable delegation of adjudication authority. For an internal advisor, explicit consent should be required. See Reiner and Aschauer, 'ICC Rules', 136; Parlett, 'Parties' Engagement with Experts in International Litigation', 445; Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement', 470; 'BCLP 2021 Survey', 4; Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1182.; Dayınlarlı, *Milletlerarası Tahkim Rehberi*, 81.; Dayınlarlı, *UNCITRAL Kurallarına göre Uzlaşma ve Tahkim*, 100.

¹⁵¹ Zuberbühler et al., *IBA Rules of Evidence*, 171.; The tribunal might rule according to the applicable law to the arbitration procedure that the losing party shall bear, among other, the expert costs.

¹⁵² BGH NJW 1965, 298; Lörcher, 'Liber Amicorum Karl-Heinz Böckstiegel', 487.; Musielak and Voit, *ZPO*, § 1049, para. 8; Wilske and Markert, *Beck'scher Online-Kommentar ZPO*, § 1049, para. 2.1. For the view that the claim should be against the arbitrator, see Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 22.

¹⁵³ Zuberbühler et al., *IBA Rules of Evidence*, 161.

¹⁵⁴ Tanrıver, *Hukukumuzda Bilirkişilik*, 31.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:463.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 190.; Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 434.; Lim, 'Tribunal-Appointed Experts in International Arbitration', 212, 221.; White, *The Use of Experts by International Tribunals*, 183.; Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1184.; Nesi, 'Expert Witness: Role and Independence', 74.; Some Arbitration rules refer to the arbitrators' requirement of independence and impartiality for tribunal-appointed experts; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 450.; See that this is not strictly required under UK Arbitration Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 272.

¹⁵⁵ Zuberbühler et al., *IBA Rules of Evidence*, 162.; Born, *International Commercial Arbitration*, 2035.; Fouchard, Gaillard, and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 579.; Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration*, 121.

The tribunal-appointed experts' independence and impartiality requirement should be understood very strictly in contrast to the party-appointed expert. The expert can be challenged, and the appointment would be terminated if it is proven that there are justifiable doubts that the expert lacks those qualifications.¹⁵⁶ Any partiality exercised by the tribunal-appointed expert may be interpreted as corrupt and, under the New York Convention and the UNCITRAL Model Law, may be a ground to challenge to enforcement of the arbitral award.¹⁵⁷

Independence is actually a precondition for having a neutral expert opinion. Impartiality, on the other hand, serves for objectivity. Both conditions are indispensable for a tribunal-appointed expert, even without explicit provisions in arbitration laws or rules.¹⁵⁸

The BGH decided that the tribunal-appointed expert can only be challenged if the violation of its duty of disclosure raises doubts about his impartiality.¹⁵⁹

When the expert is appointed by the tribunal, his central role is to translate the technical issues that are foreign to the tribunal so as to facilitate understanding by the tribunal members (*evidentiary role*).¹⁶⁰

Some scholars argue that experts are also appointed to summarise (technical) evidence, present those in an understandable form, and express comments on the claims (*advisory role*).¹⁶¹ The function of this expert is to help the adjudicator in

¹⁵⁶ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 101.; O'Malley, *Rules of Evidence in International Arbitration*, 181–82.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 271-2.

¹⁵⁷ Uluç, *Corruption in International Arbitration*, 163–64.

¹⁵⁸ Lim, 'Tribunal-Appointed Experts in International Arbitration', 221.

¹⁵⁹ See German Federal Court of Justice (BGH), I ZB 46/18, BGH. "Verletzt ... ein Sachverständiger seine Offenbarungspflicht, kann sich daraus ein selbständiger Grund für seine Ablehnung nur ergeben, sofern der Verstoß für sich bereits Zweifel an seiner Unparteilichkeit weckt."

¹⁶⁰ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:463.

¹⁶¹ Schneider, 'Technical Experts in International Arbitration', 450.; See for critics Hofmann and Kunz, 'Commentary on the Swiss Rules, Article 27 [Tribunal-Appointed Experts]', 727.; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 314.; O'Malley, *Rules of Evidence in International Arbitration*, 186.; Schäfer and Wilson, 'ICC Bulletin', 2021, 70.; See also IBA Rules Art. 3(8) for review of documents requested for document production by an independent expert.

understanding complex facts or evidence.¹⁶² The tribunal-appointed expert is assisting the tribunal.¹⁶³ However, this does not mean that the expert will weigh the evidence and arrive at conclusions.¹⁶⁴

If the parties have relied on experts and the tribunal needs to be convinced more or, as in the case of valuation issues, feels a need for consultation, it may appoint an expert to bridge the gap.¹⁶⁵ Although this is highly likely to be helpful for the tribunal in finally awarding damages, it comes with the cost of a prolonged case outcome since the tribunal-appointed expert will need to read through the whole case file, maybe consisting of a room full of pages.¹⁶⁶ This approach has been used in various cases.¹⁶⁷

2.4.1.2.4. Legal Nature & Binding Force

The tribunal-appointed expert and its report is generally accepted as a means of evidence.¹⁶⁸ The tribunal-appointed expert is neither a witness, since he will not testify on facts that were sensed with the organs, nor a fourth arbitrator who will participate in the deliberations and have a vote. The tribunal-appointed expert is an assistant to

¹⁶² de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 495.; Zuberbühler et al., *IBA Rules of Evidence*, 159.

¹⁶³ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 96.; Lörcher, ‘Liber Amicorum Karl-Heinz Böckstiegel’, 485; Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 313.; Wilske and Gack, ‘Expert Evidence in International Commercial Arbitration’, 89.; for the perspective in Public International Law see Bennouna, ‘Experts before the International Court of Justice: What For?’; Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 457. Dwyer, *The Judicial Assessment of Expert Evidence*, 195.

¹⁶⁴ O’Malley, *Rules of Evidence in International Arbitration*, 170.; Tanrıver, *Medenî Usûl Hukuku*, II:463.

¹⁶⁵ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 664.

¹⁶⁶ For critics see Blackaby and Wilbraham, 664.; Ağırman, *Millî & Milletlerarası Tahkim*, 462.

¹⁶⁷ See Suez, *Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Award (9 April 2015) para. 7–18; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) para. 585 ff.; *Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/5, Procedural Order No 15 (20 November 2012) para. 11 ff.; See for instance: “the expert evidence from both sides does not provide a sufficient degree of confidence as to the actual conditions in the Blocks. The Tribunal considers that there are too many gaps and conflicts between [the parties’] evidence on these key issues” and appointed an expert. (*Perenco Ecuador Limited v Ecuador*, Interim Decision on the Environmental Counterclaim, 2015, para. 581 ff.).

¹⁶⁸ Zuberbühler et al., *IBA Rules of Evidence*, 170.; Schäfer and Wilson, ‘ICC Bulletin’, 2021, 75.

the tribunal¹⁶⁹, either producing evidence or facilitating the understanding of technical matters beyond the knowledge of the arbitral tribunal.¹⁷⁰

The tribunal is not strictly bound by the expert's opinion and will freely appraise the report and may come to a different conclusion in the award.¹⁷¹ The tribunal may partially or fully adopt the expert's findings if they are in line with the facts and evidence in the record, logic and legal rules.¹⁷² For due process concerns, the tribunal, either when rejecting the conclusions of the expert or totally accepting them in the award, shall state reasons for it.¹⁷³

However, significant weight is generally given in practice to tribunal-appointed experts due to its nature, in contrast to party-appointed experts.¹⁷⁴

2.4.1.2.5. Appointment and Challenge

As stipulated earlier, the principal practice in international arbitration is the use of party-appointed experts.¹⁷⁵ Nevertheless, Arbitration rules give the arbitral tribunal broad authority to retain one or more experts directly after consulting the parties (e.g. ICC Arbitration Rules Article 25(3)).¹⁷⁶

¹⁶⁹ Proske, *Expert witness conferencing in Schiedsverfahren*, 14.; Budak and Karaaslan, *Medenî Usul Hukuku*, 2022, 311.; Ruhlmann and Gutkes, 'France', 141.

¹⁷⁰ O'Malley, *Rules of Evidence in International Arbitration*, 167; Lim, 'Tribunal-Appointed Experts in International Arbitration', 212; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 314.; Weiss and Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz', 499.; Proske, *Expert witness conferencing in Schiedsverfahren*, 14.; Uluç, *Corruption in International Arbitration*, 163–64.; Commentators argue that the participation of the expert could raise important issues regarding the right to be heard and should be avoided, unless it is impossible to adapt the expert's findings properly and decide the dispute. See Schneider, 'Technical Experts in International Arbitration', 464.

¹⁷¹ Zuberbühler et al., *IBA Rules of Evidence*, 170; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 313.; Uluç, *Corruption in International Arbitration*, 164.; See ICC Case No. 14079, Procedural Order May 2007, in ICC International Court of Arbitration, 'Procedural Decisions in ICC Arbitration', 11.

¹⁷² O'Malley, *Rules of Evidence in International Arbitration*, 199.

¹⁷³ O'Malley, 200.; See ICC Case No. 12131 (2006) (Partial Award) in Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 448.

¹⁷⁴ O'Malley, *Rules of Evidence in International Arbitration*, 167.

¹⁷⁵ See Chapter I Section 1.

¹⁷⁶ ICC Arbitration Rules Article 25(3): "The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert."

The tribunal-appointed expert is generally appointed after the parties have submitted their initial briefs and the tribunal has become aware of the need *ex officio*¹⁷⁷ or the parties asked for the appointment of an independent expert, and this was welcomed by the tribunal.¹⁷⁸

A mere request to appoint an expert from the parties should not be welcomed without¹⁷⁹ the determination of the tribunal that the expert is necessary for deciding on the merits of the case and that it will materially affect the outcome.¹⁸⁰ If the tribunal determines that no appointment of an expert is required, it could deny appointing an expert; however, it should stipulate this with clear reasoning in a procedural order or the award.¹⁸¹

The arbitral tribunal can also appoint an expert, even if none of the parties asked the tribunal to do so. For instance, if there is an asymmetry of information and evidence between the parties, unequal access to evidence and information cannot be adequately addressed through the directions of the tribunal.¹⁸² If, however, all parties object to the tribunal's appointment of an expert, the tribunal should refrain from doing so since at least one party must pay an advance on the expert's costs.¹⁸³

The tribunal is free to nominate and appoint an appropriate expert; however, it may ask the parties to propose a joint name or a list of experts.¹⁸⁴ The tribunal could additionally ask the parties to nominate potential experts or request from an institution, such as the ICC International Centre for Expertise or any professional institution or

¹⁷⁷ Webster/Bühler state that this is a rare phenomenon in ICC practice. See Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 445.

¹⁷⁸ Zuberbühler et al., *IBA Rules of Evidence*, 154; Lim, 'Tribunal-Appointed Experts in International Arbitration', 213; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 310; Nessi, 'Expert Witness: Role and Independence', 74.; Schäfer and Wilson, 'ICC Bulletin', 2021, 64.; Proske, *Expert witness conferencing in Schiedsverfahren*, 15.

¹⁷⁹ Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, 11.:592.

¹⁸⁰ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 90–91.

¹⁸¹ Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 445.

¹⁸² Lim, 'Tribunal-Appointed Experts in International Arbitration', 214.; Haugeneder, 'The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration', 181, 191–92.

¹⁸³ Schäfer and Wilson, 'ICC Bulletin', 2021, 70.

¹⁸⁴ Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, 11.:591.; Parlett, 'Parties' Engagement with Experts in International Litigation', 448.; Zuberbühler et al., *IBA Rules of Evidence*, 157.; Özbek, *Tahkim Hukuku*, II:1450.

professional chamber, to recommend an expert.¹⁸⁵ Not only natural persons but also legal entities could be appointed, which will indeed identify one or more real-person experts who will be responsible for delivering the opinion.¹⁸⁶

Each of these appointment methods could be used, depending on the circumstances of the case and the attitude of the parties. It can be a challenging task for the tribunal to appoint an independent and impartial person who is an expert in the required subject matter.¹⁸⁷

Although not directly chosen by parties, they should be given the opportunity to comment on the qualifications, independence and impartiality of the tribunal-appointed expert, the questions to be asked and his findings.¹⁸⁸

The Parties shall lay forth any objections they have within a time frame ordered by the tribunal (UNCITRAL Arbitration Rules Art. 29(2), IBA Rules Art. 6(2)).¹⁸⁹ Although there are generally no express provisions as for the grounds of challenge to tribunal-appointed experts in significant arbitration rules, such as the ICC, LCIA or SIAC, in practice and in some arbitration rules, such as HKIAC Art. 25(5) or Swiss Rules Art. 28(1), the same reasons for challenge of arbitrators apply analogously.

It is contentious whether the tribunal has the duty to appoint an expert if the circumstances require one.¹⁹⁰ Some arbitral tribunals have held that the appointment of a tribunal-appointed expert is not appropriate merely because there is a gap in the evidentiary record as a result of the relevant party failing to adduce a party-appointed

¹⁸⁵ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 312; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 446; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 331.

¹⁸⁶ Zuberbühler et al., *IBA Rules of Evidence*, 157.; Tanriver, *Medenî Usûl Hukuku*, 2022, II:463.

¹⁸⁷ See Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 92.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 332.

¹⁸⁸ O'Malley, *Rules of Evidence in International Arbitration*, 184; Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 434; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 336.; Özbek, *Tahkim Hukuku*, II:1450.

¹⁸⁹ Lim, 'Tribunal-Appointed Experts in International Arbitration', 221.

¹⁹⁰ Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 495.; Zuberbühler et al., *IBA Rules of Evidence*, 154. ; Weiss and Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz', 484.).

expert as the one carrying the burden of proof.¹⁹¹ Some other tribunals also argued that it would not be fair or equal treatment to appoint a tribunal-appointed expert if doing so would effectively assist the one party in establishing its case and not enlighten the dispute in general.¹⁹²

On the other hand, the Swiss Federal Tribunal stipulated in an older judgement that even in the absence of a request from a party, the arbitrator who does not have special knowledge must appoint an expert if clarification on certain specific technical problems is required for the resolution of the dispute.¹⁹³ However, in its latter judgements, the Supreme Court has changed its view and declared that such duty exists only if a party has a request for the appointment of a tribunal-appointed expert.¹⁹⁴ *O'Malley* indicates that if a party requests an expert in a timely manner, with reasons and advances in the costs, the tribunal should appoint an expert.¹⁹⁵

The tribunal will draft a terms of reference and take the views of the parties regarding the content of it, specifically on the required qualifications of the expert, duties and issues to be answered, time schedule, responsibilities and powers of the expert and scope of the opinion and the remuneration.¹⁹⁶ When the parties agree on the expert and

¹⁹¹ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 315; Schneider, 'Technical Experts in International Arbitration', 451.; Derains and Schwartz, *A Guide to the ICC Rules of Arbitration*, 279.; Sanders stating in Sanders, 'Commentary On UNCITRAL Arbitration Rules', 204.: "In the civil law tradition, the trier of facts takes an active role in determining matters requiring expertise, including readily appointing its own expert on technical matters. In the common law approach, the parties are primarily responsible for presenting their cases, including the presentation of expert witnesses. Although the trier of facts can appoint its own experts, or special masters, usually the parties present their cases at their own risk; that is, they suffer the consequences of failing to make out their cases and the court rarely steps in."

¹⁹² Lim, 'Tribunal-Appointed Experts in International Arbitration', 216–17; O'Malley, *Rules of Evidence in International Arbitration*, 169.

¹⁹³ See 'Parties Not Indicated, Tribunal Fédéral, 1ère Cour Civile',.; See also BGE 132 III 83 : "Es ist willkürlich, ohne Beizug eines unabhängigen gerichtlichen Sachverständigen auf eine bestrittene Parteibehauptung abzustellen, wenn der Sachrichter nicht über die notwendige Sachkunde verfügt (3.5)."

¹⁹⁴ Scherer, 'Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 10 June 1996', 769–70.; Scherer, 'X. S.A.L., Y. S.A.L. et A. v. Z. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4P.115/2003, 16 October 2003', 377–78.; See also Chapter III, 7.1.1. regarding the admissibility of expert evidence in relation to the duty to appoint.

¹⁹⁵ O'Malley, *Rules of Evidence in International Arbitration*, 177; Similarly Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 449.

¹⁹⁶ Zuberbühler et al., *IBA Rules of Evidence*, 159–60; Schneider, 'Technical Experts in International Arbitration', 458; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 315; O'Malley, *Rules of Evidence in International Arbitration*, 178; Reiner and Aschauer, 'ICC Rules', 136; Lim, 'Tribunal-Appointed Experts in International Arbitration', 223; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 447; Webster and Bühler, 449.; Dayınlarlı,

the conditions in the terms of reference, the document should be signed by the parties and the expert.¹⁹⁷

Upon the appointment of the expert, a complex legal relationship comes into existence.¹⁹⁸ Despite the appointment by the tribunal, a contractual relationship between the parties and the expert is deemed to have been created if the parties advance the fees of the experts.¹⁹⁹

Nevertheless, in contrast to party-appointed experts who receive direct remuneration from the appointing party, tribunal-appointed experts do not directly receive remuneration from the parties, which inherently leads to their independence and impartiality, save other circumstances which could aggrieve these notions.²⁰⁰

In international arbitration practice, parties equally pay the advance costs for the expert.²⁰¹ If one of the parties withholds to pay the advance fee, the other party will be requested to pay instead. If both parties do not advance the payment, then the tribunal will have to decide without any expert opinion and take into account the burden of proof rules that are applicable to the dispute. Parties cannot argue in such a case that the right to be heard is violated.

If it appears from circumstances, after consulting with the parties, that the expert is not in a position to fulfil his obligations to provide an opinion so that the arbitrators can resolve the issues, he/she can be released from this task.²⁰²

UNCITRAL Kurallarına göre Uzlaşma ve Tahkim, 100.; For matters to be mentioned in the terms of reference see Schäfer and Wilson, 'ICC Bulletin', 2021, 73.

¹⁹⁷ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 451.

¹⁹⁸ Zuberbühler et al., *IBA Rules of Evidence*, 158; Weiss and Bürgi Locatelli, 'Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz', 496–97; Lörcher, 'Liber Amicorum Karl-Heinz Böckstiegel', 486.

¹⁹⁹ For details of the contractual nature see Zuberbühler et al., *IBA Rules of Evidence*, 158.; Schütze, Tscherning, and Wais, *Handbuch Des Schiedsverfahrens : Praxis Der Deutschen Und Internationalen Schiedsgerichtsbarkeit*, 224.; Reiner and Aschauer, 'ICC Rules', 135.

²⁰⁰ Lim, 'Tribunal-Appointed Experts in International Arbitration', 212.

²⁰¹ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 459.

²⁰² Zuberbühler et al., *IBA Rules of Evidence*, 158; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 313.

The procedure that applies to the challenge of tribunal-appointed experts is comparable to those of arbitrators.²⁰³ A challenge shall be brought by showing justifiable doubts about independence, impartiality, or expertise, and it shall not be arbitrarily limited to reasons of which the party becomes aware after the appointment has been made.²⁰⁴

Challenges can be brought (i) to the lack of expertise/qualifications, (ii) prior or present personal or professional relationship between the expert and one of the parties,²⁰⁵ (iii) adverse opinions expressed by the expert towards one of the parties before the report was finalised²⁰⁶ and (iv) financial (or other) interest of the expert in the outcome of the case in favour of a party.²⁰⁷

2.4.1.2.6. Duties and Powers

The expert's primary duty is to provide an opinion on the matters stipulated in the terms of reference, generally in the form of a written report, 208 and testify if asked by the tribunal or the parties.²⁰⁸

Parties should be included in the process of determining the mandate of the tribunal-appointed expert so that they have an opportunity to clearly state the matters which fall under the expertise of the expert they want the expert to address.²⁰⁹ In practice, this is done via a terms of reference, which is drafted by the tribunal. The draft terms

²⁰³ See, e.g. Swiss Rules Art. 28(1): “The arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues. Articles 12 and 13 [challenge of an arbitrator] shall apply mutatis mutandis.”; Lim, ‘Tribunal-Appointed Experts in International Arbitration’, 222; Nessi, ‘Expert Witness: Role and Independence’, 75; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 450.

²⁰⁴ Lim, ‘Tribunal-Appointed Experts in International Arbitration’, 216, 222; O’Malley, *Rules of Evidence in International Arbitration*, 182; Haugeneder, ‘The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration’, 187; Patocchi, Paolo Michele and Niedermaier, ‘UNCITRAL Rules’, 1184; Nessi, ‘Expert Witness: Role and Independence’, 74; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 336; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 269.

²⁰⁵ See German Federal Court of Justice (BGH), VI ZB 31/16, BGH, para. 6 ff.; Higher Regional Court (OLG) of Frankfurt am Main, 1 U 104/96, 28th April 2005, para. 3.

²⁰⁶ Higher Regional Court (OLG) of Saarland, 5 W 42/08-16, 11th March 2008, para. 26.

²⁰⁷ Nessi, ‘Expert Witness: Role and Independence’, 75.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 300.

²⁰⁸ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 270.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:463.; Özbek, *Tahkim Hukuku*, II:1451.

²⁰⁹ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:463; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 332.

of reference is generally circulated from the tribunal to the parties for comments before officially issuing it.²¹⁰

The terms of reference for the expert is a vital tool for all participants in the case to orientate themselves. The expert will have to prepare the report according to the conditions and questions set forth in it. General matters which should be included in the expert's terms of reference could be identified as follows:

- Identification of the case (name of institution, applicable rules, case ID, names and addresses of arbitrators, parties and the expert,
- issues related to the organisation, preparation, delivery and presentation of the expert report,
- definition of the questions/issues that the expert should address,
- the scope and limits of the expert's duties and rights (such as preparing the report, being available for examination at the hearings, disclosing all information for potential conflict of interest and keeping all information and documents confidential that he is entrusted with),
- identification of information (documents, evidence, etc.) that are or should be provided to the expert on which the expert should base his or her report,
- the procedure by which the expert may contact the parties and collect further information and evidence that the expert may require in order to prepare the report,
- rules for communications between the expert, the parties, and the tribunal,
- an express statement of the parties' right to comment on the report and to examine the expert at an oral hearing,
- the remuneration and any advance payment and any cost-related issues,
- statement of the power of the tribunal to adjust and review the terms of reference.²¹¹

²¹⁰ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 333.

²¹¹ Khodykin and Mulcahy, 334–35; Schäfer, Verbist, and Imhoos, *ICC Arbitration in Practice*, 490; Schneider, 'Technical Experts in International Arbitration', 446.

The official terms of reference should be sent to both the experts and the parties (IBA Rules Art. 6), ICC Arbitration Rules Art. 25(3), UNCITRAL Arbitration Rules Art. 29(2). It is suggested that the terms of reference be signed by the tribunal, the parties, and the expert(s).²¹²

In order to produce the expert opinion, the expert will rely on the submissions and evidence submitted by the parties. These should be transmitted to the expert(s) from the parties in whole form or so that it encompasses all necessary details.²¹³

However, the expert might need additional information or explanations from the parties. This is why the parties, with the order of the arbitral tribunal, should provide any information or to provide access to any documents, goods, samples, property, machinery, systems, processes or site for inspection, but only those that are relevant to the case and material to its outcome (UNCITRAL Arbitration Rules Art. 29(3), IBA Rules Art. 6(3), Swiss Rules Art. 28(2), SIAC Arbitration Rules Rule 26(1)(b), Prague Rules Art. 6(2)(d)).²¹⁴

The documents do not need to be provided and do not automatically become part of the case file unless consented to by the affected party.²¹⁵ Goods or samples do not need to be handed over since proprietary rights could be violated.²¹⁶ Nevertheless, this does not mean that the parties have no right to information or no right to attend inspections, which would infringe the right to be heard.²¹⁷

Where the expert will carry out a site visit, the parties and their representatives will ordinarily be invited to attend the visit. If the experts carry out tests or other

²¹² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 334–35.

²¹³ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:463; Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 316.

²¹⁴ Zuberbühler et al., *IBA Rules of Evidence*, 164.; Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 316.; Lim, ‘Tribunal-Appointed Experts in International Arbitration’, 222.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 452.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 190.

²¹⁵ Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 317.

²¹⁶ Zuberbühler et al., *IBA Rules of Evidence*, 164.; Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 317.

²¹⁷ Lörcher, ‘Liber Amicorum Karl-Heinz Böckstiegel’, 492.

experiments, the parties and their representatives would be given an opportunity to participate in or observe that process.²¹⁸

If there is any objection to the relevance, materiality or appropriateness of a request by the expert, the tribunal shall decide such controversies (UNCITRAL Arbitration Rules Art. 29(3)). If the concerned party does not adhere to the request of the expert or the order of the tribunal to provide access to the materials, the only weapon in the hand of the tribunal, not the expert, would be an adverse inference to the interests of that party.²¹⁹ Nevertheless, if the affected party insists on access to the relevant documents or materials, it could request assistance from a competent state court.²²⁰

Parties have the right to receive a copy of the expert opinion, review, comment, and respond to the expert's opinion during the hearings.²²¹ If the parties have any comments or questions about the (main) report, the expert should clarify the issues with an additional report.²²² The UNCITRAL Model Law Art. 26(2) provides:

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.²²³

In contrast, EAA Section 37(2) does not expressly provide directly for a right of examination and instead refers to the parties' opportunity to comment on the expert's opinion, which nevertheless may extend to the right to examine a tribunal-appointed expert at a hearing.²²⁴

²¹⁸ Zuberbühler et al., *IBA Rules of Evidence*, 163.

²¹⁹ Lörcher, 'Liber Amicorum Karl-Heinz Böckstiegel', 492.; Eberl, *Beweis Im Schiedsverfahren*, 133; Musielak and Voit, *ZPO*, § 1042, para. 27.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 229.

²²⁰ Zuberbühler et al., *IBA Rules of Evidence*, 165.

²²¹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 190–91; Lim, 'Tribunal-Appointed Experts in International Arbitration', 225; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 445.; Özbek, *Tahkim Hukuku*, II:1451.

²²² Parlett, 'Parties' Engagement with Experts in International Litigation', 448; Zuberbühler et al., *IBA Rules of Evidence*, 157.

²²³ Similar TIAL Art. 12(A)(2), ZPO § 1049(2), UNCITRAL Arbitration Rules Art. 29(5), ICC Arbitration Rules Art. 25(3), LCIA Arbitration Rules Art. 21(4).

²²⁴ Lim, 'Tribunal-Appointed Experts in International Arbitration', 226.

Similarly, *Voser/Mueller* have noted that, in civil law jurisdictions, the right to be heard only requires that the parties have the right to submit comments in writing to the expert's opinion and not the absolute right to examine the expert.²²⁵

Ex parte communications should be prevented since this could lead to serious doubt about the independence and impartiality of the expert, and if the expert has to communicate with one party, the arbitral tribunal should make sure that the counterparty is informed about this communication, specifically its contents and purpose.²²⁶

Costs and expenses of party-appointed experts may be part of arbitration costs. For instance, Under Article 38(1) of the ICC Arbitration Rules, the costs of the arbitration can include amounts paid to party-appointed experts. Under Article 38(4), the arbitral tribunal has the discretion to decide what costs to award, which party or parties shall bear them and in what proportion.²²⁷

2.4.2. Based on the Subject Matter

Expert opinion, either submitted by the parties or as a result of the tribunal appointing an expert, can be presented on a wide range of different subjects. These subjects can be categorised as technical/scientific experts, legal experts and valuation (quantum) experts.²²⁸

One might question whether treating legal and quantum experts who are not under the scope of scientific experts is appropriate. However, as it will be demonstrated, not only are there differences in the subject, but the degree and weight of evidence might slightly change due to their nature.

²²⁵ Voser and Mueller, 'Appointment of Experts by the Arbitral Tribunal: The Civil Law Perspective', 80.

²²⁶ Schäfer and Wilson, 'ICC Bulletin', 2021, 74.

²²⁷ Schäfer and Wilson, 70.

²²⁸ Born, *International Commercial Arbitration*, 2449; Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 454; O'Malley, *Rules of Evidence in International Arbitration*, 145.

For instance, in *Compañía de Aguas v. Argentina*²²⁹, the tribunal concluded that “the settling of damages is not an exact science.”²³⁰ For sure, this is a valid argument since the level of objectivity that is presentable and testable in scientific opinions is different from the expertise in law and valuation. Especially in the latter ones, there can be multiple views/positions and methods on the subject which could be applied to the specific case, and this is not the same as determining the boiling level of water at sea level.

According to stakeholders, financial/accounting experts are used most frequently (46%), followed by technical (35%) and industry-specific experts (17%), while legal experts are used least frequently (13%).²³¹

2.4.2.1. Technical/Scientific Experts

Technical expertise is often required as a substantive area relevant to the case that is usually outside of the competence of the tribunal, such as construction, oil and gas, mining, intellectual property, environment or other areas of science.²³² Also, planning/delay analysis, market practice, technology and forensic analysis of evidence such as handwriting, photographs, or other data might become necessary.²³³

When deciding on the legal dispute between the parties, the tribunal has a mandate to engage in scientific fact-finding if the case calls for it.²³⁴ For instance, if a host state in an investor-state dispute argues that it declined to renew the license of the investor to operate since it harmed the environment, it has to prove this via an opinion by one or

²²⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*) <https://www.italaw.com/cases/309> (accessed 07.01.2023)

²³⁰ See, e.g., *Compañía de Aguas v. Argentina*, para. 8.3.16.

²³¹ ‘2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process’, 29.

²³² Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 661; Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 455; Mosk, ‘The Role of Facts in International Dispute Resolution (Volume 304)’, 128; Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 2; Spitzer, ‘Der Sachverständigenbeweis Im Österreichischen Zivilprozess’, 28.

²³³ See *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, Award, 12 July 2019, ICSID Case No ARB/12/1 available at www.italaw.com.; See Cosar, ‘Fraudulent Evidence: Investment Arbitration’, para. 30, 59.; Bor, ‘Expert Evidence’, 503; Mosk, ‘The Role of Facts in International Dispute Resolution (Volume 304)’, 75; Kamyra-Lukoda, ‘Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues’, 82.

²³⁴ Donoghue, ‘Expert Scientific Evidence in a Broader Context’, 382.

more biologists.²³⁵ The unexplained failure to present scientific evidence can lead to an adverse inference.²³⁶

For instance, in *Bear Creek Mining Corporation v Peru*, the investor claimant submitted a technical expert opinion for the technical review of the investor's Projects located in Peru.²³⁷

Technical/scientific experts are the least problematic with respect to their value to the tribunal and the potential for a biased opinion. Their opinion has to rely on some objective facts, defined best practices or industry standards, which makes their view objectively testable.²³⁸

2.4.2.2. Legal Experts

One would naturally expect that there is no need for legal experts in the proceedings since arbitrators as adjudicators²³⁹ and legal counsel of the parties would be the ones who have already extended knowledge on matters of law.²⁴⁰ Acting as legal experts (before courts) is even clearly forbidden with a statutory provision in Türkiye.²⁴¹

²³⁵ Erdoğan and Üçüncü call these in old Turkish “ehl-i hibre”, see Erdoğan and Üçüncü, ‘Bilirkişilik Kurumu ve Bilirkişi Raporunun Delil Değerine İlişkin Bazı Sorunlar’, 363.; See Methanex Corporation v United States of America, Final Award on Jurisdiction and Merits, 3 August 2005, ad hoc UNCITRAL Tribunal under NAFTA Ch 11), available at www.italaw.com; Chemtura Corporation v Government of Canada (Award, 2 August 2010, ad hoc UNCITRAL Tribunal under NAFTA Ch 11) <www.italaw.com> (accessed 19 June 2022).

²³⁶ Donoghue, ‘Expert Scientific Evidence in a Broader Context’, 385; O’Malley, *Rules of Evidence in International Arbitration*, 159.

²³⁷ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21 available at <https://www.italaw.com/cases/2848> (accessed 19 June 2022).

²³⁸ Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 455.

²³⁹ Ünüvar, ‘Experts: Investment Arbitration’, para. 56.; Bacanlı, ‘Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arbuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi’, 98.

²⁴⁰ Spitzer, ‘Der Sachverständigenbeweis Im Österreichischen Zivilprozess’, 28.; See *VM Solar Jerez GmbH, M Solar Verwaltungs GmbH, Solarizz Holding Verwaltungs-GmbH, M Solar GmbH & Co. KG, Solarizz Holding GmbH & Co. KG and Helmut Vorndran v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify All Members of the Tribunal (18.10.2022), para. 23

²⁴¹ The HMK Art. 266(1) and Turkish Law on Experts (No. 6754) Art. 10(4) prohibits lawyers to be (court-appointed) experts, See Tanrıver, *Medenî Usûl Hukuku*, 2021, I:409–11; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 113–15.; Akıncı, *Milletlerarası Tahkim*, 340–41, fn. 459.; Budak and Karaaslan, *Medenî Usul Hukuku*, 2022, 309.; Özbek, *Tahkim Hukuku*, II:1448.; Atalı argues that legal court-appointed experts impact the proceedings in a positive way and should be allowed, see Atalı, ‘6754 Sayılı Bilirkişilik Kanunu ve Hukuki Konularda Bilirkişilik’, 3278 ff.

However, in international arbitration, and even sometimes in domestic litigation, a legal expert can be required, especially if there is a foreign (domestic) law issue with which the arbitrators are not familiar.²⁴²

The legal expert will help the tribunal to assess the legal knowledge.²⁴³ Legal experts present a particular challenge to the arbitral tribunal as their opinion can be closely intertwined with advocacy. Legal experts typically provide views on international law, international investment law or the domestic law of the investor or the host State in investor-state arbitrations.

2.4.2.2.1. International Law Experts

In international practice, arbitrators appearing at an international investment dispute are expected to be the foremost experts in international and investment law.²⁴⁴ Especially in investment law, submitting a report from a party-appointed expert whose expertise is on international law is not plausible since the expert presents views on points of law; it would instead make sense to have him as a co-counsel.²⁴⁵ A well-established tribunal will hardly be impressed that the relevant person is appointed as an expert and will know how to weigh the statements. It would be more suitable to have it as counsel or even classify and treat the expert in that manner. Nevertheless, international law experts should not be excluded in advance. However, less weight could be attributed if the tribunal does not see it relevant.²⁴⁶

Despite that, international law experts are used frequently in international investment law disputes. For instance, in the famous Yukos case, inter alia, the provisional application of the Energy Charter Treaty (“ECT”), possibly with regard to the

²⁴² O'Malley, *Rules of Evidence in International Arbitration*, 174.; Centner, *Iura Novit Curia in Internationalen Schiedsverfahren: Eine Historisch-Rechtsvergleichende Studie Zu Den Grundlagen Der Rechtsermittlung*, 112.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 2. Can and Tuna, *Milletlerarası Tahkim Hukuku*, 417.; Harris and Ali, 'Better Never Than Late?', 271.

²⁴³ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 96; Schütze, *Das Internationale Zivilprozessrecht in Der ZPO: Kommentar*, 70–71.

²⁴⁴ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 455.

²⁴⁵ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 655, 661.

²⁴⁶ Freyer, Newman, and Hill, 'Assessing Expert Evidence', 430, 441.; Almost all respondents (93%) in a survey share this view in 'BCLP 2021 Survey', 9.

jurisdiction of the Arbitral Tribunal vis-à-vis cases lodged against Russia was an issue for which an expert opinion was submitted.

In *Phillip Morris v Uruguay*,²⁴⁷ international law experts gave an opinion on the meaning of international intellectual property law, the interpretation of fair and equitable treatment, arbitrary treatment, and the requisites of and burdens of proof applicable to denials of justice under customary international law.²⁴⁸

When determining the content of the law, according to the principle of *iura novit arbiter*, the arbitrator must exhaust all sources of knowledge. If, despite every effort, the arbitrator is not able to access the relevant information, he shall make use of a legal expert. This is natural since the arbitrator should try to render an award that should be safe from annulment and subject to enforcement, if necessary.²⁴⁹

2.4.2.2.2. (Domestic) Foreign Law Experts

Although arbitrators should also be appointed considering their knowledge of the relevant domestic law, legal experts are more often used to present opinions on the application of domestic law.²⁵⁰ Some have pointed to the particular circumstance of investment arbitration, with respect to the need to understand procedural and substantive areas of domestic law in jurisdictions unfamiliar to the arbitrators, as a way of accounting for the practice of resorting to legal experts.²⁵¹

It is expected that the tribunal, or at least one of the members appointed by the parties or the court, has an extended knowledge of the law applicable to the dispute. However, given the nature of complex multi-party arbitrations in practice, it is highly likely that

²⁴⁷ *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 available at <https://www.italaw.com/cases/460> (accessed 09.12.2023); Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 414–18.

²⁴⁸ Alvarez, 418; Ünüvar, ‘Experts: Investment Arbitration’, para. 53.

²⁴⁹ Centner, *Iura Novit Curia in Internationalen Schiedsverfahren: Eine Historisch-Rechtsvergleichende Studie Zu Den Grundlagen Der Rechtsermittlung*, 112.; It is even possible that eight legal experts do not suffice to determine the applicable legal rules, see for example BGH, II ZR 49/90, 21.01.1991, para 5-11.

²⁵⁰ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 661.

²⁵¹ Blackaby and Wilbraham, 660.

the tribunal needs assistance to understand specific provisions of foreign law that he is not familiar with.²⁵² Also, if an amended legal provision is so far back that it is hard for the arbitrator to have a firm understanding, then a legal expert might be helpful.²⁵³ In that case, legal experts can be appointed by the tribunal, or the parties can also rely on such.²⁵⁴

In the English courts, the foreign applicable law is proven by reference to expert evidence.²⁵⁵ The Singapore International Commercial Court Practice Directions also allow foreign law experts to be used.²⁵⁶

Generally, in countries following the civil law approach, the courts have considerable authority to apply foreign law and ascertain its content.²⁵⁷ In international arbitration, the responsibility for ascertaining foreign law is generally divided between the parties and the tribunal. However, depending on both the counsel and the arbitrators in each case, a different approach can be adopted.

Aktepe Artık argues that although it is generally possible for a non-lawyer arbitrator or arbitral tribunal to appoint a legal expert, the appointment of a legal expert should not be allowed in the presence of a legal arbitrator. Appointing a legal expert if the sole arbitrator is a lawyer or if there is a legal arbitrator in the arbitral tribunal is not considered an appropriate solution, considering that it will cause an increase in trial costs and that the parties have chosen the arbitrator on the grounds that he is an expert on the subject of the dispute. When it is remembered that the law requires that if the arbitrator consists of more than one person, at least one of them must be a lawyer with five years or more seniority in his field, it would not be suitable for the arbitrator, who

²⁵² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.

²⁵³ Centner, *Iura Novit Curia in Internationalen Schiedsverfahren: Eine Historisch-Rechtsvergleichende Studie Zu Den Grundlagen Der Rechtsermittlung*, 98.

²⁵⁴ Schütze, 'Der Beweis Des Anwendbaren Rechts Im Schiedsverfahren Und Die Feststellung Seines Inhalts', 154.

²⁵⁵ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.; Similarly for International Arbitration see Hobér and Sussman, *Cross-Examination in International Arbitration*, 26.

²⁵⁶ Singapore International Commercial Court Practice Directions, Rule 26 (2) https://www.judiciary.gov.sg/docs/default-source/amendments-docs/2022/sicc-pd_2022_v1.pdf?sfvrsn=4d986e38_2 (accessed 10.08.2022)

²⁵⁷ International Law Association Committee on International Commercial Arbitration, 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration', 163 ff.'

is already assumed to be an expert, to appoint another person who is an expert to make legal evaluations.²⁵⁸

For instance, in *Yukos v Russia*, legal expert opinions were submitted for, inter alia, constitutional legal aspects of the conclusion and application of international treaties of Russia and the arbitrability of taxation-related issues under Russian law.²⁵⁹ Similarly, in *Joshua Dean Nelson v The United Mexican States*, the disputing parties adduced expert reports concerning Mexican and U.S. civil and administrative law, specifically regarding corporation and bankruptcy law.²⁶⁰

In a mining dispute filed against Peru, multiple expert opinions were acquired, both by the claimant investor and the respondent host state. The opinions were related to Peruvian law provisions in the mining sector.

To over-rely on domestic law experts is dangerous since there might be multiple views even on a domestic law issue.²⁶¹ Additionally, lawyers often are poor experts because they can easily cross the line between being in the shoes of an expert and advocating for the appointing party.²⁶² Besides, there is always the opportunity to engage with local co-counsel, who are naturally expected to know and have the capacity to make arguments on the local law.

The tribunal does not have to appoint a natural person directly but could choose to acquire knowledge from a university or institution such as the Max-Planck Institute (MPI) for International and Comparative Law or MPI for International Procedural Law.

²⁵⁸ Aktepe Artık, *Medeni Usûl Hukukunda Hakem Kararlarının İptali Sebepleri*, 380.

²⁵⁹ Ünüvar, 'Experts: Investment Arbitration', para. 48.; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227 <https://www.italaw.com/cases/1175>

²⁶⁰ *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, para. 165. https://www.italaw.com/sites/default/files/case-documents/italaw11557_0.pdf (accessed 17.08.2023)

²⁶¹ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 455; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.

²⁶² Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 661.

The crucial point here is that the tribunal shall not, in any case, delegate its adjudication duty and authority to the legal expert.²⁶³

Again, In *Phillip Morris v Uruguay*, Uruguay law experts expressed views about whether the implemented law, which allegedly deprived the investor, extended the police power to protect health, protected the use of trademarks, considered trademarks as property, or enabled contradictory decisions by national courts.²⁶⁴

2.4.2.3. Quantum (Valuation/Damages) Experts

After a tribunal concludes that one or more parties are liable for damages or 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 that are needed. Quantum or valuation experts are cost engineers, accountants and financial experts, are indispensable especially when it is hard or not possible for the arbitral tribunal to calculate the damages or compensation in a case.²⁶⁵

There might be cases where it is readily determinable for the tribunal, based on the records, to calculate the claim of the claiming party. However, that is only sometimes the case. How should it be expected from an average arbitrator when a melting furnace that was ordered and just installed explodes in a facility, and fire surrounds and damages a whole facility that becomes inoperable for months? Not only the price for the furnace but also the installation work, all the other damaged equipment, and the financial loss due to inoperability have to be calculated.

²⁶³ Schütze, 'Der Beweis Des Anwendbaren Rechts Im Schiedsverfahren Und Die Feststellung Seines Inhalts', 155; Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 313.

²⁶⁴ Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay', 418; Ünüvar, 'Experts: Investment Arbitration', para. 53; O'Malley, *Rules of Evidence in International Arbitration*, 173.

²⁶⁵ 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 its 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 05 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).

Also, when licenses have been illegally ceased or the facilities of an investor who is projected to operate for decades in the relevant state have been expropriated, the expected income must be calculated. Thus, the tribunal will have to consult the opinions of one or more experts to award compensation.

Quantum experts are the expert type mostly faced in arbitration due to the overwhelming incapacity of fiscal skills of lawyer arbitrators, which is a result of the lack of fiscal curricula in legal education.²⁶⁶

Quantum experts are expected to be a bridge for the arbitral tribunal, which decides on the liability but cannot determine the exact amount to be awarded. However, as confronted in practice, this function is not always easily fulfilled due to the availability of multiple calculation approaches and models for the very same occasion.²⁶⁷

For instance, the “income-based approach”, which estimates the value of a business based on discounted cash flow (DCF), the “market-based approach”, which compares the subject of valuation to that of other similar businesses and the “assets-based approach” which is based on the idea that an asset is worth no more than it would cost to replace all of its constituent parts.²⁶⁸

Especially when it comes to investment arbitration, quantum experts present the greatest challenge in increasingly high-stakes cases because they generally present widely divergent estimates of damages that tribunals struggle to understand and make use of but are indispensable in order to reach a final determination of a damages award.

²⁶⁹ Tribunals have also been criticised for decisions on damages that lack a sufficient

²⁶⁶ Ünüvar, ‘Experts: Investment Arbitration’, para. 61.; Tuna, *Alternative Dispute Resolution in Energy Industries*, 209.

²⁶⁷ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 661; O’Malley, *Rules of Evidence in International Arbitration*, 173; See the proposals from Jones to overcome the challenges, Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 13–14. Blackaby/Wilbraham, 661; O’Malley, *Rules of Evidence in International Arbitration*, 173; Jones, “Ineffective Use of Expert Evidence in Construction Arbitration”, 13-14.

²⁶⁸ Faruk Kerem Giray, *Milletlerarası Yatırım Tahkiminde Kamulaştırmadan Doğan Tazminat ve Tazminatın Hesaplanmasında Kullanılan Yöntemler*, 2., Hukuk 1367 (İstanbul: Beta Basım, 2013), 222 ff.; Trenor, *The Guide to Damages in International Arbitration*, 184 ff.; Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Ankara: Seçkin, 2020), 122.

²⁶⁹ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 663. ; See for instance the ad hoc Committee found in Maritime International

explanation of how valuation was determined or the usage of inconsistent methodologies in an effort to synthesise divergent expert valuations.²⁷⁰

Simmons rightfully argues that the negative consequences of inaccurate and opaque valuations may extend to the entire arbitral system.²⁷¹ Such weaknesses in reasoning can lead to challenges to awards and, in some instances, annulment of damages awards.²⁷²

2.5. Interim Conclusion

Experts are qualified, impartial, objective, and reputable individuals or organisations who have special training, education, skills or knowledge, and experience falling within their expertise. They can also be consulted for the resolution of a dispute before a court or arbitral tribunal.²⁷³

Civil law and common law have developed different approaches to the use of experts in dispute resolution. Despite the differences in the traditions, international arbitration practice overwhelmingly favours the use of party-appointed experts. One of the reasons parties choose arbitration over other forms of dispute resolution is to have freedom and control over the evidence.

Primarily, experts are used to clarifying disputed issues that have a material outcome to the case, which the arbitrators are not able to understand. Thus, experts support tribunals in the decision-making process. In some situations, the expert can be the original source of facts in the sense that the expert observed, assessed and organised

Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, para. 6.107 the tribunal's decision on quantum "inconsistent and in contradiction with its analysis of damages theories" and annulled the award.

²⁷⁰ Simmons, 'Valuation in Investor-State Arbitration: Toward A More Exact Science', 208.

²⁷¹ See Simmons, 208 ff.

²⁷² Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 456.; *Venezuela Holdings, BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment (2017); *Occidental Petroleum Corporation and others v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment (2015); *Mar Int'l Nominees Establishment v Guinea*, ICSID Case No ARB/84/4, Decision on Annulment, (1989).

²⁷³ Tanrıver, *Hukukumuzda Bilirkişilik*, 25.; See Çayan, *Medeni Usul Hukukunda Bilirkişilik Müessesesi*, 3 ff.; Van Damme, 'The Assessment of Expert Evidence in International Adjudication', 402; Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', 126.

the facts after an inspection on sight.²⁷⁴ Parties to a dispute might even engage experts before the proceedings to receive help for constructing the pleadings of the case.²⁷⁵

Experts can be categorised based on the appointing authority or based on the subject they will give an opinion on. Based on the appointing authority, experts are either appointed/chosen by the parties or appointed by the arbitral tribunal. Based on the subject the expert will provide an opinion on, they can be classified as technical/scientific experts, legal experts and quantum (valuation) experts. In most international arbitration cases, more than one category of experts is being used in a single case.²⁷⁶

Technical expertise is often required as a substantive area relevant to the case that is normally outside of the competence of the tribunal, such as construction, oil and gas, mining, intellectual property, environment or other areas of science such as planning/delay analysis, market practice, technology and forensic analysis.²⁷⁷

Arbitrators in an international arbitration case might be from different countries. However, there may be foreign law issues with which the arbitrators are not familiar. In such situations, legal experts will be useful to understand the applicable law.²⁷⁸ Legal experts typically provide opinions on international law, international investment law or the domestic law of the investor or the host State in investor-state arbitrations.

²⁷⁴ Tanrıver, *Hukukumuzda Bilirkişilik*, 25. ; Van Damme, 'The Assessment of Expert Evidence in International Adjudication', 402.; O'Malley, *Rules of Evidence in International Arbitration*, 186.; Özbek, *Tahkim Hukuku*, II:1448.

²⁷⁵ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 578.; Parlett, 'Parties' Engagement with Experts in International Litigation', 441.

²⁷⁶ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.

²⁷⁷ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 661; Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 455; Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', 128; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 2; Spitzer, 'Der Sachverständigenbeweis Im Österreichischen Zivilprozess', 28.

²⁷⁸ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 183; Foster, 'The Role of Adjudicators and the Role of Experts', 147.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.; Ağırman, *Milli & Milletlerarası Tahkim*, 460.; Özbek, *Tahkim Hukuku*, II:1458.; Schneider and Scherer, 'Art. 184', 2098. ; Centner, *Iura Novit Curia in Internationalen Schiedsverfahren : Eine Historisch-Rechtsvergleichende Studie Zu Den Grundlagen Der Rechtsermittlung*, 111–12; Ahrens, *Der Beweis Im Zivilprozess*, 29, 459.

Damages or loss of profit are the remedies that are mostly sought in international arbitration. There might be cases where the damages and loss of profit are easily determinable for the tribunal based on the records. However, in most cases, complex calculations are needed. After a tribunal concludes that one or more parties are liable for damages or 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.²⁷⁹



²⁷⁹ 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 its 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 05 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 III

PARTY-APPOINTED EXPERTS

3.1. 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 experts²⁸⁰, sometimes explicitly and sometimes implicitly, relying on the party autonomy principle.

Nevertheless, unlike rules applicable to tribunal-appointed experts, most prominent arbitration rules mentioned below in Section 3.2. do not address the role, qualifications or ethical duties of party-appointed experts.

3.1.1. International Treaties

Although it is not necessarily expected that international conventions will 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.

3.1.1.1. 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. *USMCA* entered into force on July 1, 2020, and substituted the North American Free Trade Agreement (*NAFTA*).

²⁸⁰ Starting from this section to the end of this script, the terms “party-appointed expert”, “party expert” and “expert” will be used interchangeably referring to the same concept. Where explanations related to specifically tribunal-appointed experts are made, this will be 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.

3.1.1.2. Comprehensive Economic and Trade Agreement

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 was entered into force provisionally in 2017.²⁸¹

Also, indirectly, the agreement also enables the disputing parties to rely on their own experts. Chapter Eight 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.”

3.1.2. Arbitration Rules

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

3.1.2.1. ICSID Arbitration Rules

On 21 March 2022, the Administrative Council of ICSID approved extensive amendments to ICSID’s 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.

²⁸¹ https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en (accessed 28.09.2023)

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 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 conference, of examination is appropriate in the circumstances (ICSID Arbitration Rule 38(5)). The experts have to 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 the experts.

Phillip Morris v Uruguay is an example case where party-appointed experts were heavily relied on, including experts on law, on the marketing of cigarettes and on public health.²⁸²

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.²⁸³

²⁸² 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 09.12.2023); Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay', 413.

²⁸³ See <https://icsid.worldbank.org/resources/content/arbitrators/tribunal-assistants> (accessed: 20.09.2023)

For instance, in *Coropi Holdings et al. v. Serbia*²⁸⁴, the tribunal retained a Public International Law professor. The tribunal ruled in the First Procedural Order as below:

...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, organization 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 Tribunal. The fees and expenses of Professor Webb will be paid from the advance payments made by the parties.²⁸⁵

²⁸⁴ *Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia*, ICSID Case No. ARB/22/14.

²⁸⁵ *Coropi 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.

3.1.2.2. 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, and ad hoc arbitrations, as well as 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 Art. 27(2)). The provision states that experts could be any individual party or an individual related to a party; however, there is nothing specific about the qualification of party-appointed experts.²⁸⁶

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 Art. 17(3)).²⁸⁷

3.1.2.3. ICC Arbitration Rules

The ICC Arbitration Rules do not have detailed provisions for party-appointed experts. 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 Art. 25(2)).²⁸⁸

3.1.2.4. Istanbul Arbitration Centre (ISTAC) Arbitration Rules

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

²⁸⁶ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 459.

²⁸⁷ Bor, 'Expert Evidence', 505; Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 445.

²⁸⁸ Reiner and Aschauer, 'ICC Rules', 135; Bor, 'Expert Evidence', 506.

[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).

3.1.2.5. Istanbul Chamber of Commerce (ITOTAM) Arbitration Rules

Contrary to other institutional rules, ITOTAM Arbitration Rules are rather detailed when it comes to provisions concerning experts. Art. 28(2) stipulates that the arbitral tribunal may require the parties to submit their expert reports 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 it will be elaborated on in the coming chapters, it diminishes the problem of the 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 the 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.

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

3.1.2.6. LCIA Arbitration Rules

LCIA Arbitration Rules have detailed provisions as to party-appointed experts, what it refers to as “witnesses”. The tribunal has given 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 Art. 20(2)).²⁸⁹

In principle, the expert will have a written opinion, either as a signed statement or as a document. However, the tribunal can direct the expert otherwise (LCIA Arbitration Rules Art. 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 Art. 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 expert opinion or exclude all or any part thereof altogether, as it considers appropriate in the circumstances (LCIA Arbitration Rules Art. 20(5)).

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 Art. 20(6)).

²⁸⁹ Bor, ‘Expert Evidence’, 506.

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 Art. 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 prior to the oral testimony of that expert (LCIA Arbitration Rules Art. 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 Art. 20(9)).

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

3.1.2.7. SIAC Arbitration Rules

Before any hearing, the Tribunal may require the parties to give notice of 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 an 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 should attend for oral examination. If the witness fails to attend for 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 his appearance to give oral evidence at any hearing (SIAC Arbitration Rules 25.5).

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 the respondent shall include any expert report supporting the claim or defence (SIAC Investment Arbitration Rules 17.2.c. and 17.3.c.).

3.1.2.8. Swiss Rules

The Swiss Rules are rather conservative when it comes to the explicit regulation of party-appointed experts. The rules only directly stipulate 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 the proceedings, the tribunal may hold a hearing for the presentation of evidence by experts or for oral argument.

Article 27(4) foresees that prior to a hearing and within a time limit set by the arbitral tribunal, the evidence of experts may be presented in the form of written statements or reports. At the hearing, experts may be heard and examined. 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)).

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

The 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.

PCA Environmental Rules Art. 24(4) provides that the arbitral tribunal:

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.

3.1.3. 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)).²⁹⁰

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.

²⁹⁰ *Kesikli* argues that the UNCITRAL Model Law does not explicitly regulate party-appointed experts, see *Kesikli*, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 215.

3.1.4. Statutes

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

States also have provisions in civil procedure laws regarding party-appointed experts; however, caution needs to be exercised when exporting the evidentiary practice of national courts to international arbitration, whether under common law or civil law.²⁹¹

3.1.4.1. Türkiye

Turkish International Arbitration Law²⁹² Art. 12(A)(2) and national arbitration provisions encoded in the Code of Civil Procedure²⁹³ (“HMK”) Art. 431(2), as statutes based on the UNCITRAL Model Law, both provide the parties the opportunity to appoint their experts.²⁹⁴

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.

²⁹¹ Alvarez, ‘The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay’, 422.

²⁹² Law No. 4686 of 21 June 2001, published in OG No. 24453 of 5 July 2001. For English version see <https://turkisharbitrationacademy.com/eng/laws>

²⁹³ Law No. 6100 of 12 January 2011, published in Official Gazette No. 27836 of 4 February 2011.

²⁹⁴ Pekcanitez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 626.; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1892.; Pekcanitez and Yeşilirmak, ‘Tahkim’, 2713.; Yılmaz, *HMK Şerhi*, 2021, 4.:5482.; Akıncı, *Milletlerarası Tahkim*, 339.; Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 337.; Şanlı, Esen, and Ataman-Figanmeşe, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 787. ; Kalpsüz, *Türkiye’de Milletlerarası Tahkim*, 93.; Karşlı, *Medeni Muhakeme Hukuku*, 914.; Karadaş, *Ulusal (İç) Tahkim*, 181–82.; Özbek, ‘Uzman Görüşünün Yargılamada Değerlendirilmesi’, 75.; Ekşi, *Hukuku Muhakemeleri Kanunu’nda Tahkim*, 170.; Dayınlı, *Milletlerarası Tahkim Rehberi*, 33.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 83.; Yılmaz, *HMK Şerhi*, 2013, 1758.; Nomer, Ekşi, and Öztekin Gelgel, *Milletlerarası Tahkim Hukuku*, I:27.; Görgün, Börü, and Kodakoğlu, *Medenî Usûl Hukuku*, 741.

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, if required, is seen as a deficiency that leads to the reversal of the (first or second instance) court decision.²⁹⁵ Contrary to the domestic litigation practice, Turkish arbitration practice also favours the appointment of experts by the parties.²⁹⁶

3.1.4.2. Germany

The German arbitration law provisions are to be found in the tenth book of the Code of Civil Procedure (*ZPO*), comprising sections 1026 to 1066. The provisions are almost a literal adaptation of the UNCITRAL Model Law Art. 26, with few deviations. *ZPO* § 1049(2) foresees for the parties to appoint their own 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 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.²⁹⁷

The wording of the article seems to permit a party-appointed expert only when (i) the tribunal appointed an expert, (ii) during the oral hearings (but not in the preliminary proceedings) and (iii) through mere statements on disputed questions (instead of a comprehensive written opinion).²⁹⁸

²⁹⁵ Aktepe Artık, *Medeni Usûl Hukukunda Hakem Kararlarının İptali Sebepleri*, 379.

²⁹⁶ Pekcanitez and Yeşilirmak, 'Tahkim', 2713.; Akıncı, *Milletlerarası Tahkim*, 339.; For contrary view see Eroğlu, *Tahkimde Yargılamanın Yenilenmesi*, 146-147.

²⁹⁷ 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: 04.10.2022)

²⁹⁸ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274–75.

Wach/Petsch argue that, in German arbitration, expert evidence is only possible through a tribunal appointment. In principle, there is no party-appointed expert; at least, it is technically not “expert evidence”.²⁹⁹

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.³⁰⁰ Nevertheless, the reasoning of the legislation provides to discard 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 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.³⁰¹

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.³⁰²

Parties may agree on a neutral and objective expert, who then will be appointed by the tribunal.³⁰³ According to § 1049 of the ZPO, parties may exclude experts with an express agreement, but the arbitrator cannot order to exclude such, either tribunal or

²⁹⁹ 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.

³⁰⁰ Schwab and Walter, *Schiedsgerichtsbarkeit*, Chapter 15, para. 19.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 186, 274–75.; Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, 11.:595.

³⁰¹ 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: 29.09.2022)

³⁰² Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 275–76.

³⁰³ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 110.

party-appointed.³⁰⁴ This is not contradictory to the right to be heard envisaged in the German Constitution Art. 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.³⁰⁵

If the tribunal sees that issues are unsolvable without an expert opinion, it has the obligation to appoint one, according to § 1042 para. 4 of ZPO.³⁰⁶ In case a foreign arbitral award is sought to be enforced in Germany, the same conclusions would be applicable to such an award.³⁰⁷

Wach/Petsch argue 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.³⁰⁸ This does not prevent the parties from submitting expert opinions but prevents the tribunal from relying solely on that rather than appointing itself an expert.³⁰⁹

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

³⁰⁴ Wach and Petsch, 106, 108.; Schwab and Walter, *Schiedsgerichtsbarkeit*, Chapter 15, para. 19.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 266.

³⁰⁵ Thomas et al., *Thomas/Putzo ZPO*, § 1049 para. 2.

³⁰⁶ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 103.

³⁰⁷

³⁰⁸ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 111.

³⁰⁹ For the argument that ZPO § 1049 does preclude party-appointed experts, see Schlosser, *Kommentar zur Zivilprozessordnung: ZPO, Band 10: §§ 1025 - 1066*, § 1049, para.1.

3.1.4.3. Switzerland

Swiss International Arbitration provisions in the Federal Act on International Private Law (SPILA)³¹⁰ do not directly regulate the matter of evidence. Art. 184 of the SPILA only states that “[t]he arbitral tribunal takes the evidence itself.”³¹¹ (emphasis added)

Before Swiss courts, a private expert opinion (*Privat-gutachten*) did not constitute evidence; it was merely a party allegation.³¹² In arbitration proceedings, however, the statements, opinions and conclusions of an expert appointed by a party are considered evidence. *Berger and Kellerhals* argue that a party-appointed expert is essentially subject to similar treatment as fact witnesses.³¹³

3.1.4.4. UK

The English Arbitration Act (EAA)³¹⁴ Section 37 stipulates that, unless otherwise agreed by the parties, the tribunal may appoint experts, legal advisers or assessors.³¹⁵ The provision entails that such expert, legal adviser or assessor may attend the proceedings, and the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.³¹⁶

Although the provision does not mention the opportunity for the parties to appoint their own experts, it is also not forbidden and should be permitted according to procedural fairness reasons.³¹⁷

³¹⁰ 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 02.04.2022)

³¹¹ 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.

³¹² Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 493.; see Girsberger and Voser, *International Arbitration*, 287.

³¹³ Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 493–94.

³¹⁴ Available at <https://www.legislation.gov.uk/ukpga/1996/23/contents> (accessed 03.04.2023)

³¹⁵ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 185.; See also "Protocol for the Instruction for Experts to give evidence in Civil cases" published by the UK Civil Justice Council.

³¹⁶ Rawding, Fullelove, Gregory Roy, and Martin, ‘International Arbitration in England: A Procedural Overview’, 382.

³¹⁷ Bor, ‘Expert Evidence’, 504.

Section 33(a) of the EAA provides that parties must have an opportunity to put their case fairly. This is related to procedural fairness and indicates that parties may rely on expert evidence where appropriate.³¹⁸

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.³¹⁹

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.³²⁰ In the UK, experts who are found to violate their duties may be subject to disqualification.³²¹ However, the EAA has the power to restrict expert evidence, in contrast to the CPR.³²²

Where English law governs the arbitration, the duties owed by a party-appointed expert are often seen as being those set 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.³²³

The attorney may prepare the expert, examine and advise him/her on additional matters to include in the report.³²⁴

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

³¹⁸ Bor, 504.

³¹⁹ Rawding, Fullelove, Gregory Roy, and Martin, 'International Arbitration in England: A Procedural Overview', 381.

³²⁰ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 212.

³²¹ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457; Nesi, 'Expert Witness: Role and Independence', 77–78.

³²² Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457, fn. 22.

³²³ Referencing to *Whitehouse v Jordan*, [1981] 1 WLR 246 at p 256, per Lord Wilberforce.

³²⁴ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 187.

affects the weight of his opinion in the assessment of evidence more than his admissibility.³²⁵

3.1.4.5. USA

The USA has developed extensive procedures for the qualification of experts and allows the judge to act as a gatekeeper to exclude questionable expert testimony.³²⁶ Party-appointed experts are classified under the category of witnesses according to the Federal Rules of Evidence Rule 702.³²⁷

Traditionally, in US law, the main role for obtaining and presenting expert opinion is given to the parties because the US adopts the adversarial system. In this system, the judge as a decision-maker should be impartial and passive; the proceeding is administered by the parties and their lawyers.³²⁸ Experts are commonly produced and paid for by the parties. The court decides the admissibility of such evidence.

3.1.4.6. Singapore

The Singapore International Commercial Court (SICC) Practice Directions³²⁹ contains some rules for providing expert evidence. It provides rules as to the appointment, the method the evidence should be produced and the examination.³³⁰

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

³²⁵ Prose, *Expert witness conferencing in Schiedsverfahren*, 23.

³²⁶ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 457.

³²⁷ Budak, 'Anglo - Amerikan Medeni Yargılama Hukukunda Bilirkişilik (Uzman Tanıklar)', 828–29.; Demirkapı, 'Anglo- Amerikan Hukukunda Bilirkişilik Kurumunda Yeni Eğilimler', 50.

³²⁸ Mosk, 'The Role of Facts in International Dispute Resolution (Volume 304)', 21.; Güvenaalp, *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.

³²⁹ 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 19.01.2023); O'Malley, *Rules of Evidence in International Arbitration*, 145.

³³⁰ 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 19.10.2022)

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)). Counsel for each party is to inform all other parties on whether there are any objections to the experts that will be called (n. 87(2)). Counsel may raise objections about the experts at or prior to a Case Management Conference (n. 87(3)).

Experts are, as a default practice, directed to meet before hearings to discuss their respective opinions, 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 thereafter be expected to prepare a joint experts' report.

Setting out: a list of the issues, areas/issues where they agreed, areas/issues where they disagree, the reasons, nature and extent of their disagreement, and any other helpful information (n. 88(1)). Although this report per se does not bind parties without express agreement, the court has the discretion to take cognisance of the experts' agreement (n. 88(2)).

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

The SICC has also established a specialist Technology, Infrastructure and Construction list dealing with complex disputes in these areas, which also contains similar provisions for experts.³³¹

3.1.4.7. Hong Kong

Cap. 609 Arbitration Ordinance (AO)³³² is the arbitration law applicable to arbitration, which place of arbitration is Hong Kong (AO Art. 5(1)). The AO is based on the

³³¹ 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 19.01.2023)

³³² [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 19.01.2023)

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)).³³³

3.1.5. International Guidelines and Practice

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

However, there is no confusion as to whether it is permissible for the parties to appoint an expert in international practice. On the contrary, even the tribunal expects the parties to bring their experts.³³⁴

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 those, the Chartered Institute of Arbitrator's Protocol for the Use of Party-Appointed Experts Witnesses in International Arbitration (CIArb Protocol)³³⁵ from 2007 is the most specific and comprehensive to the issue set of rules.

Additionally, the Rules on the Taking of Evidence in International Arbitration (IBA Rules) have detailed provisions as to the appointment and use of party-appointed

³³³ *Kesikli* argues that the UNCITRAL Model Law does not explicitly regulate party-appointed experts, see *Kesikli*, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 215.

³³⁴ O'Malley, *Rules of Evidence in International Arbitration*, 145.

³³⁵ Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, www.ciarb.org/media/1273/partyappointedexpertsinternationalarbitration.pdf (accessed 20.01.2022) The CIArb Protocol applies only to party-appointed experts, not to tribunal-appointed experts or single-joint experts.

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

3.1.5.1. IBA Rules on the Taking of Evidence

The IBA Rules on the Taking of Evidence, which has its roots in 1983 and modernised in 2020, are the most widely known and the most frequently used soft-law element in arbitral practice.³³⁶ The IBA Rules are more often consulted as non-binding guidelines.³³⁷ “The rules are not directly applicable unless adopted by the parties. As there are no detailed regulations on taking and evaluating evidence in 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 these IBA Rules, they need to be chosen either by the arbitrators or by the parties.”³³⁸

The IBA Rules, *inter alia*, have 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).³³⁹ However, they do not provide for reviewing 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 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 has

³³⁶ ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’, 35.

³³⁷ Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 447.

³³⁸ Esen, ‘Violation of the Right to A Fair Trial in Arbitration’, 113.

³³⁹ Ünüvar, ‘Experts: Investment Arbitration’, para. 22-24.

been put forward. The IBA Rules are not clear on the duties which a party-appointed expert has, specifically no explicit reference to the party-appointed expert's duty to assist the arbitral tribunal exists³⁴⁰, only a mere declaration of the expert to express his/her genuine belief required.³⁴¹ 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.³⁴² Other authors have deemed the statement of independence as a mere self-assessment of limited value.³⁴³

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.³⁴⁴

3.1.5.2. 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 who are 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 which have been developed in international arbitration over time.

³⁴⁰ 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*, 304–5.

³⁴¹ 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.

³⁴² Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 447.

³⁴³ Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314, 318.

³⁴⁴ Cerrahoglu Balsenn, 'Instructions to Party-Appointed Experts Should Focus on Impartiality', 28; Michell and Mandhane, 'The Uncertain Duty of the Expert Witness', 648.

Relevant principles regarding party-appointed experts are stated in the Guideline para. 11, 20, 22, 24 and 25:

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. (11)

A Party Representative may assist Experts in the preparation of Expert Reports. (20)

A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion. (22)

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. (24)

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;
- (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.

(25)

3.1.5.3. CIArb Protocol and Guideline

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.³⁴⁵

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 envisages the experts meeting and preparing a joint statement on the areas of agreement and disagreement between the party-appointed experts.³⁴⁶

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 prior to the main arbitration hearing.³⁴⁷

However, as with other rules, it does not provide a mechanism for challenging an expert or their opinion. The Protocol is also criticised for following English judicial practice and may not have been adopted widely for that reason in international arbitration.³⁴⁸

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.³⁴⁹

It provides guidance on 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 for the expert(s) (Article 4); and v. Testing of the experts' opinions (Article 5).

³⁴⁵ CIArb Protocol Foreword.

³⁴⁶ Nessi, 'Expert Witness: Role and Independence', 79–80.

³⁴⁷ Bor, 507.

³⁴⁸ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 285.

³⁴⁹ CIArb International Arbitration Practice Guideline for the Party-appointed and Tribunal-appointed experts available at <https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf> (accessed 19.01.2023)

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.³⁵⁰

3.1.5.4. 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”) have been 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”.³⁵¹

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 the proceedings with the agreement of the parties or otherwise applied by arbitral tribunals. The Prague Rules include limited guidance regarding 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 Art. 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 Art. 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

³⁵⁰ CIArb Guidelines for Witness Conferencing in International Arbitration 2019, <https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf> (accessed 19.01.2023)

³⁵¹ Prague Rules Preamble; See Stampa, ‘The Prague Rules’, 221–44.; Patocchi, ‘Uluslararası Tahkim Sempozyumu’, 147.; For details and comparison with IBA Rules, see Bayer Mazlum Mert and Süheyla Ahsen Türkmen, ‘Milletlerarası Tahkimde Delil İkamesi Hakkında Prag Kuralları ve IBA Kuralları’nın Karşılaştırılması’, in *Milletlerarası Tahkim ve Usul Hukukuna İlişkin Güncel Meseleler*, ed. Sibel Özel and Hatice Selin Pürselim (İstanbul: On İki Levha Yayıncılık, 2022), 37 ff.

the experts agree, a list of issues on which the experts disagree and reasons why the experts disagree (Prague Rules Art. 6.7.).

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

Art. 6 should have regulated the idea that a proactive arbitrator should convene a conference to discuss the parties' views with the experts ahead of the second round of submissions on the merits or, in any event, before the hearing.³⁵²

3.1.5.5. UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution

The Secretariats of (ICSID) and the (UNCITRAL) are collaborating on a draft Code of Conduct for Arbitrators and Jurors (Adjudicators) in International Investment Disputes. The Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality, as well as the duty to conduct proceedings with integrity, fairness, efficiency, and civility. It is based on a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and international courts.

Paragraphs 1 and 2 set forth the temporal scope of the prohibition for Arbitrators. They are prohibited from acting concurrently as a legal representative or an expert witness in another IID proceeding [and for a period of three years following the end of his or her functions as an Arbitrator]. This means that an individual functioning as a legal representative or an expert witness in an IID proceeding would need to resign from that role before accepting an appointment as an Arbitrator.

The prohibition only applies if the other proceeding addresses the same measure(s), the same or related party(parties), or the same provision(s) of the same treaty. When

³⁵² Patocchi, 'Uluslararası Tahkim Sempozyumu', 165.

any of these criteria are met, the Arbitrator would be prohibited from acting as an expert in another proceeding. The use of the term “same” throughout Article 4 means that the elements under scrutiny in the IID must be identical. In other words, the threshold to trigger the prohibition is high.³⁵³

Paragraph 2 prohibits an Arbitrator from acting as a legal representative or an expert witness in another IID proceeding that involves “legal issues which are substantially so similar that accepting such a role would be in breach of article 3 (independence and impartiality). The prohibition in paragraph 2 would be triggered only if the role to be assumed by an Arbitrator concurrently [or undertaken within the three years after the IID proceeding] would amount to a lack of independence or impartiality in breach of article 3. This includes the creation of an appearance of a lack of independence or impartiality, as mentioned in Article 3(2)(f).

A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts [including in the eyes of the disputing parties] as to his or her independence or impartiality. 2. The following information shall be included in the disclosure: (a) Any financial, business, professional, or personal relationship in the past five years with (iii) Other Arbitrators and expert witnesses in the IID proceeding, and (d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years.

Article 10(7) indicates that a failure to disclose does not in itself establish [a lack of impartiality or independence] [a breach of articles 3 to 6 of the Code]. It is rather the content of the disclosed or omitted information that determines whether there is a [breach] [lack of impartiality or independence]. [Even though a breach of Article 10 is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a Candidate or Adjudicator’s duty of independence and impartiality under Articles 3 of the Code.]

³⁵³ UNCITRAL/ICSID, Draft Commentary, 8, para. 33-36.

3.1.5.6. The ALI/UNIDROIT Principles

The ALI/UNIDROIT Principles of Transnational Civil Procedure (ALI/UNIDROIT Principles), first published as a draft in 1996 and adopted in 2005 by the Governing Council of UNIDROIT, are standards for the adjudication of transnational commercial disputes.³⁵⁴

These principles aim to reconcile the differences between various national rules of civil procedure, taking into account the peculiarities of transnational disputes compared to purely domestic ones. The ALI/UNIDROIT Principles are accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or ALI but constituted the Reporters' model implementation of these principles.

Article 22 (4) of the ALI/UNIDROIT Principles provides that the court may appoint its own expert to give evidence on any relevant issue for which expert testimony is appropriate. This provision then goes on to state that the parties have the right to present their own expert evidence. Importantly, these experts, irrespective of whether they have been appointed by the court or a party, owe their duty to the court only. Article 26 of the Rules further provides that court-appointed experts have to be neutral and independent from the parties and from any other influence. Similarly, party-appointed experts are subject to the same standards of neutrality and independence as court-appointed experts.³⁵⁵

As such, the ALI/UNIDROIT Principles (supplemented by the Rules) adopt an intermediate position between the common law and civil law systems discussed earlier. The court may then appoint experts, but the parties may also present experts irrespective of whether the court has appointed its own expert. However, and this is the most salient feature of this set of rules, party- and court-appointed experts ultimately owe their duty exclusively to the court and are subject to the same standards and obligations in terms of independence.”³⁵⁶

³⁵⁴ <https://www.unidroit.org/english/documents/2005/study76/s-76-13-e.pdf>

³⁵⁵ ALI/UNIDROIT Principles of Transnational Civil Procedure, 59.

³⁵⁶ Nessi, ‘Expert Witness: Role and Independence’, 79–80.

3.1.5.7. UNCITRAL Notes on Organizing Arbitral Proceedings

In 1996, UNCITRAL adopted the Notes on Organizing Arbitral Proceedings (*UNCITRAL Notes*), which were modernised and updated in 2016.

The UNCITRAL Notes are non-binding in nature and are designed to assist arbitration practitioners by providing an annotated list of matters on which a tribunal may wish to formulate decisions during the course of arbitral proceedings, like language and place of arbitration, questions relating to confidentiality, as well as conduct of hearings and the taking of evidence and possible requirements for the filing or delivering of an award.³⁵⁷

Specifically, paras. 92-107 are related to issues for the use of both tribunal and party-appointed experts in arbitral proceedings. The Notes are silent on the independence of party-appointed experts but provide indirect tools to the tribunal to test the experts.³⁵⁸

The Notes provide that parties may appoint their experts or even a joint expert who addresses the issues agreed by the parties.³⁵⁹ The tribunal may invite the experts who address the same issues to submit a joint expert report, indicating points of agreement and disagreement with the realisation of an informal meeting (pre-hearing meeting), where experts may find common ground and take the time to discuss any specific issues.³⁶⁰ The arbitral tribunal may consider requesting additional or responsive expert reports to address the points of conflict.³⁶¹

The arbitral tribunal should address the sequence and timing of the submission of expert reports and clarify the nature and extent of communication between the parties or their representatives and their experts, as well as the potential disclosure of such communications.³⁶²

³⁵⁷ United Nations, 'UNCITRAL Notes on Organizing Arbitral Proceedings', 1.

³⁵⁸ Nessi, 'Expert Witness: Role and Independence', 85.

³⁵⁹ United Nations, 'UNCITRAL Notes on Organizing Arbitral Proceedings', para. 94, 98.

³⁶⁰ United Nations, para. 95, 97.

³⁶¹ United Nations, para. 96.

³⁶² United Nations, para. 99, 100.

3.1.5.8. ICC Arbitration Commission Report on Controlling Time and Costs

The ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration advises parties to an arbitration to presume that expert evidence will not be required and to only depart from this presumption if there are key issues on which expertise is needed to assist the tribunal.³⁶³

The techniques foresee some advice for the use of experts. Clarifying the subject matter and scope of the opinions at an early stage for having the experts report on the same issues (n. 64), limiting the number of experts per party for any particular subject matter (n. 65), and the number of rounds of expert reports, including the simultaneous or sequential exchange of these reports (n. 66) and the use of a single expert, appointed either by the arbitral tribunal or jointly by the parties for efficiency reasons (n. 68) relate to the adducing of the expert opinion.³⁶⁴

There are also notes on the pre-hearing and hearing phases. Pre-hearing meeting of experts is recommended to narrow the issues they agree and disagree on after they have exchanged reports (n. 67). Conflicting experts should be required by a specified date consistent with the timetable for the arbitration to conference and be questioned by the tribunal and by the counsel at the same time (n. 79).³⁶⁵

3.1.5.9. ICCA Guidelines on Standards of Practice in International Arbitration

These Guidelines were developed by a Task Force of experts in the practice of international arbitration with experience from diverse jurisdictions. The Task Force first carried out a survey of professional standards, ethical rules, and civility guidelines from a wide range of jurisdictions.

The Guidelines aim to articulate prevailing expectations as to the standards of practice in international arbitration. Whether a participant's conduct runs afoul of these

³⁶³ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 304.

³⁶⁴ ICC, 'ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration', 13.

³⁶⁵ ICC, 14.

Guidelines will necessarily be a fact-specific inquiry based on the circumstances at hand. While the Guidelines are not intended as mandatory rules, they may be incorporated by parties in their arbitration agreement, adopted by arbitral institutions, or included by arbitral tribunals in a procedural order or in the terms of reference where appropriate.³⁶⁶

The Guidelines are organised into four sections: (I) general guidelines for all participants in international arbitration (counsel, arbitrators, staff of arbitral institutions acting in the particular case, tribunal secretaries, witnesses, experts, court reporters, interpreters, translators, etc.); (II) guidelines for party representatives; (III) guidelines for arbitrators; and (IV) guidelines for other participants. Each sub-section sets out several general principles followed by explanatory remarks.³⁶⁷

Expert and fact witnesses shall be honest in their testimony before an arbitral tribunal. Expert and fact witnesses shall not knowingly make any false submission to the arbitral tribunal. In the event that an expert or fact witness learns that he or she has previously made a false submission to the arbitral tribunal, he or she shall promptly correct such submission (Guideline IV.A). Expert and fact witnesses shall assist the arbitral tribunal and follow its directions. (Guideline IV.B)

3.1.5.10. Code of Best Practices in Arbitration of The Spanish Arbitration Club

The Spanish Arbitration Club (Club Español del Arbitraje) has revised its Code of Best Practices (CBP) dated 2005, in 2019. While the former CBP was aimed exclusively at arbitral institutions, the updated CBP contains recommendations not only for arbitral institutions but also for all professionals participating in the arbitration process, such as arbitrators, lawyers, experts, and funders.³⁶⁸ The CBP is a good example of “soft rules” in arbitration. It is composed of recommendations which the Spanish Arbitration Club offers to the entire law arbitration community.

³⁶⁶ ICCA Task Force on Standards of Practice in International Arbitration, ‘Guidelines on Standards of Practice in International Arbitration’, 1.

³⁶⁷ ICCA Task Force on Standards of Practice in International Arbitration, 2.

³⁶⁸ Club Español del Arbitraje, Code of Best Practices in Arbitration, 2019, 6.

The recommendations include duties for experts, such as the requirement of objectivity and independence (para. 133-135), disclosure (para. 136, 139-145), loyalty (para. 147-149), confidentiality (para. 152-153) and provisions regarding the fees of experts (para. 150-151).³⁶⁹ Additionally, it contains recommendations for elements that should be included in the expert's report (para. 146), including a declaration for objectivity and independence and disclosure of information (para. 137-138).

3.1.5.11. Professional Codes of Conduct

Acting as an expert itself is not a profession. Experts are scientists, engineers, lawyers, accountants etc. Any professional organisation, such as chambers, councils or bars, have mostly established codes of conduct that set out ethical rules for their members serving as experts or witnesses in dispute resolution proceedings.³⁷⁰ These codes must be adhered to while acting as an expert, be it party-appointed or tribunal-appointed.

3.2. Legal Nature

The legal nature of a particular matter determines the regime and consequences applicable to that subject.

When it comes to party-appointed experts in international arbitration, there is no common and settled understanding regarding its legal nature.³⁷¹ Although one may easily draw analogies from domestic court applications, depending on the legal culture of the arbitrator, this should not be done in international arbitration.³⁷² Procedural rules concerning evidence for litigation are usually not mandatorily applicable in arbitration, except if they are related to fundamental rights such as equality or fair trial.³⁷³

³⁶⁹ Club Español del Arbitraje, Code of Best Practices in Arbitration, 45-49.

³⁷⁰ See for instance (accessed 21.01.2023) and https://euroexpert.org/fileadmin/Tmpl/documents/downloads/euroexpert-documents/Code_of_Practice_Stand_0719.pdf (accessed 21.01.2023); Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 304.

³⁷¹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274.

³⁷² Eijssvoogel, 'General Synthesis Report', 6.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 412.

³⁷³ Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 104.; Akıncı, *Milletlerarası Tahkim*, 342.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92. ; Born, *International Commercial Arbitration*, 2364.; Taşkın, *Tahkim Hukukunda Tahkim*

Arbitrators are generally and naturally influenced by court proceedings simply as a matter of habit or tradition. Only the best arbitration lawyers have sufficient experience and the wisdom to fully detach themselves from their own legal system when determining or influencing the procedure for international arbitration.³⁷⁴

Depending on the legal culture background, the major views are that party-appointed experts are classified as witnesses, judicial/adjudicatory assistants, expert evidence, party submission or sui-generis evidence. In my view, a party-appointed expert could be classified as a means of evidence.³⁷⁵ Before the arguments for such a position will be elaborated, various positions will be explained.

3.2.1. Witness Evidence

Party-appointed experts, especially in *common law* countries, are often called “expert witnesses”, relying on the fact that they give testimony before tribunals and courts and are examined by these and party representatives. This is also the case in some civil law countries, such as the Netherlands.³⁷⁶ Thus, they are categorised as witness evidence.³⁷⁷ The UNCITRAL Model Law Art. 26(2) also refers specifically to party-appointed experts, but not tribunal-appointed experts, as witnesses.

The LCIA Arbitration Rules Art. 20, SIAC Arbitration Rules Rule 25, American Arbitration Association (AAA) R-35, regard experts explicitly as “witnesses”. Again, the CIArb Protocol refers to party-appointed experts as “witnesses”.

Anlaşması, Hakem Kurulu ve Tahkim Yargılaması, 191.; Akıncı, ‘Usul Kurallarına Aykırılık ve Dinlenilme Hakkı’, 50.; Redfern et al., ‘The Standards and Burden of Proof in International Arbitration’, 323. ; For contrary argument See Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1892.; Ağırman, *Milli & Milletlerarası Tahkim*, 455.; Ermenek, ‘Tahkimde Hukuki Dinlenilme Hakkının Korunması’, 36.

³⁷⁴ Eijssvoogel, ‘General Synthesis Report’, 6.

³⁷⁵ Proske, *Expert witness conferencing in Schiedsverfahren*, 26.

³⁷⁶ Boerstra and Bitter, ‘The Netherlands’, 199.

³⁷⁷ Knobloch, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 277.; Proske, *Expert witness conferencing in Schiedsverfahren*, 20.; Wiegand, ‘Der Experte im Verfahren Erkenntnisse aus nationalen und internationalen Verfahren vor Schiedsgerichten und staatlichen Gerichten’, 19.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 25.

The ICC Commission Report on Issues for Arbitrators Regarding Experts also states: “Regardless of which party or parties appoint them, party-appointed experts are witnesses – nothing more and nothing less.”³⁷⁸

Nevertheless, there is a difference in the content a fact witness and an expert testify; whereas a fact witness testifies based on their first-hand experience, observations, and knowledge that he has observed or heard with the sense organs, the expert presents his professional opinion on a particular matter relying on his experience or knowledge.³⁷⁹ Thus, each testimony serves different purposes. The fact witness is only helping the tribunal to establish the facts of the case. The experts are generally helping the tribunal to understand the facts better but generally not establishing them. The fact that a witness is generally not replaceable, whereas another expert can be found on almost every occasion.³⁸⁰

So, witnesses and experts apparently differ from each other. It would be inappropriate to categorise experts as witnesses, relying merely on the fact that they give testimony and are examined at the hearings.³⁸¹

In civil law countries, party-appointed experts are not accepted as witnesses³⁸² and are approached on the basis of interchangeability. In other words, the contribution of the expert is based on the accessible experience and knowledge of his field of expertise, which many other experts might also have. In contrast, the witness’s position is that he has a special bond with an incident which, if it was the only witness, is inimitable.³⁸³ The approach in common law countries is also changing, as CPR Rule 35 and EAA Section 37, for instance, did not name experts “expert witnesses” anymore but mere

³⁷⁸ Schäfer and Wilson, ‘ICC Bulletin’, 2021, 65.

³⁷⁹ Zuberbühler et al., *IBA Rules of Evidence*, 136; Schneider, ‘Technical Experts in International Arbitration’, 446; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 440; Spitzer, ‘Der Sachverständigenbeweis Im Österreichischen Zivilprozess’, 42.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 56, 81.; Atalay, ‘Pekcanitez Usûl’, 2021, 1887.; Proske, *Expert witness conferencing in Schiedsverfahren*, 20.; Özbek, *Tahkim Hukuku*, II:1448.

³⁸⁰ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 276.

³⁸¹ Similarly Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 274, fn. 435.

³⁸² Pekcanitez, ‘Özel Uzman’, 399; Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 39.

³⁸³ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 97–98.

“experts”.³⁸⁴ The HKIAC Arbitration Rules Art. 2.9, 22.5, and 22.7 also differentiate between witnesses and experts.

3.2.2. Assistant

Some scholars argue that party-appointed experts are assistants to the tribunal during the proceedings and that they owe their duty to the court/tribunal.³⁸⁵ The CI Arb Protocol Art. 4(3) states also that “[a]n expert’s duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced [emphasis added].”

The expert should provide independent assistance to the tribunal by way of objective, unbiased opinion in relation to matters within his expertise, and the expert should never assume the role of an advocate.³⁸⁶ However, whether the duty to assist the tribunal puts party-appointed experts in the legal status of assistants can be criticised. This could possibly be argued when referring to tribunal-appointed experts.³⁸⁷ Inherently, the primary role of the party-appointed expert is to help the appointing party.³⁸⁸ It seems that this attribution to party-appointed experts is made not to define their legal nature but their role in the proceedings.

3.2.3. Party Submission

Some civil law scholars argue that the opinion submitted by the expert is a qualified party submission (*qualifizierter Parteivortrag*).³⁸⁹ Many Turkish scholars share

³⁸⁴ Teomete Yalabık, ‘Questioning Expert Witnesses in Litigation and International Arbitration: How to Prevent Partisan Expert Reports and “Battle of Experts”’, 136.; Yazıcı-Tıktık, ‘HMK m. 293’teki Uzman Görüşü Kurumu İle Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması’, 85.

³⁸⁵ Parlett, ‘Parties’ Engagement with Experts in International Litigation’, 441; Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 445; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 33; Sarısözen, ‘Özel Bilirkişi (Uzman Görüşü)’, 1703.

³⁸⁶ Bor, ‘Expert Evidence’, 511.; Hwang and Chin, ‘The Role of Witness Statements in International Commercial Arbitration’, 652.

³⁸⁷ Tanrıver, *Hukukumuzda Bilirkişilik*, 26. ;See the HKIAC Arbitration Rules Art. 25 which attributes this position to tribunal-appointed experts.

³⁸⁸ Proske, *Expert witness conferencing in Schiedsverfahren*, 20.

³⁸⁹ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 111.; Ahrens, *Der Beweis Im Zivilprozess*, 967, para. 39. Based on the argument that ZPO § 1049 is a peremptory norm of law.; ‘Procedural Efficiency

similar views (*nitelikli taraf beyanı*).³⁹⁰ It is considered as a means to influence or shape the opinion of the adjudicator.³⁹¹

Accordingly, the expert is obliged, regardless of his personal, professional conviction, to accept orders from the party that is paying the expert and represent the position that is favourable to the party commissioning him insofar as this is within the scope of what is justifiable in the scientific field in question.³⁹² This view is supported by the fact that there are no legal remedies such as challenging the expert like the tribunal-appointed experts can be.

Schneider argues that a party-appointed expert report cannot be merely a party-argument.³⁹³ Other Swiss scholars also accept that party-appointed experts are more than just a party submission for various reasons; party submissions are pleaded in briefs and not in expert reports, a party-appointed expert should actually appear at the evidentiary hearing, and the words of a party-appointed expert may still have a different weight than the arguments developed by counsel, even if the expert does not appear at the hearing. Thus, if the requirements are met, party-appointed experts should be treated as a means of evidence rather than as party representatives.³⁹⁴

However, it has been suggested that the report of a party-appointed expert who does not appear at the evidentiary hearing, despite a request, might be taken into account by

in International Arbitration: Choosing the Best of Both Legal Worlds’, 122.; Patocchi, Paolo Michele and Niedermaier, ‘UNCITRAL Rules’, 1182.

³⁹⁰ Tanrıver, *Hukukumuzda Bilirkişilik*, 33.; Pekcanitez, ‘Özel Uzman’, 393.; Atalay, ‘Pekcanitez Usûl’, 2021, 1959.; Yazıcı-Tıktık, ‘HMK m. 293’teki Uzman Görüşü Kurumu İle Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması’, 91.; Karslı, *Medeni Muhakeme Hukuku*, 623.; Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği*, 420.; Toraman, *Medeni Usul Hukukunda Bilirkişi İncelemesi*, 660.; Alangoya, Yıldırım, and Deren-Yıldırım, *Medeni Usul Hukukunun Esasları*, 369–70.; Tanrıver, *Medenî Usûl Hukuku*, 2021, I:1106.; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 34.; Akil, ‘Bilirkişi-Uzman Tanık Ayrımı’, 174, 177.; Eroğlu, *Tahkimde Yargılamanın Yenilenmesi*, 149.; Özbek, *Tahkim Hukuku*, II:1464.; Budak/Karaaslan state that if the expert opinion is on legal issues, this is part of the party submissions, but if it is related to factual issues, then it’s a means of (non-binding) evidence (“*takdiri delil*”). See Budak and Karaaslan, *Medeni Usul Hukuku*, 2022, 311.

³⁹¹ Atalay, ‘Pekcanitez Usûl’, 2021, 1959.

³⁹² Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 95.

³⁹³ Schneider, ‘Technical Experts in International Arbitration’, 446.

³⁹⁴ Zuberbühler et al., *IBA Rules of Evidence*, 148.

the arbitral tribunal as part of the party's written argument, but not as expert evidence, since the opportunity to testify and examination could not be realised.³⁹⁵

The German Federal Supreme Court and Swiss Federal Supreme Court³⁹⁶ share this view.

3.2.4. Expert-Determination

The use of experts in international arbitration can be easily confused with *expert-determination*. Expert-determination is a concept where parties, by agreement, refer a quality or quantity dispute or an issue to an expert or a panel of experts and accept as conclusive the determination or findings made by such expert(s).³⁹⁷ If parties explicitly grant the expert the power to render a binding decision on certain factual issues, this is called expert-determination.³⁹⁸ On the other hand, the expert opinion does neither strictly bind the tribunal nor the parties; expert-determination, depending on the applicable law, will have a binding effect and, thus, has to be differentiated.³⁹⁹ Parties need to have an agreement to appoint an expert in order to classify as an expert determination.

Atalı/Ermenek/Erdoğan argue that if a party does not object to an expert report, which indicates opinions on factual issues, an expert-determination agreement comes into

³⁹⁵ Zuberbühler et al., 148.; Schneider, 'Technical Experts in International Arbitration', 447.

³⁹⁶ Swiss Federal Supreme Court, 4A_178/2015, Swiss International Arbitration Decisions, 11.11.2015, para. 2.6.

³⁹⁷ Yeşilirmak, 'Expert Determination in Turkey', 306 ff.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 24. ; White, *The Use of Experts by International Tribunals*, 163.; See Tuna, *Alternative Dispute Resolution in Energy Industries*, 180–85.

³⁹⁸ Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 28. ; Zuberbühler et al., *IBA Rules of Evidence*, 159.

³⁹⁹ Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 49.; However, an expert-determination should also be differentiated from an arbitral award. "In a case brought before a German court, the legal nature of a decision made in the form of an "expert opinion-arbitral award" had to be determined. The court considered not only the form and title of the document, but the nature and effect of the said decision. Although the document was presented as an "expert opinion", there was a final and binding decision capable to be enforced and expressly excluded any review of the merits by the courts. Therefore, the court concluded that the decision was an award and not an expert opinion." See [Oberlandesgericht Stuttgart, Germany, 1 Sch 21/01, 23 January 2002], <http://www.dis-arb.de/en/47/datenbanken/rspr/olg-stuttgart-case-no-1-sch-21-01-date-2002-01-23-id171> in UNCITRAL, *UNCITRAL Digest*, 127, para. 3.; Reiner and Aschauer, 'ICC Rules', 136.

existence that is binding on the tribunal.⁴⁰⁰ On the other hand, the party-appointed expert's opinions are not binding on the tribunal.

3.2.5. Expert Evidence

Some Turkish scholars also argue that, although the party-appointed expert is an expert like the tribunal-appointed expert, this does not lead that the former shares the legal nature of the latter.⁴⁰¹ The main reason for this view is that the party-appointed expert has no duty to be independent and cannot be challenged.⁴⁰² Some other scholars stress that the equality of arms principle might be violated where the party-appointed expert is accepted as expert evidence.⁴⁰³

On the other hand, *Can/Tuna* argues that the party-appointed expert in arbitration is, in the legal sense, a (tribunal-appointed) expert.⁴⁰⁴

Some German scholars argue, according to the German ZPO, that only tribunal-appointed experts can be categorised as expert evidence (*Sachverständigenbeweis*) and that party-appointed experts cannot be categorised as the same according to ZPO § 1049, especially with the ratio that they must be neutrals and could be challenged.⁴⁰⁵

⁴⁰⁰ Atalı, Ermenek, and Erdoğan, *Medeni Usul Hukuku*, 541.

⁴⁰¹ Atalay, 'Pekcanitez Usûl', 2021, 1959.; Pekcanitez, 'Özel Uzman', 398–404.; Karslı, *Medeni Muhakeme Hukuku*, 624.; Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu İle Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması', 92.

⁴⁰² Atalay, 'Pekcanitez Usûl', 2021, 1959.; Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu İle Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması', 92.; Tanrıver, *Hukukumuzda Bilirkişilik*, 33.; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 50–51.; Pekcanitez/Atalay/Özekes, *Medeni Usul Hukuku Ders Kitabı*, 439.

⁴⁰³ Karslı, *Medeni Muhakeme Hukuku*, 624.; Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği*, 422.; Especially if one party adduces multiple experts see Proske, *Expert witness conferencing in Schiedsverfahren*, 43.

⁴⁰⁴ Can and Tuna, *Milletlerarası Tahkim Hukuku*, 412.

⁴⁰⁵ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 103, 109.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 277.; For similar views see Spitzer, 'Der Sachverständigenbeweis Im Österreichischen Zivilprozess', 40.

3.2.6. Evidence Assessment Tool

In general, evidence is submitted to prove alleged facts that occurred before filing a case.⁴⁰⁶ Evidence indicates that an alleged fact occurred, such as a document proving that one is a debtor or video footage that shows that an accident occurred.

The expert opinion sometimes does not prove an alleged fact but enables the arbitrator to come to an opinion and derive a conclusion from other evidence, such as witness statements or documents.⁴⁰⁷ Thus, some authors rightfully argue that an expert opinion lacks the representative quality of a fact (*delilin vakıayı temsil değeri*). Hence, it should not be qualified as evidence but as an assessment tool while evaluating the evidence's credibility.⁴⁰⁸

3.2.7. Sui Generis Evidence

Art. 5(1) of the IBA Rules states that a party-appointed expert is a “means of evidence”. This indicates that party-appointed experts are not mere party submissions in international arbitration but have their own weight.⁴⁰⁹

Some Turkish scholars argue that party-appointed experts are a sui generis type of non-binding evidence (*Takdiri Delil*).⁴¹⁰ Pekcanitez even argues that party-appointed experts are not a means of evidence.⁴¹¹ The main supporting argument of this view is that party-appointed experts are regulated among the section of evidence in the HMK

⁴⁰⁶ Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 56.

⁴⁰⁷ Atalay, ‘Delil Kavramı Üzerine’, 135.; Özbek, ‘Uzman Görüşünün Yargılamada Değerlendirilmesi’, 129.; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 56.

⁴⁰⁸ Atalay, ‘Delil Kavramı Üzerine’, 135.; Erdoğan and Üçüncü, ‘Bilirkişilik Kurumu ve Bilirkişi Raporunun Delil Değerine İlişkin Bazı Sorunlar’, 362.; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 60.; Görgün, Börü, and Kodakoğlu, *Medenî Usûl Hukuku*, 560.

⁴⁰⁹ Zuberbühler et al., *IBA Rules of Evidence*, 136. ;

⁴¹⁰ Kuru, *Medenî Usul Hukuku El Kitabı*, I:826, 829; Çayan, *Medeni Usul Hukukunda Bilirkişilik Müessesesi*, 10; Işık, ‘Uzman Görüşü (Mütalaa)’, 92; Öztekin, ‘Bilirkişi Raporunun Hâkimi Bağlamaması’, 1624–25.; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, *Medeni Usul Hukuku*, 472; Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 213.; Bacanlı and Eroğlu classify party-appointed experts merely as “evidence”. See Bacanlı, ‘Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arabuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi’, 97. ; Similarly in France, see Reiner, ‘Austria’, 25.

⁴¹¹ Pekcanitez, ‘Özel Uzman’, 395, 405.

(Chapter 4 Section 7).⁴¹² This view is echoed by the authors of the *Münchener Kommentar zur Zivilprozessordnung*, who stipulate that party-appointed experts are a means of sui generis expert evidence (*eine eigene Beweisform des Sachverständigenbeweises*).⁴¹³

Knoblach also argues that according to German arbitration law, the party-appointed expert's legal nature cannot be classified as the party-appointed expert in the court proceedings.⁴¹⁴ The author shares the view that party-appointed experts are a means of sui generis expert evidence.⁴¹⁵

Authors of the *Münchener Kommentar zur Zivilprozessordnung* and *Schlosser* also share the view that party-appointed experts are in no way mere party submissions but a means of evidence.⁴¹⁶

Although the expert receives instructions, he will make evaluations based on scientific facts and methods, which will differentiate him from a counsel.⁴¹⁷

As *Atalay* states, any means of establishing an opinion on a factual allegation shall be treated as evidence (*geniş anlamda delil*) to the extent that it serves to establish the existence of that fact.⁴¹⁸

Thus, as long as an expert opinion either establishes the facts or makes them clearer to understand, I consider party-appointed expert opinions as a means of evidence which the arbitrators will freely assess along with other evidence.⁴¹⁹ In case the party-appointed expert opinion is on legal issues, it can still be treated as evidence but the

⁴¹² Öztekin, 'Bilirkişi Raporunun Hâkimi Bağlamaması', 1624.; Parlett, 'Parties' Engagement with Experts in International Litigation', 441; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 182; Çayan, *Medeni Usul Hukukunda Bilirkişilik Müessesesi*, 10; Toraman, *Medeni Usul Hukukunda Bilirkişi İncelemesi*, 663.

⁴¹³ Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 38-39; Saenger, 'ZPO § 1049 Vom Schiedsgericht Bestellter Sachverständiger', para. 5; Schlosser, *ZPO*, § 1049, para. 1.

⁴¹⁴ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 276–77.

⁴¹⁵ Knoblach, 277.

⁴¹⁶ Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 39; Schlosser, *ZPO*, § 1049, para. 1.

⁴¹⁷ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 214.

⁴¹⁸ Atalay, 'Pekcanitez Usûl', 2021, 1731.; Similarly Erdoğan and Üçüncü, 'Bir Davada Alınan Bilirkişi Raporunun Başka Davada Delil Değeri', 1512.

⁴¹⁹ Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Ankara: Seçkin, 2020), 91.

arbitrators will have it easier to deny the points made in such opinion, compared to a scientific or technical experts' determination on matters.

3.3. Relation to Fundamental Rights

3.3.1. Right to Be Heard (Due Process)

The right to be heard is the right to impact the proceedings and the outcome thereof. The right to be heard is accepted as a fundamental right and a sub-element of the right to a fair trial in many jurisdictions.⁴²⁰ Right to be heard is not only applicable in the state judiciary but also in arbitral proceedings.⁴²¹

The right to be heard in arbitration has been codified in many arbitration laws (HMK Art. 423 and 439/2-f, SPILA Art. 182, ZPO § 1042(1)).⁴²² The violation of the right to be heard is a ground for annulment and refusal for recognition and enforcement of an arbitral award in many jurisdictions such as Türkiye, Germany, Switzerland, the USA, France and Belgium.⁴²³

According to the right to be heard, the parties have the right to be informed and must be given the opportunity to present their case, in both its factual and legal aspects, and

⁴²⁰ Yeğengil, *Tahkim (L'Arbitrage)*, 294.; Pekcanitez, Atalay, and Özkes, *Medenî Usûl Hukuku Ders Kitabı*, 623. Pekcanitez, 'Hukuki Dinlenilme Hakkı', 754, 760-762.; Yılmaz, 'Hukukî Dinlenilme Hakkı', 1-2.; Curschmann, 'Germany', 144.

⁴²¹ Born, *International Commercial Arbitration*, 2326.; Pekcanitez and Yeşilirmak, 'Tahkim', 2703.; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1891.; Arslan et al., *Medenî Usul Hukuku*, 829.; Postacioğlu and Altay, *Medenî Usul Hukuku Dersleri*, 1044.; Ekşi, *Hukuku Muhakemeleri Kanunu'nda Tahkim*, 158.; Nomer, Ekşi, and Öztekin Gelgel, *Milletlerarası Tahkim Hukuku*, I:23. ; Mavrantonakis, *Das Verbot Der Révision Au Fond Im Internationalen Handelsschiedsverfahren: Zur Bindung Des Staatlichen Gerichts an Die Schiedsgerichtlichen Sachverhaltsfeststellungen Und Zu Den Erforderlichen Ausnahmen*, 98.; For German law see Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, 355.; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 94–95.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.; Proske, *Expert witness conferencing in Schiedsverfahren*, 41.; Karlı, *Medeni Muhakeme Hukuku*, 910.

⁴²² Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 318.; Görgün, Börü, and Kodakoğlu, *Medenî Usûl Hukuku*, 741.

⁴²³ Pekcanitez and Yeşilirmak, 'Tahkim', 2765.; Aslan, 'Tahkim Davalarında Hukuk, Dinlenilme Hakkı ve Kamu Düzeni', 21.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 374.; Işık, *MTK ve HMK Kapmasında Hakem Kararlarına Karşı İptal Davası*, 286 ff.; Özbek, *Tahkim Hukuku*, II:1357.; see Swiss Federal Supreme Court, 4A_440/2010, Bundesgericht, para. 4.1.

the arbitral tribunal must consider these statements.⁴²⁴ Right to be heard has many sub-elements; inter alia, it includes being given all the statements, documents or other information which have been submitted to the arbitral tribunal, a copy of any communication by the other party to the tribunal, and of any expert report or other document on which the arbitral tribunal may rely in rendering its award.⁴²⁵ However, this right must be exercised in due time and in accordance with the procedure. For instance, the right to comment on the report of a tribunal-appointed expert has been accepted as a basic right by a Hong Kong court.⁴²⁶ However, the rejection of evidence or non-examination of it relating to a matter or facts that are not in dispute is not a violation of the right to be heard.⁴²⁷

To convince the arbitrator, the party seeking a claim must assert and lay down the relevant facts and, if necessary, according to the burden of proof rules, prove them. If the factual circumstances require specialised or technical knowledge that the arbitrators do not possess, the party bearing the burden of proof must submit an expert opinion to prove its arguments.⁴²⁸ The same is true for the counterparty to have the opportunity to respond to an expert report as a matter of due process.⁴²⁹

What would happen if the parties did not submit an expert opinion but asked the tribunal to appoint an expert? Is the tribunal bound with such a request? Or does the

⁴²⁴ Pekcanitez and Yeşilirmak, 'Tahkim', 2704, 2765.; Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, 355.; Lachmann, *Handbuch Für Die Schiedsgerichtspraxis*, 323, para. 1299.; Esen, 'Violation of the Right to A Fair Trial in Arbitration', 100.; Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 94.; Özekes, *Medenî Usûl Hukukunda Hukukî Dinlenilme Hakkı*, 153. ; Aktepe Artık, *Medeni Usûl Hukukunda Hakem Kararlarının İptali Sebepleri*, 384.; Curschmann, 'Germany', 144.; Yılmaz, 'Hukukî Dinlenilme Hakkı', 26.; Işık, *MTK ve HMK Kapmasında Hakem Kararlarına Karşı İptal Davası*, 288–92.; Ermenek, 'Tahkimde Hukuki Dinlenilme Hakkının Korunması', 39–41.; Özbek, *Tahkim Hukuku*, II:333; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 142.; Swiss Federal Supreme Court, 4A_440/2010, Bundesgericht, para. 4.1.

⁴²⁵ Pekcanitez and Yeşilirmak, 'Tahkim', 2767.; UNCITRAL, *UNCITRAL Digest*, 112.; Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 71.; Yılmaz, 'Hukukî Dinlenilme Hakkı', 13.; Güvenalp, 'Tahkimde Tarafların Eşitliği ve Hukuki Dinlenilme Hakkı', 111.; Ağırman, *Milli & Milletlerarası Tahkim*, 388.

⁴²⁶ *Paklito Investment Limited v. Klockner East Asia Limited*, High Court—Court of First Instance, Hong Kong, 15 January 1993, [1993] 2 HKLR 39, <http://www.hklii.hk/eng/hk/cases/hkcfi/1993/147.html>. (accessed 09.01.2023)

⁴²⁷ Pekcanitez and Yeşilirmak, 'Tahkim', 2767.

⁴²⁸ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 94.

⁴²⁹ Waincymer, *Procedure and Evidence in International Arbitration*, 424.

tribunal have the authority and discretion to reject such a request? This is specifically a vital matter since, in civil law countries, there is a tendency to rely more on tribunal-appointed experts.⁴³⁰

If the arbitrators do not appoint an expert, since they do not consider it necessary to resolve the case rightfully, this is no set-aside reason:

Moreover, the arbitral tribunal may refuse to allow evidence without violating the right to be heard if the evidence is inadequate to satisfy the tribunal of the existence of a given fact, if the fact to be proven is already established, if it is irrelevant or if the court, by proceeding with an advance assessment of the evidence, reaches the conclusion that it is already satisfied and that further evidence based on the advance assessment sought by a party can no longer modify its views.⁴³¹

In international arbitration, it is generally accepted that it is not an obligation on the tribunal to appoint an expert⁴³²; however, if the parties do not rely on their experts and the dispute includes matters of knowledge out of the scope of expertise of the arbitrators. Thus, mandatory information/opinion is required for the resolution of the dispute; the Swiss Federal Supreme Court is of the view that the tribunal should appoint an expert if requested according to the procedure and timely.⁴³³ Nevertheless, not appointing an expert can only violate the right to be heard if this impacts the essence of the arbitral award.⁴³⁴

If both parties request so, the tribunal shall have due regard to such since the tribunal is bound by the applicable law to the arbitration and, in case of a lack of any imperative provisions, is bound by the parties' agreement. Only if the parties have no agreement does the tribunal has the discretion to act.⁴³⁵ Also, not providing any expert report or withdrawing it cannot violate the right to be heard.⁴³⁶

⁴³⁰ Parlett, 'Parties' Engagement with Experts in International Litigation', 441; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 182.

⁴³¹ Scherer, 'A. v. 1. B., 2. C., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_335/2012, 30 January 2013'.; Scherer, 'Society X. v. Z., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_277/2017, 28 August 2017'.

⁴³² UNCITRAL, *UNCITRAL Digest*, 116.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 23.; Narçin, '4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller', 17.

⁴³³ Zuberbühler et al., *IBA Rules of Evidence*, 155.; Özbek, *Tahkim Hukuku*, II:1456–57.

⁴³⁴ Özbek, *Tahkim Hukuku*, II:1457.

⁴³⁵ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 102; Münch, *Münchener Kommentar Zur ZPO§* 1042, para. 118 .

⁴³⁶ Scherer, 'A. v. B. SA, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_572/2015, 6 January 2016'.

However, there is also the view that, according to the rules of burden of proof, the claiming party, in order to prove its argument successfully, has to rely on the evidence adduced on his side and failing to do so, i.e., not adduce a party-appointed expert report, it will fail to prove, and the claim should be dismissed, and no burden should be put on the tribunal.

If the tribunal has no power to appoint an expert and the parties do not adduce an expert report either, despite it being fundamental to resolve the issues in the case, the tribunal will decide the issues according to the presented evidence, and if it is not possible to decide due to lack of essential knowledge, the tribunal should proceed on the basis of the principles on the burden of proof pursuant to the law applicable to the arbitration.⁴³⁷

According to German law, the wording of ZPO § 1049 (2) seems to give discretionary power to the arbitral tribunal to appoint an expert at its own discretion, but if the facts cannot be established from the mere submission of the parties and the arbitral tribunal does not have such knowledge, the arbitral tribunal must appoint an expert, for the right to be heard reasons, even if there is no request from the parties to do so.⁴³⁸ The tribunal could rely merely on its own expertise, provided that the parties are informed about the tribunal's intention on this matter and the parties have a right to submit comments on the opinion.⁴³⁹

Arbitral tribunals are free to assess the relevance of a particular fact in the decision. A wrong assessment does not, in general, infringe on the parties' right to be heard. It is only violated if the tribunal's assessment is solely intended to conceal that the tribunal did not engage with the parties' arguments in any way.⁴⁴⁰ That is the case if the reasoning of the tribunal does not take note of or consider the arguments at all.⁴⁴¹

⁴³⁷ Zuberbühler et al., *IBA Rules of Evidence*, 156.

⁴³⁸ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 103.

⁴³⁹ Meier, 'Germany', 3.1.2, para. 4.

⁴⁴⁰ Pekcanitez, 'Özel Uzman', 415.; Pekcanitez and Yeşilirmak, 'Tahkim', 2764, fn. 496.; Işık, *MTK ve HMK Kapmasında Hakem Kararlarına Karşı İptal Davası*, 291.

⁴⁴¹ Tanrıver, *Hukukumuzda Bilirkişilik*, 33.; Rosenfeld, 'Country Report: Germany', 184.; German Federal Court of Justice (BGH), I ZB 90/18, openJur.; Bundesgerichtshof (German Federal Court of Justice), III ZR 169/90, Wolters Kluwer.; German Federal Court of Justice (BGH), I ZB 1/16, SchiedsVZ at 317; German Federal Court of Justice (BGH), I ZB 7/15, 2016 SchiedsVZ at 339.

Additionally, the tribunal needs to give the counterparty an opportunity to comment or argue against the views presented.⁴⁴²

The issue with the CIArb Protocol is that if parties have agreed on the application, the Protocol provides that parties need to get permission from the tribunal before adducing the party-appointed expert.⁴⁴³ IBA Rules do not have similar provision⁴⁴⁴, and the international arbitration practice does not require any permission either, as can be recognised from arbitration rules.⁴⁴⁵ The prior permission approach is criticised since it could impact the recognition and enforcement of the award in certain jurisdictions.⁴⁴⁶ This, however, does not mean that parties have full freedom while adducing experts, but the tribunal should have the discretion to exclude or limit the presentation of the expert evidence.⁴⁴⁷

3.3.2. Equality

The principle of equal treatment of the parties means that all parties are given equal opportunities to present their claims and defences at all stages of the proceedings. Equality is fundamental to arbitration, like any dispute resolution procedure.⁴⁴⁸

These principles, which determine the limits of procedural rules, are also the basic criteria for the collection and evaluation of evidence. Equality has been regulated in the UNCITRAL Model Law (Art. 18), and, among others, Turkish (TIAL art. 8/B/1), German (ZPO § 1042(1)), Swiss (SPILA Art. 182(3))⁴⁴⁹, English arbitration (EAA Art.

⁴⁴² Tanrıver, *Hukukumuzda Bilirkişilik*, 34.

⁴⁴³ Parlett, 'Parties' Engagement with Experts in International Litigation', 442.

⁴⁴⁴ Freyer, Newman, and Hill, 'Assessing Expert Evidence', 433.

⁴⁴⁵ See for example ICC Arbitration Rules Art. 25(2), SCC Arbitration Rules Art. 33, Swiss Rules Art. 27.

⁴⁴⁶ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 289.

⁴⁴⁷ Khodykin and Mulcahy, 290.; Pekcanitez and Yeşilirmak, 'Tahkim', 2764, fn. 496.; Işık, *MTK ve HMK Kapmasında Hakem Kararlarına Karşı İptal Davası*, 291.

⁴⁴⁸ Pekcanitez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 623. ; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1891.; Yılmaz, *HMK Şerhi*, 2021, 4.:5464.; Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 99.; Mavrantakis, *Das Verbot Der Révision Au Fond Im Internationalen Handelsschiedsverfahren: Zur Bindung Des Staatlichen Gerichts an Die Schiedsgerichtlichen Sachverhaltsfeststellungen Und Zu Den Erforderlichen Ausnahmen*, 98.; Ekşi, *Hukuku Muhakemeleri Kanunu'nda Tahkim*, 158.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 373.; Ağırman, *Milli & Milletlerarası Tahkim*, 387.

⁴⁴⁹ See Swiss Federal Supreme Court, 4A_440/2010, Bundesgericht, para. 4.1.

33). It is also foreseen in many arbitration rules like the UNCITRAL Arbitration Rules Art. 17/1 and soft law elements such as IBA Rules Art. 9(2)(g).⁴⁵⁰

The equal opportunity of the parties to present evidence and to examine the evidence is so important that it has a direct impact on the enforceability of the award. For example, if the time limits for filings and the time allocation at the hearings are different, the other party is not given the opportunity to present evidence against the claim, or if one party's witness is unreasonably treated, or if experts are not given equal opportunity to comment and be questioned, there is a high likelihood that the award will be annulled or denied enforcement due to a violation of the equality of the parties and their rights of defence (TIAL Art. 15/A/1-g, UNCITRAL Model Law Art. 34/2, MÖHUK Art. 62/ç-d).⁴⁵¹

As stressed in *CME Czech Republic B.V. v. The Czech Republic*, the tribunal shall safeguard each party's equal right to present their case, which includes cross-examining the parties' experts.⁴⁵²

For example, the fact that the number of expert reports they submit is not equal should not by itself mean that the principle of equality is violated. Additionally, the parties should be able to appoint an expert to support their own claims and defences, and the report of the expert they appoint should be taken into consideration by the arbitrators in making the final decision. One of the parties may claim that the opinion of the expert appointed was not taken into account by the arbitrators, and, therefore, he was deprived of the opportunity to have equal influence on the final decision.⁴⁵³

⁴⁵⁰ Pekcanitez and Yeşilirmak, 'Tahkim', 2703.; Arslan et al., *Medenî Usul Hukuku*, 829, 831.; Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 94.; Born, *International Commercial Arbitration*, 2337.; Tanrıver, *Medenî Usul Hukuku*, II: 417, 461.; Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 405.; Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği*, 204-5.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 142.; Özekes, *Medenî Usul Hukukunda Hukukî Dinlenilme Hakkı*, 222.; Karlı, *Medeni Muhakeme Hukuku*, 909.

⁴⁵¹ Hohler, 'Country Report: Switzerland', 380.; Kaufmann-Kohler and Rigozzi, *International Arbitration: Law and Practice in Switzerland*, 279.; Geisinger and Ducret, 'The Arbitral Procedure', 88.; Narçin, '4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller', 27.; Yılmaz, 'Hukukî Dinlenilme Hakkı', 25.

⁴⁵² See *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award 14 March 2003, para. 80 available at, <https://www.italaw.com/cases/281> (accessed: 30.08.2022)

⁴⁵³ Güvenalp, 'Tahkimde Tarafların Eşitliği ve Hukukî Dinlenilme Hakkı', 121.

The UNCITRAL Model Law Art. 18 establishes the fundamental principles that in all arbitrations, each party must be treated with equality and be given a full opportunity to present his case. It is clear that Article 18's mandatory procedural guarantees of equal treatment and the right to be heard apply to, and sometimes override, both the parties' procedural autonomy and the arbitral tribunal's discretion.⁴⁵⁴

3.3.3. Party Autonomy

Party autonomy is the primary principle when it comes to international arbitration.⁴⁵⁵ Party autonomy not only enables the parties to bring a dispute before an arbitral tribunal instead of a state court but also enables parties to construct the proceedings according to their desire, subject to mandatory rules (UNCITRAL Model Law Art. 19 and arbitration laws based on it (TIAL Art. 8/A, ZPO § 1042(3)).⁴⁵⁶

Parties can adduce whatever evidence they believe would lead them to succeed. Therefore, they are free whether to adduce an expert opinion or not.⁴⁵⁷ Accordingly, parties may waive the use of party-appointed experts.

⁴⁵⁴ Born, *International Commercial Arbitration*, 2327.

⁴⁵⁵ Born, 2295.; Pekcanitez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 624.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 104.; Takavut, *Milletlerarası Ticari Tahkimde Usule İlişkin Konularda İrade Serbestisi*, 30–31.; Fouchard, Gaillard, and Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 502.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 47.; Narçin, '4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller', 26.; Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 87.; Akıncı, 'Usule Uygulanacak Kurallar ve Usule Aykırılığın Sonuçları', 3.

⁴⁵⁶ Pekcanitez and Yeşilirmak, 'Tahkim', 2704.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 104.; Yeğengil, *Tahkim (L'Arbitrage)*, 295–96. ; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1890.; Arslan et al., *Medenî Usul Hukuku*, 829.; Budak and Karaaslan, *Medenî Usul Hukuku*, 2019, 434. ;Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 48.; Karlı, *Medeni Muhakeme Hukuku*, 910.; Ekşi, *Hukuku Muhakemeleri Kanunu'nda Tahkim*, 164.; Ağırman, *Millî & Milletlerarası Tahkim*, , 383455.

⁴⁵⁷ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 578.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.; Akıncı, *Milletlerarası Tahkim*, 340.

Whilst there can be situations where it is required to apply for leave to submit a party-appointed expert opinion, as it is in the UK, in most jurisdictions, there is no need to get any approval from the tribunal to submit a party-appointed expert opinion.⁴⁵⁸

In principle, parties to an arbitration have the duty to furnish evidence and introduce experts to assist the arbitral tribunal.⁴⁵⁹ Unless the applicable law or rules provide otherwise, the tribunal does not engage in a fact-finding process and seeks evidence.⁴⁶⁰ This is called the maxim of disposition or principle of party presentation (*tarafklarca getirilme ilkesi, Verhandlungsgrundsatz, Verhandlungsmaxime*).

The maxim of disposition stipulates that the material of the case, i.e., the material facts and means of proof that form the basis of the claim and defence, must be brought before the tribunal by the parties to the case.⁴⁶¹ Pursuant to this principle, the arbitrator cannot ex officio consider the material facts not raised by one of the parties and, as a rule, cannot resort to any evidence ex officio.

Parties can totally exclude the usage of experts with express agreement⁴⁶² if the relevant provision in the applicable law to the arbitration procedure allows this agreement.

3.3.4. Iura Novit Curia/Arbiter

A court or tribunal is expected to know the applicable law to the dispute on its own without having to rely on the parties' legal pleadings.⁴⁶³ This is a universal principle

⁴⁵⁸ Zuberbühler et al., *IBA Rules of Evidence*, 135.; Roney, 'Cross-Examination of Experts', 112.

⁴⁵⁹ Schneider and Scherer, 'Art. 184', 2083. UNCITRAL, *UNCITRAL Digest*, 116, para. 1.; Tanrıver, *Medenî Usûl Hukuku*, II: 423, 461. ;Born, *International Commercial Arbitration*, 2448.;Bacanlı, 'Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arbuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrası ve Değerlendirilmesi', 97.; Ağırman, *Millî & Milletlerarası Tahkim*, 388–89, 391.; Demir Gökyayla, 'Tahkimde Taraflarca Getirilme İlkesi ve Delil İkamesi', 72.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 175.; L. Şanal Görgün, Levent Börü, and Mehmet Kodakoğlu, *Medenî Usûl Hukuku*, 12. (Ankara: Yetkin Yayınları, 2023), 736.

⁴⁶⁰ Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 175.; Ermenek, 'Tahkimde Hukuki Dinlenilme Hakkının Korunması', 37.Schneider and Scherer, 'Art. 184', 2082; Ermenek, 'Tahkimde Hukuki Dinlenilme Hakkının Korunması', 37.

⁴⁶¹ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:423.; Demir Gökyayla, 'Tahkimde Taraflarca Getirilme İlkesi ve Delil İkamesi', 72.

⁴⁶² Proske, *Expert witness conferencing in Schiedsverfahren*, 26.; Karadaş, *Ulusal (İç) Tahkim*, 174.

⁴⁶³ Cordero-Moss, 'Iura Novit Curia', 111.

found in law in any legal culture.⁴⁶⁴ Accordingly, in international arbitration, arbitrators should also know the law to be applicable.⁴⁶⁵

However, when it comes to international disputes, multiple jurisdictions can be involved, and members of a tribunal may only be specialised in some branches of law, such as commercial law, civil law or investment law in specific jurisdictions.⁴⁶⁶ Thus, as it was demonstrated in Chapter 2 Section 4.2.2., arbitrators cannot know every law, specifically foreign domestic law, which creates the need for legal experts. Nevertheless, this does neither harm the principle nor in itself lead to a delegation of decision-making.

While some argue⁴⁶⁷ that, even in situations where arbitrators have the desired knowledge of a particular legal field, expert opinions should still be allowed by recognised specialists so that the tribunal becomes more informed, helping a more accurate and consistent award.⁴⁶⁸ The tribunal needs to allow parties to make submissions to express their views on the law so that the right to be heard is not violated.⁴⁶⁹

In practice, domestic law experts are commonly used in ISDS. The *Philip Morris v Uruguay* tribunal, for instance, did not apply the *iura novit curia* principle to disqualify legal experts.⁴⁷⁰ Legal experts certainly play a crucial role in identifying domestic laws relevant to disputes so that arbitrators understand and ascertain the law better and integrate these rules in their awards.⁴⁷¹

In Germany, although legal expert opinion is generally regarded as inadmissible evidence in arbitration law, exceptions are recognised where the arbitral tribunal lacks expertise and an expert is required and where fact and law are so closely intertwined that it is not reasonably possible to distinguish between them. The extent to which legal

⁴⁶⁴ Cordero-Moss, 111.

⁴⁶⁵ Pekcanitez, Atalay, and Özekes, *Medenî Usûl Hukuku Ders Kitabı*, 624.; Pekcanitez and Yeşilirmak, 'Tahkim', 2705.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:431.; Özbek, *Tahkim Hukuku*, II:1363.

⁴⁶⁶ Ünüvar, 'Experts: Investment Arbitration', para. 58.

⁴⁶⁷ Ünüvar, para. 59.

⁴⁶⁸ Ünüvar, para. 59.

⁴⁶⁹ Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 79.

⁴⁷⁰ Alvarez, 'The Search for Objectivity: The Use of Experts in Philip Morris v Uruguay', 418.

⁴⁷¹ Ünüvar, 'Experts: Investment Arbitration', para. 57.

provisions can be the subject of proof is problematic. In German ordinary court proceedings, the principle of *iura novit curia* applies, meaning that legal provisions are generally not subject to proof, except for the law applicable in another state, customary law and statutes of evidence.

The legal situation in international arbitration proceedings in some countries is less clear. Particularly when lawyers are arbitrators, it may be necessary to call in experts to provide knowledge about the applicable law.⁴⁷²

3.3.5. Procedural Fairness, Flexibility and Cost-Efficiency

The tribunal has the responsibility to conduct the proceedings fairly, and flexibility and cost-efficiency have to be balanced.⁴⁷³ In international commercial arbitration, procedural fairness is a vital right, and this will include the right of each party to present its case.⁴⁷⁴

Where on the one hand, the parties enjoy great flexibility⁴⁷⁵ to adduce party-appointed experts; on the other hand, permitting the parties to present expert evidence without any limits could adversely affect the proceedings in terms of cost-efficiency⁴⁷⁶, especially when it is unnecessary to have party-appointed experts or experts at all.⁴⁷⁷ These are competing positions that must be discussed and preferably agreed upon between the parties and the tribunal.⁴⁷⁸ If the tribunal was composed of members who were specifically appointed due to their expertise in specific matters, experts should not be required to take an active part in the proceedings.⁴⁷⁹

⁴⁷² Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 216-17.

⁴⁷³ Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 94.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:432.; Ağırman, *Millî & Milletlerarası Tahkim*, 392.

⁴⁷⁴ Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement', 464.; Born, *International Commercial Arbitration*, 2327.

⁴⁷⁵ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 48.

⁴⁷⁶ Jones, 'Redefining the Role and Value of Expert Evidence', 23.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282.; Even if one of the parties did not rely on party-appointed experts, it will after the other party adduces an expert. See Münch, *Münchener Kommentar Zur ZPO*, § 1042, para.19. ; Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 83.; Özekes, *Medenî Usûl Hukukunda Hukukî Dinlenilme Hakkı*, 112.

⁴⁷⁷ Proske, *Expert witness conferencing in Schiedsverfahren*, 32.

⁴⁷⁸ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 288.

⁴⁷⁹ Özbek, *Tahkim Hukuku*, II:1456.

If a party insists on using a party-appointed expert where the tribunal takes the view that such evidence is not required, the tribunal might not prevent adducing the report but could exclude the oral testimony of the expert. Generally, in practice, even if one of the parties would not have relied on an expert, it will do so when the counterparty insists on using a party-appointed expert. The tribunal could potentially decide adversely against the party when it comes to deciding on costs due to violation of cost-efficiency concerns.⁴⁸⁰

Adducing expert opinions in the very later stages of the proceedings is a situation where it might not be evaluated by the tribunal and could be disregarded.⁴⁸¹ However, if there is a recent development where the parties had just been informed about a fact or evidence, expert opinion could be allowed in such a scenario.⁴⁸²

3.3.6. Tribunal's Duty to Enquire

Arbitrators, as the adjudicators in an arbitration case, have the primary authority and duty to administer and direct the proceedings.⁴⁸³ Establishing the facts of the case is also among the scope of this matter.

When it comes to the collection and presentation of evidence, it is mostly not clear where such authority and duty reach their limits. Do the arbitrators have a duty to appoint experts if there are technical matters beyond the understanding of the tribunal and the parties refrain from appointing their experts?

Civil law jurisdictions such as Türkiye, Switzerland, Germany and France require the judge to appoint a court-retained expert if there are technical matters beyond the

⁴⁸⁰ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 288.

⁴⁸¹ Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 85–89.

⁴⁸² Güvenalp, 89.

⁴⁸³ See UNCITRAL Arbitration Rules Art. 17, ICC Arbitration Rules Art. 22; For details of authority of arbitrators see Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*.

judge.⁴⁸⁴ The rationale behind this approach is that the judge has the duty to enquire (*hâkimin davayı aydınlatma ödevi, Aufklärungspflicht*).⁴⁸⁵

However, domestic civil procedure rules applicable to litigation are, in principle, not applicable to arbitration.⁴⁸⁶ In international arbitration, primarily the parties are responsible for bringing their evidence, and it is generally accepted that only a restricted principle of investigation (*sınırlı araştırma ilkesi, beschränkter Untersuchungsgrundsatz*) is applicable.⁴⁸⁷ The parties can decide otherwise, for instance, agreeing on the application of the Prague Rules.⁴⁸⁸ Accordingly, the facts relied upon must primarily be established by the parties (*tarafılarca getirilme ilkesi, Verhandlungsgrundsatz*).⁴⁸⁹

However, in some cases, the facts brought by the parties may be ambiguous and unclear. It is difficult for the arbitrator to evaluate a case that he cannot understand. In this case, the arbitrator may step in. Thus, while arbitrators generally have the authority to appoint a tribunal-appointed expert depending on the applicable rules to the arbitration, they are not ordinarily obligated to do so.⁴⁹⁰ There are likely to be grey areas where an arbitral tribunal feels conflicted between the duty to uphold the right to be heard obligations and a duty to promote fairness and efficiency while at the

⁴⁸⁴ Pekcanıtez and Yeşilirmak, 'Tahkim', 2768.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 326.; 'Parties Not Indicated, Tribunal Fédéral, 1ère Cour Civile', 381.

⁴⁸⁵ For details see Meriç, 'Hâkimin Davayı Aydınlatma Yükümlülüğü', 390 ff.; Karadaş, *Ulusal (İç) Tahkim*, 173.

⁴⁸⁶ Yeğengil, *Tahkim (L'Arbitrage)*, 296–97.; Akıncı, *Milletlerarası Tahkim*, 342.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.; Born, *International Commercial Arbitration*, 2364.; Taşkın, *Tahkim Hukukunda Tahkim Anlaşması, Hakem Kurulu ve Tahkim Yargılaması*, 191.; Akıncı, 'Usul Kurallarına Aykırılık ve Dinlenilme Hakkı', 50.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 323.; For contrary argument see Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1892.

⁴⁸⁷ Curschmann, 'Germany', 143.

⁴⁸⁸ *Demir Gökyayla* argues that the Prague Rules do give wide Powers, nevertheless does not indicate that the ex officio principle is applicable, see *Demir Gökyayla*, 'Tahkimde Tarafılarca Getirilme İlkesi ve Delil İkamesi', 78.

⁴⁸⁹ Tanrıver, *Medenî Usul Hukuku*, 2022, II:461.; *Demir Gökyayla*, 'Tahkimde Tarafılarca Getirilme İlkesi ve Delil İkamesi', 72.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 175.; Swiss Federal Supreme Court, 4A_597/2013, Bundesgericht, para. 3.2.2.

⁴⁹⁰ Akıncı, *Milletlerarası Tahkim*, 339.; *Akil* referring to the view echoed in German literature see *Akil*, 'Bilirkişi-Uzman Tanık Ayrımı', 175, fn. 20.; *Demir Gökyayla*, 'Tahkimde Tarafılarca Getirilme İlkesi ve Delil İkamesi', 86.; Özbek, *Tahkim Hukuku*, II:1453. ; In the same direction in Italy see Cavasola and Paton, 'Italy', 174.

same time supporting the duty to respect the autonomy of the parties. Denying the tribunal the ability to appoint its own expert can be one of these situations.⁴⁹¹

The arbitrators should express what may be relevant, determine how the relevant facts can be established and give the necessary guidance and directives to the parties and their experts.⁴⁹² The arbitrators can ask the party-appointed experts to clarify some issues rather than appointing a tribunal expert directly.⁴⁹³

In a set-aside case before the Turkish courts, the plaintiff claimed that the application of the penal clause in the Contract would cause its economic ruin and that the decision to reject the appointment of a tribunal-appointed expert to determine this situation violated the right to be heard and was against public order. Nevertheless, the Court of Cassation has rightly accepted that this is a matter at the discretion of the arbitrators and does not constitute a reason for set-aside.⁴⁹⁴

Whilst there is no doubt that an arbitral tribunal shall not render a decision that it does not fully comprehend, it is also the parties who respectively bear the burden of proof. So, the tribunal's duty of enquiry needs to be considered in conjunction with the maxim of disposition.⁴⁹⁵

In the civil law country practice, the administration of evidence is concerned only with those facts which have been sufficiently addressed by the parties.⁴⁹⁶ So, if the parties did not mention in their submission an issue that could lead to an expertise-required matter, the tribunal cannot per se engage in a fact-establishing process in this regard.

However, if the parties submitted expert opinions and there was room for elaboration, the tribunal could ask these experts supplemental questions. Then, if the tribunal determines one of the experts(s) more convincing, it can decide in favour of one or,

⁴⁹¹ Waincymer, *Procedure and Evidence in International Arbitration*, 391–92.

⁴⁹² Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 176.

⁴⁹³ Ağırman, *Milli & Milletlerarası Tahkim*, 391.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 156.

⁴⁹⁴ Turkish Court of Appeal, 11th Civil Chamber, Docket No. 2020/577, Decision No. 2021/618, 01.02.2021.; Ağırman, *Milli & Milletlerarası Tahkim*, 462.

⁴⁹⁵ Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 95.

⁴⁹⁶ Reiner, 'Austria', 23.

alternatively, come to a totally different conclusion, provided that this is arguable under the circumstances of the case.

If the parties did not adduce expert opinions during the proceedings, the tribunal will decide according to the presented file it has received (HMK Art. 430I/c).⁴⁹⁷ The tribunal should, in principle, not appoint a tribunal-appointed expert if the parties relied on their experts or did not explicitly ask for the appointment of an independent expert.

However, if the parties did not adduce expert opinions, the tribunal is not equipped with the expertise, and the resolution of the issues asks unquestionably for expertise, the tribunal should appoint an expert if the parties' agreement or the applicable law or rules empower the tribunal to do so.⁴⁹⁸ The contrary position could lead to the annulment of the award in some jurisdictions, with the ratio that the right to be heard is violated.⁴⁹⁹

As a result, in international arbitration, the primary responsibility for seeking and presenting evidence lies with the parties.⁵⁰⁰ However, this is not absolute; if necessary, the tribunal has the authority to intervene and guide the parties (*Manuduktionspflicht*) and even appoint an expert.⁵⁰¹ Thus, the approach in international arbitration is the combination of both the adversarial and the inquisitorial methods.

If an expert is appointed by the tribunal, it is fundamental that the arbitrators may not properly delegate to an expert the responsibility for deciding either all or part of the dispute.⁵⁰²

However, an arbitral tribunal lacking its own expertise can base its award on the report of a party-appointed expert without relying on a tribunal-appointed expert if the

⁴⁹⁷ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:461.

⁴⁹⁸ Özbek, *Tahkim Hukuku*, II:1454–56.

⁴⁹⁹ Özbek, II:1455.; See for details Chapter VI, Section 5.

⁵⁰⁰ Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 324.; Allen, Jr., 'Overview: The Common Law Systems', 17.

⁵⁰¹ Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 328.

⁵⁰² Born, *International Commercial Arbitration*, 2448.

tribunal designates why it finds the expert report (more) plausible and gives the other party the opportunity to comment.⁵⁰³

3.3.7. Principle of Truth

Everyone is obliged to comply with the principles of integrity when exercising their rights and fulfilling their obligations. The rule of law does not protect the manifest abuse of a right.⁵⁰⁴ In an arbitration proceeding, the parties and their representatives must act according to this notion during the procedure.⁵⁰⁵

Ideally, the parties have the obligation to submit the facts of the case according to the subjective truth.⁵⁰⁶ This principle also extends to the expert and their opinion, however, with minor differences.⁵⁰⁷ The difference arises out of terminological reasons. Whereas the truth is related to factual circumstances, the expert opinion, as the term already suggests, is an opinion, and opinions relate to a conclusion considering the relevant facts.

Some authors argue that the party-appointed expert is under the responsibility to tell the truth when he testifies, similar to a fact witness.⁵⁰⁸ As I consider the party-appointed expert not as a witness but as a category on its own, the obligation to provide an expert opinion “truthfully” does not fit to experts.⁵⁰⁹ This does not mean that the expert’s opinion could be manipulative or misleading. However, the expert’s opinion might not possibly reflect the “truth”. Thus, it would be logical to expect the expert to provide his opinion according to his “genuine belief”.

⁵⁰³ Borris et al., ‘New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]’, para. 551.; For a case in Germany see OLG München, 34 Sch 10/11, 2012, 119383 openJur, para. 23-26. See also Van Den Berg, *ICCA Yearbook Commercial Arbitration* 2012, XXXVII:231, para. 20.

⁵⁰⁴ Ağırman, *Milli & Milletlerarası Tahkim*, 389.

⁵⁰⁵ L. Şanal Görgün, Levent Börü, and Mehmet Kodakoğlu, *Medenî Usûl Hukuku*, 12. (Ankara: Yetkin Yayınları, 2023), 736.

⁵⁰⁶ Pekcantez and Yeşilirmak, ‘Tahkim’, 2704.; Tanrıver, *Medenî Usûl Hukuku*, II:430-431.;

⁵⁰⁷ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 95.

⁵⁰⁸ Schäfer and Wilson, ‘ICC Bulletin’, 2021, 63.

⁵⁰⁹ For contrary view see Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 278–79.

3.4. The Personality and Qualifications of Party-Appointed Experts

There are many factors to consider when appointing an expert. An expert would be chosen based on the candidate's professional experience, reputation, analytical skills and qualifications, arbitral practice, and academic track record, which are represented by high-quality research output and the expert's own opinions on such issues relevant to the dispute.⁵¹⁰ There is no uniform understanding of the threshold of the required experience. However, being knowledgeable about the arbitral process itself would naturally be beneficial.⁵¹¹ "A proposed expert witness who is unable or unwilling to fulfil this duty to the court is not properly qualified to perform the role of an expert."⁵¹²

The credibility of an expert depends on many criteria. In an unpublished case administered by the SHIAC in 2016, the sea shipper questioned the independence of the assessor as the assessor was solely appointed by the cargo owner and pleaded inadmissibility of the assessment report as a whole. The sea shipper also argued that the assessor should be summoned to testify before the tribunal, which would be extremely unlikely in the competitive assessment industry. The tribunal allowed the evidence because it held that opinions given by a party-appointed expert should generally be treated as document evidence submitted by the filing party rather than as testimony from an individual witness.

Hence, the expert was not required to testify before the tribunal either under the Chinese Procedural Code or the SHIAC Rules. The tribunal further noted the well-recognized credibility of the assessor in the industry and found the likelihood of the assessor falsifying the opinions to be extremely low, provided that there was no counter evidence showing probable credibility concern over the authenticity of the documented opinions or the assessor himself.

As for the assessment of losses, the arbitral tribunal noted that the sea shipper had engaged its own expert. Given that the credibility of such an expert was not known to

⁵¹⁰ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 193.; Ünüvar, 'Experts: Investment Arbitration', para. 42.

⁵¹¹ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 184.; Ünüvar, 'Experts: Investment Arbitration', para. 45.

⁵¹² Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 53.

the Tribunal and that it was considered economically feasible to have such an expert testify before the tribunal, an oral hearing was convened to examine the opinions given by the sea shipper-appointed expert.⁵¹³

The arbitrator, before digging into the opinion, will assess the credibility of the author, also called *Voir dire*.⁵¹⁴ The arbitrator will have a better understanding of whether or not he can rely on the findings and views stipulated in the opinion if he knows the (personal and) professional qualifications of the expert. This could be comparable to a situation where someone goes to a restaurant based on the chef's qualifications.

The arbitrator will take into account the personality, education, experience and reputation of the expert to assess whether the expert's views are scientifically objective and trustworthy.⁵¹⁵ Thus, it is vital for the expert to be transparent, and provisions of the IBA Rules (Article 5(2)(a) and 5(2)(c)) aim to ensure it via a statement including the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, a description of his or her background, qualifications, training and experience and his or her independence from the Parties, their legal advisors and the Arbitral Tribunal'.⁵¹⁶

According to *Wach and Petsch*, relying on the overriding mandatory provision of ZPO § 1049, the expert has to be neutral and not be paid or instructed by a party.⁵¹⁷ The authors even exclude this in case the expert declared to adhere to "expert rules of conduct".⁵¹⁸

⁵¹³ Zhihe and Tingwei, 'The Use of Expert Witness in Arbitration from the Perspective of SHIAC'.

⁵¹⁴ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 657.

⁵¹⁵ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 97.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 193.

⁵¹⁶ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 657.

⁵¹⁷ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 110.

⁵¹⁸ Wach and Petsch, 110.

It is hard to assess for the arbitrator who has no knowledge of that issue whether the opinion is or is not constructed in an unobjective way.⁵¹⁹

3.4.1. Independence

IBA Rules Art. 5(2)(c) foresee that the expert report shall contain a statement of the expert's independence from the parties, their legal advisors and the Arbitral Tribunal. Although the CIArb Protocol Art. 4 headline reads as "Independence, Duty and Opinion", the article itself does not mention an independence requirement.⁵²⁰ Neither the IBA Rules nor the CIArb Protocol is clear on how an expert can, in fact, be independent.⁵²¹

Being independent can be defined as not being dependent, such as not being subject to control by others, not being affiliated with a larger controlling unit, not requiring or relying on something else, not looking to others for one's opinions or for guidance in conduct, not bound by or committed to a party.⁵²²

According to the comprehensive empirical study conducted by the University of Geneva⁵²³ with arbitrators, counsel and experts, independence was mentioned as a must-have fundamental attribute of experts by "all respondents".⁵²⁴

From the view of arbitrators and counsel, independence is the concept where the expert's position is assessed, whether it has objective links with the party.⁵²⁵ On the other hand, experts see independence as acting in freedom and in the absence of control by the party.⁵²⁶

⁵¹⁹ Wach and Petsch, 110.

⁵²⁰ CIArb Protocol Art. 4(1): "An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party."

⁵²¹ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.

⁵²² Merriam-Webster.com Dictionary, "independent," accessed July 6, 2022, <https://www.merriam-webster.com/dictionary/independent>.

⁵²³ See Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes'; de Chazournes et al., 'Uses of Experts before International Courts and Tribunals'.

⁵²⁴ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 492.

⁵²⁵ de Chazournes et al., 493.

⁵²⁶ de Chazournes et al., 495–96.

There are views that foresee party-appointed experts should be independent.⁵²⁷ The main reason for this view is grounded in the function similar to the tribunal-appointed expert.

The expert is expected to be independent from the party and its agents but also from the counsel representing the client. Actually, not the parties but the legal counsel generally determine the expert to be appointed. It is not uncommon for legal counsel and their law firms to reach out to experts whom they occasionally engage for cases. That's why the IBA Rules Article 5(2)(c) have foreseen that the expert should be independent of the legal advisors, too.⁵²⁸

As it will be evaluated in Chapter IV, neither the IBA Rules nor the CIArb Protocol explain how a party-appointed expert can, in fact, be independent and not just show independence.⁵²⁹ Although stipulated as requirements in soft laws, due to their status, party-appointed experts cannot be and should not be expected to be independent, but their report can be an independent product.

3.4.2. Impartiality

Impartiality refers to the absence of bias or predisposition towards a party and ensures objectivity. "The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand."⁵³⁰

Being dependent does not automatically mean that the expert should be partial. Contrary to independence, impartiality should be absolutely sought when it comes to party-appointed experts.⁵³¹

⁵²⁷ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 575.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 215.; Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 133, para. 21.; Roney, 'Cross-Examination of Experts', 114.; Club Español del Arbitraje, Code of Best Practices in Arbitration, Rule 39.

⁵²⁸ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 303.

⁵²⁹ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.

⁵³⁰ Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 32.

⁵³¹ Akıncı, *Milletlerarası Tahkim*, 341.; Tanrıver, *Hukukumuzda Bilirkişilik*, 31.

Especially when it comes to academic experts, published writings can speak on their behalf and should be checked to ensure that they contain no statements inconsistent with the client's case. It could directly discredit the expert and lead the tribunal to the conclusion of lacking impartiality if any contrary statements are found in the opinion.⁵³²

Quantum experts are increasingly employed in multiple cases by the same counsel, leading to the perception of the expert as a 'hired gun'.⁵³³ Their valuations and methodologies can be remarkably similar, or they can differ between cases depending on the party (investor or state) that retains them, leading to questions of the credibility of their opinions.⁵³⁴

3.4.3. Reputable Expertise

The main reason the relevant expert is appointed is his extensive knowledge and/or experience in the subject and the reputation he has because of that.⁵³⁵ The expert's opinion should be distinguishable from a "lay" opinion.⁵³⁶ It is crucial to establish in any review that the expert is well-recognized in the relevant discipline via experience or academic work.⁵³⁷ This must be objectively testable.⁵³⁸ This criterion would be probably the most vital in order to convince the tribunal and have a result in favour.⁵³⁹ The expert's reputation must be above any suspicion.⁵⁴⁰

⁵³² Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 658.

⁵³³ %51 of respondents agreed that party-appointed experts are hired guns or advocates in disguise but %24 do not consider it as in issue in 'BCLP 2021 Survey', 9.

⁵³⁴ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 456.

⁵³⁵ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 184; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 107; Tanrıver, *Hukukumuzda Bilirkişilik*, 31; Sarısözen, 'Özel Bilirkişi (Uzman Görüşü)', 1709.; Atalay, 'Pekcanıtez Usûl', 2021, 1959.; Taşdemir, 'İngiliz ve Amerikan Medenî Yargılamasında Uzman Tanıklık', 86.

⁵³⁶ Tarman, 'Bilirkişilik Sözleşmesinin Hukuki Niteliği ve Bilirkişinin Üçüncü Kişiye Karşı Olan Sorumluluğu', 5–6.

⁵³⁷ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 658; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 108; Sarısözen, 'Özel Bilirkişi (Uzman Görüşü)', 1709.

⁵³⁸ Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 90.

⁵³⁹ Proske, *Expert witness conferencing in Schiedsverfahren*, 27.; Moses, *The Principles and Practice of International Commercial Arbitration*, 197.

⁵⁴⁰ Nessi, 'Expert Witness: Role and Independence', 100.

3.5. The Relationship Between the Party and the Expert

3.5.1. Appointment Procedure

There is no clear-cut regulated procedure for appointing party-appointed experts.⁵⁴¹ Only some limited arbitration rules, such as the LCIA Arbitration Rules Art. 20.1, address that before any hearing, the tribunal may order any party to give written notice of the identity of each expert that the party wishes to call, as well as the subject matter of his testimony, its content and its relevance to the issues in the arbitration. Putting aside the potential difficulty in identifying the desired expert, once the name is determined, it is vital to interview the potential expert before conclusively deciding to work with him.⁵⁴² Experts may be engaged prior to the initiation of the proceedings or after the request has been filed.

Parties are free to choose whatever expert they consider. This freedom is laid down in *Bridgestone v Panama*:

Lawyers acting for a party to litigation or arbitration who are seeking the services of an expert witness will inevitably wish to discuss the case with the proposed expert before engaging him or her. The reason for this is that, before engaging an expert, it is sensible to check that the expert's opinion will support the party's case.⁵⁴³

The main purpose of the expert interview is to enable a detailed discussion on the personality and potential conflicts and content of the expert's opinion; to provide the expert with details as to the issues in dispute, for the expert to ask further questions to confirm his or her expertise and availability, and for counsel to assess the candidate's abilities as an expert. There may also be some discussions regarding the expert's preliminary view on certain aspects of the case. The expert will potentially declare the

⁵⁴¹ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 214.

⁵⁴² Voser and Bell, 'Expert Evidence in Construction Disputes: Arbitrator Perspective', 229.

⁵⁴³ *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34), Ruling On Claimants' Application To Remove The Respondent's Expert Witness As To Panamanian Law, 13 December 2018, para. 27, 35.

views he cannot support and the areas he has no expertise.⁵⁴⁴ The expert does not have to accept the appointment.⁵⁴⁵

According to Art. 5(1)(i) of IBA Rules, the party that wants to rely on party-appointed expert evidence has to identify the related expert(s) within the time frame the arbitral tribunal considers appropriate, best with the memoranda of claim and answer.⁵⁴⁶ This rule aims to prevent strategic withholding of expert reports, contribute to equality of arms and promote time and cost-efficiency.⁵⁴⁷

The party (counsel) engaging the expert would definitely predetermine that the expert's opinion would support the party's position. This, however, does not mean that the expert is not independent. An expert could hold a view totally in line with scientific or technical standards. It would be absurd and naive to think that counsel would leave the room totally to the expert without hinting at the party's desired position.⁵⁴⁸

3.5.2. Terms of Appointment

It is also explicitly permissible for a party to interview a potential expert witness for the purpose of presenting such person's testimony to the tribunal. Article 5(2)(b) of the IBA Rules requires a party-appointed expert to provide a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions. It is vital that counsels provide a set of clear instructions or terms of appointment for a party-appointed expert.⁵⁴⁹

After the counsel comes with a preliminary understanding of the expert, the counsel usually works closely with the expert to formulate the terms of appointment or

⁵⁴⁴ Voser and Bell, 'Expert Evidence in Construction Disputes: Arbitrator Perspective', 230; Parlett, 'Parties' Engagement with Experts in International Litigation', 447.

⁵⁴⁵ Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314.

⁵⁴⁶ Zuberbühler et al., *IBA Rules of Evidence*, 136; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 292.

⁵⁴⁷ Zuberbühler et al., *IBA Rules of Evidence*, 143; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 293.

⁵⁴⁸ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 216.

⁵⁴⁹ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 659.; See O'Malley, *Rules of Evidence in International Arbitration*, 178–80.; Proske, *Expert witness conferencing in Schiedsverfahren*, 21.

questions to be answered in the report. The expert is provided with necessary documents, such as counter-expert opinions and judicial decisions, that must be considered, as well as other evidence on which to base his opinion. The expert needs to explicitly reference these documents while writing his opinion.

3.5.3. Submission of Report

The party-appointed expert produces a draft report, which is refined and then eventually submitted as evidence.⁵⁵⁰ Parties generally submit the expert's report with their initial submissions. Although the party relying on an expert has to acknowledge this earlier, the expert report can be submitted later, again within the time ordered by the tribunal (Art. 5(1)(ii) of IBA Rules). If submitted at a late stage of the proceedings, the party risks the evidence being inadmissible.⁵⁵¹ Nevertheless, the arbitral tribunal will, in principle, generally decide, with the procedural timetable, when and how to submit the expert's report, time taking into account the relation of the report with other submissions made by the parties.⁵⁵²

Although the expert reports could be exchanged simultaneously, the sequential exchange could help the tribunal understand the issues addressed in the report better, 549, since experts will comment on the counter expert's report, which is expected to lead to a more refined explanation of the issues in general.⁵⁵³

3.5.4. Rights of Party-Appointed Experts

3.5.4.1. Assistance of the Party Counsel

Although the expert is approached to assist the parties in making their case, the expert will also need the assistance of the party and specifically their representatives during

⁵⁵⁰ Parlett, 'Parties' Engagement with Experts in International Litigation', 447; Lim, 'Tribunal-Appointed Experts in International Arbitration', 224.

⁵⁵¹ ICC Case No. 12761: "The technical opinion of the individuals who have not been identified as experts by the parties in their respective evidential proposal writs, or whose Expert Report has not been presented on the abovementioned date, will not be admissible." In ICC Bulletin, 2010 Special Supplement: Decisions on ICC Arbitration Procedure, 74.

⁵⁵² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 293; Zuberbühler et al., *IBA Rules of Evidence*, 137.

⁵⁵³ See United Nations, 'UNCITRAL Notes on Organizing Arbitral Proceedings', para. 99.

the preparation of the opinion and the hearings.⁵⁵⁴ 2013 IBA Guidelines on Party Representation provide some guidance: they provide in general terms that party representatives may assist experts in the preparation of their reports but should seek to ensure that an expert's report reflects his or her own analysis and opinion.⁵⁵⁵

This assistance includes a proper explanation of all aspects and providing evidence regarding the case that the expert needs to refer to and consider. Additional information regarding the role of the expert in the hearings, during the testimony and examination, style, tactics for behaviour⁵⁵⁶, and expectations should be provided. While the party representatives should not instruct the specific view the expert should provide, it can instruct "how" to formulate it and its scope.⁵⁵⁷ That's why, in practice, the draft expert report is sent to the party representatives for review and comments. These comments should only address issues like relevance, language, structure and form without intervening in the expert's opinions.⁵⁵⁸

3.5.4.2. Remuneration

The expert is providing a service to the party, which could qualify as a work contract or ordinary mandate under many jurisdictions.⁵⁵⁹ This naturally means that the expert will receive remuneration.⁵⁶⁰ In principle, this should be paid by the appointing party

⁵⁵⁴ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 188.; Rifkind, 'Preparing the Witness for Cross-Examination', 143; Schwartz and Digón, 'Witness Statements: Use and Abuse', 764.

⁵⁵⁵ Parlett, 'Parties' Engagement with Experts in International Litigation', 449.; IBA Guidelines on Party Representation in International Arbitration (2013), Guidelines 20 and 22. The IBA Guidelines are more detailed than the 2014 LCIA Guidelines, which provide that '[a] legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court': 2014 LCIA Guidelines, para 5.

⁵⁵⁶ See Rifkind, 'Preparing the Witness for Cross-Examination', 144.

⁵⁵⁷ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189.; Kent, 'Expert Witnesses in Arbitration and Litigation Proceedings', 4.; Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration', 80.

⁵⁵⁸ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189.

⁵⁵⁹ Oetiker, 'Commentary on Art. 26-30 Swiss Rules of Arbitration', 312-13.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 266.; Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, 11.:593.

⁵⁶⁰ Schiau, 'An Arbitration Dilemma', 337.; for instance, see for very high expert expenses in the amount of USD 4,774,505.01 in *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* ICSID Case No. ARB/12/, para. 1855.; See for critics related to high expenditure in Tuna, *Alternative Dispute Resolution in Energy Industries*, 129-30.

and should be born alone and not be considered under legal costs.⁵⁶¹ Nevertheless, arbitration rules give great discretion to the tribunal while awarding the arbitration and legal costs and expenses. For instance, ICC Arbitration Rules Art. 38 states that the costs of the arbitration shall include, among others, the reasonable legal and other costs incurred by the parties for the arbitration.⁵⁶² This means that the tribunal can order the payment of the party-appointed expert's fee from the counterparty. Also, LCIA Arbitration Rules Art. 28.3 foresee that:

The Arbitral Tribunal shall also have the power to decide by an order or award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on a reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

An expert should not receive benefits that could affect his sincere views when drafting the report, such as a fee arrangement that depends on the outcome of the case or benefits other than his fee and expenses.⁵⁶³ In order to prevent this, it is useful to stipulate the basis of the remuneration of the expert (CIArb Protocol Art. 4(4)(c)).

3.5.5. Obligations of the Party-Appointed Expert

The obligations of the party-appointed expert are not exhaustively dealt with in statutory provisions. However, soft law instruments regulate some obligations of party-appointed experts.

First and foremost, the party-appointed expert has not only obligations towards the appointing party but also to the tribunal. Even though the engagement of the expert by a party puts pressure on the expert, specifically in the perspective of being continuously hired, partisanship will highly likely have an adverse effect, and if exposed by the tribunal, this would harm the expert's overall reputation and lower

⁵⁶¹ Centner, *Iura Novit Curia in Internationalen Schiedsverfahren: Eine Historisch-Rechtsvergleichende Studie Zu Den Grundlagen Der Rechtsermittlung*, 112.

⁵⁶² Yeşilirmak, *ICC Tahkim Kuralları ve Uygulaması*, 129.

⁵⁶³ Bor, 'Expert Evidence', 513; Zuberbühler et al., *IBA Rules of Evidence*, 140; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 300.

demand for his advice.⁵⁶⁴ The obligation towards the tribunal overrides, despite having received instructions and been paid by a party (CIArb Protocol, Art. 7.1.).⁵⁶⁵

Every other obligation should be read, bearing in mind this primary mandate. The party-appointed expert is expected to provide, before or during the proceedings, a well-organized and clear written report on the issues it was referred to (3.5.5.1.). The expert will need to attend, if not decided otherwise by the tribunal, the oral hearings for testimony and examination (3.5.5.2.) The expert, according to the terms of the agreement the party engaged him/her, the applicable law to the arbitration and arbitration rules must keep confidential all information he is provided within the course of the arbitral proceedings (3.5.5.3.).

3.5.5.1. Providing an Opinion

When the expert engaged by the party accepts the mandate, his/her main obligation is to provide the engaging party with an independent, professional and objectively verifiable clear written opinion in the form of a report that includes his/her views that enables the tribunal to understand the special or technical matter. The expert report should be composed of some mandatory components, as detailedly approached in section 3.6.3. of this chapter.

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.⁵⁶⁶ The expert should provide assistance to the court by way of objective, independent and unbiased professional opinion in relation to matters within his expertise without assuming the role of the party representative.⁵⁶⁷

⁵⁶⁴ Nessi, 'Expert Witness: Role and Independence', 100–101.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 414.

⁵⁶⁵ 'BCLP 2021 Survey', 4; Nessi, 'Expert Witness: Role and Independence', 75–76.; Explicitly stipulated in English High Court Civil Procedural Rules (26 April 1999) R 35.3.2.

⁵⁶⁶ Referencing to *Whitehouse v Jordan*, [1981] 1 WLR 246 at p 256, per Lord Wilberforce.

⁵⁶⁷ Bor, 'Expert Evidence', 511; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189.; see *Polivitte Ltd v Commercial Union Assurance Co Plc*, [1987] 1 Lloyd's Rep 379 at 386 per Mr Justice Garland and *Re J*, [1990] FCR 193 per Mr Justice Cazalet.

The expert should also help the tribunal at the post-hearing stage while applying, for instance, interest rates on issues of quantum.⁵⁶⁸

3.5.5.2. Attendance at the Hearings

Mostly, when the experts submit a report to the tribunal and the counter-party, their mandate is half done since they are generally expected to take part in oral hearings, testify and be examined by their appointing party, the counterparty and the tribunal.⁵⁶⁹ This can be agreed upon otherwise by the parties, or the expert can be exempted by the decision of the tribunal, especially if the expert evidence is immaterial.⁵⁷⁰

The expert must be prepared for the testimony and examination and adhere to the tribunal's orders during the hearings. Additionally, if requested by the tribunal, the expert shall confer and coordinate with the counter-party's expert to clarify the issues together and declare common understandings to facilitate the process for the arbitral tribunal.⁵⁷¹ However, it is considered under due process rights to examine the (opposing) expert when asked so.⁵⁷²

If the expert does not attend the hearing, despite the order of the tribunal to do so, it can be discarded.⁵⁷³

3.5.5.3. Confidentiality

Although arbitration rules regulate a confidentiality obligation only towards tribunal-appointed experts⁵⁷⁴, a party-appointed expert shall also hold information that he

⁵⁶⁸ Jones, 'Redefining the Role and Value of Expert Evidence', 39-40.

⁵⁶⁹ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 318.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 278.; for details of testimony and examination see Chapter III Section 7.

⁵⁷⁰ Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 440-41; Schäfer and Wilson, 'ICC Bulletin', 2021, 64.

⁵⁷¹ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 190.

⁵⁷² Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 441.

⁵⁷³ For further analysis of not attending the hearings by the party-appointed expert See Section 8.1. in this Chapter.

⁵⁷⁴ See e.g. Swiss Rules Art. 44(1): "Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitration proceedings not already in the public domain, except and to

received in due course of the proceedings confidential. The terms of reference would probably indicate an obligation of confidentiality for the expert.

Whether written communications between party-appointed experts and counsel may or may not be subject to disclosure is a rarely confronted issue. *Friedland/Brown De Vejar* stipulate that “the overwhelming view among experienced international arbitrators is that, in the ordinary situation, production would not be warranted.”⁵⁷⁵

UNCITRAL note states that “the arbitral tribunal may wish to clarify the nature and extent of communication between the parties or their representatives and their experts, and whether a party might be requested to disclose such communications.”⁵⁷⁶

The disclosure issue is not dealt with in any of the rules of major arbitral institutions. However, international practice shows that there is a presumption of non-disclosure of counsel-expert communications other than the documents relied upon by the expert in forming his opinion, as well as the documents expressly referenced by the expert in the report.⁵⁷⁷

While counsel-expert communications may be relevant to assist in evaluating the credibility and impartiality of an expert⁵⁷⁸, few believe that rules allowing the disclosure of counsel-expert communications would promote greater independence and objectivity of party-appointed experts.⁵⁷⁹ Allowing disclosure would result in increased costs and inefficiency by increasing the use of “shadow” experts. Additionally, experienced arbitrators are generally well-equipped to determine a lack of objectivity or bias.⁵⁸⁰

the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary to the arbitral tribunal, the members of the board of directors of the Swiss Arbitration Centre, the members of the Court and the Secretariat.”

⁵⁷⁵ Friedland and De Vejar, ‘Discoverability of Communications Between Counsel and Party-Appointed Experts in International Arbitration’, 162.; Friedland and De Vejar, ‘Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration’, 3.

⁵⁷⁶ United Nations, ‘UNCITRAL Notes on Organizing Arbitral Proceedings’, para. 100.

⁵⁷⁷ Friedland and De Vejar, ‘Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration’, 2 ff.

⁵⁷⁸ See Nessi, ‘Expert Witness: Role and Independence’, 95–96.

⁵⁷⁹ ‘BCLP 2021 Survey’, 9.

⁵⁸⁰ ‘BCLP 2021 Survey’, 9.

3.5.6. Powers of the Party-Appointed Expert

The expert should have the opportunity to inspect any site, property, machinery or any other goods, samples, systems, processes, or documents upon request by the parties or at the tribunal's discretion (IBA Rules Article 7).⁵⁸¹ The parties and their representatives are allowed to partake in such inspections.⁵⁸²

In case the expert needs any documents from the counterparty and the party is not willing to provide the documents, the tribunal may order that party to provide the requested documents to the party-appointed expert.⁵⁸³

The party-appointed expert may question the tribunal-appointed expert on issues raised in his expert report, the parties' submissions or witness statements or the expert reports made by the party-appointed experts pursuant to IBA Rules Article 6.5.

3.6. The Expert Opinion

The positive impact of the party-appointed expert report on the proceedings is strictly tied to two things: 1) The personality of the expert (Subjective Test) and 2) the content and quality of the opinion (Objective Test). The personality should show strong signs of impartiality, excellent education, comprehensive experience and reputation. The opinion should be independent, scientifically objective and trustworthy.

The arbitral tribunal will do its own critical, informed and independent assessment of the expert's opinion, whether or not to evaluate it as evidence while drafting the award.⁵⁸⁴ However, it is not always easy to assess the expert evidence, as possibly there will be either contradicting experts, too technical reports or poor reports that do not assist the tribunal in deciding on the matters of what the expert report actually was adduced for.

⁵⁸¹ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 94.; Cosar, 'Fraudulent Evidence: Investment Arbitration', para. 30.

⁵⁸² Ünüvar, 'Experts: Investment Arbitration', para. 28.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 94.

⁵⁸³ Can and Tuna, *Milletlerarası Tahkim Hukuku*, 416.

⁵⁸⁴ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 195.; Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 461.

The tribunal should first make a subjective analysis of the expert and should have a deeper look at whether the expert is especially challenged on his/her credibility and reliability. Then, arbitrators should make an objective analysis by analysing the content of the experts' report and weighing it.

The central problem in party-appointed experts is that experts can become highly likely mere advocates and produce partisan opinions, as it was also acknowledged by the famous case before UK courts: "It is [not] an exaggeration to say that the parties seem to have become more intent on winning the battle of the experts than on establishing the facts upon which their respective cases were based."⁵⁸⁵ (emphasis added)

Thus, tribunals who already suffer the required knowledge will have to differentiate between opposing experts.⁵⁸⁶

3.6.1. Contents of the Opinion

Arbitration laws and rules generally do not indicate details about how the expert's opinion should be composed, such as form and style. UNCITRAL Model Law Art. 26(2) stipulates that a tribunal-appointed expert may deliver a "written or oral report" (similar to TIAL Art. 12(A)(2), ZPO § 1049(2)). Arbitration laws, such as the EAA or PILA's Arbitration chapter, do not even stipulate those provisions.

The IBA Guidelines, the CIArb Protocol, and the CBP indicate rules that the experts should adhere to when drafting their opinions. These rules have been developed over time in practice and present a good example of what qualifications a well-established expert opinion should have.

Whether non-compliance with the contents of the report leads to issues as to its admissibility or weight depends on the circumstances of non-compliance. Where the report lacks some formal basics, for instance, full name and communication address of the expert, this could be overcome by rapid revision, but if the report lacks the

⁵⁸⁵ *The Ikarian Reefer.*; Bor, 'Expert Evidence', 503.; See also Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 281.

⁵⁸⁶ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 93.

methodology or clear conclusions, this could lead the tribunal to attribute less value to the report. Thus, full compliance with the subjects listed below would enable the expert's opinion to have a greater weight.⁵⁸⁷

In International arbitration, the memorial style of written submissions, where parties submit their statements of claim and answer that contain the factual evidence, legal arguments, and all documentary material relied upon, including expert opinions, is more common.⁵⁸⁸

3.6.1.1. Author(s)

As is the case for all documents having a legal impact, the author should be indicated with communication details at the very beginning of the opinion. If there are multiple authors, such as when a joint report is produced, Article 5(2)(i) of the IBA Rules states that “if the Expert Report has been signed by more than one person, [the Expert Report shall contain] an attribution of the entirety or specific parts of the Expert Report to each author”.⁵⁸⁹ Otherwise, it will make the life of the tribunal and opposing counsel harder as to whom objections and questions at the cross-examination phase shall be directed.⁵⁹⁰ It is not possible that the names of the experts can be kept confidential.⁵⁹¹

The name would also help the tribunal and the counter-party address issues of conflict of interest or grounds to challenge the expert, especially if there is any relationship with the tribunal or the counter-party.⁵⁹²

It is not infrequent for an expert in one area to indicate that the expert has relied upon the work of a person with expertise in preparing the expert's report. If the issue relied

⁵⁸⁷ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 191.

⁵⁸⁸ Jones, ‘Redefining the Role and Value of Expert Evidence’, 34.

⁵⁸⁹ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 310.

⁵⁹⁰ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 660; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 311.

⁵⁹¹ Esen, ‘Violation of the Right to A Fair Trial in Arbitration’, 114.

⁵⁹² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 297.

on a substantive one, then the indirect source as a base for the report may affect the gravity of the opinions but not the admissibility.⁵⁹³

The work must be a product of the expert himself, uninfluenced by any of the parties or their counsel. However, counsel may (and always do) assist experts in formulating and presenting the report in a way likely to be helpful to convince the tribunal, consistent with the party's arguments.⁵⁹⁴ This should not result in the counsel drafting the report and the expert having just a finishing touch and a signature.⁵⁹⁵

The author should indicate a “description of his or her background, qualifications, training and experience” with a detailed curriculum vitae, which will enable the reader to duly perceive and assess the report (IBA Rules Art. 5(2)(a), CIArb Protocol Art. 4(4)(a), CBP para. 146(a)).

3.6.1.2. Guarantee of Independence and Impartiality

It is vital for the expert's credibility to be as transparent as possible. This is why the expert should include a statement regarding his present and past relationship (if any) with any of the parties, their legal advisors and the arbitral tribunal and that the expert is independent⁵⁹⁶ of these and is not biased (IBA Rules Art 5(2)(a), 5(2)(c), CIArb Protocol Art. 4(1), 4(4)(b), 8(1)).⁵⁹⁷ These requirements are important to prevent legal

⁵⁹³ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 424.

⁵⁹⁴ Bor, 'Expert Evidence', 514.

⁵⁹⁵ Proske, *Expert witness conferencing in Schiedsverfahren*, 30; Dave, 'Should Experts Be Neutrals or Advocates?', 152.

⁵⁹⁶ As it will be elaborated in Chapter IV Section 4.2.1., I do not believe that the party-appointed expert as a person should be independent, but the opinion must be independent.

⁵⁹⁷ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 657; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 191; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 297.

See e.g. CIArb Protocol Art. 8: "I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal decide the issues in respect of which expert evidence is adduced. I have complied with, and will continue to comply with, that duty. (b) I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration. (c) I confirm that all matters upon which I have expressed an opinion are within my area of expertise. (d) I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal all matters, of which I am aware, which might adversely affect my opinion; (e) I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion. (f) I confirm that if, subsequently, I consider this opinion requires any correction,

advisors from regularly appointing the same experts who render favourable opinions for the respective party.⁵⁹⁸

Lack of independence or impartiality can have serious legal effects, such as annulment or refusal for recognition and enforcement of an award. Recently, an ICSID arbitral award⁵⁹⁹ was annulled by the ICSID Ad Hoc Committee on the grounds that a party-appointed arbitrator and his former law firm had worked closely and multiple times with that party's damages expert and his firm, which was not expressly disclosed.⁶⁰⁰

The Committee, thus, finds critical the fact that the other arbitrators had no knowledge of the relationship between Dr. Alexandrov and Mr. Lapuerta. Had this information been shared with them, either by Dr. Alexandrov or by Mr. Lapuerta and the Brattle Group, it may have affected both the deliberations and the outcome. In any event it is impossible to conclude that such disclosure would have had no material effect on the arbitrators, their deliberations and the ultimate outcome.⁶⁰¹

Having any past or present relationship should not, without any hesitation, lead to dependency or bias.⁶⁰² It should be critically assessed whether any present or past relationship has an effect.⁶⁰³

The expert report's purpose is primarily not the establishment of the facts; this is the duty of the counsel and the fact witnesses. The expert, to the degree possible, will provide objective professional comments and opinions on matters.⁶⁰⁴ In line with this, an affirmation by the party-appointed expert of his genuine/honest belief in the opinion is expected.⁶⁰⁵ Genuine belief indicates accurate descriptions of the facts he has been provided with and his opinion on the matters. Although this seems a rather formalistic requirement, it can become vital if the expert is acting simultaneously or has acted in another case where he expressed the contrary view. In such a scenario, opposing

modification or qualification I will notify the parties to this arbitration and the arbitral tribunal forthwith.”

⁵⁹⁸ Zuberbühler et al., *IBA Rules of Evidence*, 138.

⁵⁹⁹ *Eiser Infrastructure Limited Andenergía Solar Luxembourg S. À R.L. v Kingdom of Spain (Eiser v Spain)*, ICSID Case No. ARB/13/36 (11 June 2020) at 188 ff. <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/36> (accessed 19.11.2022).

⁶⁰⁰ Zuberbühler et al., *IBA Rules of Evidence*, 138.

⁶⁰¹ *Eiser v Spain*, para. 249.

⁶⁰² *Nessi* states that in a confidential ICC arbitration, where an expert was appointed among employees, the tribunal found the findings and opinions of the expert clear and helpful. See *Nessi*, ‘Expert Witness: Role and Independence’, 100.

⁶⁰³ Zuberbühler et al., *IBA Rules of Evidence*, 138.

⁶⁰⁴ Zuberbühler et al., 141.

⁶⁰⁵ O’Malley, *Rules of Evidence in International Arbitration*, 155–56.

counsel could easily highlight this contradiction in front of the tribunal and would undermine the expert's opinion.⁶⁰⁶

Indeed, all these leave much to the “honour and integrity of an individual expert and provides little in the way of concrete guarantees”.⁶⁰⁷

“At the same time, experts must disclose any circumstance which, in the view of a reasonable and informed person, may give rise to justifiable doubts as to their objectivity and independence.”⁶⁰⁸

3.6.1.3. Expertise

The expert shall attach a CV to the report that lays down his expertise in the field via professional practice and, if present, academic records such as degrees and published works.⁶⁰⁹ This part of the opinion will be a core element of why the tribunal shall credit

⁶⁰⁶ Zuberbühler et al., *IBA Rules of Evidence*, 142.

⁶⁰⁷ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 658.

⁶⁰⁸ In the Code of Best Practices in Arbitration by the Club Español del Arbitraje, a non-exhaustive list of questions is included that are important to determine the objectivity and independence of party-appointed experts: “1) Are you currently acting as an expert for or against one of the parties in some matter? 2) In the last 10 years, have you acted as an expert for one of the parties or against one of the parties in some matter? 3) Is your firm currently acting as an expert for one of the parties or against one of the parties in some matter, without your involvement? 4) In the last three years, has your firm acted as an expert for one of the parties or against one of the parties in some matter, without your involvement? 5) Is there any other personal or professional relationship, present or past, with either of the parties that you consider you should disclose? 6) Have you, or has your firm, provided advice or issued an opinion on the dispute or on some aspect thereof at any previous time? 7) Can the outcome of the dispute afford you some benefit or occasion you some detriment, financial or otherwise? 8) If you answer yes to any of questions (1) through (5) and (9) through (15), is the other matter or arbitration related to the current arbitration? 9) Are you or your firm currently acting as an expert in another proceeding upon appointment by the same lawyer or law firm that has appointed you in the present arbitration? 10) In the last three years, has your firm acted, without your involvement, as an expert in another proceeding upon appointment by the same lawyer or law firm that has appointed you in the present arbitration? 11) In the last 10 years, have you personally acted as an expert in another proceeding upon appointment by the same lawyer or law firm that has appointed you in the present arbitration? 12) Is there any other personal or professional relationship, present or past, with one of the lawyers for the parties that you consider you should disclose? 13) Is there any personal or professional relationship, present or past, with third-party funders that you consider you should disclose? 14) Is there any other personal or professional relationship, present or past, with witnesses that you consider you should disclose? 15) Is there any personal or professional relationship, present or past, with the arbitral institution that you consider you should disclose?”

⁶⁰⁹ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 658; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 299; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, para. 22-80.

the expert's opinions and incorporate them into the award. The expert is also expected to stipulate areas in which he does not possess any expertise.

3.6.1.4. Instructions (Terms of Reference)

The expert's report has to be read together with the instructions the opinion was formulated, either with the questions the party counsel asked the expert or by a proactive⁶¹⁰ arbitral tribunal.⁶¹¹ The report will be only objectively assessable by the tribunal if it understands the basis of the expert's conclusions.⁶¹²

Additionally, disclosing the instructions would foster transparency as to the independence and impartiality of the expert.⁶¹³ Disclosure of the instructions is considered necessary and already constitutes best practice in international arbitration.⁶¹⁴

Thus, it should be accepted that the instructions from the party should not be privileged (CIArb Protocol Art. 5(1)). However, this does not mean that the documents for instructions should be disclosed or that the expert should be questioned on this issue unless there is a plausible reason for it.⁶¹⁵

If the report does not indicate the questions or is too vague, the tribunal may step in and provide a set of clear instructions or terms of reference (IBA Rules Art. 5(2)(b), CIArb Protocol Art. 4(d)).⁶¹⁶ However, the tribunal could also act passively and give

⁶¹⁰ See Chapter V Section 6.1.

⁶¹¹ While %97 of respondents in the BCLP Survey responded that the "expert report should include a description of the instructions given to the expert, only 72% of them "agreed that a copy of the instructions given to the expert should be annexed to the report." in 'BCLP 2021 Survey', 14..

⁶¹² Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 106; Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 85.

⁶¹³ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 299.

⁶¹⁴ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 493.

⁶¹⁵ O'Malley, *Rules of Evidence in International Arbitration*, 155.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 300.; CIArb Protocol Art. 5(2) stipulates that drafts, working papers or other documentation created by an expert for the arbitration should be regarded as privileged. See supporting practice that agrees with this view in 'BCLP 2021 Survey', 15.; Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 153.; Communications with consulting experts who do not testify remain privileged and non-disclosable, see Schäfer and Wilson, 'ICC Bulletin', 2021, 68.

⁶¹⁶ Bor, 'Expert Evidence', 514; Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 659.; O'Malley argues that a line-by-line recitation

less weight to the report without engaging in additional endeavour. Nevertheless, it should be more active when an expert opinion is required according to the circumstances of the case, and it wants to refrain from tribunal-appointed experts, which could lengthen the proceedings.

3.6.1.5. Facts and Evidence

The expert's opinion must state a full description of the factual basis and evidence that it has considered and relies on (IBA Rules Art. 5(2)(d), CIArb Protocol Art. 4(4)(e-f), CBP para. 146(d)).⁶¹⁷

A well-equipped tribunal and counsel of the counterparty will want to know on which circumstances and evidence the opinion was based.⁶¹⁸ This is crucial information that will ensure that everyone in the proceedings is on the same page and that the same matters are being addressed.

Where expert evidence refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the counterparty at the same time as the exchange of reports. If the opinion is based on wrong or irrelevant facts, it will be easily disregarded since the conclusions drawn by it are inapplicable to the case at hand.⁶¹⁹ That is why the opinion has to state on which occasions, facts and evidence thereto it was produced. The expert shall also make those documents accessible and provide copies, even if some of them are publicly available or the documents are

of the instructions is generally not required, in O'Malley, *Rules of Evidence in International Arbitration*, 155.; Schäfer and Wilson, 'ICC Bulletin', 2021, 64.

⁶¹⁷ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 304; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 107; Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 85.

⁶¹⁸ Bor, 'Expert Evidence', 514.

⁶¹⁹ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 659; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 423; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 305.

voluminous⁶²⁰ (IBA Rules Article 5(2)(d), 5(2)(e), CIArb Protocol Art. 4(4)(j)).⁶²¹ Failure to do so would have a negative effect on the expert report, potentially being either disregarded or attributed less weight.⁶²² The tribunal is not bound by the factual basis the expert positioned himself but will ultimately establish the facts.⁶²³

Parties are given the opportunity to comment in writing on the tribunal-appointed expert's report and to examine any document that the expert relied on in the report.⁶²⁴

3.6.1.6. Methodology

An expert report should indicate which methodology was used while deriving the relevant conclusions (IBA Rules Article 5(2)(e), CIArb Protocol Art. 4(4)(j), CBP para. 146(c)). This is necessary so that the opinion is independently verifiable or susceptible to peer review.⁶²⁵

If the expert uses another expert's opinions, which will be the case in complex construction disputes, e.g. the quantum expert using the scientific expert's opinion, to derive certain conclusions, this should be indicated.

⁶²⁰ See *Methanex Corporation v United States of America*, UNCITRAL, Letter from Tribunal (on documents relied upon by Methanex Experts) 10th October 2003, available at <https://www.italaw.com/cases/683> (accessed 20.09.2022):

“(1) As previously ordered by the Tribunal, each Disputing Party's Expert Reports are required to comply with Article 5 of the IBA Rules; and in particular each Expert Report is required, by Article 5(2)(b) & (c) of the IBA Rules, to contain a statement of the facts on which that Expert Report is based and a description of the evidence and information used in arriving at that Expert Report's conclusions: (2) As also previously ordered by the Tribunal and in accordance with the time-table already established by the Tribunal, each Disputing Party is required by Article 3(1) of the IBA Rules to submit to the Tribunal and the other parties, all documents available to that party on which that party relies, including public documents and those in the public domain (except for any documents that have already been submitted by another party)”

⁶²¹ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 660; Zuberbühler et al., *IBA Rules of Evidence*, 140; O'Malley, *Rules of Evidence in International Arbitration*, 153; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 308.

⁶²² O'Malley, *Rules of Evidence in International Arbitration*, 154; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 305.

⁶²³ Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 233.

⁶²⁴ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.; Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 446.

⁶²⁵ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 660.

3.6.1.7. Opinions and Conclusions

The author of the report should, preferably in a similar style to a judgements' operative part, state explicitly its findings and conclusions as to the questions asked to himself by the parties or the tribunal (IBA Rules Art. 5(2)(e), CBP para. 146(e-f)).⁶²⁶

The expert should affirm that he produced the report according to his genuine belief expressed in the report (IBA Rules Art. 5(2)(g)).⁶²⁷ This rule aims for the expert to adhere to his ethical duties in his discipline.⁶²⁸ The conclusions should be objective and independent and do not have to reflect the client's case or interests.⁶²⁹

Experts should not assume the tribunal's knowledge of any technical matters dealt with or referred to in the report and should explain them and the expert's own view in a "clear, concise, coherent, organised and simplified manner, without coming across as shallow or unhelpful."⁶³⁰ The expert shall form his opinion simplistically. The report shall be formulated in a way that explains technical issues to a layman. The opinion will not convince the tribunal if it is not simple enough.⁶³¹

Although not expected in most scenarios, in case the expert could not form an opinion on some points for whatever reason, it shall also state why it was not able to reach an opinion on the matter(s) (CI Arb Protocol Art. 4(4)(h)).⁶³² Expert's may also include opposing views to show the tribunal that he is conscious of other positions.⁶³³ This could positively impact the perception of the expert's independence and impartiality.⁶³⁴

⁶²⁶ Zuberbühler et al., *IBA Rules of Evidence*, 140.

⁶²⁷ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 310. This amendment is criticized with the reason that the 1999 version which sought "the truth" rather than "genuine belief" was more accurate.

⁶²⁸ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 234.

⁶²⁹ Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration*, 102.; LCIA Ref. No 97/X27, para. 4.3. in 'Challenge Digests', 323–24.

⁶³⁰ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 189.

⁶³¹ Roney, 'Cross-Examination of Experts', 114.

⁶³² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 306.

⁶³³ Khodykin and Mulcahy, 307.

⁶³⁴ Khodykin and Mulcahy, 307, fn. 78.

3.6.1.8. Form and Language

Although some arbitration laws provide that the expert's opinion may be in oral or written form, the expert opinion should be in the form of a firm written report, as this is more in line with due process components (UNCITRAL Arbitration Rules Art. 15(2)).⁶³⁵

The report should have a clear structure with headings, separate sections or sub-sections, paragraph numbering, simple language that enables arbitrators and other subjects with little or no knowledge of the particular area to understand, summaries, appropriate charts and diagrams.⁶³⁶

The expert opinion in the form of a written report should be generally submitted to the tribunal with the memorandum in chief, the first submission of the parties, including the statement of claim and evidentiary documents.⁶³⁷ Nevertheless, depending on the case, it could be submitted at a later stage, especially if document production is necessary or other evidence is anticipated.⁶³⁸

As an official document, the expert report shall be signed, indicating the date it was finally produced and also the place (IBA Rules 5(2)(h), CIArb Protocol Art. 4(4)(l), CBP para. 146(a)).

In case the expert report was originally produced in a language different from the language of the arbitration, a statement should be made in the original language in which it was written (IBA Rules Art. 5(2)(f)).⁶³⁹ The original and translated report should be submitted together so that the tribunal and counter-party can verify the content and, if necessary, challenge opinions and conclusions in the translated report

⁶³⁵ O'Malley, *Rules of Evidence in International Arbitration*, 147; Lim, 'Tribunal-Appointed Experts in International Arbitration', 224.

⁶³⁶ Bor, 'Expert Evidence', 514.

⁶³⁷ O'Malley, *Rules of Evidence in International Arbitration*, 147; Schneider, 'Technical Experts in International Arbitration', 447; Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration', 79.; For acceptance of late submissions see *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, para. 188, available at <https://www.italaw.com/sites/default/files/case-documents/ita0299.pdf> (accessed: 1.09.2022)

⁶³⁸ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 307.

⁶³⁹ Khodykin and Mulcahy, 309.

that do not confirm the original one. Additionally, stating the original language in which the expert report was prepared enables the tribunal to conclude that, in case of loss in translation, this should not be attributable to the expert himself.⁶⁴⁰

3.6.2. Revision of Report and Additional Report

Despite the fact that statutory laws and arbitration rules are silent on the issue, the revision of already adduced expert reports and additional reports (“rebuttal expert reports”) are possible in practice (IBA Rules Art. 5(3), CIArb Protocol Art. 6(1)(f) 6(1)(g)).⁶⁴¹ Based on the parties’ right to be heard, this opportunity does not seem restricted; however, durational and scope limitations may be applicable depending on the status of the proceedings.⁶⁴²

It might be that the expert overlooked facts or evidence or new facts become known, which would lead to a different conclusion from his previous opinions. On that occasion, the tribunal should be made aware, and a revised report should be submitted, stating reasons why the amendment was necessary.⁶⁴³ Additionally, after the hearings, the tribunal might request the expert to clarify points in the report and help it to understand issues.⁶⁴⁴

After submission, if the expert changes his view on a material matter, such change of view should be communicated to the other side immediately.⁶⁴⁵

It’s possible that one of the parties decided not to adduce a party-appointed expert report at the brief interchange phase but changed its mind after seeing the counter party’s expert report or other submissions, despite the fact that parties had to state clearly in their brief if they want to adduce an expert report. In that case, the party may

⁶⁴⁰ Zuberbühler et al., *IBA Rules of Evidence*, 141.

⁶⁴¹ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 313.

⁶⁴² Zuberbühler et al., *IBA Rules of Evidence*, 142; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 424.

⁶⁴³ Zuberbühler et al., *IBA Rules of Evidence*, 143.

⁶⁴⁴ Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 187–88.

⁶⁴⁵ See *The Ikarian Reefer*.

submit an expert opinion that responds only to matters “contained in a witness statement, expert report or other submission of the other party”⁶⁴⁶ (IBA Rules 5(3)(a)). Also, if new developments occurred that could not have been addressed in a previous Expert Report, then the submission of a revised or additional expert report should be possible (IBA Rules 5(3)(b)).

Thus, a rebuttal of expert reports should only be admissible if it responds to matters contained in a witness statement, party statement or expert report of the other party that has not been previously presented in the proceedings or if new developments occurred that could not have been addressed previously (IBA Rules 5(3)).⁶⁴⁷

3.7. Admissibility, Assessment and Binding Nature

Sources applicable in international arbitration are mainly silent when it comes to the details of admissibility and assessment of evidence.⁶⁴⁸ The tribunal has great inherent authority to evaluate the admissibility, probative value and materiality of the evidence offered.

Free assessment of evidence is one of the main rules in international arbitration proceedings, where it is rare to find specific and detailed provisions relating to the weighing of evidence or burden of proof in statutes or rules (UNCITRAL Model Law Art. 19, MTK Art. 8(A), ZPO § 1042 para.4, EAA S. 34(2)(f)).⁶⁴⁹

⁶⁴⁶ Zuberbühler et al., *IBA Rules of Evidence*, 143.

⁶⁴⁷ O’Malley, *Rules of Evidence in International Arbitration*, 158.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 313–14.

⁶⁴⁸ Redfern et al., ‘The Standards and Burden of Proof in International Arbitration’, 321.; Hacibekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 10.; Alfter, *Das Beweismaß in Der Internationalen Handelsschiedsgerichtsbarkeit: Auswirkungen Der Best Practice Der Document Production Auf Den Beweis*, 63 ff.

⁶⁴⁹ Yeşilirmak, *Türkiye’de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.; Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 97.; Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’, 450.; Patocchi, Paolo Michele and Niedermaier, ‘UNCITRAL Rules’, 1182.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 228–29.; Pekcanitez and Yeşilirmak, ‘Tahkim’, 2705.; Narçin, ‘4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller’, 18.; Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 271.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:428.; Reiner, ‘Austria’, 21.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 22.; Borris et al., ‘New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]’, para. 177.

The UNCITRAL Arbitration Rules sets forth this principle by stipulating that the tribunal has the inherent power to determine the admissibility, relevance, materiality and weight of the evidence offered (UNCITRAL Arbitration Rules Article 27(4), ICSID Arbitration Rule 36(1), IBA Rules Art. 9(1)).

Thus, there is wide recognition of the tribunal's discretion in arbitration to admit or reject any evidence, depending on its probative value and full discretion to give evidentiary weight or not to expert reports.⁶⁵⁰

3.7.1. Admissibility

Generally, expert opinion, as a means of evidence, is admissible where the subject matter is outside the knowledge or experience of the trier of fact, i.e. the arbitral tribunal, and where such expert opinion can assist the trier in its final determination of an issue.⁶⁵¹

Inadmissibility of the expert evidence relates to the existence of legal or other impediments that prevent the evaluation of the evidence. Arbitral tribunals have great freedom to determine the admissibility of the expert evidence and are accepted not to be bound by court procedure rules in this regard.⁶⁵² The tribunal will freely probe the party-appointed expert's report and is free to disregard an expert's opinion if it is considered lacking fundamental qualifications such as being an independent product, impartiality (objectivity) or expertise.

If there is no necessity for an expert opinion, so the opinion is irrelevant or not material, then these would only impair the cost-efficiency of the proceedings by leading to additional costs and prolonging the hearings.⁶⁵³ That's why the tribunal should be

⁶⁵⁰ Nessi, 'Expert Witness: Role and Independence', 99.; Rosenfeld, 'Country Report: Germany', 185–86.

⁶⁵¹ Silver, 'Back to Burgess: The Impact of the White Burgess Expert Evidence Regime in Alberta Decisions', 5.

⁶⁵² O'Malley, *Rules of Evidence in International Arbitration*, 203.; Schneider and Scherer, 'Art. 184', 2086.; However, mandatory provisions of the *lex fori*, including public policy concerns, that restrict the admissibility of the evidence should be given regard.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 22.

⁶⁵³ Hobér and Sussman, *Cross-Examination in International Arbitration*, 22.; Geisinger, 'Advocacy in International Commercial Arbitration: What For?', 15.

proactively involved in the case management conference to inform parties about the position of the tribunal, whether it deems an expert opinion is required or not and if required, the scope and conditions.⁶⁵⁴

There are four requirements for a proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert.⁶⁵⁵

Various cases show that there is a thin line between free assessment and unjustly ignoring or not admitting the party's material and relevant expert evidence, thus possibly violating the right to be heard.⁶⁵⁶ This is especially so when there are conflicting expert reports.⁶⁵⁷

If the tribunal sees that the expert report or the testimony of the expert is not in accordance with the independence and impartiality declaration, such expert opinion would then be either disregarded or attributed very little weight.⁶⁵⁸ This is also the case if the expert is not really an expert or the used methodology is fatal.⁶⁵⁹

If the expert fails to comply with the tribunal's directions regarding the submission of a report, the tribunal might bar the expert from testifying or limit it to the material specifically addressed in the report. This is vital since it affects the opposing party's ability to prepare for and present its case at the hearing.⁶⁶⁰

⁶⁵⁴ Schäfer and Wilson, 'ICC Bulletin', 2021, 64.

⁶⁵⁵ See Supreme Court of Canada, *R. v. Mohan*; OLG Köln, 19 Sch 7/10, Justiz NRW, para. 58.

⁶⁵⁶ O'Malley, *Rules of Evidence in International Arbitration*, 203.;Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 265.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:429.

⁶⁵⁷ "Para 3.2.1.:.,it is apparent from the award under appeal that, while the sole arbitrator expressly mentions therein the deductions proposed by the expert E._____ (n. 101) and, following him, by the Appellant, he completely ignores them by the following, without providing the slightest explanation in this regard." (X._____ v. Y._____, 4A_669/2012) For the original decision in French see Swiss Federal Supreme Court, 4A_669/2012, Bundesgericht.

⁶⁵⁸ Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 451; Lim, 'Tribunal-Appointed Experts in International Arbitration', 213; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 291; Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration', 78.

⁶⁵⁹ Schäfer and Wilson, 'ICC Bulletin', 2021, 67.

⁶⁶⁰ Schäfer and Wilson, 67.

Swiss literature and court decisions stipulate that evidence not offered in due time or form may not be admissible, or the evidence in question is not fit or relevant for proving the facts or arguments or is already accepted to be proven.⁶⁶¹

3.7.2. Weight of Evidence & Binding Nature

As evaluated above, different jurisdictions categorise experts' legal nature differently. These classifications are mostly based on civil procedure rules before courts. Nevertheless, an arbitral tribunal is not bound by civil procedural law rules regarding evidence before courts.⁶⁶² That's why a separate classification and the binding nature need to be exposed.

In international arbitration, there are no strict rules as to the binding nature of different evidence, but the free assessment of evidence is predominantly accepted (UNCITRAL Arbitration Rules Article 27(4), ICSID Arbitration Rule 36(1), IBA Rules Art. 9(1)). So, whereas the arbitrator is not strictly bound by the expert's opinion, it cannot merely leave the expert opinion aside without consideration.⁶⁶³

As high court judge Justice Foskett from the UK demonstrated, the tribunal can deviate from the expert's views:

As in any case, I have not seen it as my duty either to accept the whole of the expert opinion of each expert or not to accept it at all. As I shall be observing at one part of the judgment... an expert can be right about most things but wrong about others.⁶⁶⁴

⁶⁶¹ Nater-Bass and Rouvinez, 'Art. 24 Commentary on Swiss Rules', 266.; 'Parties Not Indicated, Tribunal Fédéral, 1ère Cour Civile', 397.

⁶⁶² Proske, *Expert witness conferencing in Schiedsverfahren*, 6.; Christoph Liebscher, Olivier Luc Mosimann and Nils Schmidt-Ahrendts, in Hellwig Torggler and et al. (eds), *Handbuch Schiedsgerichtsbarkeit* (2., Nomos; Schulthess; Verlag Österreich 2017) 379, 395.; Rosenfeld, 'Country Report: Germany', 186.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 104.; Akıncı, *Milletlerarası Tahkim*, 342.; Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 92.; Born, *International Commercial Arbitration*, 2364.; Taşkın, *Tahkim Hukukunda Tahkim Anlaşması, Hakem Kurulu ve Tahkim Yargılaması*, 191.; Akıncı, 'Usul Kurallarına Aykırılık ve Dinlenilme Hakkı', 50.; Liebscher, Mosimann, and Schmidt-Ahrendts, 'Handbuch Schiedsgerichtsbarkeit', 378–79, para. 1141.

⁶⁶³ Narçin, '4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller', 17. *Atalay* argues similarly for party-appointed experts before state courts in *Atalay*, 'Pekcanitez Usûl', 2021, 1959.; Atalı, '6754 Sayılı Bilirkişilik Kanunu ve Hukuki Konularda Bilirkişilik', 3279.

⁶⁶⁴ England and Wales High Court, *Various Claimants v Giambrone & Law (a firm) & Ors*, [2015] EWHC 1946 (QB), para. 265.; See *Hong Kong, Brunswick Bowling & Billiards Corporation v. Shanghai Zhonglu Industrial Co. Ltd. and Chen Rong*, para. 51.

Arbitrators, who have the power and duty to make findings of fact relevant to the issues between the parties, may also make errors of fact or draw invalid inferences while assessing the expert's opinion. However, without serious irregularity affecting the right to be heard of parties, this is a foreseeable risk not affecting the award.⁶⁶⁵

The expert opinion has to be relevant and related to the disputed issues in order to be considered.⁶⁶⁶ “The examination of evidence may be refused by the arbitral tribunal, without fearing a violation of the right to be heard, if 1) the evidence is unfit to create conviction, 2) the fact to be proven is already established or irrelevant⁶⁶⁷ or 3) the arbitral tribunal, in an anticipated assessment of the evidence, reaches the conclusion that it is already convinced and that the result of the evidentiary measure requested cannot modify its conviction.”⁶⁶⁸

Putting aside the criteria tied to the personality of the expert and the legal nature it, an expert's opinion will be weighed and credited if it affirmatively assists the tribunal in understanding or establishing facts and rendering the award. The tribunal will decide if it sees that the opinions of the expert are in line with the facts of the record, with legal provisions, and with the rules of logic.

According to German arbitration law provisions (ZPO § 1042), although the tribunal has the right freely to assess the evidence, including the party-appointed expert, it is attributed clearly less weight as can be read in the explanatory memorandum, in contrast, court/tribunal-appointed expert.⁶⁶⁹

“The issue of quantum is one of the matters submitted to the Tribunal for determination. The Tribunal is not bound by the positions taken by the parties if it can, on the basis of the evidence canvassed, come to a different conclusion.”

⁶⁶⁵ Similarly Rosenfeld, ‘Country Report: Germany’, 186.

⁶⁶⁶ Rosenfeld, 183.

⁶⁶⁷ Aktepe Artık, *Medeni Usûl Hukukunda Hakem Kararlarının İptali Sebepleri*, 379.

⁶⁶⁸ Swiss Federal Supreme Court, 4A_440/2010, Bundesgericht, para. 4.1.

⁶⁶⁹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 280.; Musielak and Voit, *ZPO*, § 1049, para. 11.

See also Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 280.: „In jedem Fall zeigen sowohl der Grundsatz des rechtlichen Gehörs § 1042 Abs. 1 S. 2 ZPO als auch die ausdrückliche Erwähnung des Parteisachverständigen in § 1049 Abs. 2 S. 2 ZPO, daß das Schiedsgericht ein Gutachten eines Parteisachverständigen, das den Ausführungen eines vom Schiedsgericht bestellten Sachverständigen widerspricht, nicht leichtfertig ignorieren darf.“

The tribunal will freely probe the party-appointed expert's report and is free to ignore an expert's opinion if it is considered immaterial to the award. This, however, should not be in itself a ground for challenge.⁶⁷⁰ Reasons should be stipulated in the award if one of the expert's opinions is chosen over the other or the tribunal deviates from the expert's views.⁶⁷¹

However, especially when the expert report is not challenged by the counterparty and the tribunal sees the evaluation and conclusions of the expert in line with the facts of the record, with legal provisions and the rules of logic, not having any contradictions, there is no reason why it should not adopt it.⁶⁷²

Party-appointed experts who act like advocates will highly likely lose credibility before the tribunal. This lack of credibility would undermine a party's case, particularly where the issues on which expert opinion is proffered are central to the dispute.⁶⁷³ On the other side, the arbitrator would potentially find the expert more credible if he is willing to accept other views.

If the arbitral tribunal decides not to hear a party-appointed expert whose cross-examination was requested, the expert's report can still remain on record. However, it is obvious that the arbitral tribunal will have to attribute little weight to such an opinion since it declined to have the expert examined.⁶⁷⁴

⁶⁷⁰ O'Malley, *Rules of Evidence in International Arbitration*, 145–46, 201.; See *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para. 214, available at <https://www.italaw.com/cases/3399> (accessed 11.1.2023):

“It would not be proper for an annulment committee to re-evaluate that evidence, and nor is it in a position to do so. As it was put in *Rumeli v Kazakhstan*, ‘[a]n ad hoc committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties’.”

⁶⁷¹ O'Malley, 207.; Tanrıver, *Hukukumuzda Bilirkişilik*, 33.

⁶⁷² O'Malley, *Rules of Evidence in International Arbitration*, 163, fn. 53.; A view from Canada: “I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.”, in Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 47.

⁶⁷³ Parlett, ‘Parties’ Engagement with Experts in International Litigation’, 451.; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 194.

⁶⁷⁴ Zuberbühler et al., *IBA Rules of Evidence*, 148.

In case the expert has a long-lasting relationship and is even employed prior in relation to the subject matter of the dispute, e.g. for a construction project, the expert might be given less value.⁶⁷⁵ US, Canadian and Australian courts have treated these matters as going exclusively to weight rather than to admissibility.⁶⁷⁶

3.7.3. Proof, Burden of Proof and Standard of Proof

Proof is the activity carried out by the parties to convince the arbitrator that the facts claimed are in accordance with the conditional facts of the applicable law on which the claim is based and have occurred as claimed.⁶⁷⁷ The subject matter of proof is the disputed facts on which the parties cannot agree, and which may be effective in the resolution of the dispute.⁶⁷⁸

If there is a technical element in a dispute that needs to be clearly understood, for instance, that the wrong choice of pipes by the respondent was the main cause for occasional floods, then who needs to adduce an expert's opinion to prove its argument and thus bears the responsibility to prove this argument and what standard is required to have proven its argument? The tribunal will determine who bears the burden of proof according to the *lex arbitri*⁶⁷⁹ or according to the *lex causae*.⁶⁸⁰

3.7.3.1. Burden of Proof and the Burden to Provide Evidence

When parties commence an arbitration, primarily, they must submit (*Iddia yükü, Behauptungslast*) and substantiate their allegations with evidence (*Delil ikame yükü, Beweislast or Beweisführungslast*), unless propositions are so obvious, or notorious, that proof is not required.⁶⁸¹

⁶⁷⁵ See Nessi, 'Expert Witness: Role and Independence', 99.

⁶⁷⁶ See Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 39.

⁶⁷⁷ Atalay, 'Pekcanitez Usûl', 2021.; Özbek, *Tahkim Hukuku*, II:1367.

⁶⁷⁸ Yeğengil, *Tahkim (L'Arbitrage)*, 302.

⁶⁷⁹ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 217.

⁶⁸⁰ Schneider and Scherer, 'Art. 184', 2083.

⁶⁸¹ Yeğengil, *Tahkim (L'Arbitrage)*, 302.; Pekcanitez, Atalay, and Özkes, *Medenî Usûl Hukuku Ders Kitabı*, 356–61.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 321.; see Swiss Federal Supreme Court, 4A_597/2013, Bundesgericht, para. 3.2.2.

The tribunal generally has limited roles in this process and will generally not intervene, although there could be differences depending on the *lex arbitri*, *lex causae*, and the style of arbitrators.⁶⁸² The burden of proof is the concept which foresees in a dispute which party is responsible for submitting evidence and the consequences for failing to do so (effectively).⁶⁸³

The burden of proof plays an important role when the tribunal evaluates a claim and decides whether to accept it. While the burden of proof in civil law countries is strictly tied with the right asserted and its material provisions⁶⁷⁹, when it comes to international arbitration, there is no clearcut generally accepted position.

In international arbitration, the general concept and practice is that “each party has the burden of proving the facts relied on to support its claim or defence”, otherwise known as *actori incumbit (onus) probandi*⁶⁸⁴ (UNCITRAL Arbitration Rules Art. 27(1)).⁶⁸⁵

Some other arbitration rules, such as the Swiss Rules (Art. 26), have not directly held the parties responsible for the burden of proof of the claims or defences they allege; however, they have given the tribunal the discretion to determine in what circumstances which party has the burden of proof.

The burden of proof applies not only to the claiming party but also to the party in defence. Where the claimant will assert and submit evidence that some chain of facts happened, which the law foresees for him a right to claim, the respondent will defend himself by alleging facts and submitting evidence that either the facts did not happen,

⁶⁸² For differences between Germany and the UK see Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 217.

⁶⁸³ Atalay, ‘Delil Kavramı Üzerine’, 129.; O’Malley, *Rules of Evidence in International Arbitration*, 209.; Nater-Bass and Rouvinez, ‘Art. 24 Commentary on Swiss Rules’, 263.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 221.; Özbek, *Tahkim Hukuku*, II:1367.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 147.

⁶⁸⁴ Also known as *onus probandi actori incumbit* or *Actori incumbit (onus) probation*.

⁶⁸⁵ Yeşilirmak, *Türkiye’de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 413.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 221.; Özbek, *Tahkim Hukuku*, II:1367.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 147.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 11.; Redfern et al., ‘The Standards and Burden of Proof in International Arbitration’, 321.

the evidence submitted is misleading and not accurate or some other facts occurred which makes the claimant's claim fall.⁶⁸⁶

In relation to the experts, if there is a technical/scientific issue that needs to be clarified to the tribunal, both parties, depending on their claim or defence, may bear the burden of proof.⁶⁸⁷ If the claiming party asks for damages for the wrong usage of pipes in the infrastructure project, it needs to prove and adduce an expert report from engineers, urban planning and meteorology experts that the respondent had failed to take into account average rainfall statistics and the range of chosen pipes by the respondent were wrong and that floods occurred directly because of this reason. If this is a satisfactory report capable of explaining the concept of average rainfall and its relation to the importance of the diameter of drainpipes and the impact on floods, convincing the tribunal, the defending party will need to counter-argue these allegations also with an expert report or other evidence.

The tribunal will then assess and decide which position it agrees with and, in case it does not, it needs to decide against whom the adverse consequences of not adhering to the burden of proof for the alleging claimant or respondent means. If the tribunal believes, even without the recourse of the defending party's arguments and evidence, that the expert report does not enable the claiming party to prove its argument, the party will not have fulfilled its burden of proof. Thus, it will be decided against its request.

Some authors argue that a party's request to the tribunal to appoint an expert is a sufficient means of discharging its burden of evidence.⁶⁸⁸

Instead of stating directly that a particular fact did or did not occur, arbitrators will typically conclude that a party has "failed to provide sufficient evidence" of an alleged fact or has not proven those facts, enabling the right tied to the facts.⁶⁸⁹

⁶⁸⁶ O'Malley, *Rules of Evidence in International Arbitration*, 211.

⁶⁸⁷ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 423.

⁶⁸⁸ Contrary to this argument, see *Cemile Demir Gökyayla* in Akıncı and Ekmen, 'Tartışmalar', 201–2.

⁶⁸⁹ Donoghue, 'Expert Scientific Evidence in a Broader Context', 385.

3.7.3.2. Standard of Proof

The standard required to determine whether the claiming or defending party has conformed with the burden of proof, i.e. adduced expert evidence that supports the claim and establishes the facts thereto, or not, is regulated by the substantive applicable law (*lex causae*), however sometimes also with the law applicable to the arbitration (*lex arbitri*).⁶⁹⁰

The rules in these provisions generally require proving a fact with full conviction, high probability⁶⁹¹ or overwhelming probability (also called balance of probabilities or reasonable certainty).⁶⁹²

In international arbitration, the standard of overwhelming probability (balance of probability) is generally accepted and applied.⁶⁹³ This standard calls for a claim to be established if the tribunal is convinced by the evidence that the claim is more likely to be true than not.⁶⁹⁴

The tribunal in the ICSID case between *Tethyan Copper v Pakistan* is a good example of such a standard:

⁶⁹⁰ O'Malley, *Rules of Evidence in International Arbitration*, 215.; See Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 319. For the argument that in international arbitration the burden of proof should be determined according to the *lex arbitri* see Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 227.

⁶⁹¹ For the standard for forgery see *National Bank of Xanadu v. Company ACME*, Final Award, ICC Case No. 17818 in Schill, *ICCA Yearbook Commercial Arbitration 2019*, XLIV:64, para. 114.

⁶⁹² Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 321.; See for lower standard of proof for determination of quantum *Distributor v. Manufacturer*, Final Award, ICC Case No. 20065 in Schill, *ICCA Yearbook Commercial Arbitration 2019*, XLIV:308, para. 177.; See Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 414, para. 27-45.; For German law see Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 225–26.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 14.

⁶⁹³ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 227.; Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.; See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Final Award, 26th July 2007, para. 124, available at <https://www.italaw.com/cases/1099> (accessed: 1.10.2022)

⁶⁹⁴ See O'Malley, *Rules of Evidence in International Arbitration*, 215 ff.; 'Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds', 120–22.; Nater-Bass and Rouvinez, 'Art. 24 Commentary on Swiss Rules', 264.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 355.

The dispute, therefore, appears to concern ... whether the valuation method used by Claimant and its expert yields results that are not “too speculative” or “too uncertain” but rather enable the Tribunal to assess Claimant’s damages “with reasonable confidence” and reach a “reliable” conclusion.⁶⁹⁵

The approach is also used in international commercial arbitration: “[U]nder the CISG, the standard of proof is met if the decision maker is convinced with a reasonable degree of certainty that an alleged fact is true.”⁶⁹⁶

These broad rules for both the burden and standard of proof leave great space for the tribunal, which not only deals with the nature and quality of the facts and the submitted evidence but with the circumstantial perception of the arbitrator, depending on his/her legal background.⁶⁹⁷

With respect to quantum issues, there are special issues regarding the burden of proof of fact in many legal systems.⁶⁹⁸ Also, the UNIDROIT Principles Art. 7.4.3 foresee that harm (as a precondition for compensation) can be established with “a reasonable degree of certainty”, and if “damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion” lies with the tribunal.

3.8. Testimony and Examination

The rules stipulated for party-appointed experts’ personalities and the report may not safeguard the proper functioning of this evidence alone. This is why the secondary step, the testing procedure, is necessary.

Testing is done at the evidentiary hearing phase via oral examination, be it an examination by the tribunal, direct examination, cross-examination by the counsel or

⁶⁹⁵ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, para. 298, available at <https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf> (accessed 12.12.2022).

⁶⁹⁶ *Buyer (India) v. Seller (Turkey)*, Final Award, ICC Case No. 18981 in Schill, *ICCA Yearbook Commercial Arbitration 2018*, XLIII:201, para. 39.; Similarly *Distributor (US) v. Supplier (Germany)*, Final Award, SCC Case No. 2017/164, 27 November 2018 in Schill, *ICCA Yearbook Commercial Arbitration 2020*, XLV:107–13.

⁶⁹⁷ ‘Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds’, 121–22.; de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 494..

⁶⁹⁸ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 415.

conferencing among the experts.⁶⁹⁹ That the expert knows from the outset that he will be examined in various forms will motivate him to be diligent and show extra care.⁷⁰⁰ It's also a win for the expert that his opinion is accepted as a basis for the award.

Unless an expedited procedure or “documents only” procedure is followed in an arbitration, or the tribunal orders otherwise or parties have waived to request it, the experts are expected to testify at the hearing and will be examined by the appointing party, counterparty, and the tribunal (IBA Rules Art. 5(5)).⁷⁰¹

The tribunal will decide whether any testimony or examination and in which order will be realised.⁷⁰² Although arbitrators and parties' counsel are expected to have the necessary intelligence to understand and derive conclusions from a written expert report, it is always helpful to listen to the expert, who will present his opinions, generally in a 30-60 minutes presentation, followed by a question-and-answer phase.⁷⁰³

Testimony by the party-appointed expert is key and would definitely affect the tribunal's perception of the report, positively or negatively.⁷⁰⁴ In principle, there is no absolute duty of the party-appointed expert to appear before the tribunal.⁷⁰⁵ However,

⁶⁹⁹ Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 441.; Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 235.; Bacanlı, ‘Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arabuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi’, 97.; Ağırman, *Milli & Milletlerarası Tahkim*, 462–64. Whether these examination methods will be done at the same proceeding is up to the tribunal's decision in each case. For details, see Proske, *Expert witness conferencing in Schiedsverfahren*, 46.

⁷⁰⁰ Atalay, ‘Pekcanitez Usûl’, 2021, 1962.; Pekcanitez, ‘Özel Uzman’, 409.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 416.; Ağırman, *Milli & Milletlerarası Tahkim*, 464.

⁷⁰¹ O'Malley, *Rules of Evidence in International Arbitration*, 161.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 191. ; Raeschke-Kessler, ‘The Arbitrator as Settlement Facilitator’, 528.; For otherwise example see *Karaha Bodas Co LLC and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, et al, Final Award, December 18, 2000, Ad Hoc Proceeding, 1976 UNCITRAL, at 10–11 as reported in Caron and Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 614.: “In case a witness whose presence at the hearing was requested does not show up, his or her written statement shall be disregarded. This rule will not apply to expert's reports.”

⁷⁰² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 291.

⁷⁰³ Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 185.; Bor, ‘Expert Evidence’, 509.; Atalay, ‘Pekcanitez Usûl’, 2021, 1961.

⁷⁰⁴ Pekcanitez, ‘Özel Uzman’, 409.; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 186.; See Schlaepfer and Duvanel, ‘Direct and Re-Direct Examination’, 73 ff.; Narçin, ‘4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller’, 23.

⁷⁰⁵ See *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Procedural Order No. 8, 18th April 2014, para. 2-4 available at <https://jsumundi.com/en/document/other/en-adel-a>

the report's gravity would be much higher if the expert presented his report and the parties were granted the opportunity to challenge the expert's opinion.⁷⁰⁶

In rare circumstances, both the parties and the tribunal might not request to examine the expert but still give regard to the written report. However, no request to examine the party-appointed expert shall not mean that the tribunal or the parties have agreed to the correctness of the content of the expert report (IBA Rules Art. 5(6)).⁷⁰⁷

The tribunal should not deny an examination if one party or both parties request so, save where the tribunal limits or excludes any appearance of the expert to be irrelevant, immaterial, unreasonably burdensome, duplicative or for grounds of commercial, political, or technical confidentiality, considerations of procedural economy, proportionality, fairness or equality of the Parties.

The party has the right to ask the expert supplementary questions. However, as sometimes practised in international arbitration, the receipt of a statement upon written questions should not be considered a violation in this sense. On the other hand, the party has the right to ask questions that are supplementary to these written answers.⁷⁰⁸

In *VM Solar & Co. KG and Helmut Vorndran v. Spain*, the request by the Respondent for disqualifying the whole tribunal due to, inter alia, rejecting to hear the legal expert (on European Union law and Spanish regulatory law) did not lead to the disqualification of the tribunal due to impartiality.⁷⁰⁹

hamadi-al-tamimi-v-sultanate-of-oman-procedural-order-no-8-friday-18th-april-2014#other_document_1364 (accessed: 11.03.2023):

“the Respondent submitted a letter to the Tribunal in which it stated that the Claimant was refusing to present its party-appointed expert, JAJ Consultants LLC (“JAJ”) for cross-examination and had withdrawn the JAJ Expert Report. The Respondent requested that the “JAJ Report should remain in the record and the Tribunal should draw from it whatever inferences it concludes are warranted in the circumstances” .

...

Mr. Rivkin indicated that the Claimant consented to the Application. The Respondent's Application is therefore granted by consent. JAJ Consultants LLC shall not appear for cross-examination, but its report shall remain in the record and the Tribunal, after receiving further submissions, if any, during the proceedings, may draw whatever inferences, if any, it considers are warranted in the circumstances.”

⁷⁰⁶ Zuberbühler et al., *IBA Rules of Evidence*, 146.; Roney, ‘Cross-Examination of Experts’, 113.

⁷⁰⁷ O'Malley, *Rules of Evidence in International Arbitration*, 162; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 321.

⁷⁰⁸ Pekcanitez and Yeşilirmak, ‘Tahkim’, 2767.

⁷⁰⁹ *VM Solar Jerez GmbH, M Solar Verwaltungs GmbH, Solarizz Holding Verwaltungs-GmbH, M Solar GmbH & Co. KG, Solarizz Holding GmbH & Co. KG and Helmut Vorndran v. Kingdom of Spain*,

The Tribunal has the discretion to determine specifically how and in what order the examination will take place. In practice, the counsel of the party calling the expert would begin the examination-in-chief.⁷¹⁰ The expert could be asked by the counsel to give a statement in the form of a presentation of the report. If the counsel is not convinced by the expert's presentation or assumes that some points were left out, he could pose additional questions to the expert.⁷¹¹ Before the beginning, the expert should be expected to re-affirm that the opinions expressed in the report are his or her genuine beliefs (IBA Rules Art. 8(5)). If the views of the expert have changed during the period between the submission and the hearing, the expert should clarify his/her new views and the conclusions thereto.⁷¹² After, the counterparty to the dispute would be given an opportunity to cross-examine the expert. If an expert fails to answer questions put to him, less weight is likely to be given to his opinion.

The scope of the cross-examination would be confined to the personality of the expert and his qualifications (subjective test), as well as written and oral statements (objective test) already made by the experts. Cross-examination will test the veracity of the party-appointed expert evidence by focusing 1) on the impartiality of the expert, 2) the expert's qualifications, 3) the sources or methodology adopted by the expert to reach his views, 4) whether the expert's views are consistent with the common view expressed in the field and why to adopt it and (5) whether the expert's own views are consistent and applicable to the case.⁷¹³ Additionally, the expert could be asked questions that do not attack the personality or content of the report but serve to affirm the examining party's views.⁷¹⁴

ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify All Members of the Tribunal, 18.10.2022, para. 26, 44, 79.

⁷¹⁰ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 322.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 207.

⁷¹¹ Veeder and et al., 'Act III: Advocacy with Witness Testimony', 606.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 186.; Proske, *Expert witness conferencing in Schiedsverfahren*, 45.

⁷¹² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 310.

⁷¹³ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 200.

⁷¹⁴ Abdel Wahab, 201.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 237.; Roney, 'Cross-Examination of Experts', 114.

The party calling the expert could then be asked whether to re-examine the expert or not. Any such re-examination should be shorter and would be limited in scope to issues already dealt with in the cross-examination phase. Thereafter, the tribunal could question the experts.

The arbitral tribunal has the authority to limit or exclude any questions if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome or duplicative ((Art. 8(3) of IBA Rules), taking into account right to be heard requirements.⁷¹⁵

Whether the expert has to administer an oath before testimony and examination is a controversial issue. Neither the Model Law nor major arbitration countries' statutory provisions or arbitration rules have any provision regarding the oath of experts.⁷¹⁶ Pekcanitez argues that party-appointed experts do not need to take an oath, and even if they would, this would not have any effect.⁷¹⁷

That leaves the tribunal the discretion of whether or not to utilise an oath. Depending on the legal culture of the tribunal, an oath could be required from the party-appointed expert. However, generally, a written affirmation of the genuine belief of the expert is performed and accepted.⁷¹⁸

For example, arbitral tribunals seated in England or Wales may administer oaths or affirmations for arbitrations, but in Germany, there is no oath practice. In Switzerland, the question has not been settled yet.⁷¹⁹

⁷¹⁵ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 291; Ünüvar, 'Experts: Investment Arbitration', para. 29.

⁷¹⁶ Öhrström, 'SCC Rules', 840.; Poudret and Besson, *Comparative Law of International Arbitration*, 559.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 423.; Hobér and Sussman, *Cross-Examination in International Arbitration*, 21.

⁷¹⁷ Pekcanitez, 'Özel Uzman', 397.; Similarly Karadaş, *Ulusal (İç) Tahkim*, 175.

⁷¹⁸ O'Malley, *Rules of Evidence in International Arbitration*, 156–57; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 83.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 279.; Atalay, 'Pekcanitez Usûl', 2021, 1960.; Boerstra and Bitter, 'The Netherlands', 200.

⁷¹⁹ Poudret and Besson, *Comparative Law of International Arbitration*, 559; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 489 ff.; Schneider and Scherer, 'Art. 184', 2093, para. 35.

Kantor states that: “Many international arbitrators do not in any event consider the administration of an oath to be part of international arbitration.”⁷²⁰ However, especially in ICC arbitration, examples of the administration of oath by experts are present.⁷²¹

3.9. Challenge of Experts & Expert Opinion

Party-appointed experts, in general, may not be subject to disqualification or exclusion as evidence, as tribunal-appointed experts can be in certain situations.⁷²² In international commercial arbitration, considering the law applicable to the arbitration procedure, no exclusion seems possible after a prima facie scrutinisation since the issue has not been subject to regulation, not even in the CIArb Protocol or the IBA Rules.⁷²³

Born states that national procedural law rules regarding the qualifications of party-appointed experts do not apply in international arbitration and challenges to the authenticity, value or expert character of putatively expert evidence should be relevant only to the weight and credibility of such evidence, not to its admissibility. He further states that, in practice, arbitrators rarely uphold challenges to the admissibility of party-appointed expert opinions.⁷²⁴

However, as arbitration laws⁷²⁵ and arbitration rules⁷²⁶ grant the tribunal great autonomy in conducting the proceedings and assessing the evidence, the tribunal might disregard the party-appointed expert, explicitly stating that it will not regard it while

⁷²⁰ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 327.

⁷²¹ See cases reported in O’Malley, *Rules of Evidence in International Arbitration*, 156, fn. 35.

⁷²² See e.g. VIAC Rules of Arbitration and Mediation 2021 Art. 23.; Liebscher, ‘VIAC Rules’, 340; Nesi, ‘Expert Witness: Role and Independence’, 96; Ehle, ‘Practical Aspects of Using Expert Evidence in International Arbitration’, 78.;Knobloch, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 269,279.; Proske, *Expert witness conferencing in Schiedsverfahren*, 20.; Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 133, para. 21.; Tanrıver, *Hukukumuzda Bilirkişilik*, 35.

⁷²³ Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 217.

⁷²⁴ Born, *International Commercial Arbitration*, 2449.

⁷²⁵ UNCITRAL Model Law Art. 19(2): “Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

⁷²⁶ See e.g. ICC Arbitration Rules Art. 22 and 25,

deliberating and drafting the award. Alternatively, it could give less weight, depending on the situation.⁷²⁷

The reasons for that might be the failure to appear despite being ordered to be present at the hearings (3.9.1.), failing the subjective test, as either lacking the required impartiality, expertise or having a conflict of interest with members of the tribunal (3.9.2.) or possessing confidential information of the counterparty (3.9.3.).

3.9.1. Failure to Appear

As stated among the obligations of the party-appointed expert in Section 3.5.5.2, the expert is, in principle, expected to appear at the hearing for testimony and examination. Non-appearance of a party-appointed expert at an oral hearing, despite an order to do so, would potentially make the tribunal disregard the expert's written opinion in total (IBA Rules Art. 5(5), CIArb Protocol Art. 6.1(h&i)).⁷²⁸

The CIArb Protocol is strict on testimony as it dictates that “[e]ach expert who has provided a written opinion in the Arbitration *shall* give oral testimony at an Evidentiary Hearing unless the Parties agree otherwise, and the Arbitral Tribunal confirms that agreement.” (Emphasis added)

Thus, where the CIArb Protocol is applicable, the expert opinion may be excluded and disregarded.⁷²⁹ The non-appearance of party-appointed experts in Turkish litigation also leads to disregard of the opinion (HMK m. 293/3).⁷³⁰

The reasoning behind this is that until tested in cross-examination or conferencing, the opinions of the expert have little value.⁷³¹

⁷²⁷ Smiley, 368.

⁷²⁸ Bor, 515; Khodykin/Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 319; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 279.; Similarly in Turkish Civil Procedure See Tanrıver, *Hukukumuzda Bilirkişilik*, 32.; Akıncı, *Milletlerarası Tahkim*, 342.; Atalay, ‘Pekantez Usûl’, 2021, 1961.

⁷²⁹ Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 236.; *Pekantez* argues in the same direction in Pekantez, ‘Özel Uzman’, 405.

⁷³⁰ Karşlı, *Medeni Muhakeme Hukuku*, 624.

⁷³¹ Khodykin/Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 320.; Karşlı, 624.

Another position in this regard is that the mere absence of the expert should not be a reason to disregard the report with prejudice, having also regard to *lex arbitri* provisions, but less weight could be attributed.

Although due process also requires the counterparty to hear and examine the expert⁷³², this rule should not be interpreted strictly because circumstances could occur where the expert cannot attend the hearing due to unanticipated or unplanned occurrences, such as illness, accident, inability to travel, albeit provided an independent and well-established report for clear understanding the issue.⁷³³

Accepting that there is no absolute duty of the party-appointed expert to appear before the tribunal would definitely affect the gravity of the opinions negatively.⁷³⁴

To draw adverse inferences in relation to the non-attendance of the expert should be denied since it will be difficult to pinpoint a particular inference from a generally non-binary expert opinion.⁷³⁵

⁷³² Abdel Wahab, Party-Appointed Experts in International Commercial Arbitration, 197; Khodykin/Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 320.

⁷³³ Khodykin/Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 319.

⁷³⁴ Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 133, para. 22.; See Levine, ‘Can Arbitrators Choose Who to Call as Witnesses (And What Can Be Done If They Don’t Show Up)?’, 335–37.; See *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Procedural Order No. 8 18th April 2014, https://jsumundi.com/en/document/other/en-adel-a-hamadi-al-tamimi-v-sultanate-of-oman-procedural-order-no-8-friday-18th-april-2014#other_document_1364, para. 2-4:

“the Respondent submitted a letter to the Tribunal in which it stated that the Claimant was refusing to present its party-appointed expert, JAJ Consultants LLC (“JAJ”) for cross-examination and had withdrawn the JAJ Expert Report. The Respondent requested that the “JAJ Report should remain in the record and the Tribunal should draw from it whatever inferences it concludes are warranted in the circumstances” .

...

Mr. Rivkin indicated that the Claimant consented to the Application. The Respondent’s Application is therefore granted by consent. JAJ Consultants LLC shall not appear for cross-examination, but its report shall remain in the record and the Tribunal, after receiving further submissions, if any, during the proceedings, may draw whatever inferences, if any, it considers are warranted in the circumstances.”

⁷³⁵ Khodykin/Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 321.

3.9.2. Failing the Subjective Test

The expert is expected to have some personal qualifications, such as impartiality and objectivity, as well as expertise and experience. The expert is also required not to have some status, such as any present or past relation, that would lead to having a conflict of interest with members of the tribunal or the counterparty (and its representatives).⁷³⁶

If the expert had served or had a relationship with the party that calls the expert, the tribunal usually will not decide that the expert is inadmissible but may give less weight to the opinion.⁷³⁷

Whether failing the subjective test should lead to a disqualification or disregard of the expert as evidence is controversial. If the expert seems partial or his expertise is reasonably questioned, then not disqualifying seems more appropriate, but the opinion would have less or even no impact on the matters the evidence was provided for.⁷³⁸

However, if the expert has a conflict of interest with any tribunal member due to an existing or previous relationship,⁷³⁹ the tribunal should analyse whether allowing the expert would objectively create an improper appearance, taking into account the results to the party who appointed the expert, if the expert is not permitted to the proceedings. Both the tribunal (member) and the expert should disclose such occasions to other members of the tribunal and the parties.⁷⁴⁰

For instance, in the *State General Reserve Fund of Oman v. Bulgaria*⁷⁴¹, the respondent had submitted a report from a quantum expert. That same expert had been engaged by the respondent state in an UNCITRAL arbitration in which the party-appointed arbitrator from the claimant acted as counsel for the respondent. In response,

⁷³⁶ Abdel Wahab, *Party-Appointed Experts in International Commercial Arbitration*, 197. Especially if the expert has been engaged multiple times by the same party, see Kamyra-Lukoda/Morgan, *Role of Expert Witnesses in Construction Arbitration*, 79.

⁷³⁷ Schäfer/Wilson, *Issues for Arbitrators to Consider Regarding Experts*, 67.

⁷³⁸ Abdel Wahab, *Party Appointed Experts in International Commercial Arbitration*, 197.; Smiley, *'An Unwanted Intrusion: Challenging the Appointment of Experts in International Arbitration'*, 367.

⁷³⁹ Such as a Professional relationship the expert being the employer or vice versa, or the arbitrator as counsel appointing the expert in another proceeding.

⁷⁴⁰ Schäfer and Wilson, *'ICC Bulletin'*, 2021, 68.

⁷⁴¹ *State General Reserve Fund of Oman v. Bulgaria*, ICSID Case No. ARB/15/43, available at <https://www.italaw.com/cases/8765> (accessed: 30.06.2022)

the claimant requested that the arbitral tribunal should disqualify the expert or that the respondent should withdraw the expert from the arbitral proceedings. This offer was declined by the respondent. In a decision by the tribunal where the concerned party-appointed arbitrator from the claimant did not take part, the remaining arbitrators dismissed the claimant's request for disqualification of the respondent's expert on damages.⁷⁴²

It could also be the case that the expert has an interest in the outcome of the dispute. For instance, the contractor's CEO, who is an engineer or architect acting as an expert in the dispute, brings up questions as to the objectivity of the opinion.⁷⁴³

In many arbitrations, challenges against party-appointed experts are encountered, as in *Occidental v Ecuador*.⁷⁴⁴ In the case against Ecuador, the legal expert of Occidental, Hernan Perez Loose, was also co-counsel in a separate claim against Ecuador. However, the tribunal did not accept Ecuador's disqualification request.⁷⁴⁵

3.9.3. Possessing Confidential Information

The party-appointed expert might have a relationship with the counterparty, which he writes an opinion against, where during the relationship, information was obtained which was agreed upon or is, according to the applicable law, confidential or a trade secret. If the report will make use of such information that could deprive the counterparty, then the expert should be inadmissible to report or testify. However, if

⁷⁴² Lisa Bohmer, *Newly-Disclosed Award Sheds Light On Attempt To Disqualify Quantum Expert, and on Allocation of Costs in Dispute Between Oman's Sovereign Wealth Fund and Bulgaria*, Feb 22, 2021, IAREporter, available at <https://www.iareporter.com/articles/newly-disclosed-award-sheds-light-on-attempt-to-disqualify-quantum-expert-and-on-allocation-of-costs-in-dispute-between-omans-sovereign-wealth-fund-and-bulgaria/> (accessed: 30.06.2022)

⁷⁴³ Kamyia-Lukoda, 'Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues', 79.

⁷⁴⁴ *Occidental Petroleum Corporation Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5.10.2012, available at <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf> (accessed: 30.06.2022). The quantum experts were required to produce a joint expert report using the discounted cash flow method. The tribunal established a procedure for the parties to comment on the joint report. See *Occidental Petroleum v Republic of Ecuador*, 24-25, paras. 80-83.

⁷⁴⁵ The tribunal declined to disqualify him, finding that his work on a 'family related' dispute 'in no way impacted' his previous work in the case. See *Occidental Petroleum v Republic of Ecuador*, 153, para. 398, fn. 22.

there is no ground for preclusion arising from the agreement of the parties or from the law, the expert should not be dismissed from the proceedings.

The arbitral tribunal should give due regard to such a challenge when alleged with detailed reasons.

In investment arbitration, it is encountered in the case law that party-appointed experts are challenged, such as in the *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela*⁷⁴⁶ cases. The investor sought to disqualify the expert of Venezuela based on the confidentiality of information gained by the expert. The Tribunal declined under Article 34(1) of the ICSID Arbitration Rules to disqualify the expert on the basis that, when provided, the claimant had failed to mark any information confidential or make reservations as to the confidentiality of the information.⁷⁴⁷

The Swiss Federal Tribunal states that an immediate challenge of the experts is as necessary as it is for the challenge of arbitrators. The challenge must be brought immediately under penalty of forfeiture.⁷⁴⁸

3.9.4. Exclusion and its Effects

When the tribunal excludes the expert evidence provided by the party, the tribunal makes a decision regarding the admissibility of the evidence. With the exclusion, the tribunal will not only give no regard to the expert but also exclude the written report from the case file.

Some authors distinguish ‘exclusion’ from ‘gating’, where in the latter situation, the tribunal does not require the expert to testify if, for example, his testimony is irrelevant

⁷⁴⁶ See Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/19, available at <https://www.italaw.com/cases/1524> (accessed 3.8.2022)

⁷⁴⁷ IAREporter, ‘Arbitrators Weigh Disqualification of Venezuela’s Damages Expert, but Decide His Earlier Contacts with Claimant Don’t Warrant It’. available at <https://www.iareporter.com/articles/arbitrators-weigh-disqualification-of-venezuelas-damages-expert-but-decide-his-earlier-contacts-with-claimant-dont-warrant-it/> (accessed 13.10.2022)

⁷⁴⁸ Swiss Federal Supreme Court, 4A_606/2013, Bundesgericht, para. 6.2.

or duplicative.⁷⁴⁹ Nevertheless, the expert's report is kept as part of the case record, but the expert is not requested to testify orally.⁷⁵⁰

3.10. Liability

The party expert normally receives a fee for his services, which is usually paid by the instructing party. Accordingly, liability may arise not only for breach of contractual duties but also for acts that can be categorised as tort.⁷⁵¹ This will be determined according to the law applicable to the arbitration. The expert will, in principle, only be liable for intentional wrongdoing or gross negligence.

3.11. Interim Conclusion

Party-appointed experts have their legal basis in various international agreements, arbitration rules (such as ICSID, UNCITRAL, and ICC), the UNCITRAL Model Law, and many acts of state. Additionally, provisions concerning party-appointed experts can be found in soft law elements such as the IBA Rules, the CI Arb Protocol and the ICC Arbitration Commission Report on Controlling Time and Costs.

The legal nature of party-appointed experts is categorised differently in various jurisdictions. Often, party-appointed experts are referred to as “witnesses”, relying on the fact that they testify before the tribunal. Some courts and tribunals refer to these experts as “judicial/adjudicatory assistants” despite being appointed by parties. There is much debate on whether the party-appointed expert can be classified as a (tribunal-appointed) “expert evidence”, a view that is rejected by the majority in various jurisdictions.

Despite some views that consider party-appointed expert opinions as part of the party arguments, its nature should not be classified as the same. Party-appointed experts might be classified as evidence assessment tools since the expert mostly does not prove

⁷⁴⁹ Levine, ‘Can Arbitrators Choose Who to Call as Witnesses (And What Can Be Done If They Don’t Show Up)?’, 335–37.

⁷⁵⁰ Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 199.

⁷⁵¹ Proske, *Expert witness conferencing in Schiedsverfahren*, 22.

an alleged fact but enables the arbitrator to come to an opinion and derive a conclusion from the other evidence, such as witness statements or documents.⁷⁵²

Although court practices are useful for drawing inferences, Art. 5(1) of the IBA Rules rightfully regulates that a party-appointed expert is a “means of evidence”. This indicates that party-appointed experts are neither witnesses nor mere party submissions but have their own classification.⁷⁵³ That means they will be assessed freely together with other evidence. It is not vital how to classify party-appointed experts since international arbitration foresees the free assessment of evidence.⁷⁵⁴

As party-appointed experts directly impact the proceedings, it is inherently related to fundamental principles applicable in arbitration.

Submitting party-appointed expert opinion as evidence is a way for a party to present its case. As such, expert opinion is part of the right to be heard, and any irregularity could lead to the award being challenged.

Parties must be given equal opportunities to present their claims and defences at all stages of the proceedings. This includes being given the opportunity to submit expert evidence in equal numbers and, as stressed in *CME Czech Republic B.V. v. The Czech Republic*, cross-examining the parties’ experts.⁷⁵⁵

Party autonomy enables the parties to construct the proceedings according to their desire.⁷⁵⁶ Parties can adduce whatever evidence they believe would lead them to

⁷⁵² Özbek, ‘Uzman Görüşünün Yargılamada Değerlendirilmesi’, 129.; Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 56.

⁷⁵³ Zuberbühler et al., *IBA Rules of Evidence*, 136.; Münch, *Münchener Kommentar Zur ZPO*, § 1049, para. 39; Schlosser, *ZPO*, § 1049, para. 1.

⁷⁵⁴ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 277.

⁷⁵⁵ See *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award 14 March 2003, para. 80 available at, <https://www.italaw.com/cases/281> (accessed: 30.08.2022)

⁷⁵⁶ Pekcanitez and Yeşilirmak, ‘Tahkim’, 2704.; Yeşilirmak, *Türkiye’de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 104.; Yeğengil, *Tahkim (L’Arbitrage)*, 295–96. ; Kuru and Aydın, *Medenî Usul Hukuku El Kitabı*, II:1890.; Arslan et al., *Medenî Usul Hukuku*, 829.; Budak and Karaaslan, *Medenî Usul Hukuku*, 2019, 434. ; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 48.; Karlı, *Medeni Muhakeme Hukuku*, 910.; Ekşi, *Hukuku Muhakemeleri Kanunu’nda Tahkim*, 164.; Ağırman, *Milli & Milletlerarası Tahkim*, , 383455.

succeed. Therefore, they are free whether to adduce an expert opinion or not.⁷⁵⁷ Accordingly, parties may waive the use of party-appointed experts.

Arbitrators, as decision-makers, are expected to know the law to solve disputes effectively. However, in an international arbitration dispute, more than just one or even more laws may be applicable, and the arbitrators may not control every law. So, this situation creates the need for legal experts. Nevertheless, using legal experts does neither harm *iura novit curia* nor in itself lead to a delegation of decision-making.

Where on the one hand, the parties enjoy great flexibility⁷⁵⁸ to adduce party-appointed experts. On the other hand, permitting the parties to present expert opinions without any limits could adversely affect the proceedings in terms of cost-efficiency⁷⁵⁹, especially when it is unnecessary to have party-appointed experts or experts at all.⁷⁶⁰ If the tribunal was composed of members who were specifically appointed due to their expertise in specific matters, experts should not be required to take an active part in the proceedings.⁷⁶¹

When it comes to who will need to bring an expert to the proceedings, no actual provision seems to be found. In international arbitration, the parties are primarily responsible for bringing their evidence, and it is generally accepted that only a restricted principle of investigation is applicable.⁷⁶² Accordingly, the facts relied upon must primarily be established by the parties.⁷⁶³ This also encompasses the adducing of expert opinion. While arbitrators generally have the authority to appoint a tribunal-appointed expert depending on the applicable rules to the arbitration, they are not

⁷⁵⁷ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 578.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.; Akıncı, *Milletlerarası Tahkim*, 340.

⁷⁵⁸ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 48.

⁷⁵⁹ Jones, 'Redefining the Role and Value of Expert Evidence', 23.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282.; Özkes, *Medenî Usûl Hukukunda Hukukî Dinlenilme Hakkı*, 112.

⁷⁶⁰ Proske, *Expert witness conferencing in Schiedsverfahren*, 32.

⁷⁶¹ Özbek, *Tahkim Hukuku*, II:1456.

⁷⁶² Curschmann, 'Germany', 143.

⁷⁶³ Tanriver, *Medenî Usûl Hukuku*, 2022, II:461.; Demir Gökyayla, 'Tahkimde Taraflarca Getirilme İlkesi ve Delil İkamesi', 72.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 175.; Swiss Federal Supreme Court, 4A_597/2013, Bundesgericht, para. 3.2.2.

ordinarily obligated to do so.⁷⁶⁴ Whilst there is no doubt that an arbitral tribunal shall not render a decision that it does not fully comprehend, it is also the parties who respectively bear the burden of proof. So, the tribunal's duty of enquiry needs to be considered in conjunction with the maxim of disposition.⁷⁶⁵

In an arbitration proceeding, the parties and their representatives must act according to the principle of truth or good faith. Ideally, the parties have the obligation to submit the facts of the case according to the subjective truth.⁷⁶⁶ This principle also extends to the expert and his opinion. However, the expert's opinion might not possibly reflect the objective truth. Thus, it would be logical to expect the expert to provide his opinion according to his "genuine belief".

The party-appointed expert's personality should reflect that he is impartial and objective. Independence as a personal qualification cannot be expected from the party-appointed expert since he is dependent on the appointing party. Independence should still be a sought qualification, but not from the expert, but the expert opinion, in the sense that it was not drafted solely according to the party's request, and the expert had relative freedom in forming his opinion. Although the expert receives instructions, he will make evaluations based on scientific facts and methods, which will differentiate him from a counsel.⁷⁶⁷

When it comes to the expert's appointment procedure, there are no detailed rules. Experts may be engaged prior to the initiation of the proceedings or after the request has been filed. Generally, the expert is interviewed, and if the party deems the expert to support its case, it engages with the expert, and they agree on terms of appointment where the party's instructions can be found. The expert must be handed over the evidence and other documents to create his opinion. He may ask for the party's assistance during that stage. The party-appointed expert will receive his fee directly from the appointing party, which is different from the tribunal-appointed expert.

⁷⁶⁴ Akıncı, *Milletlerarası Tahkim*, 339.; *Akil* referring to the view echoed in German literature see Akil, 'Bilirkişi-Uzman Tanık Ayrımı', 175, fn. 20.; Demir Gökyayla, 'Tahkimde Taraflarca Getirilme İlkesi ve Delil İkamesi', 86.; Özbek, *Tahkim Hukuku*, II:1453. ; In the same direction in Italy see Cavasola and Paton, 'Italy', 174.

⁷⁶⁵ Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 95.

⁷⁶⁶ Pekcanitez and Yeşilirmak, 'Tahkim', 2704.; Tanrıver, *Medenî Usûl Hukuku*, II:430-431.;

⁷⁶⁷ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 214.

In return, the expert must provide an arguable and convincing expert opinion and, unless directed otherwise, attend the hearings for testimony and examination. The expert must hold confidential the information he received in due course of the proceedings.

The IBA Guidelines, the CIArb Protocol, and the CBP indicate rules that the experts should adhere to when drafting their opinions. These rules have been developed over time in practice and present a good example of what qualifications a well-established expert opinion should have. The report shall include the full name and address of the expert, a statement regarding his or her present and past relationship (if any) with any of the parties, their legal representatives, advisors, witnesses and the arbitral tribunal, and a description of his or her background, qualifications, training and experience, including areas outside his or her expertise, a description of the instructions and questions pursuant to which he is providing his or her opinions and conclusions, a declaration of his impartiality and objectivity, a declaration that his opinions are an independent product of his own views and conclusions, a statement that he has received his remuneration before the final production of this report, a statement of the facts on which he is basing his or her expert opinions and conclusions, his expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions, if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the expert anticipates giving testimony at the hearing, the signature of the expert(s) and its date and place; and if the expert report has been signed by more than one person, an attribution of the entirety or specific parts of the Report to each author.

Sources applicable in international arbitration are mainly silent when it comes to the details of admissibility and assessment of evidence.⁷⁶⁸ Free assessment of evidence is one of the main rules in international arbitration proceedings, where it is rare to find specific and detailed provisions relating to the weighing of evidence or burden of proof

⁷⁶⁸ Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 321.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 10.; Alfter, *Das Beweismaß in Der Internationalen Handelsschiedsgerichtsbarkeit: Auswirkungen Der Best Practice Der Document Production Auf Den Beweis*, 63 ff.

in statutes or rules. The Model Law and arbitration rules set forth this principle by stipulating that the tribunal has the inherent power to determine the admissibility, relevance, materiality and weight of the evidence offered (UNCITRAL Arbitration Rules Article 27(4), ICSID Arbitration Rule 36(1), IBA Rules Art. 9(1)).

Generally, expert opinion, as a means of evidence, is admissible where the subject matter is outside the knowledge or experience of the trier of fact, i.e. the arbitral tribunal, and where such expert opinion can assist the trier in its final determination of an issue.⁷⁶⁹

In international arbitration, the general concept and practice is that “each party has the burden of proving the facts relied on to support its claim or defence” (UNCITRAL Arbitration Rules Art. 27(1)).⁷⁷⁰ In relation to the experts, if there is a technical/scientific issue that needs to be clarified to the tribunal, both parties, depending on their claim or defence, bear the burden of proof.⁷⁷¹

The standard required to determine whether the claiming or defending party has conformed with the burden of proof, i.e. adduced expert evidence that supports the claim and establishes the facts thereto, or not, is regulated by the substantive applicable law (*lex causae*), however, sometimes also with the law applicable to the arbitration (*lex arbitri*).⁷⁷²

The rules in these provisions generally require proving a fact with complete conviction, high probability or overwhelming probability. In international arbitration,

⁷⁶⁹ Silver, ‘Back to Burgess: The Impact of the White Burgess Expert Evidence Regime in Alberta Decisions’, 5.

⁷⁷⁰ Yeşilirmak, *Türkiye’de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 413.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 221.; Özbek, *Tahkim Hukuku*, II:1367.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 147.; Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 11.; Redfern et al., ‘The Standards and Burden of Proof in International Arbitration’, 321.

⁷⁷¹ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 423.

⁷⁷² O’Malley, *Rules of Evidence in International Arbitration*, 215.

the standard of overwhelming probability is usually accepted and applied.⁷⁷³ This standard calls for a claim to be established if the tribunal is convinced by the evidence that the claim is more likely to be true than not.⁷⁷⁴

Testing of the expert and his opinion is done at the evidentiary hearing phase via oral examination, be it examination by the tribunal, direct examination and/or cross-examination by the counsel or conferencing among the experts.⁷⁷⁵

The impartiality of the expert and independence of the expert's work is one of the most critical areas worth exploring in this regard. If it can be demonstrated during cross-examination that the expert is not objective and impartial or the expert's work lacks independence, this may result in the tribunal placing little or no weight on the expert's views.⁷⁷⁶ So, whereas the arbitrator is not strictly bound by the expert's opinion, it cannot merely leave the expert opinion aside without consideration.⁷⁷⁷

The expert's qualifications and expertise are also important while assessing the weight. For instance, if it can be proven that the expert is testifying in areas falling beyond his scope of expertise, then the whole testimony faces the risk of collapsing without even tackling further the substance of the report.

Party-appointed experts, in general, may not be subject to disqualification or exclusion as tribunal-appointed experts can be in certain situations.⁷⁷⁸ In international

⁷⁷³ Yeşilirmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri*, 114.

⁷⁷⁴ See O'Malley, *Rules of Evidence in International Arbitration*, 215 ff.; 'Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds', 120–22.; Nater-Bass and Rouvinez, 'Art. 24 Commentary on Swiss Rules', 264.; Redfern et al., 'The Standards and Burden of Proof in International Arbitration', 355.

⁷⁷⁵ Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 441.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 235.; Bacanlı, 'Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arabuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi', 97.; Ağırman, *Milli & Milletlerarası Tahkim*, 462–64.; Whether these methods of examination will be done at the same proceeding is up to the decision of the tribunal in each case. For details see Proske, *Expert witness conferencing in Schiedsverfahren*, 46.

⁷⁷⁶ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 200–201.

⁷⁷⁷ Narçin, '4686 Sayılı Milletlerarası Tahkim Uyarınca Deliller', 17. Atalay argues similarly for party-appointed experts before state courts in Atalay, 'Pekcanitez Usûl', 2021, 1959.; Atalı, '6754 Sayılı Bilirkişilik Kanunu ve Hukuki Konularda Bilirkişilik', 3279.

⁷⁷⁸ See e.g. VIAC Rules of Arbitration and Mediation 2021 Art. 23.; Liebscher, 'VIAC Rules', 340; Nessi, 'Expert Witness: Role and Independence', 96; Ehle, 'Practical Aspects of Using Expert Evidence

commercial arbitration, depending on the law applicable to the arbitration procedure, no exclusion seems possible at first sight since the issue has not been subject to regulation, not even in the CIArb Protocol or the IBA Rules.⁷⁷⁹

The exclusion of a party-appointed expert is a very serious measure that should be a last resort.⁷⁸⁰ Wrongful or inappropriate exclusion of an expert may indeed threaten the award to set-aside or denied enforcement due to contended breaches of due process.

Thus, arbitral tribunals are usually very cautious when determining whether or not to exercise their discretionary powers to exclude a party-appointed expert and will usually prefer not to exclude it altogether but assess it with caution and potentially credit less weight.⁷⁸¹

The appointing party or any other party who suffered damages due to the expert opinion may pursue a claim against the expert without forgetting that the expert will be, in principle, only liable for intentional wrongdoing or gross negligence.

in *International Arbitration*, 78.;Knobloch, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 269,279.; Proske, *Expert witness conferencing in Schiedsverfahren*, 20.; Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 133, para. 21.; Tanriver, *Hukukumuzda Bilirkişilik*, 35.

⁷⁷⁹ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 217.

⁷⁸⁰ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 199; Smiley, 'An Unwanted Intrusion: Challenging the Appointment of Experts in International Arbitration', 376.

⁷⁸¹ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 199; Burianski and Lang, 'Bibliographic Reference "Challenges" to Party-Appointed Experts', 15:272.

CHAPTER IV

PROBLEMS RELATED TO PARTY-APPOINTED EXPERTS

The prevailing use of party-appointed experts in international arbitration is not without flaws.⁷⁸² There are obvious concerns in practice as to their fair and efficient use.⁷⁸³ The critics are not restricted to the realm of international arbitration but can be seen in various jurisdictions regarding litigation, too.⁷⁸⁴ As will be mentioned, empirical studies have explicitly determined these concerns.

When the studies are reviewed, the problem surrounding the use of party-appointed experts can be classified into two main categories: Problems related to their personality and problems related to the usage style. These challenges not only discredit the usage of party-appointed experts but also attack the efficiency of arbitration, prolong the proceedings and lead them to cost more.⁷⁸⁵

4.1. Empirical Proof of Problems

For more than 17 years, The Queen Mary University School of International Arbitration, with the financial support of various law firms⁷⁸⁶, has conducted empirical

⁷⁸² Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 137.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 1.; Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314.

⁷⁸³ Jones, 'Redefining the Role and Value of Expert Evidence', 23.

⁷⁸⁴ For the UK see Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* (Final Report, 1996); Proske, *Expert witness conferencing in Schiedsverfahren*. Jones, 'Redefining the Role and Value of Expert Evidence', 25–26.

For details in Türkiye see Atalı, '6754 Sayılı Bilirkişilik Kanunu ve Hukuki Konularda Bilirkişilik'; Tanrıver, *Hukukumuzda Bilirkişilik*.

⁷⁸⁵ Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 137.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 1.; Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314.

⁷⁸⁶ Like White & Case, PriceWaterhouseCoopers and Pinsent Masons.

studies that shed light on developments, trends and issues faced in international arbitration.⁷⁸⁷

The reports from 2012, 2015, 2018, 2020, 2021, and 2022 indicate statistics regarding experts from which the need for development and change can be derived. In the 2021 report, when asked respondents, as a party or counsel, which procedural options they would leave out in order to have cheaper or faster proceedings, 13% selected to opt out for party-appointed experts.

Some arbitrators adopted the view that party-appointed experts are sometimes used as ‘hired guns’.⁷⁸⁸ On the other hand, some counsel stated that a tribunal-appointed expert might also become a de facto fourth arbitrator, which, in their view, was undesired.⁷⁸⁹

In the 2018 report, when asked whether arbitration rules should include standards of independence and impartiality of (party) experts, 69% responded affirmative, which proves the clear need.⁷⁹⁰

It’s known in international arbitration that some figures are prominently known, not only for their appointment as arbitrators but also for acting as counsel and experts, thus creating the phenomena which is called *double-hatting*.⁷⁹¹

Double-hatting is the practice where individuals switch roles as arbitrators, counsel and experts in different arbitral proceedings. Experienced counsels who actively represent parties before arbitral tribunals may also serve as arbitrators in other cases. In the 2020 report, 57% of respondents indicated that arbitrators should be allowed to act as experts in other ISDS disputes.⁷⁹²

⁷⁸⁷ See web site <https://arbitration.qmul.ac.uk/research/> (accessed 10.03.2022)

⁷⁸⁸ De Berti, ‘Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?’, 54; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 191; Waincymer, *Procedure and Evidence in International Arbitration*, 933.; This argument is made especially for “professional” experts, see for critics Proske, *Expert witness conferencing in Schiedsverfahren*, 30.

⁷⁸⁹ ‘2021 International Arbitration Survey: Adapting Arbitration to a Changing World’, 14; ‘BCLP 2021 Survey’, 17.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 413.

⁷⁹⁰ ‘2018 International Arbitration Survey: The Evolution of International Arbitration’, 33–34.

⁷⁹¹ For instance, Mr Alexandrov in *Tethyan Copper Company v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1 and SolEs Badojoz GmbH v Kingdom of Spain, ICSID Case No ARB/15/38.

⁷⁹² ‘2020 International Arbitration Survey: Investor-State Dispute Settlement (ISDS)’, 15.

Although more parties are in favour, a substantial amount bear potentially the fear that the small-privileged arbitration community could influence each other.

These results are surprising in view of the continued debate on which method is more effective. Respondents' preferences are, in fact, more balanced: 43% find experts more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective. Consistent with domestic litigation culture, more civil lawyers (43%) than common lawyers (19%) find tribunal-appointed experts more effective.

Respondents who preferred tribunal-appointed experts argued that party-appointed experts often act as “partisan advocates” for the party who appointed them, which regularly leads to the appointment of a third tribunal-appointed expert. According to them, a system whereby an expert is appointed by the tribunal from the beginning would bring a more neutral expert opinion, as well as save time and money.⁷⁹³

4.2. Problems Related to the Qualifications of Experts

Opposed to the understanding of tribunal-appointed experts' personal qualifications of independence and impartiality, it is controversial whether party-appointed experts need to be independent and impartial.

Guidelines, court decisions, arbitral awards, and scholarly writing are not clear when referring to the independence and impartiality of party-appointed experts and the terms are used interchangeably, leading to confusion.

Below, I will try to define the terms and elaborate on whether and, if yes, how they are related to party-appointed experts.

⁷⁹³ ‘2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process’, 29.

4.2.1. Independence

As elaborated earlier⁷⁹⁴, some soft laws and scholars require not only tribunal-appointed experts to be independent but also party-appointed experts.⁷⁹⁵

Before attributing such qualification, one must delve into the term *independence*. Being independent can be defined as not being dependent, such as not being subject to control by others, not being affiliated with a larger controlling unit, not requiring or relying on something else, not looking to others for one's opinions or for guidance in conduct, not bound by or committed to a party.⁷⁹⁶ Independence is the first step to ensure neutrality.

According to the comprehensive empirical study conducted by the University of Geneva⁷⁹⁷ with arbitrators, counsel and experts, independence was mentioned as a must-have fundamental attribute of experts by “all respondents”.⁷⁹⁸

Independence, when related to experts, is the concept where the expert's position is assessed, whether it has objective links with the party.⁷⁹⁹ On the other hand, experts see independence slightly differently. According to experts in arbitration, independence is acting in freedom and in the absence of control by the party.⁸⁰⁰

The IBA Rules require that the expert should not only be independent from the party and its agents but also from the counsel representing the client. Actually, not the parties but the legal counsel generally determine the expert to be appointed. It is not uncommon for legal counsel and their law firms to reach out to experts whom they

⁷⁹⁴ See Chapter III, Section 4.1.

⁷⁹⁵ Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 133, para. 21.; Roney, ‘Cross-Examination of Experts’, 114.; Club Español del Arbitraje, Code of Best Practices in Arbitration, Rule 39.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 575.; Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 215.

⁷⁹⁶ Merriam-Webster.com Dictionary, “independent,” accessed July 6, 2022, <https://www.merriam-webster.com/dictionary/independent>.

⁷⁹⁷ See Mbengue and Das, ‘Rules Governing the Use of Experts in International Disputes’; de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’.

⁷⁹⁸ de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 492.

⁷⁹⁹ de Chazournes et al., 493.

⁸⁰⁰ de Chazournes et al., 495–96.

occasionally engage for cases. That's why the IBA Rules Article 5(2)(c) have foreseen that the expert should be independent from the legal advisors, too.⁸⁰¹

Neither the IBA Rules nor the CIArb Protocol explain how a party-appointed expert can, in fact, be independent and not just show independence.⁸⁰² *Kantor* argues that “no protocol or code can regulate the ability of a party to hire an expert who is just a good actor or actress and who is able to appear objective while delivering fundamentally partisan evidence.”⁸⁰³ The independence declaration, as required by the CIArb Protocol alone, may not ensure independence.⁸⁰⁴ The IBA Rules' requirement of the statement on the party-appointed expert's independence is not either. In both rules, it is not clear whether any lack of independence would disqualify or discredit the conclusions submitted by the party-appointed expert.

Party-appointed experts generally work closely with legal counsel while preparing their opinions.⁸⁰⁵ If close collaboration prevents independence, this cannot be achieved.

Before US courts, in order to determine the independence of a party-appointed expert, practitioners place greater value on an expert's adherence to scientific methodology and on any relevant standards applied by the expert's profession. If an expert fails to comply with such methodology or standards, this can be revealed during cross-examination.⁸⁰⁶

I believe that the views that require party-appointed experts to be independent do not take into account the ontology and reality of party-appointed experts. First of all, party-

⁸⁰¹ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 303.

⁸⁰² Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.

⁸⁰³ Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?', 335.

⁸⁰⁴ Parlett, 'Parties' Engagement with Experts in International Litigation', 451.

⁸⁰⁵ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 662.; IBA Guidelines on Party Representation in International Arbitration Art 24 provides as follows: "A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony."

⁸⁰⁶ Blackaby and Wilbraham, 658.

appointed experts cannot be independent since they are engaged, instructed and paid by a party. So, it is no surprise that the party-appointed expert is not independent. However, this lack of independence is a natural result when the nature of engagement is considered.⁸⁰⁷ According to the IBA Rules Article 6(2), tribunal-appointed experts must deliver a statement on their qualifications, background, and independence. On the other hand, IBA Rules Article 5 does not specify such right to submit objections to declared independence.⁸⁰⁸

Rogers also confirms that “an expert who is unilaterally selected and compensated by only one party, and who works extensively with that party’s counsel, cannot have the same meaning as the requirement that an arbitrator remains “independent” of the parties and their counsel.⁸⁰⁹

Thus, the question arises from this perspective: Can the party-appointed expert be literally independent? It is obvious that the party-appointed expert is acting as per the instructions of the party that engaged him.⁸¹⁰ Since an expert is a professional who puts together a “work”, he will be remunerated by the party. Therefore, it cannot be expected that the party-appointed expert will be literally as independent as the tribunal-appointed expert since they do not share the same exact position.⁸¹¹

For tribunal-appointed experts, principally, there is the assumption that these experts are already (expected to be) independent due to the procedure of appointment.⁸¹² On the other hand, party-appointed experts are chosen strategically, even sometimes way before the proceedings, and without the interference of the tribunal or the consent of the counterparty.

⁸⁰⁷ Kantor citing *Prof. Thomas Walde* in Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 334.

⁸⁰⁸ Ünüvar, ‘Experts: Investment Arbitration’, para. 25.

⁸⁰⁹ Rogers, *Ethics in International Arbitration*, 143.

⁸¹⁰ O’Malley, *Rules of Evidence in International Arbitration*, 150; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 190.; Proske, *Expert witness conferencing in Schiedsverfahren*, 21.

⁸¹¹ O’Malley, *Rules of Evidence in International Arbitration*, 150; O’Malley, 150, fn. 15.; *Professor Thomas Walde* refers the independence of party-appointed experts as “fiction” in Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 335.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 414.

⁸¹² Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 97. This does not mean, that they are always independent, but the procedure promises it. Nevertheless, they can be challenged, replaced or excluded.

Not being required to be independent shall not mean that they should be biased or partial.⁸¹³ Not the party-appointed expert as a personality should be required to be independent, but the opinion “must be independent in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome.”⁸¹⁴ The party-appointed expert is not neutral.⁸¹⁵ On the contrary, the tribunal-appointed expert has to be neutral and, if not, can be challenged on the same grounds as the arbitrators can be.⁸¹⁶

Thus, independence in relation to party-appointed experts should not be regarded as an admissibility issue but evaluated in the context of weight and assessment.⁸¹⁷ That’s why, in international practice, even (former) employees and consultants of a party can be seen as experts.⁸¹⁸

Khodykin/Mulcahy state that it is possible for experts to be independent but partial. That’s why what really matters is that they are impartial; however, impartiality is a state of mind that is thorny to detect.⁸¹⁹

If there is or was a relation between a party-appointed expert and the counterparty or the arbitral tribunal, again, this must be critically evaluated.⁸²⁰ For instance, in *Jan de Nul v Egypt*, the tribunal was requested by the claimants to disregard the respondent’s party-appointed expert report from the case file because the expert had previously been a member of the board of directors for one of the claimants.⁸²¹ However, the tribunal

⁸¹³ Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 217.

⁸¹⁴ Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 32.

⁸¹⁵ Musielak and Voit, ZPO§ 1049, para. 11.

⁸¹⁶ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 103.

⁸¹⁷ O’Malley, *Rules of Evidence in International Arbitration*, 152.; de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 493.; That’s why in practice, generally the party-appointed expert is not disregarded, even failing to be independent in ‘BCLP 2021 Survey’, 21.

⁸¹⁸ O’Malley, *Rules of Evidence in International Arbitration*, 151; O’Malley, 151, fn. 17.

⁸¹⁹ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 302.

⁸²⁰ O’Malley, *Rules of Evidence in International Arbitration*, 152.

⁸²¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Final Award (November 6, 2008), para. 28, available at <https://www.italaw.com/cases/587>.

concluded that this relation could not make the expert's opinion inadmissible but consider the weight while rendering the decision.⁸²²

The professionalism and consistency experts show in preparing the report and their testimony at the hearing might be a more determinative factor in whether they are independent (and impartial) than mere links with parties.⁸²³

As it was mentioned in *Lord Abinger v. Ashton*:

[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.⁸²⁴

UNCITRAL Arbitration Rules provide some indication, in the form of appointment, that independence and impartiality are required from a tribunal-appointed expert, not from a party-appointed expert.⁸²⁵ The party-appointed expert, contrary to the tribunal-appointed one, cannot be rejected.⁸²⁶

Misen v. Ukraine is a good example of how the tribunal handled the issue of independence and impartiality.⁸²⁷ The chair arbitrator stated in the decision for a request for disqualifying one of the tribunal members:

[I]t is not uncommon for the same expert to appear before the same arbitrator on multiple occasions. Quantum experts specialised in the field, such as Dr. Moselle, are few in number. Some interaction between arbitrators and experts is thus to be expected. As a result, multiple appearances of an expert before an arbitrator are, per se, insufficient to sustain a disqualification decision. This is particularly so considering that in each case, the arbitrator exercises the same independent arbitral function. Thus, something more is required; i.e. that because of the proximity,

⁸²² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Final Award (November 6, 2008), para. 28; Similar decision of a UK Court see *Brandeis (Brokers) Ltd v Black and Ors*, 2001 Arbitration Law Reports and Review at 223–239.

⁸²³ O'Malley, *Rules of Evidence in International Arbitration*, 153; Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?', 373.

⁸²⁴ *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374 cited in Supreme Court of Canada, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, para. 11.

⁸²⁵ Mbengue and Das, 'Rules Governing the Use of Experts in International Disputes', 433.

⁸²⁶ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 95, 103; Thomas et al., *Thomas/Putzo ZPO*, § 1049, para. 3.

⁸²⁷ *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine* (ICSID Case No. ARB/21/15), Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov, para 104. <https://www.italaw.com/sites/default/files/case-documents/italaw170103.pdf> (accessed 28.08.2022)

dependence, intensity and/or materiality, a specific connection between an arbitrator and an expert create an obvious appearance of lack of independence or impartiality.⁸²⁸

The matter of proximity, intensity, dependence and materiality was assessed by *Suez v Argentina*:

Proximity: How closely connected is the challenged arbitrator to one of the parties by reason of the alleged connection? The closer the connection between an arbitrator and a party, the more likely that the relationship may influence an arbitrator's independence of judgment and impartiality;

Intensity: How intense and frequent are the interactions between challenged arbitrator and one of the parties as a result of the alleged connection? The more frequent and intense the interaction by virtue of the relationship between an arbitrator and a party the more probable that such relationship will affect the arbitrator's independence of judgment and impartiality;

Dependence: To what extent is the challenged arbitrator dependent on one of the parties for benefits as a result of the connection? The more an arbitrator is dependent on a relationship for benefits or advantages the more likely that the relationship may influence the arbitrator's independence of judgment and impartiality; and

Materiality: To what extent are any benefits accruing to the challenged arbitrator as a result of the alleged connection significant and therefore likely to influence in some way the arbitrator's judgment? Obviously significant benefits derived from a relationship will be more likely to influence an arbitrator's judgment and impartiality than negligible or insignificant benefits.⁸²⁹

⁸²⁸ *Misen v. Ukraine*, Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov, para 141-42.

⁸²⁹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, para. 35. <https://jsumundi.com/en/document/decision/en-suez-sociedad-general-de-aguas-de-barcelona-s-a-and-interagua-servicios-integrales-de-agua-s-a-v-argentine-republic-decision-on-a-second-proposal-for->

In *Orazul v. Argentine*, the president arbitrator failed to disclose that she sat on the *Green Power v. Spain*⁸³⁰ tribunal together with the respondent's legal expert. This, along with the attitude during questioning and broader conduct during the hearing, led the Claimant to request the disqualification of the president arbitrator. The claimant's appointee and respondent's appointee considered that it would have been "advisable" for the president to disclose that she sat on the *Green Power v. Spain* with the legal expert at the time when it became clear that the legal expert would appear at the hearing for cross-examination. However, the arbitrators added that neither party had reacted when the *Green Power v. Spain* award became public in late June 2022. Considering the attitude to question an expert, the party-appointed arbitrators saw nothing in the president's conduct during the hearing that created an appearance of bias or lack of independence. Consequently, the challenge was dismissed.⁸³¹

4.2.2. Impartiality and Bias

The second problem seen because of the personality of the party-appointed expert is his potential to be impartial, which leads to him being biased or not objective.⁸³² The main goal of requiring the party-appointed expert to be impartial is to ensure objectivity of the opinion.

The biggest criticism of party-appointed experts is the lack of impartiality.⁸³³ Impartiality of the arbitrator is an absolute requirement and, as a matter of public policy, cannot be altered by arbitration rules. However, the right to contest lack of

the-disqualification-of-a-member-of-the-arbitral-tribunal-monday-12th-may-2008 (accessed 15.08.2022)

⁸³⁰ *Green Power K/S and Obton A/S v. Spain*, SCC Case No. V 2016/135 available at <https://www.italaw.com/cases/9471> (accessed 31 December 2022)

⁸³¹ *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Claimant's Proposal to Disqualify Dr. Inka Hanefeld, 11 September 2022, available at <https://www.italaw.com/cases/8790> (accessed 15.11.2022).

⁸³² Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 270; Van Houtte, 'Party-Appointed Experts and Tribunal-Appointed Experts', 136; Waincymer, *Procedure and Evidence in International Arbitration*, 933; Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming : A New Approach to Expert Evidence', 135.; Akıncı, 'Milletlerarası Tahkimde Bilirkişi', 78.; Balkar, *Milletlerarası Ticarî Tahkim ve Etik*, 167.; Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 61.

⁸³³ Dave, 'Should Experts Be Neutrals or Advocates?', 149.; Jones, 'Improving Arbitral Procedure: Perspectives from the Coalface', 94.; Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming : A New Approach to Expert Evidence', 139.; Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314.

impartiality yields to party autonomy and, therefore, can be waived.⁸³⁴ In the case of a party-appointed expert, the same level of impartiality cannot be expected.

According to the above-referred study conducted by the University of Geneva, impartiality was also mentioned as a must-have attribute of experts by “all respondents”.⁸³⁵ Impartiality refers to a state of mind. Impartiality, in the context of party-appointed experts in international arbitration, is acting without bias in favour of the appointing client.⁸³⁶ In other words, the party-appointed expert needs to be objective. Objectivity requires that experts are willing and capable to perform their role according to the truth and report not only favourable matters that help the appointing party but also those adverse to it.⁸³⁷ The duty of objectivity requires that the expert’s fee is not dependent on the outcome of the arbitration.⁸³⁸

Kantor states that parties may prepare their expert to present his arguments in a way that is impartial enough to comply with the impartiality requirements while still supporting the party’s case.⁸³⁹ He believes that rules which address these matters can only go so far in addressing issues of subconscious bias.⁸⁴⁰ However, given the negative consequences, the issue of impartiality cannot be ignored.⁸⁴¹

The CIArb Protocol Art. 4(1) stipulates that “[a]n expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.” (emphasis added) The IBA Rules do not refer to bias or impartiality as an attribute of the experts or the report.

⁸³⁴ Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration*, 185.

⁸³⁵ de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 492.; See for the view that party-appointed experts cannot be impartial in de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 493.

⁸³⁶ de Chazournes et al., 496; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 302.; Harry K Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (HMSO, 1996) [13.6].

⁸³⁷ Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 447.

⁸³⁸ Club Español del Arbitraje, Code of Best Practices in Arbitration, 45, para. 134-135.

⁸³⁹ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 335–36.

⁸⁴⁰ Kantor, 335–36. *Kantor* states that it is even expected that experts will be partisan to an extent and argues that this partisanship strengthens the adversarial process.

⁸⁴¹ Jones, ‘Redefining the Role and Value of Expert Evidence’, 24.

That the party-appointed expert is naturally not independent is not creating problems, but dependency that affects impartiality⁸⁴² in a way that leads to bias.⁸⁴³ That's why bias (unobjective) as a concept must be analysed.

Bias can be divided into three categories: Deliberate bias, unconscious bias, and selection bias. In deliberate bias, the party expert deliberately tailors his opinion and testimony to support his party's case. In more subtle unintentional bias, the expert does not intentionally opine in favour of the appointing party but is nevertheless influenced to opine on favouring points. In selection bias, the parties select a party-appointed expert who represents a particular school or method that supports the party's case.⁸⁴⁴

The reality that experts are carefully chosen and paid for by the parties consciously or subconsciously impacts the framing of their view to support the party employing them. This does not suggest that experts are directly or purposefully biased. However, close engagement may influence them to adopt a favourable position or direction with their evidence for the benefit of the appointing party.⁸⁴⁵

Experts are sometimes engaged in an advisory role while the counsel structures the claim. It is common knowledge that counsel often collaborate with their experts in fulfilling their task of providing their expert opinion to the tribunal. This leads them to grow familiar with the case and counsel of their appointed party, potentially having a subconscious or unintentional bias.⁸⁴⁶ However, the involvement of counsel in the preparation of opinion may improve the readability and comprehension of it, as experts with no experience before adjudicatory bodies may not always be able to produce clear and understandable reports for non-experts.⁸⁴⁷

⁸⁴² See *Misen v. Ukraine* (ICSID Case No. ARB/21/15), Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov, para. 104.

⁸⁴³ Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 177.; Rogers, *Ethics in International Arbitration*, 145.

⁸⁴⁴ Proske, Expert witness conferencing in Schiedsverfahren, 22.

⁸⁴⁵ Jones, 'Redefining the Role and Value of Expert Evidence', 23.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 214.; Akıncı, *Milletlerarası Tahkim*, 340.; Schiau, 'An Arbitration Dilemma', 336.

⁸⁴⁶ Jones, 'Redefining the Role and Value of Expert Evidence', 23.

⁸⁴⁷ Parlett, 'Parties' Engagement with Experts in International Litigation', 449; Daly and Poon, 'Technical and Legal Experts in International Investment Disputes', 362.

Bias can be especially present with full-time experts who have an interest in being retained in future disputes. Bias may also be a particular concern where experts are engaged consistently either by the same counsel or parties on related matters for a particular category of party. A typical example is being appointed constantly for a respondent state.⁸⁴⁸

Repeated appointments can be an indicator of bias, especially if the same law firm or party appoints an expert several times.⁸⁴⁹ However, where the sought expertise is a niche area where only a limited pool of experts is available, repeat appointments cannot in itself be a sign of bias.⁸⁵⁰

An experienced arbitral tribunal is potentially the most important barrier against bias.⁸⁵¹ If there are serious signs recognised by the arbitral tribunal that hint at a partisanship attitude of the party-appointed expert, the tribunal will not credit the expert's opinion and, although it would not exclude his opinion from the record, would deem it *de facto* inadmissible.⁸⁵²

Party-appointed experts are employed and paid by the appointing party. This is not to suggest that the remuneration itself leads to explicit bias. Rather, as *Jones* argues, partiality may exist on a more subconscious level.⁸⁵³ It is therefore said to follow that experts naturally feel inclined to use their testimony to 'assist' their appointing party's case.

Although the expert is adduced as evidence by a party which supports its position and pays it, if the personality does not indicate any signs of partisanship (partiality) and

⁸⁴⁸ Jones, 'Redefining the Role and Value of Expert Evidence', 23.

⁸⁴⁹ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 3.

⁸⁵⁰ Jones, 3.

⁸⁵¹ 84% of respondents agreed that tribunals are 'generally capable of determining when a party appointed expert is not being objective in their testimony', see 'BCLP 2021 Survey', 14.

⁸⁵² 93% of respondents thought that 'a tribunal should give limited weight to the evidence of a party-appointed expert who breaches his/her duty to remain independent and assist the tribunal', see 'BCLP 2021 Survey', 14.; Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 137.; Samaras and Strasser, 'Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-', 314.

⁸⁵³ *Jones* says that the expert as a human being may feel subconsciously indebted to those who are paying their fees and seek repeat business, in Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 3.

lack of professionalism, and the report is an objectively arguable work that has a scientifically acceptable and reviewable basis, then the party-appointed expert needs to be classified as objective. In other words, if the expert were to be appointed by the counterparty and still would have produced the same exact report, it could be said that the expert's opinion is impartial.

It's controversial whether in-house experts can be impartial party-appointed experts. Some views state that in-house (party-appointed) experts are not even technically experts, and seeing them so would be against due process.⁸⁵⁴ However, various practice seems to allow the use of internal expertise. In *Field v. Leeds City Council*⁸⁵⁵, the English court affirmed that an employee could act as an expert for his employer but warned that there might be circumstances where this would be inappropriate.⁸⁵⁶ In *Norbrook Laboratories Ltd v Tank*, the court affirmed that:

The arbitrator was entitled to permit an employee to give expert evidence, provided that he took into account the fact that diminished objectivity could reduce the weight properly to be attached to that evidence. Indeed, if he took the view that lack of objectivity was such that no weight should be attached to it, the evidence should not be admitted. No doubt the issue of objectivity could be tested in the course of the hearing. For these reasons I do not consider that the arbitrator can be criticized or bias inferred from his permitting Moulson to rely on Mr Pontefract's evidence simply because he was an employee. It may well be that further investigation of his evidence, possibly in cross-examination, would disclose a lack of objectivity so great as to justify the arbitrator in wholly discounting the witness's technical opinions.⁸⁵⁷

However, one must bear in mind that the arbitrator needs to strictly evaluate and examine the expert if he is an employee of the appointing party. As demonstrated in *Re Continental Assurance Company*, if the employee is partisan (biased), he should not act as an expert.⁸⁵⁸

Repeat appointments of the same experts, unless it is a very niche subject matter, could be an indication of bias. For instance, when global law firms seek to appoint the same expert regularly, this could be perceived as a potential bias and must be carefully

⁸⁵⁴ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 493.

⁸⁵⁵ England and Wales High Court, *Field & Anor v Leeds City Council*, Casemine.

⁸⁵⁶ Similar views in Schäfer and Wilson, 'ICC Bulletin', 2021, 65.

⁸⁵⁷ 'Norbrook Laboratories Ltd v Tank', 665.; Bor, 'Expert Evidence', 515–16.

⁸⁵⁸ England and Wales High Court, *Re Continental Assurance Company*, Casemine. in Bor, 'Expert Evidence', 511–12.

analysed.⁸⁵⁹ It could also be argued that a lack of diversity currently exists in the appointment of experts, which could also lead to repeat appointments.⁸⁶⁰

According to some German scholars who handle the matter realistically, there is no necessity for the expert to be impartial. On the contrary, the expert will accept orders and will be remunerated and can only present favourable opinions in relation to the appointing party.⁸⁶¹

Contrary to the tribunal-appointed expert, who has a strict duty of objectivity⁸⁶² regardless of the parties' positions, the party-appointed expert, although expected to be objective, does not have the same duty of objectivity in terms of such as the former one. This, however, does not entail the party-appointed expert being a mere advocate of the party.⁸⁶³ The party-appointed expert is still expected to provide a scientific or provable objective opinion.

As *Senogles* expresses, when experts are examined, the lack of objectivity is derived since some experts are dogmatic in their opinions, “unwilling to concede a point made, even in the face of overwhelming logic or contradictory evidence presented. Such attitudes and demeanour, I suggest, are typically easily identified by experienced, vigilant and intelligent tribunal members.”⁸⁶⁴

4.3. Problems Related to the Usage Style of Party-Appointed Experts

Despite seeing some rules or guidelines for party-appointed experts, it is fair to say that this subject matter is largely unregulated. A widely accepted code of conduct for professionals acting as party-appointed experts in international arbitration is not present. That leads every arbitral proceeding to be “another story”, and the tribunal is

⁸⁵⁹ Jones, ‘Redefining the Role and Value of Expert Evidence’, 23.; Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 3.

⁸⁶⁰ Jones, ‘Redefining the Role and Value of Expert Evidence’, 23.

⁸⁶¹ Wach and Petsch, ‘Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht’, 95.

⁸⁶² Wach and Petsch, 97.

⁸⁶³ Kamy-Lukoda, ‘Role of Expert Witnesses in Construction Arbitration: Delay and Disruption and Quantum Issues’, 79.

⁸⁶⁴ Senogles, ‘Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle’, 363.

left to deal with the situation without further guidance. Furthermore, the sequential testimony of experts during the hearings and over-reliance on experts, as if the case could only be one with a convincing expert opinion, multiplies the problems.

4.3.1. Unregulated Use of Party-Appointed Experts

There are no clear rules in practice besides the soft law elements referred to above. This leads mostly to an unregulated and, hence, unorganised use of party-appointed experts. Specifically, there are no rules on whom to appoint, how to appoint, and when to appoint. Most institutional rules contain only general provisions for taking evidence or establishing facts, leaving the details to be determined by the tribunal and sometimes the parties.

This generally results in a random flow that creates multiple issues. Appointing experts without being necessary at all or without the direction of the tribunal causes unnecessary arbitration costs and delays in proceedings. For instance, if there are no clear rules on the engagement of experts, the party may not appoint an expert where it is required or appoint an unrelated or unqualified expert. Additionally, without clear time limits, a party that had not considered engaging an expert may suddenly try to submit an opinion at a later phase in the proceedings, which delays the proceedings.

As the memorial style for written party submissions is generally practised in international arbitration, expert opinions are generally submitted with statements, which prevents them from having a common understanding of how to form opinions and almost inevitably leads to conflicting experts.⁸⁶⁵ Having “conflicting experts” is not the real problem, but the way the experts present diverse opinions is creating the issues. The experts will highly likely have produced opposing opinions relying on different facts, data and methodologies during the formation. In the end, the arbitral tribunal, which is already not familiar with the matters and is in need of clear guidance, will not be helped out.

⁸⁶⁵ Jones, ‘Redefining the Role and Value of Expert Evidence’, 34.

Additionally, the absence of rules for the assessment of expert opinions can be problematic, at least for inexperienced arbitrators. These challenges lead to prolonged proceedings, increased costs, and reduced value of the expert's opinion.⁸⁶⁶

4.3.2. Lack of Code of Conduct and Double-Hatting

Although there are some arbitral rules and the IBA Guidelines on Conflicts of Interest in International Arbitration that regulate the code of conduct for arbitrators⁸⁶⁷, there is no widely accepted code of conduct in international arbitration that refers to party-appointed experts.⁸⁶⁸ The Chartered Institute of Arbitrators (CIArb) Protocol seems to be the only soft law element that comprehensively touches on the use of party-appointed experts in international arbitration.⁸⁶⁹

The lack of a code of conduct has led to the same persons acting in various roles in international arbitration, so-called *double hatting*. Double hatting is an activity describing the situation where actors, such as arbitrators, party counsel and experts in investor-state dispute resolution proceedings, act in these various roles in different proceedings with different roles in each proceeding, such as being arbitrators in one and an expert in another.⁸⁷⁰ The challenge of the credibility of quantum experts tends to be the focus of the concerns expressed about experts.⁸⁷¹

Double hatting has been criticised for a long period, and the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has recently completed the draft code of conduct for arbitrators in international investment dispute resolution, aiming to prevent this phenomenon.⁸⁷² The “Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for

⁸⁶⁶ Jones, ‘Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last’, 137.; Samaras and Strasser, ‘Managing Party-Appointed Experts in International Arbitration--Analysis of the Current Framework and Best Practice Proposals-’, 314.

⁸⁶⁷ Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 37.

⁸⁶⁸ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 323.; Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 168.

⁸⁶⁹ The CIArb Protocol Article 4(1) foresees that the “expert’s opinion shall be impartial, objective, unbiased and uninfluenced”.

⁸⁷⁰ See Langford, Behn, and Lie, ‘The Revolving Door in International Investment Arbitration’.; Üzüvar, ‘Experts: Investment Arbitration’.

⁸⁷¹ Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 456.

⁸⁷² <https://unis.unvienna.org/unis/en/pressrels/2023/unisl343.html> (accessed 6 May 2023)

Judges in International Investment Dispute Resolution with respective commentary of the United Nations Commission on International Trade Law” was adopted on 7 December 2023 by the General Assembly Resolution in the 45th plenary meeting.⁸⁷³

The draft code of conduct for arbitrators aims, among other issues, to reinforce the duty of independence and impartiality and regulates the practice of arbitrators acting as experts in international investment disputes.

The code of conduct foresees that as a principle, an arbitrator shall not act concurrently within a period of specified time years following the conclusion of an international investment dispute as an expert in another international investment dispute involving (a) the same measures, (b) the same or related parties or (c) the same provisions of the same treaty.

Double hatting has already been forbidden in the United States-Mexico-Canada Agreement (USMCA) Article 14.D.6(5)(c), such that the arbitrator shall not, for the duration of the proceedings, act as a party-appointed expert in any pending arbitration under USMCA.⁸⁷⁴ Also, EU-Mexico Trade Agreement Article 13(1) of the “Resolution of Investment Disputes” section Article 13(1) foresees that arbitrators, upon appointment, shall refrain from acting as party-appointed expert in any pending or new investment protection dispute under EU-Mexico Trade Agreement or any other agreement or domestic law.⁸⁷⁵

4.3.3. Sequential Use of Party-Appointed Experts

Parties generally submit expert opinions with their statements. In such a scenario, experts will not have discussed the dispute and how they could potentially engage the matter. Thus, they will base their opinion on different facts, deal with divergent issues

⁸⁷³https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf (accessed 14 February 2024)

⁸⁷⁴ United States-Mexico-Canada Agreement, entered into force on July 1, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf> (accessed 5 May 2023); Ünüvar, ‘Experts: Investment Arbitration’, para. 37.

⁸⁷⁵ EU-Mexico Trade Agreement, not in force yet, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/9f9e6630-7c43-49df-8a5f-653a23839b94/details> (accessed 5 May 2023).

and apply dissimilar methods. This adds to the problem that the reports of the experts do not correspond to each other. In the end, the tribunal will not be in a position to derive conclusions from the reports.⁸⁷⁶

4.3.4. Over-Reliance

Some part of party-appointed experts used in international arbitration may be an unnecessary effort by parties to bolster their case. The underlying belief is that the number of experts adds to the strength of their case.⁸⁷⁷ Alternatively, where either a claimant or respondent did not consider adducing an expert opinion since the case does not explicitly require a technical or expertise-required matter, in order “not to look weak”, the other party also generally submits an expert opinion.⁸⁷⁸

Arbitrators, with “due process paranoia” in their minds, permit lengthy expert testimony, which causes high costs and lost efficiency in the arbitral process.⁸⁷⁹

Thus, the underlying matter seems to be to determine whether, how and when expert assistance is required. For example, if the weather at a particular airport on a particular day is an important element in the factual matrix, it is sufficient to produce a copy of a contemporary report from a newspaper or a weather forecast website rather than to adduce a meteorological expert to provide an opinion.⁸⁸⁰

4.4. Problems that Affect the Arbitral Award

Without a doubt, experts execute important duties during the proceedings. Although conclusions reached by experts are not directly binding upon tribunals, their usage style and opinion may influence the arbitral award's validity and enforcement.⁸⁸¹

⁸⁷⁶ Sachs and Schmidt-Ahrendts, ‘Protocol on Expert Teaming : A New Approach to Expert Evidence’, 139; Proske, *Expert witness conferencing in Schiedsverfahren*, 31–32.

⁸⁷⁷ Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 5.; Jones, ‘Redefining the Role and Value of Expert Evidence’, 25.

⁸⁷⁸ Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 5.; This problem also arises before Turkish state courts, see Atalay, ‘Pekcanitez Usûl’, 2021, 1959–60.

⁸⁷⁹ Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 5.; Jones, ‘Redefining the Role and Value of Expert Evidence’, 25.

⁸⁸⁰ Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.86.

⁸⁸¹ Uluç, *Corruption in International Arbitration*, 163–64.

In this section, the problems presented above that impact the arbitral awards, either in ICSID annulment proceedings, set-aside⁸⁸² proceedings at state courts or recognition and enforcement proceedings at state courts, will be analysed.

When these decisions are critically evaluated, it becomes obvious that the reasons affecting the validity and enforcement of arbitral awards can be categorised as follows: Refusal to allow parties to adduce or consider the expert opinion, lack of improper notice or inadequate opportunity to comment on expert opinion, delegation of decision-making, challenge based on lack of independence of the expert and quality of evidence, not evaluating conflicting expert opinions and contradicting parties' agreement.

4.4.1. Refusal to Allow Parties to Adduce or Consider the Expert Opinion

As illustrated above, the right to be heard and party autonomy grant the parties the right to submit expert evidence and ask the tribunal to consider it.⁸⁸³ However, rights are not absolute and are not without limits.⁸⁸⁴

As a general principle, a tribunal should not refuse to admit expert opinion, which is essential to the dispute.⁸⁸⁵ Nevertheless, can an award be set-aside on the grounds of irregularity in the procedure, or the right to be heard of the parties is not adhered to if a party has been refused to adduce expert opinion or the adduced expert opinion was not considered?

This is up to the applicable arbitration law and the approach of courts to apply a strict or loose threshold for violation of the fundamental principles in the arbitration procedure. However, some general conclusions can be drawn when various jurisdictions are analysed.

⁸⁸² Also referred to in various jurisdictions as *annulment* or *vacatur*.

⁸⁸³ See Chapter III Section 3.1.

⁸⁸⁴ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 289.

⁸⁸⁵ Rosenfeld, 'Country Report: Germany', 183.

If a tribunal refuses to allow a party to adduce expert opinion to be examined at the hearing, this may amount to a violation of the right to present their case.⁸⁸⁶ The limit of the tribunal's discretion is exceeded where it abuses its adjudicatory power by intentionally disregarding the opinion.

One can conclude that the party-appointed expert has been considered if it is seen in the award that the tribunal has evaluated the opinion of the expert in depth.⁸⁸⁷

A reviewing court, whether for annulment or recognition and enforcement proceedings, shall not overturn an award because an arbitral tribunal merely incorrectly credited the expert's opinion (e.g., accepting one party's expert's views over the other) since this would be a matter of materiality of the case and harm the principle of *revision au fond*.⁸⁸⁸

Violation of the right to be heard may serve as grounds to annul an award (Art 34(2)(a)(ii) UNCITRAL Model Law),⁸⁸⁹ or occasion for non-recognition or non-enforcement of a foreign or non-domestic award (Art V(1)(b) NYC).⁸⁹⁰

In an ICC Arbitration⁸⁹¹, where the IBA Rules were applicable, the Claimant submitted an expert report, which the respondent could not evaluate. However, the arbitral tribunal did. The award was set-aside by the Turkish Court of Appeal⁸⁹²:

by concealing the relevant assumptions and data being the basis for the financial model of the March 2010 report and also the drafters and the purpose thereof, from the respondent, and by depriving the respondent from the opportunity to cross-examine the experts who drafted the report, the arbitral tribunal acted in violation of IBA Rules... Finally, it should be emphasized that, by prohibiting the respondent from viewing the March 2010 report, by concealing from the respondent the drafter and purpose thereof, by hiding the financial models based on the preparation thereof from both the respondent and the respondent's valuation expert, the arbitral tribunal not only violated the principles of fair trial such as the equality of the parties and the

⁸⁸⁶ Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1187; Sanders, 'Commentary On UNCITRAL Arbitration Rules', 204.; Tanrıver, *Medenî Usûl Hukuku*, 2022, II:429.

⁸⁸⁷ Akil, 'Bilirkişi-Uzman Tanık Ayrımı', 176.

⁸⁸⁸ O'Malley, *Rules of Evidence in International Arbitration*, 205–6.; Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1182.

⁸⁸⁹ Born, *International Commercial Arbitration*, 3564.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 287.

⁸⁹⁰ Born, *International Commercial Arbitration*, 3863, 3936.; Angoura, *The Impartiality and Independence of Arbitrators in International Commercial Arbitration*, 169.

⁸⁹¹ ICC Case No. 17586/FM/MHM/EMT available at Lexpera (accessed 25.12.2023)

⁸⁹² Turkish Court of Appeal 11. Civil Chamber, Docket No. 2019/2417, Decision No. 2021/1051, 10.02.2021 (Lexpera, accessed 25.12.2023)

right to be heard, and not only damaged the principle of impartiality of the arbitrators, but also deprived the respondent of the opportunity to present his case. Pursuant to Article V(1)(b) of the New York Convention, any request for enforcement of an award has to be rejected if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.⁸⁹³

The right to be heard requires the arbitral tribunal to obtain an expert opinion if it has to decide an issue for which technical knowledge is required, which the tribunal does not have.

Accordingly, the Swiss Federal Supreme Court held that if the arbitral tribunal refrains from obtaining such an expert opinion without having the required knowledge itself, it violates the right to be heard.⁸⁹⁴

However, in a more recent decision, the Swiss Federal Supreme Court stated that, as arbitration proceedings are governed by the principle that it is primarily the task of the parties to present their case (*Verhandlungsmaxime*) and not the arbitral tribunal's task, the arbitral tribunal does not need to remedy failures of the parties and obtain an expert opinion not requested by the parties.⁸⁹⁵

In addition to the submission of expert opinion, the right to be heard requires that the parties have a reasonable opportunity to comment on the presented opinion in the arbitral proceedings.⁸⁹⁶

In a case before the Singapore Court of Appeal, a party claimed that his right to be heard was violated during the arbitration proceedings due to reasons such as not granting him the right to extend the time to submit an expert opinion and not accepting the additional submitted expert opinion. In this case, where the allegation of violation was misused, the Singapore court found that a party's right to be heard is not unlimited and that this right is implicitly limited to fairness and reasonableness.⁸⁹⁷

⁸⁹³ Esen, 114-16.

⁸⁹⁴ Arroyo, 'Commentary on Chapter 12 PILS, Article 190 [Finality, Challenge: Principle]', 314.; Swiss Federal Supreme Court, 4A_2/2007, Bundesgericht, para. 3.1.

⁸⁹⁵ Swiss Federal Supreme Court, 4A_597/2013, Bundesgericht, para. 3.2.2.

⁸⁹⁶ Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 414 ff.; Hohler, 'Country Report: Switzerland', 393.

⁸⁹⁷ *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd* [2020] SGCA 12, 28 February 2020 (<https://www.supremecourt.gov.sg/docs/default->

The Higher Regional Court of Munich had to decide whether a tribunal breached a party's right to be heard by failing to appoint its own expert when the two party-appointed experts reached diverging opinions. The court left it open whether the assessment of evidence by a tribunal that lacks the relevant expertise is tantamount to ignoring the relevant submissions and, for this reason, amounts to a breach of the right to be heard. In any event, the tribunal examined the expert opinions and assessed them by reference to extrinsic considerations that were not arbitrary. The court could rightfully not review whether or not the assessment was correct, as this would have been contrary to the prohibition of a review on the merits.⁸⁹⁸

In another decision by the Higher Regional Court of Hamburg, the court confirmed that a tribunal does not breach the parties' right to be heard if it, by and large, follows an expert's determinations.⁸⁹⁹ The right to be heard is also not necessarily breached where a tribunal uses its own knowledge and dismisses evidentiary offers because it considers the relevant facts to be sufficiently clarified.⁹⁰⁰

Similarly, courts have found that a tribunal does not breach the parties' right to be heard by conducting independent research on the Internet. Where an arbitral tribunal has undertaken such independent research, it should have offered the parties sufficient opportunity to comment on the result of the findings.⁹⁰¹

As mentioned above, In *Field v. Leeds City Council*⁹⁰² and *Norbrook Laboratories Ltd v Tank*, English courts have affirmed that an employee could act as an expert for his employer.⁹⁰³

Before the TIAL was enacted, the Turkish Court of Appeal considered that not appointing a tribunal-appointed expert when there are technical issues beyond the arbitral tribunal's capacity is grounds for set-aside.⁹⁰⁴

source/module-document/judgement/-2020-sgca-12-pdf.pdf), para. 97 in Demirkol, 'Karşılaştırmalı Hukukta Hakem Kararlarının Tenfizinde Hukukî Dinlenme Hakkı', 197.

⁸⁹⁸ OLG München, 34 Sch 10/11, 2012, 119383 openJur.

⁸⁹⁹ OLG Hamburg, 6 Sch 1/16, Rechtstipp24.

⁹⁰⁰ OLG Köln, 19 Sch 6/17, 2018, 7064 openJur.

⁹⁰¹ OLG München, 34 Sch 18/06, DISArb.

⁹⁰² England and Wales High Court, *Field & Anor v Leeds City Council*, Casemine.

⁹⁰³ 'Norbrook Laboratories Ltd v Tank', 665.; Bor, 'Expert Evidence', 515–16.

⁹⁰⁴ Akıncı, *Milletlerarası Tahkim*, 339.; Ağırman, *Milli & Milletlerarası Tahkim*, 461.

In an older decision by the Turkish Court of Appeal, the award of the arbitral tribunal was set-aside on the grounds that an expert report had not been obtained.⁹⁰⁵ During the arbitral proceedings, the tribunal asked the parties whether to appoint an expert and received a negative response.⁹⁰⁶ This approach by the Turkish Court of Appeal was not right, as party autonomy and the knowledge of the arbitral tribunal would enable it to decide without appointing experts.⁹⁰⁷

The recent approach by the Turkish Court of Appeal is that not appointing an expert cannot directly lead to an annulment.⁹⁰⁸

In a case, the Regional Court stated that the matters that restrict or remove the right of defence might be against public policy in accordance with the procedural law and annulled the arbitral award based on the ground, among others, that the arbitral tribunal did not appoint an expert.

The Regional Court reasoned that Under the Turkish International Arbitration Law, the arbitral tribunal had the power to appoint an expert, and according to the applicable arbitration (ITOTAM) rules, the arbitral tribunal had the obligation to safeguard the parties' right to be heard. The court concluded that since the arbitral tribunal did not appoint an expert while there were contradictory expert reports, there was a procedural deficiency affecting the merits of the case, which is directly connected to the right to a fair trial and the right to be heard, hence also connected to public policy and is a ground for annulment.

Upon appeal, the Court of Appeal stated that whether or not obtaining an expert report is a procedural matter not related to public policy, which the law does not list among the grounds for annulment. Hence, it concluded that the contrary would contradict the legislator's general objective and violate the numerous clauses principle under Article 15 of the TIAL. Thus, the court overturned the Regional Court's set-aside decision.

⁹⁰⁵ Turkish Court of Appeal 15th Civil Chamber, Docket No. 1995/4114, Decision No. 1995/4916, 22.09.1995 in *Dayınlarlı, HUMK'da Düzenlenen İhtiyari İç Tahkim*, 79–81.

⁹⁰⁶ Turkish Court of Appeal 15th Civil Chamber, Docket No. 1995/4114, Decision No. 1995/4916, 22.09.1995 in *Dayınlarlı*, 79–81.

⁹⁰⁷ *Dayınlarlı*, 79–81.

⁹⁰⁸ Turkish Court of Appeal 15th Civil Chamber, Docket No. 2019/2474, Decision No. 2019/3640, 26.09.2019 (*Yargıtay Karar Arama*).

Similarly, in Switzerland, the Swiss Federal Supreme Court⁹⁰⁹ recalled the principles governing a party's (limited) right to request the appointment of an expert by the arbitral tribunal and the circumstances in which the arbitral tribunal can refuse to appoint an expert, hence not be a set-aside ground. The Court decided that the requesting party must be willing to advance the costs of the expert, must relate to the relevant facts of the case, the expert opinion must be suitable to have an effect on the outcome of the proceedings, and the opinion must appear necessary. Additionally, the party must expressly request the appointment of an expert on time and in line with the procedural rules of the arbitration.

In a case before a German court, the respondent objected that the arbitral tribunal did not possess the required knowledge of Italian patent law and, therefore, had violated its duty to call for a tribunal-appointed expert. That court held that the arbitral tribunal's refusal to appoint an expert did not violate the applicant's right to be heard.⁹¹⁰

Based on this assessment of the facts and the state of the dispute on the basis of the submissions of both parties, the arbitral tribunal came to the conclusion that, in the absence of other available documents, a tribunal-appointed expert would not provide any further reliable findings with regard to the future prognosis to be made. In view of this, the well-founded rejection of the respondent's request for an additional expert opinion cannot be considered an arbitrary exceeding of the arbitral tribunal's authority and, consequently, not a violation of the principle of the right to be heard.

The Higher Regional Court of Köln also confirmed that it was not arbitrary by the tribunal to change its view not to appoint an expert. The arbitral tribunal initially intended to appoint an expert as referred to in its former procedural order, and subsequently, the parties were informed of the change in the (preliminary) assessment (in a later procedural order). The Court ruled that the parties had the opportunity to

⁹⁰⁹ Swiss Federal Supreme Court, 4A_277/2017, Bundesgericht, para 3.2 ff.; See Göksu, 'Schiedsgerichtsbarkeit – Anspruch Auf Einholung Eines Gutachtens (BGE 4A_277/2017)'.; See also Schneider, 'Technical Experts in International Arbitration', 446.

⁹¹⁰ BayObLG, 4Z Sch 23/99, CLOUT case 375 UNCITRAL.

comment on the matter and raise any objections. The arbitral tribunal was not prevented from changing its initial view.⁹¹¹

In a case before the High Court of Delhi, the court decided that it is not an obligation for the arbitral tribunal to call for expert evidence, particularly in cases where the arbitrators themselves are experts in the field.⁹¹²

When appointing a tribunal expert, it is advisable that the role and scope of the expert's duty in arbitral proceedings are clearly defined. In a Singapore case, a party attempted to set aside an arbitral award on the ground that the expert's involvement in the case went beyond what had been agreed upon. The applicant submitted that the expert performed tasks that ought to have been carried out by the arbitral tribunal. The court refused this argument and held that "unless there was strong and unambiguous evidence of irregularity in the manner in which the arbitration was conducted, the integrity of the tribunal should not be questioned".⁹¹³

A Court of Appeal in New Zealand rejected a challenge of an award based on an alleged violation of the right to be heard. In that case, the party argued that the arbitrator relied solely on his own expertise in rendering the award, as he determined a price for the delivery of natural gas based on a model he prepared without discussing it with the parties. The Court held that the model prepared by the arbitrator was not an "expert report" which had to be communicated to the parties. As the arbitrator had been chosen for his expert knowledge and the arbitration agreement expressly provided for the use of such knowledge, the court considered the refusal to discuss the model with the parties did not constitute a violation of the rules of natural justice.⁹¹⁴

A court in Jordan rendered a similar decision, stating that arbitrators may rely on their personal knowledge and not on expert opinions to assess damages without the threat of having the award set aside.⁹¹⁵

⁹¹¹ OLG Köln, 19 Sch 6/17, 2018, 7064 openJur, para. 60.

⁹¹² High Court of Delhi, National Thermal Power Corporation Ltd. v. Wig Brothers Builders and Engineers Ltd., para. 55-56, 60.

⁹¹³ Singapore High Court, Luzon Hydro Corp. v. Transfield Philippines Inc.

⁹¹⁴ New Zealand Court of Appeal, Methanex Motunui Ltd. v. Spellman, [2004] 3 NZLR 454.

⁹¹⁵ UNCITRAL, *UNCITRAL Digest*, 149, fn. 736.

A Hong Kong Court decided that if the arbitrators are not experts themselves, they are obliged to appoint an expert and canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond:

[I]n the process of fact finding, arbitrators must have autonomy in drawing inferences as they deem fit and in that respect they are entitled to depart from the positions advanced by the parties. However, on primary factual disputes, they have to act on evidence and give reasonable opportunity to the parties to put forward their respective case on such evidence...given that we are dealing with an arbitration in Hong Kong, the requirement of contractual validity under PRC law has to be decided on the [expert] evidence before the Tribunal... the arbitrators were not appointed on account of their expertise in PRC law and the Respondents had no reason to expect the Tribunal to adopt a view on PRC law which had not been canvassed in the course of the arbitration. In such circumstances, the Tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond before making a decision on the same. The failure of the Tribunal in this regard furnished the Respondents a valid ground of complaint under Article 34(2)(a)(ii).⁹¹⁶ (emphasis added)

In another case before Hong Kong courts, similarly, the court declared that an expert arbitrator could rely on his own expert knowledge. However, an “expert arbitrator should not, in effect, give evidence to himself without disclosing the evidence on which he relies to the parties. But a distinction is made in the cases between general expert knowledge and knowledge of special facts relevant to the particular case.”⁹¹⁷

In Switzerland, the Swiss Federal Supreme Court decided that the requesting party must be willing to advance the costs of the expert, must relate to the relevant facts of the case, the expert opinion must be suitable to have an effect on the outcome of the proceedings, and it must appear necessary. Additionally, the party must expressly request the appointment of an expert on time and in line with the procedural rules of the arbitration. Thus, the court recalled the principles governing a party’s (limited) right to request the appointment of an expert by the arbitral tribunal and the circumstances in which the arbitral tribunal can refuse to appoint an expert. Thus, the mere refusal to appoint an expert cannot be a set-aside ground.⁹¹⁸

⁹¹⁶ Hong Kong, Brunswick Bowling & Billiards Corporation v. Shanghai Zhonglu Industrial Co. Ltd. and Chen Rong, para. 26-28.

⁹¹⁷ Fox v Wellfair Ltd [1981] 2 Lloyds Representative 514, referred in Hong Kong, para. 23.

⁹¹⁸ Swiss Federal Supreme Court, 4A_277/2017, Bundesgericht, para. 3.2 ff.; See Göksu, ‘Schiedsgerichtsbarkeit – Anspruch Auf Einholung Eines Gutachtens (BGE 4A_277/2017)’.; See also Schneider, ‘Technical Experts in International Arbitration’, 446.

In a case before the English High Court, the respondent challenged the award based on not being able to adduce expert evidence due to refusal of the tribunal,⁹¹⁹ where an issue in the case had been the quality of the sold aluminium. The tribunal was composed of arbitrators who had extended knowledge in primary aluminium trading but were not experienced in the trading of secondary aluminium, which the appellant considered material. The English High Court found that the refusal to allow the respondent to adduce expert evidence had been made after careful consideration and did not give rise to a substantial injustice, thus upholding the award.⁹²⁰

In the case *JD Wetherspoon v. Jay Mar Estates*, the English High Court set out that the arbitral tribunal may rely on its own expertise; however, it stressed that the arbitrators could not use the expertise to introduce new evidence.⁹²¹ In another decision by the Court, unless the parties have agreed otherwise, a tribunal should not feel compelled to appoint an expert where the circumstances do not require it.⁹²²

Even if the applicable rules of procedural law (arbitration agreement of the parties, arbitration rules, procedural rules issued by the arbitral tribunal) contain a mandatory rule that expert reports should be removed from the record if the party-appointed expert does not appear for testimony. If the arbitral tribunal were not to take the expert report of such a party-appointed expert into consideration, even though it is relevant, this might amount to a violation of the right to be heard, potentially leading to the annulment of the arbitral award.⁹²³

In *Egmatra AG v Marco Trading Corporation*, the losing party sought to set-aside the award on the basis that the tribunal had rejected an invitation by that party to permit the introduction of expert opinion to assist the arbitral tribunal. The tribunal had declined that request on the basis that it had the necessary expertise. The applicable

⁹¹⁹ Bor, 'Expert Evidence', 517.; Queen's Bench Division (Commercial Court), *Egmatra AG v. Marco Trading Corporation*.

⁹²⁰ Queen's Bench Division (Commercial Court), *Egmatra AG v. Marco Trading Corporation*.

⁹²¹ England and Wales High Court, *JD Wetherspoon Plc v Jay Mar Estates*.

⁹²² *Amego Litho Ltd v. Scanway Ltd* [1994] 1 EGLR 15 reported in Chapter 25: Annulment of International Arbitral Awards (Updated January 2023)', in Gary B. Born, *International Commercial Arbitration* (Third Edition), Kluwer Law International 2021, fn. 577.

⁹²³ Zuberbühler et al., *IBA Rules of Evidence*, 148.; In contrast, the violation of any rules or procedural laws mandating removal from the record is not viewed in the case law of the Swiss Federal Supreme Court as a sufficient basis for successfully challenging an arbitral award.

rules in the arbitration expressly permitted the tribunal to allow, refuse, or limit the appearance of experts. The Court found that there was no serious irregularity, and the challenge to the award was rejected.⁹²⁴

The scenario in which an arbitral tribunal does not sufficiently take into consideration an expert opinion is not considered a ground for refusal. A review of the arbitral tribunal's decision with regard to the question of whether the expert's opinion had been "sufficiently" taken into account would have led to a *révision au fond* and was thus denied by the court.⁹²⁵

The problem here is not that the tribunal does not take the expert opinion into account but the arbitrary nature of not evaluating it and not giving it consideration.⁹²⁶ However, if the expert opinion is not material for the resolution of the dispute, an arbitral tribunal may disregard it, and this itself cannot be a violation of the right to be heard.⁹²⁷

4.4.2. Lack of Improper Notice or Inadequate Opportunity to Comment on Expert Opinion

It is part of the right to be heard that the parties have an opportunity to comment on the expert's opinion.⁹²⁸ Additionally, if the tribunal relies on its own expertise, the parties should be given the opportunity to comment and object to these views. If the party was not allowed to comment on the expert opinion, this could be grounds for a set-aside or refusal of recognition and enforcement of the arbitral award.⁹²⁹

A Hong Kong court set-aside an award on the basis that a party was not given any chance to deal with the tribunal-appointed expert reports relied upon by the arbitral tribunal, which, in effect, prevented the party from presenting its case.⁹³⁰

⁹²⁴ Queen's Bench Division (Commercial Court), *Egmatra AG v. Marco Trading Corporation*.

⁹²⁵ *Borris et al.*, 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 340.

⁹²⁶ Güvenalp, *Milletlerarası Tahkimde İddia ve Savunma Hakkının İhlali*, 91.

⁹²⁷ Güvenalp, 92.

⁹²⁸ Pekcanitez, 'Hukuki Dinlenilme Hakkı', 758.; *Borris et al.*, 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 177.

⁹²⁹ Pekcanitez, 'Hukuki Dinlenilme Hakkı', 767.

⁹³⁰ *Hong Kong, Paklito Investment Limited v. Klockner East Asia Limited*, [1993] 2 HKLR 39, para. 58.

In an ICC arbitration case, the arbitrators appointed an expert to assist the tribunal in technical matters. The tribunal rendered an award. However, no written report of the expert was ever submitted to the parties for comment. The set-aside application was dismissed on the basis that, among others, parties would have received a written report if one was made.⁹³¹

4.4.3. Delegation of Decision-Making

Legal experts are widely used, especially in international investment arbitration. This becomes problematic when a legal expert's opinion is heavily embedded in the award. The parties may challenge the award based on the delegation of the decision-making authority, which belongs inherently to the tribunal. Additionally, if it's obvious that the tribunal copy-pasted the expert report into the award, serious doubt regarding the delegation of the authority can be deduced.⁹³²

Therefore, Recognition and enforcement of an award can be refused if the arbitral tribunal delegates its power to render a decision to an expert.⁹³³

However, as it was decided in the *Price v. Carter* case if the tribunal has reviewed and evaluated the expert's opinion and nevertheless came to the exact conclusion in its award, the argument of delegation cannot succeed.⁹³⁴

In an arbitration case, the tribunal appointed an expert to help determine the applicable law without consulting the parties or inviting the parties to a meeting with the expert, which resulted in a challenge to the award. The English High Court held that this behaviour did not amount to an "irregularity" under the English Arbitration Act and, thus, did not constitute a basis for setting the award aside.⁹³⁵

⁹³¹ *Luzon Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR 705, https://www.elitigation.sg/gdviewer/s/2004_SGHC_204 in Boo, 'Arbitration', 61.

⁹³² Mavrantoukakis, *Das Verbot Der Révision Au Fond Im Internationalen Handelsschiedsverfahren: Zur Bindung Des Staatlichen Gerichts an Die Schiedsgerichtlichen Sachverhaltsfeststellungen Und Zu Den Erforderlichen Ausnahmen*, 113.; Aktepe Artik, *Medeni Usül Hukukunda Hakem Kararlarının İptali Sebepleri*, 380–81.

⁹³³ Borris et al., 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 340.

⁹³⁴ England and Wales High Court, *Price & Anor v. Carter (T/A Ian Carter Building Contractors)*.

⁹³⁵ England and Wales High Court, *Hussman (Europe) Ltd.v. Al Ameen Dev. & Trade Co.* in Bor, 'Expert Evidence', 522.

4.4.4. Challenge Based on Lack of Independence/Impartiality of the Expert and Non-Disclosure

As elaborated, there is generally no requirement under various statutory provisions that party-appointed experts have to be independent.⁹³⁶ However, this does not itself mean that the opinion can be accepted without any recourse to other qualifications such as impartiality.

As seen in *Brandeis (Brokers) Ltd v. Black and others*⁹³⁷, the existence of a party-appointed expert who allegedly was not qualified to give evidence opinion and the tribunal not disqualifying the expert cannot lead in itself to the annulment.⁹³⁸ Since the tribunal has the discretion not to rely on it, giving its reasons, this procedural issue should not be regarded as a serious irregularity.

In a case before US courts, the court denied that mere lack of disclosure between the business or other relationship between the (respondent) party and the party-appointed expert could be a set-aside (vacatur) reason.⁹³⁹

The German Federal Court of Justice also decided (in *I ZB 46/18*) that the tribunal-appointed expert can only be challenged if the violation of its duty of disclosure raises doubts about his impartiality.⁹⁴⁰ So, the mere non-disclosure cannot lead to the set-aside of an arbitral award.

4.4.5. Not Evaluating Conflicting Expert Opinions

Experts are being criticised for becoming hired guns or battlers; in addition to counsel who might be expected to some degree to “battle”, they merely argue in favour of the

⁹³⁶ See Chapter IV Section 2.

⁹³⁷ *Brandeis (Brokers) Ltd v Black and Ors*, 2001 Arbitration Law Reports and Review.

⁹³⁸ Bor, ‘Expert Evidence’, 519.

⁹³⁹ U.S. District Court, Southern District of California, Trevino Hernandez, S. de R.L. de C.V. v. Smart & Final Inc. at 13.

⁹⁴⁰ See German Federal Court of Justice (BGH), I ZB 46/18, BGH.: “Verletzt ... ein Sachverständiger seine Offenbarungspflicht, kann sich daraus ein selbständiger Grund für seine Ablehnung nur ergeben, sofern der Verstoß für sich bereits Zweifel an seiner Unparteilichkeit weckt.”

appointing party.⁹⁴¹ Experts are supposed to be presenting something objective in order to assist the arbitrators.

However, arbitrators are generally left to analyse competing and conflicting expert reports.⁹⁴² This can sometimes prove to be a very difficult task, even to the extent that the experts are no longer facilitating the proceedings but making it more complex and burdensome.⁹⁴³

It is natural that experts with different backgrounds and experiences have conflicting opinions and opposing conclusions on complex matters.⁹⁴⁴ The problem arises where the differences in opinion are due to the differences in factual assumptions or the experts assuming a partisan position.

As is the case in *Phillip Morris v Uruguay or Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*⁹⁴⁵, there is always the possibility of involvement of multiple experts of each party, who have a difference in opinion. It is also possible that, in addition to conflicting experts, there is a tribunal-appointed expert, possibly having a different view on the same issues. These lead to questions about what to do or which part to go for the tribunal when there are conflicting experts.

Before addressing how to deal with conflicting expert opinions, domestic litigation practices in various jurisdictions will be scrutinised to add value to the analysis.

In Türkiye, according to the Turkish Court of Appeal, to resolve the contradiction between the party-appointed expert and the court-appointed expert opinion in

⁹⁴¹ Nessi, 'Expert Witness: Role and Independence', 72.; See Swinehart, 'International Law Commons, and the Organizations Law Commons Recommended Citation Recommended Citation Matthew W. Swinehart, Reliability of Expert Evidence in International Disputes'; Unbound and Langbein, 'The German Advantage in Civil Procedure'.

⁹⁴² Ferhan Yıldızlı, *Uluslararası Tahkimde Zararın Değerlendirilmesi* (Ankara: Seçkin, 2020), 88.

⁹⁴³ O'Malley, *Rules of Evidence in International Arbitration*, 159.

⁹⁴⁴ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 4.

⁹⁴⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), (Annulment Proceeding) Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, para. 250, available at <https://www.italaw.com/sites/default/files/case-documents/ita0221.pdf> (accessed 14.12.2022).

litigation, a new expert should be consulted by the court that established the facts.⁹⁴⁶ This approach is, in fact, similar to the Court of Appeal's solution method in the event of a contradiction between two separate court-appointed experts.⁹⁴⁷ Scholars argue, in parallel with the practice of the Court of Appeal, that the judge should resolve the contradiction between the party-appointed expert and the court-appointed expert opinion by obtaining a new court-appointed expert report on the same subject matter⁹⁴⁸ or order both experts to testify before the court.⁹⁴⁹

The Turkish Court of Appeal deems it crucial that the party-appointed expert opinion must be evaluated:

[T]he party-appointed expert opinion in Article 293 of the HMK is regulated as obtaining information on a subject from a special and technical expert determined by the parties in order to clarify and understand the dispute and to prove the claims and defences. In order to protect the interests of the parties and, in case they are not satisfied with the court-appointed expert report, they may obtain a private expert opinion and submit it to the court in order to ensure that the incident is fully clarified and the correct and fair decision is made. The court is obliged to consider and evaluate the expert opinion submitted by the party, especially in matters requiring special and technical knowledge, if it is related to the subject of the case. In this sense, if one of the parties objected to the expert report based on the party-appointed expert opinion and these objections were never taken into consideration by the court and the objections were not met in a reasoned manner, the right to be heard, which is the most important element of the right to a fair trial regulated in Article 27 of the HMK, Article 36 of the Constitution of Türkiye and Article 6 of the European Convention on Human Rights, may be violated. In the expert opinions submitted to the record, findings and opinions contrary to the opinions determined by the court-appointed expert report have been put forward, and the court-appointed expert report and party-appointed expert opinions contain serious contradictions. Expert opinions are not included in the expert report and were not evaluated in the judgement. In terms of resolving the contradiction between the court-appointed expert report and the party-appointed expert opinions, it was not correct to render a judgement without evaluating and discussing the expert opinion.⁹⁵⁰ (emphasis added)

⁹⁴⁶ Kaplan, 'Medenî Usûl Hukukunda Bilirkişi Raporu İle Uzman Görüşü Arasındaki Çelişkinin Giderilmesi', 570.; for cases see Turkish Court of Appeal, 15th Civil Chamber, Docket No. 2019/748, Decision No. 2019/3857, 9.10.2019 (Lexpera); Turkish Court of Appeal 1. Civil Chamber, Docket No. 2014/1052, Decision No. 2014/17226, 10.11.2014 (Lexpera)

⁹⁴⁷ Kaplan, 570. ; See Turkish Court of Appeal 11. Civil Chamber, Docket No. 2013/16990 Decision No. 2014/18560, 28.11.2014 (Lexpera).

⁹⁴⁸ Pekcanitez, 'Özel Uzman', 395.; Sarısözen, 'Özel Bilirkişi (Uzman Görüşü)', 1729.; Akil, 'Bilirkişi-Uzman Tanık Ayrımı', 175; Işık, 'Uzman Görüşü (Mütalaa)', 93.; Özbek, 'Uzman Görüşünün Yargılamada Değerlendirilmesi', 143.

⁹⁴⁹ Elyıldırım, *Hukuk Yargılamasında Uzman Görüşü*, 178.

⁹⁵⁰ The original judgment in Turkish: "Bilindiği üzere 6100 sayılı HMK'nın 293. maddesinde düzenlenen uzman görüşü, tarafların uyuşmazlığın aydınlanabilmesi, anlaşılabilmesi ve iddia ve savunmaların ispatı için kendisinin belirlediği özel ve teknik bilirkişiden bir konuda bilgi alması olarak düzenlenmiş olup, uygulamada özel bilirkişi adı da verilmektedir. Taraflar kendi menfaatlerini koruyabilmek ve alınan bilirkişi raporundan tatmin olmamaları halinde olayın tam olarak aydınlanmasını sağlamak ve doğru ve adil kararın verilmesi için uzman görüşü alıp mahkemeye ibraz edebilecektir. Mahkeme özellikle özel ve teknik bilgiyi gerektiren konularda tarafın sunduğu uzman görüşünü dava konusu ile ilgili olması halinde mutlaka dikkate almak ve değerlendirmek zorundadır. Bu anlamda alınan bilirkişi raporuna, taraflardan biri, uzman görüşüne dayanmak suretiyle itiraz etmiş

The approach in Germany is similar, where it is suggested that conflicting experts be heard before the court and that a new court-appointed expert be ordered only if the hearing did not result in a resolution of the conflict.⁹⁵¹

In international arbitration, to decide how to handle all reports of various experts, the tribunal has to realise the reasons for differences in opinion before arriving at a conclusion. In practice, mainly three scenarios of conflict can be seen: (i) Expert's relying on different factual baselines, (ii) experts advocating rather than acting as experts and (iii) a genuine difference of opinion between the experts on the same issue.⁹⁵²

The first type of conflict can be resolved and even prevented if the tribunal, after the submissions, instructs the experts on the questions to be answered with details and scope.⁹⁵³

The assumption that experts are analysing objective facts and, therefore, necessarily come to the same conclusion is misleading.⁹⁵⁴ Failure to use common data sets and facts hinders the tribunal's ability to effectively use the experts' opinions. Had the tribunal asked the experts to have a pre-hearing meeting, common data sets and facts could have been mutually used, and experts may have reached conclusions similar to

ve bu itirazlar mahkeme tarafından hiç değerlendirmeye alınmamış ve itirazlar gerekçeli bir şekilde karşılanmamış ise uzman görüşüne dayanan tarafın 6100 sayılı HMK'nın 27, Anayasa'nın 36 ve Avrupa İnsan Hakları Sözleşmesi'nin 6. maddesinde düzenlenen adil yargılanması hakkının en önemli unsuru olan hukuki dinlenme hakkı ihlal edilmiş olabilecektir. Dosyaya ibraz edilen uzman görüşlerinde, 08.04.2013 tarihli bilirkişi raporu ile tespit edilen görüşlerin aksine tespit ve görüşler ileri sürülmüş olup, bilirkişi raporu ile uzman görüşleri ciddi şekilde çelişkiler içermektedir. Mahkemece alınan bilirkişi raporunda ve gerekçeli kararda uzman görüşlerine hiç yer verilmemiş ve bu görüşler değerlendirilmemiştir. Alınan bilirkişi raporu ile uzman görüşleri arasındaki çelişkinin giderilmesi yönünden de mahallinde keşif yapıp yeni bir bilirkişi heyetinden rapor alınması yerine esaslı itiraza uğrayan rapora dayanılarak uzman görüşü kararda gerekçeli olarak değerlendirilip tartışılmadan karar verilmiş olması da doğru olmamıştır.” Turkish Court of Appeal 15th Civil Chamber, Docket No. 2020/3360, Decision No. 2021/1893, 22.04.2021. (Yargıtay Karar Arama, accessed 25. 12.2023); For similar decisions see Turkish Court of Appeal 15th Civil Chamber, Docket No. 2019/748, Decision No. 2019/3857, 09.10.2019, Turkish Court of Appeal 15th Civil Chamber, Docket No. 2017/1782, Decision No. 2017/3805, 06.11.2017; Turkish Court of Appeal 15th Civil Chamber, Docket No. 2015/5127, Decision No. 2016/4635, 10.11.2016.

⁹⁵¹ See Kaplan, 'Medenî Usûl Hukukunda Bilirkişi Raporu İle Uzman Görüşü Arasındaki Çelişkinin Giderilmesi', 571–72, fn. 67.

⁹⁵² Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 195.

⁹⁵³ Jones, 'Redefining the Role and Value of Expert Evidence', 25.

⁹⁵⁴ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 4.; Jones, 'Redefining the Role and Value of Expert Evidence', 25.

one another or at least allowed them to narrow the issues in a joint memorandum.⁹⁵⁵ The use of different methodologies also causes similar issues where the tribunal becomes unable to sufficiently compare the experts' opinions and assess the more persuasive one.⁹⁵⁶

To deal with the second conflict, the tribunal has to assess mostly the personality and credibility of the party-appointed experts first. It has been suggested that the tribunal should consider the integrity of the experts, whether they are objective, their experience, the extent of work carried out on the issue, and whether their opinions would have been the same if instructed by the other party.⁹⁵⁷ The BCLP Survey shows that tribunals are “generally capable of determining when a party-appointed expert is not being objective in their test testimony.”⁹⁵⁸

For the third occasion, if where there are no issues of factual differences or the party-appointed experts do not seem biased or partisan, the tribunal is left to carefully consider all of the available evidence and render a decision based on a careful evaluation. In such a scenario, making a determination is possible since, despite experts' contradictory findings, the arbitral tribunal can still convey knowledge or expertise on the issue.

This is not considered inappropriate, and the tribunal can prefer one expert's report on the other one or formulate its own opinion, stating the reasons for it.⁹⁵⁹ Diverging methodological approaches can result in different conclusions, and it is not always possible for the tribunal to discern which, if any, are correct. “This is particularly the case for expert disciplines where there are multiple accepted methodologies, e.g. delay and disruption expertise.”⁹⁶⁰

⁹⁵⁵ Bernstein, Tackaberry, and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, para. 2-855; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 195.

⁹⁵⁶ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 4.; Jones, 'Redefining the Role and Value of Expert Evidence', 25.

⁹⁵⁷ Bernstein, Tackaberry, and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, para. 2-856.

⁹⁵⁸ 'BCLP 2021 Survey', 14.

⁹⁵⁹ According to Turkish civil procedure, if there are serious differences in their opinion of party-appointed experts, the judge needs to appoint ex officio an independent expert. See Tanriver, *Hukukumuzda Bilirkişilik*, 34.; Pekcanitez, 'Özel Uzman', 416.; Atalay, 'Pekcanitez Usûl', 2021, 1959.

⁹⁶⁰ Jones, 'Redefining the Role and Value of Expert Evidence', 25.

In any case, the tribunal should not leave the conflicting opinions but should try to resolve the differences or explain the view that it has adopted.⁹⁶¹

If the matters cannot be decided on without the expertise required knowledge, it might be necessary to appoint a tribunal-appointed expert.⁹⁶² However, there is no absolute duty to appoint a tribunal expert, as recent case law from various jurisdictions suggests.⁹⁶³

According to the recent German dominant perspective, in the event of conflicting party-appointed expert opinions, it is at the discretion of the arbitral tribunal whether to appoint a third expert. If the arbitrators come to the conclusion that it is not necessary due to the expertise of the arbitrators and do not appoint an expert, this cannot automatically constitute a breach of the right to be heard.⁹⁶⁴

In the event of conflicting expert opinions, it is at the discretion of the arbitration tribunal whether to appoint an expert. If it comes to the conclusion that this is not necessarily due to the expertise of the arbitrators, this does not automatically constitute a violation of the right to be heard.⁹⁶⁵

The High Court in Hong Kong refused enforcement of an award, which was largely based on the report of an expert appointed by the arbitral tribunal against the objection of the defendant and where the defendant was refused the opportunity to comment on the report. The right to comment on the report of the tribunal-appointed expert has been accepted as a basic right by the court, and enforcement was denied since it was not adhered to.⁹⁶⁶

⁹⁶¹ Özbek, *Tahkim Hukuku*, II:1465.

⁹⁶² Bernstein, Tackaberry, and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, para. 2-857.; For civil court practice see Pekcanitez, 'Özel Uzman'.

⁹⁶³ For details see Gramlich, 'Widersprüchliche Parteisachverständige: Pflicht zur Bestellung eines schiedsgerichtlichen Sachverständigen?', 233.; Saenger, 'ZPO § 1049 Vom Schiedsgericht Besteller Sachverständiger', para. 5.

⁹⁶⁴ Musielak and Voit, *ZPO*, § 1049, para. 11; Gramlich, 'Widersprüchliche Parteisachverständige: Pflicht zur Bestellung eines schiedsgerichtlichen Sachverständigen?' 233 ff.; Mavrantonakis, *Das Verbot Der Révision Au Fond Im Internationalen Handelsschiedsverfahren: Zur Bindung Des Staatlichen Gerichts an Die Schiedsgerichtlichen Sachverhaltsfeststellungen Und Zu Den Erforderlichen Ausnahmen*, 98–110.

⁹⁶⁵ Musielak and Voit, *ZPO* § 1049, para. 11; Gramlich, 'Widersprüchliche Parteisachverständige: Pflicht zur Bestellung eines schiedsgerichtlichen Sachverständigen?', 233 ff.

⁹⁶⁶ Hong Kong, *Paklito Investment Limited v. Klockner East Asia Limited*, [1993] 2 HKLR 39.

A challenge before the Superior Court of Ontario was brought against the award from *Nelson v. The Government of the United Mexican States*⁹⁶⁷, with the reasoning that the expert evidence was not evaluated. The court dismissed the application:

While it may be literally true that the applicants' experts were not mentioned by name in the award, it must be understood that the parties submitted their respective expert evidence as exhibits to their pleadings and their pleadings addressed that expert evidence in detail. ...Throughout the award, the tribunal cited extensively from the applicant's claim and reply. Many of the paragraphs cited by the tribunal expressly address the applicant's expert evidence... the tribunal set out in great detail what the arguments of each party were and what those arguments were based on. The evidence was not repeated verbatim in the award but detailed and extensive citations were made referring to the parties' positions and evidence on each issue and but the fact is that the experts' arguments are fully referenced and the tribunal's reasons for why it reached its conclusions are set out in detail. No one could reasonably be in any doubt about whether the tribunal considered the applicant's evidence or why the tribunal decided the case the way it did. For the foregoing reasons, the application for relief under Article 34(2)(a)(ii) of the Model Law from the decision of the tribunal in this case is dismissed.⁹⁶⁸

In *Holder-Cowles and Holden v. Worrall*, each party presented expert evidence on technical issues. The arbitrator, however, dismissed the claim without referring to the expert's opinion. The court stated that:

It was fundamental for the [arbitrator] to have adjudicated upon the conflicting evidence of the experts and to reach a finding as to which expert's opinion he preferred in relation to the issues raised in evidence. A tribunal cannot therefore simply 'sit on the fence' but must be prepared to engage and take a decision on the expert evidence before it, or at least explain why it has been impossible to do so.⁹⁶⁹

4.4.6. Contradicting Parties' Agreement

Party autonomy is the fundamental basis of arbitration. Therefore, the arbitral tribunal and the parties have to follow the framework the parties have foreseen for the tribunal.⁹⁷⁰ Contradicting the parties' agreement can lead to a challenge of the award.

The Higher Regional Court of Frankfurt am Main set-aside an arbitral award due to the failure of one of the parties and its appointed expert to adhere to the agreed

⁹⁶⁷ *Nelson v. The Government of the United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020 available at https://www.italaw.com/sites/default/files/case-documents/italaw11557_0.pdf (accessed 12.10.2022)

⁹⁶⁸ *Nelson v. The Government of the United Mexican States*, 2022 ONSC 1193, para. 37 ff. available at <https://www.italaw.com/sites/default/files/case-documents/italaw170039.pdf> (accessed 9.10.2023); similarly *Oil Basins Ltd v. BHP Billiton LTD & Ors*, [2007] VSCA 255.

⁹⁶⁹ Referenced in Bor, 521.

⁹⁷⁰ See Chapter III Section 3 for details.

procedural rules. During the proceedings, the arbitral tribunal issued a procedural order containing detailed directions for the taking of expert evidence. The directions required the parties to disclose all information that the experts had reviewed in the process of drafting their respective expert reports. This provision had been subject to extensive prior negotiations between the parties and the tribunal and was referred to in the procedural order as an ‘agreement by the parties’. Subsequently, one of the parties failed to disclose all of the information it referred to its appointed expert when preparing its opinion. The Court held that the parties’ agreement on procedural issues, such as the taking of expert evidence, takes priority over the tribunal’s procedural discretion and could not be overridden by the arbitral tribunal.⁹⁷¹

Turkish courts share the view that the appointment of experts should be left to the discretion of the arbitrators, and failure to appoint an expert should not be considered a deficiency that will affect the arbitral award.⁹⁷²

4.5. Interim Conclusion

The use of experts in International Arbitration has increased tremendously in recent years. As can be seen in the survey conducted by the LCIA in 2018, experts were involved in almost all 300 cases.⁹⁷³ Statistics based on views from various experienced practitioners and scholars show that there are apparent problems related to the personality and usage style of party-appointed experts.

Due to the above-described problems of the party-appointed expert and presented opinion, the focus is on improving the use of party-appointed experts. Statistics prove the need for a settled understanding of at least some aspects regarding party-appointed experts.

⁹⁷¹ See OLG Frankfurt am Main decision 26 Sch 13/10, dated 17 February 2011. The German Supreme Court, in its judgment of 2 October 2012, III ZB 8/11, dismissed the appeal against this decision.

⁹⁷² Turkish Court of Appeal 11. Civil Chamber, Docket No. 2016/1652, Decision No. 2016/2111, 29.02.2016.

⁹⁷³ LCIA, Experts in International Arbitration, 17 January 2018 available at <https://www.lcia.org/News/experts-in-international-arbitration.aspx> (accessed 12.03.2022)

First of all, independence and impartiality need to be correctly distinguished and must be evaluated separately. Neither the IBA Rules nor the CIArb Protocol explain how a party-appointed expert can, in fact, be independent and not just show independence.⁹⁷⁴

Although stipulated as requirements in soft laws, due to their status, party-appointed experts cannot be and should not be expected to be independent, but their report can be an independent product. More crucial, impartiality, which reflects itself on the outer world as objectivity, has to be sought from the party-engaged experts so that the expert report fairly helps the tribunal to draw conclusions while rendering a just award.

Moreover, the unregulated use of experts, the lack of a code of conduct and double-hatting, sequential adducing and hearing and reliance on experts, if no assistance is necessary, are adversely affecting and threatening arbitration as an effective dispute resolution mechanism.

When court and annulment decisions are critically evaluated, it becomes obvious that the situations where experts impact the proceedings are as follows: Refusal to allow parties to adduce or consider the expert opinion, lack of improper notice or inadequate opportunity to comment on expert opinion, delegation of decision-making, challenge based on lack of independence of the expert and quality of evidence, not evaluating conflicting expert opinions and contradicting parties' agreement.

The right to be heard and party autonomy grant the parties the right to submit expert evidence and ask the tribunal to consider it.⁹⁷⁵ As a general principle, a tribunal should not refuse to admit expert evidence which is essential to the dispute.⁹⁷⁶ If a tribunal refuses to allow a party to examine an expert at the hearing, this may amount to a violation of the right to present their case.⁹⁷⁷ The limit of the tribunal's discretion is exceeded where it abuses its adjudicatory power by intentionally disregarding the opinion. On the other hand, one can conclude that the party-appointed expert has been

⁹⁷⁴ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.

⁹⁷⁵ See Chapter III Section 3.1.

⁹⁷⁶ Rosenfeld, 'Country Report: Germany', 183.

⁹⁷⁷ Patocchi, Paolo Michele and Niedermaier, 'UNCITRAL Rules', 1187; Sanders, 'Commentary On UNCITRAL Arbitration Rules', 204.; Tanriver, *Medeni Usûl Hukuku*, 2022, II:429.

considered if it is seen in the award that the tribunal has evaluated the opinion of the expert in depth.⁹⁷⁸

It is part of the right to be heard that the parties have an opportunity to comment on the expert's opinion.⁹⁷⁹ In case the tribunal is already composed of experts, then the parties should be given the opportunity to comment and object to these views. If the party was not allowed to comment on the expert opinion, this could be a ground for set-aside or refusal for recognition and enforcement of an arbitral award.⁹⁸⁰

Although it is allowed to use foreign and international law experts in arbitration, this becomes problematic when a legal expert's opinion is heavily embedded in the award in such a way that the tribunal copy-pasted the expert report into the award. Such a decision risks being set aside or, alternatively, not enforced.⁹⁸¹

As elaborated, there is generally no requirement under various statutory provisions that party-appointed experts have to be independent.⁹⁸² However, this does not itself mean that the opinion can be accepted without any recourse to other qualifications such as impartiality.

As seen in *Brandeis (Brokers) Ltd v. Black and others*⁹⁸³, the mere existence of a party-appointed expert who allegedly was not qualified to give evidence opinion and the tribunal not disqualifying the expert cannot lead in itself to the annulment.⁹⁸⁴ Since the tribunal has the discretion not to rely on the expert opinion, this procedural issue should not be regarded as a serious irregularity.

⁹⁷⁸ Akil, 'Bilirkişi-Uzman Tanık Ayrımı', 176.

⁹⁷⁹ Pekcanitez, 'Hukuki Dinlenilme Hakkı', 758.; Borris et al., 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 177.

⁹⁸⁰ Pekcanitez, 'Hukuki Dinlenilme Hakkı', 767.

⁹⁸¹ Borris et al., 'New York Convention, Article V [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]', para. 340.

⁹⁸² See Chapter IV Section 2.

⁹⁸³ *Brandeis (Brokers) Ltd v Black and Ors*, 2001 Arbitration Law Reports and Review.

⁹⁸⁴ Bor, 'Expert Evidence', 519.

Arbitrators are generally left to analyse competing and conflicting expert reports. This can sometimes prove to be a very difficult task, even to the extent that the experts are no longer facilitating the proceedings but making it more complex and burdensome.⁹⁸⁵

In international arbitration, to decide how to handle all reports of various experts, the tribunal has to realise the reasons for differences in opinion before arriving at a conclusion. In practice, mainly three scenarios of conflict can be seen: Expert's relying on different factual baselines, experts advocating rather than acting as experts and a genuine difference of opinion between the experts on the same issue.

The first type of conflict can be resolved and even prevented if the tribunal, after the submissions, instructs the experts on the questions to be answered with details and scope.

To deal with the second conflict, the tribunal has to assess mostly the personality and credibility of the party-appointed experts. It has been suggested that the tribunal should consider the integrity of the experts, whether they are objective, their experience, the extent of work carried out on the issue, and whether their opinions would have been the same if instructed by the other party.⁹⁸⁶

For the third situation, if where there are no issues of factual differences or the party-appointed experts do not seem biased or partisan, the tribunal is left to carefully consider all of the available evidence and render a decision based on its evaluation. The tribunal can either prefer one expert's report on the other one or formulate its own opinion, giving the reasons for it.⁹⁸⁷

Last but not least, the tribunal shall give due regard to the parties' agreement concerning the use of experts. Violation may lead to set-aside or rejection of enforcement.

⁹⁸⁵ O'Malley, *Rules of Evidence in International Arbitration*, 159.

⁹⁸⁶ Bernstein, Tackaberry, and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, para. 2-856.

⁹⁸⁷ According to Turkish civil procedure, if there are serious differences in their opinion of party-appointed experts, the judge needs to appoint ex officio an independent expert. See Tanriver, *Hukukumuzda Bilirkişilik*, 34.; Pekcanitez, 'Özel Uzman', 416.; Atalay, 'Pekcanitez Usûl', 2021, 1959.

CHAPTER V

POSSIBLE SOLUTIONS TO PROBLEMS RELATED TO THE USE OF PARTY-APPOINTED EXPERTS

Above, a picture of experts in general, with a special focus on party-appointed experts and their presence in international arbitration, was presented: the *raison d'être*, their function, role, qualifications, types, and legal basis.

The use of party-appointed experts is directly tied to and affects fundamental rights in arbitration. Although party-appointed experts have their legal basis in primary international and national sources and secondary soft law elements, it is relatively vague how they will be used, treated and assessed in the proceedings.

The above-mentioned criticisms relating to party-appointed experts are not restricted to international arbitration only but can be seen in various domestic courts, too.⁹⁸⁸ The IBA and the CI Arb have developed some standards of conduct for party-appointed experts.⁹⁸⁹ Additionally, various recommendations have been proposed over the years, both for international commercial and investment arbitration and domestic litigation.⁹⁹⁰

Though 52% of the respondents of the BCLP Survey did not think there should be greater control over the use of party-appointed experts,⁹⁹¹ international and national

⁹⁸⁸ For critics in Türkiye see Tanrıver, 'Yasal Düzenleme ve Teorik Boyutuyla Bilirkişilik'; For critics in the UK see Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* (Final Report, 1996); Proske (n 4) 13-30.; Jones, 'Redefining the Role and Value of Expert Evidence', 25–26.

⁹⁸⁹ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 6.; Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming : A New Approach to Expert Evidence', 137.

⁹⁹⁰ See Teomete Yalabık, 'Questioning Expert Witnesses in Litigation and International Arbitration: How to Prevent Partisan Expert Reports and "Battle of Experts"'.
⁹⁹¹ Burn, Morel de Westgaver and Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert', 9.

arbitration practices reveal that solutions are needed to the above-presented problems arising out of the impartiality and unregulated use of party-appointed experts. A transparent body of rules addressing the duties of party-appointed experts and the way their opinions will be dealt with could result in more remedies for the parties and strengthen their role and overall value.

International arbitration has partly owed its success to its flexibility. That's why some consider not overregulating the issue of experts and adapting the process to the nature of each dispute.⁹⁹²

Most institutional arbitration rules contain only general provisions on the evidence, leaving the parties and the tribunal to determine the details. The IBA and CIArb, however, have developed more comprehensive standards of conduct about the taking of evidence, including arrangements for party-appointed experts.⁹⁹³ Nevertheless, issues regarding admissibility, the burden of proof, the standard of proof, the burden to provide evidence and the style of preparing the opinion and its evaluation are either absent or lack vital nuances.

In the last chapter of this thesis, possible solutions will be analysed, and a single or a combination of solutions will be sought for the problems described. Firstly, from an ethical perspective, the effect of a possible code of conduct for party-appointed experts will be examined. Thereafter, methods/practices for the use of party-appointed experts will be evaluated.

5.1. Code of Conduct for Double-Hatting

Although there are some arbitral rules and the IBA Guidelines on Conflicts of Interest in International Arbitration that regulate the code of conduct for arbitrators⁹⁹⁴, there is

⁹⁹² Chazournes/Mbengue/Das/Gros, 494; See Mbengue/Das, *Rules Governing the Use of Experts in International Disputes*, 447-450.; *Plant* criticises that rules could limit the core principle of flexibility of international dispute settlement. See *Plant*, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement', 467-68.

⁹⁹³ Jones, "Ineffective Use of Expert Evidence in Construction Arbitration", 6; Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (ICCA Congress Series, Kluwer Law International 2011) vol 15, 137.

⁹⁹⁴ Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 37.

no widely accepted code of conduct in international arbitration that refers to party-appointed experts.⁹⁹⁵ The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration is the only soft law instrument that comprehensively touches on the use of party-appointed experts in international arbitration.⁹⁹⁶

The lack of a code of conduct has resulted in “double hatting”. Double hatting is an activity describing the situation where actors, such as arbitrators, party counsel and experts in investor-state dispute resolution proceedings, act in these various roles in different proceedings with different roles in each proceeding, such as being arbitrators in one and an expert in another.⁹⁹⁷

Double hatting has been criticised for a long period, and the UNCITRAL Working Group III’s work on “Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for Judges in International Investment Dispute Resolution with respective commentary of the United Nations Commission on International Trade Law” was adopted on 7 December 2023 by the General Assembly Resolution in the 45th plenary meeting.⁹⁹⁸ The draft code of conduct for arbitrators aims, among other issues, to reinforce the duty of independence and impartiality and regulates the practice of arbitrators acting as experts in international investment disputes.

In the UK, the Ethics Committee of the General Council of the Bar has issued guidance to assist members of the Bar in identifying what is permissible by way of a party-appointed expert preparation. It emphasises that counsel has a proper role in assisting an expert with the issues that the expert should address in the report. However, expert reports should be an independent product of the expert in question, and therefore, counsels are forbidden to draft any part of an expert’s report. Nevertheless, counsel

⁹⁹⁵ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 323.; Balkar, *Milletlerarası Ticari Tahkim ve Etik*, 168.

⁹⁹⁶ The CIArb Protocol Article 4(1) foresees that the “expert’s opinion shall be impartial, objective, unbiased and uninfluenced”.

⁹⁹⁷ See Langford, Behn, and Lie, ‘The Revolving Door in International Investment Arbitration’.

⁹⁹⁸ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf (accessed 14 February 2024)

may annotate a draft report, observations and questions for the expert to consider in any revisions to the draft.⁹⁹⁹

A lawyer from the US may be permitted to engage in rehearsals of testimony, including mock cross-examinations, and to take a more interventionist approach to the substance of an expert's opinion, both in terms of written and oral evidence. The expert is coached, which might indicate that the expert is not giving his honest opinion or is not exercising a sufficient degree of independence.¹⁰⁰⁰ A tribunal could impose cost sanctions or publicly censure a party-appointed expert who breaches his duty to remain impartial and assist the arbitral tribunal.¹⁰⁰¹

The possibility of formulating and applying a code of conduct for party-appointed experts is considered generally helpful, but some consider that it should remain in the form of general guidelines rather than a detailed code.¹⁰⁰²

The goal of a Code of Conduct is to ensure a healthy framework for the use of party-appointed experts. That's why it should address fundamental issues that need to be present before, during and after the process.

Firstly, it must address who the expert really is. The expert needs to have some concrete material qualities. An expert is a professional who has undergone education, experience, special knowledge or skills that would enable him to help the arbitral tribunal to decide on disputed issues. It may be enough that an expert is appointed by a party due to one or more of the qualifications (CoC-1). The more qualifications are present, the better the expert's credibility would be.

Secondly, the experts should have abstract-immaterial qualities. The expert shall only accept the proposal to act as an expert if he is impartial and will remain objective during his service. If the expert senses any reasons that will lead him to prepare a

⁹⁹⁹ Parlett, 'Parties' Engagement with Experts in International Litigation', 450.; General Council of the Bar, Ethics Committee, 'Witness Preparation', August 2017, paras. 21–23 available at http://www.barcouncil.org.uk/media/411847/witness_preparation.pdf (accessed 10.09.2022)

¹⁰⁰⁰ Parlett, 450.

¹⁰⁰¹ Burn, Morel de Westgaver and Clark, 'Expert Evidence in International Arbitration: Saving the Party-Appointed Expert', 9.

¹⁰⁰² See de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 493.

biased opinion, the expert shall not accept his office. An expert shall not accept his duty if he is acting as a mediator or arbitrator in another dispute where the parties or any related parties are the disputants (CoC-2).

Thirdly, the expert's opinion shall be an independent product of his own, not influenced by the appointing party (CoC-3). The expert's primary duty and responsibility is against the arbitral tribunal (CoC-4).

In order to accomplish rules 3 and 4, the expert's fees for his services shall be paid before the final report has been prepared so that the expert is not pressured by the parties who wish for a pre-ordered report. The expert's fees shall not be dependent on the outcome of the case (CoC-5).

The expert will be entrusted with sensitive information. Therefore, he shall maintain confidentiality of any and all information related to the dispute or the parties that he has gained before, during or after the proceedings (CoC-6).

An expert shall comply with his Codes of Practice and Guidelines that are foreseen in his profession (CoC-7).

5.2. Method and Practice Solutions

In addition to the code of conduct and guidelines that may be applicable to the use of experts in arbitration generally, various practices have emerged to attempt to address potential concerns regarding the use of party-appointed experts.

5.2.1. Proactive Case Management

The tribunal has the primary responsibility and authority to determine and direct the proceedings.¹⁰⁰³ Not every step or issue can be regulated in statutory provisions or arbitration rules, so the tribunal needs to step in with its procedural orders.¹⁰⁰⁴

To tackle the problems and enhance the usefulness of party-appointed experts requires, first and foremost, proactive involvement by the arbitral tribunal and reinforcement of the expert's duty to assist the tribunal.¹⁰⁰⁵

Rather than leaving the use of party-appointed experts to the parties and the expert's discretion, the tribunal, in cooperation with the parties, should determine at an early stage of the proceedings the disciplines for which expert opinion is required and a list of questions that they want the experts to address.¹⁰⁰⁶ This ensures, from the outset, that evidence will be tendered only on the relevant issues, preventing excessive proceeding costs.¹⁰⁰⁷ For example, when the case does not include complex and highly debated legal issues, the tribunal should inform and direct the parties not to adduce legal experts.¹⁰⁰⁸ This places a burden on the tribunal in its preparation for a hearing.¹⁰⁰⁹

The tribunal may decide to bifurcate the proceedings, such as liability and quantum. The tribunal shall, in such a situation, address that expert opinions on quantum issues shall only be adduced after the tribunal affirms any liability. This would be more cost-efficient considering expenses made for quantum calculations. Once there is a finding

¹⁰⁰³ Tanrıver, *Medenî Usûl Hukuku*, 2022, II:426.; Ağırman, *Milli & Milletlerarası Tahkim*, 393.; Kurkela, Turunen, and Conflict Management Institute, *Due Process in International Commercial Arbitration*, 173.

¹⁰⁰⁴ Dülger, *Milletlerarası Tahkimde Hakemlerin Doğal Yetkileri*, 93.; Budak, 'Tahkim Yargılamasında İlk Aşama: Görev Belgesi ve 1 Numaralı Usuli Karar', 28.

¹⁰⁰⁵ Jones, 'Redefining the Role and Value of Expert Evidence', 24, 34, 39.

¹⁰⁰⁶ Waincymer, *Procedure and Evidence in International Arbitration*, 452.; Ağırman, *Milli & Milletlerarası Tahkim*, 459.; Bor, 'Expert Evidence', 509.; Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 666–68.; Instructions to the expert should be drafted carefully to ensure that experts deal with all relevant matters, without leading them to adopt a particular line of position.

¹⁰⁰⁷ Jones, 'Redefining the Role and Value of Expert Evidence', 34.; For similar practice see ICC, 'ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration', 13, para. 62.

¹⁰⁰⁸ Roney, 'Cross-Examination of Experts', 112.

¹⁰⁰⁹ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 91.; Bor, 509.

of liability, the tribunal is left with an unenviable position of trying to make sense of quantum submissions from experts that have been put in at the beginning without any appreciation of how the liability phase will emerge.

Once the relevant disciplines are selected and the experts have been appointed early in the proceedings, parties get the opportunity to challenge¹⁰¹⁰ experts. This contributes to the efficiency of the proceedings, avoiding later challenges and prolonging the assessment of the opinions.¹⁰¹¹ The tribunal should not allow the legal experts to testify if the tribunal is already an expert on that law.¹⁰¹²

An expert's duty in providing his opinion in the arbitration is to assist the arbitral tribunal in deciding the disputed issues with respect to which expert evidence is adduced.¹⁰¹³ The tribunal could declare that it will impose cost sanctions in respect of a party-appointed expert who breaches his duty to remain impartial and assist the tribunal.¹⁰¹⁴

The arbitral tribunal will be unable to derive conclusions from two opinions that address substantively different questions or matters. Hence, within each expert discipline, the tribunal should establish a common list of questions and issues for the appointed experts to address.¹⁰¹⁵ Thus, arbitrators will understand whether there is a genuine difference in methodology or analysis that leads to different opinions. Common questions and issues should be determined, with the assistance of the parties, during the case management conference.¹⁰¹⁶

¹⁰¹⁰ See Chapter III Section 9.

¹⁰¹¹ Jones, 'Redefining the Role and Value of Expert Evidence', 34.

¹⁰¹² Geisinger, 'Advocacy in International Commercial Arbitration: What For?', 15.

¹⁰¹³ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 303.

¹⁰¹⁴ 'BCLP 2021 Survey', 9.

¹⁰¹⁵ Since the memorial style for written party submissions is generally practiced in international arbitration, expert opinions are generally already submitted, which prevents party-appointed experts to address the same issues based on the same facts. See for critics Jones, 'Redefining the Role and Value of Expert Evidence', 34-36.

¹⁰¹⁶ Jones, 36.

Disclosure of the instructions the expert received is necessary. In particular, the way in which counsel formulates instructions may, on its own, help the tribunal understand whether the expert opinion will be helpful or not.¹⁰¹⁷

The tribunal must maintain active oversight over this process, for instance, assisting where parties cannot agree on the questions to be asked.

Another vital point is that an objective analysis will only be possible after all factual evidence has been provided to both experts. A party-appointed expert who has just been provided evidence from the appointing party will not indeed be able to create an objective opinion.¹⁰¹⁸ Hence, the tribunal must ensure that parties provide both their appointed and counterparty experts with the same factual evidence, and common datasets and expert reports should only be submitted after this has been established.¹⁰¹⁹

Another matter that needs to be addressed is the communication between party-appointed experts and the arbitral tribunal. Contrary to the proposal in the ICC Arbitration Commission Report on Controlling Time and Costs, where it is advised that the tribunal does not communicate directly with a party-appointed expert, except when the expert is testifying at a hearing¹⁰²⁰, the direct engagement by the tribunal would affirm the expert's understanding of his duty against the tribunal.

5.2.2. Joint-Appointment

Where some counsels prefer party-appointed experts, others prefer tribunal-appointed experts. A third way could be a joint-appointment.

Joint-appointment is a hybrid method of expert appointment where either both parties nominate the expert who will be appointed by the tribunal or, without the participation

¹⁰¹⁷ 'BCLP 2021 Survey', 5.

¹⁰¹⁸ That is one of the main reasons the Memorial Style of submission is criticized. See for details Jones, 'Redefining the Role and Value of Expert Evidence', 36.

¹⁰¹⁹ Jones, 36.

¹⁰²⁰ Schäfer and Wilson, 'ICC Bulletin', 2021, 65.

of the tribunal, directly appoint a single joint expert.¹⁰²¹ Alternatively, the parties may propose several experts, and the tribunal chooses one from each list.¹⁰²²

If the parties can agree on a single joint expert, this would benefit from reducing costs and streamlining the proceedings.¹⁰²³ When agreeing on a single joint expert, parties should clarify in the terms of reference whether they would be bound by the conclusions of the joint expert and the report. Almost half (46%) of the stakeholders in arbitration believe that counsel should consider joint expert reports for better arbitration.¹⁰²⁴

The parties may apply to the ICC ADR Rules for the Appointment of Experts and Neutrals¹⁰²⁵ for the appointment of experts. ICC has detailed rules that provide for three different services, which the ICC can provide with respect to experts in a dispute.

As mentioned earlier, CPR Rule 35.7 foresees the usage of a single joint expert. The civil court practice from the UK demonstrates that this method is fruitful.¹⁰²⁶

Jones rightfully stresses that a single joint expert cannot find the solution to the problems brought by the use of party-appointed experts. To rely only on a single expert would cause the tribunal almost blindly to accept the expert's conclusions.¹⁰²⁷

¹⁰²¹ Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', 144.; Schäfer and Wilson, 'ICC Bulletin', 2021, 65.; Jones, 'Redefining the Role and Value of Expert Evidence', 22, 26.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 414.

¹⁰²² In the BCLP survey, the most favoured alternative to the party-appointed expert was a tribunal-appointed expert nominated by the parties (58%), followed by a single joint expert directly appointed by the parties (53%) in 'BCLP 2021 Survey', 9; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 446; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 10.; Also, the ICC Centre for ADR can be engaged to select experts whose experience is tailored to the parties' particular needs. See 'ICC Commission on Arbitration and ADR Report: Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC 2019) ICC Commission on Arbitration and ADR 999 ENG 26, para. 5.32.

¹⁰²³ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 283; Schäfer and Wilson, 'ICC Bulletin', 2021, Section D para(v).

¹⁰²⁴ '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', 30.

¹⁰²⁵ Available at <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/experts/appointment-of-experts-and-neutrals/rules-for-the-appointment-of-experts-and-neutrals/#:~:text=Every%20expert%20or%20neutral%20must,%2C%20availability%2C%20impartiality%20and%20independence.> (accessed 8.05.2022)

¹⁰²⁶ Yazıcı-Tıktık, 'HMK m. 293'teki Uzman Görüşü Kurumu İle Anglo-Sakson Hukuk Sistemindeki Uzman Tanık Kurumunun Karşılaştırılması', 86.

¹⁰²⁷ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 10–11.

5.2.3. Expert Teaming

Even if the parties do not jointly appoint an expert, the expert opinion can still be, at least to a certain degree, a joint product.

Sachs and *Schmidt-Ahrendts* propose the “expert teaming” method where the tribunal will choose two experts, one from each of the two lists the parties proposed and appoint these experts as a team. In this way, the main aim is to ensure the neutrality and objectivity of the experts and a more qualified proceeding.

This method allows each party to exchange a list of expert candidates and comments on the other candidates.¹⁰²⁸ The tribunal then chooses two experts, one from each list, to form the expert team. The arbitrators and the parties meet with the expert team to establish a terms of reference, outlining the expected issues to be answered and the style of the report.¹⁰²⁹

After the exchange of initial reports, parties’ experts (within each discipline) can meet to discuss (in a pre-hearing meeting)¹⁰³⁰ the scope of the differences between them and submit a joint report to the tribunal identifying in summary form (a) assumptions, methodology and opinions on which they agree and (b) assumptions, methodology and opinions on which they disagree.¹⁰³¹

¹⁰²⁸ Sachs and Schmidt-Ahrendts, ‘Protocol on Expert Teaming : A New Approach to Expert Evidence’, 145–46.

¹⁰²⁹ Sachs and Schmidt-Ahrendts, 145–46.

¹⁰³⁰ Jones: “experts are far more likely to find areas of agreement through confidential discussions with each other, before they have formally declared positions in a written report. The tribunal should encourage these discussions to be held in camera without counsel present.” Jones, ‘Redefining the Role and Value of Expert Evidence’, 37.

¹⁰³¹ Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 195.; For problems of instructions from counsel to experts not to agree during the meetings see Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 316. and Jones, ‘Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last’, 145; Schlaepfer and Duvanel, ‘Direct and Re-Direct Examination’, 73–74.; for content of joint report see CI Arb Guidelines for Witness Conferencing in International Arbitration, 36, para. 6(b); See *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Procedural Order No.2, 25 July 2012, para. 2 available at https://jsumundi.com/en/document/other/en-gold-reserve-inc-v-bolivarian-republic-of-venezuela-procedural-order-no-2-wednesday-25th-july-2012#other_document_17483, (accessed: 22.10.2022); *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No. 17, 26 February 2001, para. 12 available at https://jsumundi.com/en/document/other/en-s-d-myers-inc-v-government-of-canada-procedural-order-no-17-and-no-18-monday-26th-february-2001#other_document_1293 (accessed: 22.10.2022); *Jones*

Thereafter, the experts (within each discipline) should produce individual expert reports on areas of disagreement only and not raise unrelated new matters.¹⁰³² Experts should reply to these expert reports, limiting their reply to what their opinion would be if the counterparty expert's assumptions and methodologies were to be accepted.¹⁰³³

Limiting the scope of individual reports to areas of difference facilitates a better understanding of complex issues for the tribunal and enhances the efficiency of the use of party-appointed experts.¹⁰³⁴

The expert team would be questioned at the hearing, including by parties' 'expert consultants' (experts hired directly by the parties to address areas of disagreement between the two members of the expert team).¹⁰³⁵

Sachs describes this method as providing "checks and balances" for the experts' technical findings. It is potentially a way of qualifying experts and ensuring their credibility.¹⁰³⁶

This method offers an option for addressing the credibility of experts but justifies tribunal-appointed experts. It does not address the process of determining whether a party-appointed expert opinion is credible and should be admitted. Despite its potential advantages, the *Sachs* method is said to suffer from a lack of application and has not achieved widespread adoption in international arbitration.¹⁰³⁷

While *Sachs* envisions a solution to a whole host of challenges facing expert evidence by merging the two approaches, there are concerns about the practicality of this proposal with regard to experts' access to relevant documents and information, which would be more readily available to party-appointed experts working closely with counsel.¹⁰³⁸

argues that experts should as a first step prepare a joint expert report, and not after the initial report. Jones, 'Redefining the Role and Value of Expert Evidence', 37.

¹⁰³² Jones, 'Redefining the Role and Value of Expert Evidence', 37–38.

¹⁰³³ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 11.; Jones, 'Redefining the Role and Value of Expert Evidence', 37–38.

¹⁰³⁴ Jones, 'Redefining the Role and Value of Expert Evidence', 37.

¹⁰³⁵ Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming : A New Approach to Expert Evidence', 145.

¹⁰³⁶ Sachs and Schmidt-Ahrendts, 135.; See also Schmidt-Ahrendts, 'Expert Teaming -Bridging the Divide between Party-Appointed and Tribunal-Appointed Experts', 653.

¹⁰³⁷ Jones, 'Redefining the Role and Value of Expert Evidence', 22.

¹⁰³⁸ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 493.

5.2.4. Pre-Hearing Expert Meeting

5.2.4.1. Definition

A pre-hearing expert conference is a meeting between the party-appointed experts prior to the main hearing(s) at which they discuss their respective (a) factual basis, assumptions, methodology and opinions on which they agree and (b) factual basis assumptions, methodology and opinions on which they disagree.¹⁰³⁹ Actually, the joint report described and discussed above is a result of this meeting.¹⁰⁴⁰ Without this meeting, a joint report is a difficult mission.

The goal of this meeting is to streamline the evidentiary process and make the proceedings cost-efficient.¹⁰⁴¹ After the exchange of initial or draft reports, parties' experts (within each discipline) meet and discuss the matters on which expert opinions are necessary.¹⁰⁴²

¹⁰³⁹ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 195.; See for problems of instructions from counsel to experts not to agree during the meetings Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 316. and Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last', 145.; Hacibekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi*, 126.; Schlaepfer and Duvanel, 'Direct and Re-Direct Examination', 73–74.; For the content of a joint report see CIArb Guidelines for Witness Conferencing in International Arbitration 36, para. 6(b); See *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Procedural Order No.2, 25 July 2012, para. 2 https://jsumundi.com/en/document/other/en-gold-reserve-inc-v-bolivarian-republic-of-venezuela-procedural-order-no-2-wednesday-25th-july-2012#other_document_17483 accessed 1 September 2022.

S.D. Myers, Inc. v. Government of Canada, Procedural Order No. 17, 26 February 2001, para. 12. https://jsumundi.com/en/document/other/en-s-d-myers-inc-v-government-of-canada-procedural-order-no-17-and-no-18-monday-26th-february-2001#other_document_1293 accessed 19 August 2022.; Jones argues that experts should as a first step prepare a joint expert report, and not after the initial report, see Jones, 'Redefining the Role and Value of Expert Evidence', 37.

¹⁰⁴⁰ Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren*, 163.

¹⁰⁴¹ Ehle, 'Practical Aspects of Using Expert Evidence in International Arbitration', 82.; Zuberbühler et al., *IBA Rules of Evidence*, 145.; Parlett, 'Parties' Engagement with Experts in International Litigation', 447.; Ünüvar, 'Experts: Investment Arbitration', para. 23.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 424.

¹⁰⁴² Jones argues: "experts are far more likely to find areas of agreement through confidential discussions with each other, before they have formally declared positions in a written report. The tribunal should encourage these discussions to be held in camera without counsel present." See Jones, 'Redefining the Role and Value of Expert Evidence', 37.

5.2.4.2. The Practice of Expert Meeting

A meeting between the experts early¹⁰⁴³ and before the main evidentiary hearing will be useful to prevent a lengthy and exhausting expert testimony phase in the evidentiary hearings, where the experts would possibly not be willing to let go of their opinions. Almost half (46%) of the stakeholders in arbitration believe that counsel should consider early meetings of experts for better arbitration.¹⁰⁴⁴

In this meeting, the experts will come together and discuss their understanding of the dispute and their initial approach/view before the expert report is already drafted.¹⁰⁴⁵

At such meetings, the experts should attempt to come to common ground on as many issues as possible, record them in writing, and submit a joint report.¹⁰⁴⁶ For issues where experts have a difference of opinion, they should render their separate views indicating the reasons for their disagreement, adding to that what their conclusions would be if he would be adopting the counter-expert's position.¹⁰⁴⁷

The IBA Rules, the CIArb Protocol and the UNCITRAL Notes encourage pre-hearing meetings between party-appointed experts from the same discipline.¹⁰⁴⁸ The purpose

¹⁰⁴³ Blackaby and Wilbraham argue that it will take time before the tribunal (and even the parties) can determine the necessary issues to be illuminated with experts in complex investment cases, generally until after the first round of substantive submissions. See Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 666.; Schäfer and Wilson, 'ICC Bulletin', 2021, 64.

¹⁰⁴⁴ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 11; '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', 30.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi', 218.; See also Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration in Waincymer, *Procedure and Evidence in International Arbitration*, 437.

¹⁰⁴⁵ Senogles, 'Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle', 364.; O'Malley, *Rules of Evidence in International Arbitration*, 161; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 195.

¹⁰⁴⁶ Jones, 'Redefining the Role and Value of Expert Evidence', 37.; Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren* (PL Acad Research 2013) 163.

¹⁰⁴⁷ Senogles, 'Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle', 364.; Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 95.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 11.; Jones, 'Redefining the Role and Value of Expert Evidence', 37.

¹⁰⁴⁸ CIArb Protocol, Art. 6; IBA Rules, Art. 5(4); 2016 United Nations and United Nations Commission on International Trade Law, 'UNCITRAL Notes on Organizing Arbitral Proceedings', para. 97–98.; Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 459–60.; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 315.

of these meetings is to attempt to reach an agreement and to identify points of difference.¹⁰⁴⁹ Although indirectly, the Case Management Techniques in the ICC Arbitration Rules also suggest pre-hearing meetings.¹⁰⁵⁰

Notably, when multiple quantum experts are engaged by the parties, it would be beneficial for the tribunal to intervene and guide the party-appointed experts to provide views on or even use the methods of the other expert and provide conclusions. The tribunal will make it easier to have a common ground to compare. This method can lead the party-appointed experts to disassociate themselves from the parties and their counsel and have a more neutral role. Thus, the need for a tribunal-appointed expert would also be diminished, and extensive costs and time loss would be prevented.¹⁰⁵¹

Sachs suggests that such meetings are beneficial because they (i) clarify technical and factual issues (ii) outline areas of agreement and disagreement, (iii) focus on relevant points, (iv) narrow down the differences between expert reports, (v) encourage scientific debate and, consequently, (vi) render the expert evidence more time- and cost-efficient and effective.¹⁰⁵²

When asked to practitioners, over half of respondents (54%) find the practice of experts conferring in advance of the main hearing to be useful, compared to only 7% who do not and 34% who do not exclude the possibility but say that “it depends on the case”.¹⁰⁵³ Scholars also share the view that these hearings “almost always do help”.¹⁰⁵⁴ It is considered useful to enter into discussion with the expert of the other party to identify respective objectives and methods.

¹⁰⁴⁹ Zuberbühler et al., *IBA Rules of Evidence*, 145; Parlett, ‘Parties’ Engagement with Experts in International Litigation’, 447; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 424; Ünüvar, ‘Experts: Investment Arbitration’, para. 23; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 315; Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 459–60.; CI Arb Protocol, Art. 6; IBA Rules, Art. 5(4); United Nations, ‘UNCITRAL Notes on Organizing Arbitral Proceedings’, para. 97–98.

¹⁰⁵⁰ ICC Arbitration Rules Appendix IV, para. (b), para. (e).

¹⁰⁵¹ Blackaby and Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’, 668.; See *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, 31-32, para. 130 <https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf> (accessed 9 April 2023)

¹⁰⁵² Sachs and Schmidt-Ahrendts, ‘Protocol on Expert Teaming : A New Approach to Expert Evidence’, 143–44.

¹⁰⁵³ ‘2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process’, 31.

¹⁰⁵⁴ de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 496.

Blackaby and Wilbraham note that such meetings are likely to be fruitful when they occur between experts of the same qualification, who discuss a narrow scope of specific issues and identify the principal issues dividing the experts. This is expected to distil lengthy complex reports into more digestible ones, thus also assisting parties and the tribunal in preparing to question experts at the hearing more effectively.¹⁰⁵⁵ However, where the divisions between the experts are pivotal to the case, it could be difficult for experts to reach even a partial agreement.¹⁰⁵⁶

For instance, in *Hydro Energy 1 and Hydroxana Sweden v. Spain*, initially, the experts' valuation estimates ranged between 4 million and 161 million EUR. Later, the parties filed a joint model designed in collaboration with their experts, with an accompanying memorandum highlighting the remaining areas of disagreement. The tribunal applied this joint model and found a middle ground of EUR 31 million.¹⁰⁵⁷

5.2.5. Tribunal-Appointed Expert

As explained, tribunal-appointed experts are generally not preferred over party-appointed experts. Nevertheless, the tribunal may appoint an expert if expertise is required to decide on the disputed matters and the parties have yet to adduce expert opinion.

The tribunal may appoint an expert whose competence is known or approach a specialist institution to help identify expertise or invite the parties to suggest suitable experts. The benefit of this process is that the tribunal will determine critical issues of the case early enough in the proceedings to allow for the efficient deployment of the expert.¹⁰⁵⁸

¹⁰⁵⁵ Parlett, 'Parties' Engagement with Experts in International Litigation', 448; Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 666.; See Article 3(1) of the CIArb Protocol.

¹⁰⁵⁶ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 665.

¹⁰⁵⁷ *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Award, 5 August 2020, para. 11-13 <https://www.italaw.com/sites/default/files/case-documents/italaw170209.pdf> (accessed 9 April 2023)

¹⁰⁵⁸ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 332.; Jones, 'Redefining the Role and Value of Expert Evidence', 21.

Additionally, if there are multiple party-appointed experts and the tribunal feels lost due to the complexity of both opinions not clarifying the required expertise, the tribunal can appoint an expert and resort to him as a guide.¹⁰⁵⁹ In that case, this expert should preferably deal only with the issues with which the party-appointed experts disagree.¹⁰⁶⁰ This method is viable when the party-appointed experts disagree on a particular point or when the tribunal doubts the neutrality of the party-appointed experts.¹⁰⁶¹

If the tribunal bifurcated the proceedings and parties have adduced experts only for the merits but not for the quantum stage, the tribunal could appoint the quantum expert.¹⁰⁶² Some argue that this method could be cost-efficient¹⁰⁶³, while the contrary experience from some practitioners reveals that tribunal-appointed experts might not be cost and time-efficient in every case.¹⁰⁶⁴

For instance, in *S.D. Meyers v Government of Canada*, the tribunal decided that a “[tribunal expert should be appointed pursuant to Article 27(1) of the UNCITRAL Rules to assist in the determination of issues that are outstanding as between the Disputing Parties’ expert[s]”.¹⁰⁶⁵ (emphasis added)

¹⁰⁵⁹ Khodykin and Mulcahy, ‘Commentary on the IBA Rules on Evidence, Article 5 [Party-Appointed Experts]’, 330.; Tanriver, *Hukukumuzda Bilirkişilik*, 34.

¹⁰⁶⁰ O’Malley, *Rules of Evidence in International Arbitration*, 172.; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 196.; Lim, ‘Tribunal-Appointed Experts in International Arbitration’, 214.; See *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, para. 585 <https://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf> (accessed 20.10.2022): “The Tribunal has now arrived at the point where it has narrowed the counterclaim on the principal issues of law and fact. The Tribunal has set out the main issues of fact and law which have divided the experts. However, with regard to many of the IEMS/GSI differences, the Tribunal does not feel able to prefer one above the other. It seems to the Tribunal that each was attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation. It is clear to the Tribunal that the experts were effectively shooting at different targets and this has made the work of this Tribunal most difficult.”

¹⁰⁶¹ Wilske and Gack, ‘Expert Evidence in International Commercial Arbitration’, 893.; See Van Houtte, ‘Party-Appointed Experts and Tribunal-Appointed Experts’.

¹⁰⁶² Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 283.

¹⁰⁶³ Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282.

¹⁰⁶⁴ Lehmann and Mazuera, ‘LIDW 2022: States as First-Class Citizens? Special Treatment for States in International Disputes’.; Hoffmann and Shetty, ‘Evidence and Hearings’, 215.; Bacanlı, ‘Bir Alternatif Uyuşmazlık Çözüm Yolu Olarak İstanbul Tahkim ve Arbuluculuk Merkezi (ISTAC) Tahkim Yargılamasında Delillerin İbrazı ve Değerlendirilmesi’, 97.

¹⁰⁶⁵ *S.D. Myers, Inc. v. Government of Canada*, Procedural Order No. 17, 26 February 2001, para. 12, available at <https://jsumundi.com/en/document/other/en-s-d-myers-inc-v-government-of-canada->

The tribunal should not merely rely solely on a tribunal-appointed expert when the parties adduced expert opinion.¹⁰⁶⁶

A tribunal-appointed expert, an alternative to the party-appointed expert, is a less favoured option by practitioners.¹⁰⁶⁷ Not only does it help out the party with fulfilling the burden of proof, but also because it prolongs the case and leads to additional costs, and sometimes even does not solve the issues.¹⁰⁶⁸ The use of a tribunal-appointed expert comes with the risk that the tribunal will rely too heavily on the expert's opinion rather than making its own determination. The tribunal may end up delegating key decision-making responsibilities to the expert, especially if it's a legal issue.¹⁰⁶⁹

Although not realistic, in theory, a party-appointed expert could become a tribunal-appointed expert with consent from the counterparty.¹⁰⁷⁰

One should note that it is not mandatory for the tribunal to appoint an expert if not requested timely.¹⁰⁷¹ Additionally, if the tribunal members consider themselves to be adequately informed about the subject, they may reject a request to appoint an expert.¹⁰⁷² When deciding so, in order to prevent any latter right to be heard concerns, the arbitral tribunal should expressly point out the reasons for refusal.¹⁰⁷³

Parties may not desire the appointment of a tribunal-appointed expert for confidentiality reasons. In ICC Case No. 649.¹⁰⁷⁴, where corruption allegations were

procedural-order-no-17-and-no-18-monday-26th-february-2001#other_document_1293 (accessed 16.12.2022)

¹⁰⁶⁶ Schlosser, Peter F., 'Spontan Präsentierte Zeugen Und (Privat-)Gutachten Nach Deutschem Und Österreichischem Recht', 508.

¹⁰⁶⁷ While 41% are in favour, 32% are against it, in 'BCLP 2021 Survey', 9.

¹⁰⁶⁸ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 86, 94.; See also Van Houtte, 'Party-Appointed Experts and Tribunal-Appointed Experts'.

¹⁰⁶⁹ Jones, "Ineffective Use of Expert Evidence in Construction Arbitration", 10.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 282–83.; Sachs and Schmidt-Ahrendts, 'Protocol on Expert Teaming : A New Approach to Expert Evidence', 140.

¹⁰⁷⁰ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 111.; In line with IBA Guidelines 2.1 (waivable red list).

¹⁰⁷¹ Swiss Federal Supreme Court, 4A_617/2010.

¹⁰⁷² Bundesgerichtshof (German Federal Court of Justice), III ZR 44/89, Wolters Kluwer.

¹⁰⁷³ 'BCLP 2021 Survey', 19.

¹⁰⁷⁴ "In this case, the Consultant raised a confidentiality objection to disclose when asked to reveal banking documents. These documents allegedly showed deposits into the Consultant's account, deductions from the account, and where money went. The Consultant balked to produce the documents since such 'production would jeopardize... legitimate business secrets and possibly secrets of third

made, the parties objected to the analysis of the documents and records by a tribunal-appointed expert.

5.2.6. Examination

The first five recommendations above for the use of party-appointed experts relate to the formation of an understandable opinion that can be evaluated by the tribunal, which has no understanding of the field.

After the opinion of experts has been brought before the tribunal, arbitrators will assess the views of the experts and test whether they are credible and worthy to be accepted for the basis of their decisions. As is especially the case in investment arbitration, multibillion-dollar awards are increasingly becoming normal, and it is vital to examine the experts during their damages determinations.¹⁰⁷⁵

Like witnesses of fact, party-appointed experts are being examined and cross-examined on their opinions.¹⁰⁷⁶ Examination of the opinion(s) can be compared to the safety/homologation tests of new car models before they are allowed on the streets. These tests will uncover whether they are functioning and safe. It is possible that experts consciously or mistakenly have made incorrect assumptions or arithmetical mistakes with material results.¹⁰⁷⁷ This can only be revealed through a proper oral testimony and examination phase.¹⁰⁷⁸ Testimony and examination are deemed to be essentially related to the right to be heard.¹⁰⁷⁹

In cases where one of the parties refers to an expert opinion, the other party must be given the opportunity to make explanations against the expert report in accordance with the right to be heard and equality of arms.¹⁰⁸⁰ Again, if the expert's opinion is

parties. To overcome the confidentiality objection, the tribunal appointed an expert witness.' Despite resistance, the Consultant ultimately submitted documents illuminating facts at odds with those originally proffered" in Uluç, *Corruption in International Arbitration*, 163–64.; See ICC Case No. 6497, Final Award in Van Den Berg, *ICCA Yearbook Commercial Arbitration 1999*, XXIVa:71–79.

¹⁰⁷⁵ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 454.

¹⁰⁷⁶ Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 79.

¹⁰⁷⁷ Atalay, 'Pekcanitez Usûl', 2021, 1961.

¹⁰⁷⁸ Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 458.; Tanrıver, *Hukukumuzda Bilirkişilik*, 32.

¹⁰⁷⁹ Pekcanitez and Yeşilirmak, 'Tahkim', 2713.

¹⁰⁸⁰ Atalay, 'Pekcanitez Usûl', 2021, 1961.

erroneous, it will be possible for the other party to prove this by asking questions, revealing contradictions, and asking questions in order to eliminate the doubts of the arbitrator.

If the expert opinion is evaluated only on paper, it may be incomplete in many aspects and may be evaluated without revealing the errors. The ability of the party or the arbitrator to ask the expert questions about the opinion prepared and submitted to the arbitral tribunal and to investigate the accuracy of his opinion is not an inconvenience but brings quality and benefit to the proceedings. In this way, it will be possible to reach the factual truth. Due to examination, experts will be better prepared and will not act arbitrarily.¹⁰⁸¹

The examination phase has been deemed so critical that, for instance, according to the CIArb Protocol, any expert who has provided a written opinion must give oral testimony unless otherwise agreed by the parties. Failure to appear without a valid reason would cause the tribunal to disregard this expert's written opinion.¹⁰⁸²

5.2.6.1. Examination by the Tribunal

Many arbitral rules foresee that, at the evidentiary hearing, the parties or the tribunal may question the experts on issues raised in the expert's report, parties' submissions or witness statements.¹⁰⁸³

The arbitral tribunal will conduct a subjective and objective test on the expert.¹⁰⁸⁴ The tribunal will decide whether any testimony or examination, and if in which order, will be realised.¹⁰⁸⁵

¹⁰⁸¹ Tanrıver, *Hukukumuzda Bilirkişilik*, 33.

¹⁰⁸² CIArb Protocol Art. 6.1. (h), (i).

¹⁰⁸³ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 287.; Sarisözen, *Medeni Usul Hukukunda Soru Yönelme ve Çapraz Soru*, 349.

¹⁰⁸⁴

¹⁰⁸⁵ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 291.

Practitioners see the arbitral tribunal as “the most important barrier against bias”.¹⁰⁸⁶ Tribunals are “generally capable of determining when a party-appointed expert is not being objective in their testimony”.¹⁰⁸⁷ In case the party-appointed expert breaches his duty to be impartial and assist the tribunal, arbitrators should give limited weight to the testimony and statements.¹⁰⁸⁸

5.2.6.2. Examination by the Parties

Besides examination by the tribunal, the counsel can also examine the party-appointed experts.¹⁰⁸⁹ This has two phases. The first phase is direct examination, where the counsel examines his own expert to make a case before the tribunal. The second and tricker phase is cross-examination.

There is very strong support for the use of cross-examination in international arbitration to test experts. The vast majority believe that cross-examination was always or usually an effective form of testing the expert (86%).¹⁰⁹⁰

An expert who knows that he will be subject to cross-examination through the adversarial process by the opposing counsel is a further check on the process.¹⁰⁹¹ Because counsel will work hard to find any error in the methodology or application in the experts’ views.

For instance, quantum experts can make incorrect assumptions or arithmetical mistakes with material results. That should make the expert’s testimony not credible.¹⁰⁹²

¹⁰⁸⁶ ‘BCLP 2021 Survey’, 14.

¹⁰⁸⁷ ‘BCLP 2021 Survey’, 14.

¹⁰⁸⁸ Jones, ‘Redefining the Role and Value of Expert Evidence’, 24.; ‘BCLP 2021 Survey’, 21.

¹⁰⁸⁹ Tanrıver, *Hukukumuzda Bilirkişilik*, 32.

¹⁰⁹⁰ ‘2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process’, 26.; Abdel Wahab, ‘Party Appointed Experts in International Commercial Arbitration’, 199.; More than two-thirds (%69) of respondents in the BCLP Survey share the view that any potential bias is cancelled out with cross-examination, see ‘BCLP 2021 Survey’, 17.; See critics regarding cross-examination of party-appointed experts Proske, *Expert witness conferencing in Schiedsverfahren*, 31 and Blackaby et al., *Redfern and Hunter on International Arbitration (Student Version)*, 6.138.

¹⁰⁹¹ Parlett, ‘Parties’ Engagement with Experts in International Litigation’, 451.; Aygül, *Milletlerarası Ticari Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 269.; Akıncı, *Milletlerarası Tahkim*, 341.; Tanrıver, *Hukukumuzda Bilirkişilik*, 32.

¹⁰⁹² Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 458.

Examination of the party-appointed expert by the parties on his evaluations and conclusions will strengthen the power of the expert opinion's objectivity.¹⁰⁹³ In practice, the counsel of the party calling the expert would begin the examination-in-chief, followed by cross-examination by the opposing counsel.¹⁰⁹⁴

5.2.6.2.1. Direct Examination

Although experts will present their opinions in writing, counsel may want to draw attention to crucial points and nuances of the case in a short presentation.¹⁰⁹⁵ Direct examination of party-appointed experts can occur as an oral presentation, often accompanied by visual aid.

Direct examination can be an important medium to acknowledge and address weaknesses in a case.¹⁰⁹⁶ During the examination, counsel may only ask “non-leading” questions to the expert. These are the types of questions that do not suggest the answer; however, leave the expert free to tell what he should tell. Consequently, the tribunal will be educated on a technical matter. Besides, through direct examination of its expert, counsels create the opportunity to enhance the credibility of its case.

The tribunal has the discretion to determine specifically how and in what order the examination will take place.

5.2.6.2.2. Cross-Examination

Cross-examination refers to the process by which an attorney, usually through skilled questioning, seeks to elicit, challenge, and clarify the expert's testimony provided during the hearings.¹⁰⁹⁷

¹⁰⁹³ Tanrıver, *Hukukumuzda Bilirkişilik*, 32.

¹⁰⁹⁴ Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 322.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 207.

¹⁰⁹⁵ Waincymer, ‘Advocacy Training in International Commercial and Investment Arbitration’, 72.

¹⁰⁹⁶ Waincymer, 73.

¹⁰⁹⁷ Hobér and Sussman, *Cross-Examination in International Arbitration*, 32–33.

This methodical and adversarial approach aims to uncover inconsistencies, biases, and pertinent information that the counter-witness or expert has provided that may impact the resolution of the dispute. Cross-examination enables the testing of an expert's credibility, the clarification of ambiguities, and the introduction of counter-narratives. Quite occasionally, it is even suggested that cross-examination (additional to the expert conferencing) is advisable¹⁰⁹⁸ or even necessary to have regard to due process.¹⁰⁹⁹

Cross-examination of experts requires a high understanding of technical matters. The cross-examination of a party-appointed expert is one of the most challenging tasks for attorneys in international arbitration. When executed effectively, it is an excellent method to test the opinions of an expert.¹¹⁰⁰

In fact, in the cross-examination of party experts, the opposing counsel should be familiar with all the details of the case, prepare for the cross-examination in detail before the hearing and conduct the cross-examination of the party-appointed expert with a disciplined questioning technique.¹¹⁰¹

Cross-examination aims to shake both the credibility of the expert and his opinion.¹¹⁰² If possible, cross-examination will first try to shake the credibility of the expert. It can be about his personality, qualifications or professional attitude.

US practice uses cross-examination to reveal whether the party-appointed experts adhere to scientific methodology and any relevant standards applied by the expert's profession.¹¹⁰³

¹⁰⁹⁸ Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 72.

¹⁰⁹⁹ Waincymer, *Procedure and Evidence in International Arbitration*, 968.; For critics to this view see Proske, *Expert witness conferencing in Schiedsverfahren*, 46.

¹¹⁰⁰ Roney, 'Cross-Examination of Experts', 110.; Ađırman, *Milli & Milletlerarası Tahkim*, 463–64. Akıncı, *Milletlerarası Tahkim*, 341.

¹¹⁰¹ Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Deđerlendirilmesi', 237.

¹¹⁰² Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 93.; Kesikli, 'Milletlerarası Ticari Tahkimde Delillerin Deđerlendirilmesi', 237.; Allen, Jr., 'United States', 289.; Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 73.

¹¹⁰³ Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 658.

Cross-examination is also perceived necessary to uncover contradictions in the expert's opinion. It can expose inconsistencies between the present and former views of the expert.¹¹⁰⁴

Before cross-examination, the party-appointed expert and counsel should analyse and identify areas to refute the opinion of the counter-expert. They may also identify matters for seeking an agreement that helps their case.¹¹⁰⁵

Equal opportunity should be given to both parties during examination and cross-examination.¹¹⁰⁶ As stressed in *CME Czech Republic B.V. v. The Czech Republic*, the tribunal shall safeguard each party's equal right to present their case, which includes cross-examining the parties' experts.¹¹⁰⁷

In rare circumstances, both parties might not request to cross-examine the expert but still give regard to the written report. However, no request for cross-examination shall not mean that the tribunal or the parties have agreed to the correctness of the content of the expert report (IBA Rules Art. 5(6)).¹¹⁰⁸

5.2.7. Expert Conferencing

5.2.7.1. Definition

Expert conferencing is a method of examination in which two or more party-appointed experts from opposing parties¹¹⁰⁹ present their opinions and are questioned by the

¹¹⁰⁴ Kalpsüz, *Türkiye'de Milletlerarası Tahkim*, 93.; Hunter, 'Expert Conferencing and New Methods', 4, para. 11.; Proske, *Expert witness conferencing in Schiedsverfahren*, 45.; For the argument that credibility should not be subject at the expert conferencing See Raeschke-Kessler, 'Witness Conferencing', 704.; Roney, 'Cross-Examination of Experts', 112.

¹¹⁰⁵ Roney, 'Cross-Examination of Experts', 113.

¹¹⁰⁶ For details see Proske, *Expert witness conferencing in Schiedsverfahren*, 42.;

¹¹⁰⁷ See *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award 14 March 2003, para. 80 available at, <https://www.italaw.com/cases/281> (accessed: 30.08.2022)

¹¹⁰⁸ O'Malley, *Rules of Evidence in International Arbitration*, 162; Khodykin and Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, 321.; Roney, 'Cross-Examination of Experts', 112.

¹¹⁰⁹ Whereas the method is used mostly for party-appointed experts, this method is not excluded when there are also tribunal-appointed experts. See for details Proske, *Expert witness conferencing in Schiedsverfahren*, 39-40.

arbitral tribunal or the counsel during the oral hearings jointly and simultaneously rather than sequentially and separately.¹¹¹⁰

The salient feature of this method is that it allows the experts to interact with each other.¹¹¹¹ Expert conferencing is not a recent phenomenon; its application can also be found in domestic litigation in some states.¹¹¹²

5.2.7.2. The Practice of Expert Conferencing

Generally, expert conferencing can be applied in any case where there are complex factual and technical issues involving multiple opposing experts.¹¹¹³ Additionally, where experts know each other, what is likely, especially in investment arbitrations due to its relatively narrow pool of practitioners, or the experts seemingly agree on some points, the method could be practised.¹¹¹⁴ If the issues where expert opinion is sought are highly controversial or the opposing experts did not opine on the same issues, the method may not be viable.¹¹¹⁵

¹¹¹⁰ Peter, ‘Witness “Conferencing”’, 47.; For various terms used by different authors, such as expert witness conferencing, conferencing, hot-tubbing or joint conferencing, for the same concept see Proske, *Expert witness conferencing in Schiedsverfahren*, 34-37.; Townsend, ‘Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration’, 165.; Wilske and Gack, ‘Expert Evidence in International Commercial Arbitration’, 94.; Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality*, 123.; Pörnbacher, Duncker, and Baur, ‘Gaspreisanpassungs-Schiedsverfahren – Hintergründe und prozessuale Besonderheiten’, 298. Weiss and Bürgi Locatelli, ‘Der Vom Schiedsgericht Bestellte Experte-Ein Überblick Aus Sicht Eines Internationalen Schiedsgerichts Mit Sitz in Der Schweiz’, 482.; Proske, *Expert witness conferencing in Schiedsverfahren*, 38.; Hwang, ‘Witness Conferencing’, 3.; Hwang and Ong, ‘Effective Cross-Examination in Asian Arbitrations’, 285.; Veeder and et al., ‘Act III: Advocacy with Witness Testimony’, 605–6.; Kesikli, ‘Milletlerarası Ticari Tahkimde Delillerin Değerlendirilmesi’, 222.; Can and Tuna, *Milletlerarası Tahkim Hukuku*, 417.

¹¹¹¹ Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.

¹¹¹² See for Australia: The New South Wales Uniform Civil Procedure Rules 2005, R 31.23. available at <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0418#sec.31.19> (accessed 17.12.2022), Jones, 27–28.; See for Canada: Federal Courts Rules SOR/98-106, Rule 52.2 Code of Conduct for Expert Witnesses available at <https://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/page-118.html#:~:text=1%20An%20expert%20witness%20named,person%20retaining%20the%20expert%20witness> (accessed 17.12.2022)

¹¹¹³ Bor, ‘Expert Evidence’, 508.; Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 459–60.; Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.; Proske, *Expert witness conferencing in Schiedsverfahren*, 52.

¹¹¹⁴ Nemeth and Haidostian, ‘The “Hot Tub” Method of Taking Expert Testimony Is Gaining Steam: What You Need to Know’, 92.

¹¹¹⁵ Bor, ‘Expert Evidence’, 509.

The expert conferencing method can be helpful on the condition that it is constructed and controlled firmly by the tribunal but not left solely to the experts or the legal counsel.¹¹¹⁶

No detailed rules on expert conferencing are to be found in arbitration rules.¹¹¹⁷ Therefore, the tribunal, advisably in the first procedural order¹¹¹⁸, should not only determine and inform the participants of the proceedings how the expert and its opinion should be adduced but also the style and procedure of the examination of the experts, time limits, the stage when the conferencing should take place, whether and how cross-examination will be performed.¹¹¹⁹ If not appropriately regulated early in the proceedings¹¹²⁰, the benefits of expert conferencing cannot be expected.¹¹²¹ The tribunal should direct the opposing experts to have a joint report, where possible.

Opposing experts should be placed at the same table in a position that enables them to look into each other's eyes and have a discussion.¹¹²² The tribunal should limit the matters to be addressed by the experts and have a focused conversation rather than an occasional debate. Translators should be made available if necessary.

For the effectiveness of the method, the tribunal should also be well prepared, thoroughly read the written expert opinions, determine the specific matters it needs to understand and make the experts explain their opinions.¹¹²³ This method will only bear fruit if the tribunal carries out its responsibility to manage the case proactively.¹¹²⁴

¹¹¹⁶ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 496.; 'BCLP 2021 Survey', 20.; Proske, *Expert witness conferencing in Schiedsverfahren*, 38,40.; Bor, 'Expert Evidence', 509.; Schütze and Thümmel, *Schiedsgericht Und Schiedsverfahren*, 119, para. 482.

¹¹¹⁷ Proske, *Expert witness conferencing in Schiedsverfahren*, 48.

¹¹¹⁸ Advisably after consultation and in agreement with the parties. Generally the tribunal is "pushing" the parties for conferencing See for details Proske, *Expert witness conferencing in Schiedsverfahren*, 49, 51.

¹¹¹⁹ Proske, *Expert witness conferencing in Schiedsverfahren*, 44, 49.

¹¹²⁰ Preferably, in the first case management conference. In case the tribunal is not in a position to foresee whether the conferencing will be necessary, it should at least foreshadow the possibility.

¹¹²¹ Proske, *Expert witness conferencing in Schiedsverfahren*, 50.; Raeschke-Kessler, 'Witness Conferencing', 699.

¹¹²² Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.185.; Proske, *Expert witness conferencing in Schiedsverfahren*, 53.; Raeschke-Kessler, 'Witness Conferencing', 701.

¹¹²³ ;Bor, 'Expert Evidence', 509.; Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality*, 124.; Raeschke-Kessler, 'Witness Conferencing', 698.

¹¹²⁴ See above in this Chapter V Section 2.1.

The arbitral tribunal will be able to ask questions to each of the experts. After the arbitral tribunal examines the experts, it is imperative to grant the counsels the opportunity to ask supplementary questions to adhere to the right to be heard of the parties.¹¹²⁵ Counsel should ask supplemental questions on issues which still need to be settled or handled. The tribunal may also directly leave the floor to the party counsel and put only additional questions if some points are not clear.

However, counsels need to understand that this examination differs from the conventional cross-examination, in which they lead the examined expert according to the interests of the party.¹¹²⁶ Counsel should allow the experts to interact, and the tribunal should intervene if this is not happening.

Whereas one may think that cross-examination is unnecessary when experts already confer, Proske demonstrates in her study that in practice, mainly expert conferencing and cross-examination take place in arbitration, with differences in each regarding their order.¹¹²⁷

Cross-examination is perceived necessary to uncover contradictions between the former opinions, i.e. published works, and the opinion of a party-appointed expert in the arbitration proceedings or to test the credibility of a party-appointed expert generally.¹¹²⁸ Quite occasionally, it is even suggested that the cross-examination (additional to the expert conferencing) is advisable¹¹²⁹ or even necessary to have regard to due process.¹¹³⁰

¹¹²⁵ Proske, *Expert witness conferencing in Schiedsverfahren*, 45.; Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality*, 123.

¹¹²⁶ See for details Proske, *Expert witness conferencing in Schiedsverfahren*, 44.; Hwang, 'Witness Conferencing', 3.; For the argument by various authors that share the view that expert conferencing is only supplementary to cross-examination see Blackaby et al., *Redfern & Hunter On International Arbitration*, para. 6.184.; Veeder and et al., 'Act III: Advocacy with Witness Testimony', 609–10.

¹¹²⁷ Proske stipulates that sometimes expert conferencing is first applied and sometimes later after cross-examination. See Proske, *Expert witness conferencing in Schiedsverfahren*, 47.

¹¹²⁸ Hunter, 'Expert Conferencing and New Methods', 4, para. 11.; Proske, *Expert witness conferencing in Schiedsverfahren*, 45.; Hunter, 'Expert Conferencing and New Methods', 4, para. 11.; For the argument that credibility should not be subject at the expert conferencing see Raeschke-Kessler, 'Witness Conferencing', 704.

¹¹²⁹ Hunter, 'Expert Conferencing and New Methods', 4, para. 11.

¹¹³⁰ Waincymer, *Procedure and Evidence in International Arbitration*, 968.; For critic to this view see Proske, *Expert witness conferencing in Schiedsverfahren*, 46-47.

Equal opportunity should be given to both parties during examination and cross-examination.¹¹³¹ The existence of a different number of party experts per side does not necessarily, and automatically, lead to unequal treatment of the parties in expert conferencing. However, the arbitral tribunal should avoid even the impression of favouritism towards one party at any time during the hearing.¹¹³²

After the expert has presented his opinion orally or when the tribunal and the parties deem it unnecessary, the examination may be done both by the tribunal and the counsels by asking questions to the expert(s).¹¹³³

Where there are multiple disputed issues from different subject matters that need to be addressed by experts, separate conferences should be directed.¹¹³⁴

5.2.7.3. Evaluation of Expert Conferencing

Over time, with its successful applications, expert conferencing has gained some acceptance in the practice of international arbitration.¹¹³⁵

When asked practitioners about their views on expert conferencing, support seems to be mixed. According to the BCLP Survey, only 49% of respondents agreed that conferencing was more effective than sequential hearing.¹¹³⁶ However, it is important to note that 75% agreed that the effectiveness of conferencing is drastically increased when led by the arbitral tribunal in accordance with an agreed protocol.¹¹³⁷

This method of taking evidence is especially effective in complex arbitrations which have difficult factual and technical issues and where the parties rely on evidence from

¹¹³¹ For details see Proske, *Expert witness conferencing in Schiedsverfahren*, 42.

¹¹³² Proske, 43.

¹¹³³ Proske, 40.; Förstel-Cherng et al., *Beweiserhebung Im Schiedsverfahren*, 83, 174, para. 468, fn. 912.

¹¹³⁴ CI Arb Guidelines for Witness Conferencing in International Arbitration, 34, para. 5(1)(a).

¹¹³⁵ Raeschke-Kessler, 'Witness Conferencing', 689; Townsend, 'Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration', 165; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 446.; Jones, 'Redefining the Role and Value of Expert Evidence', 32.; Some state courts also adopted this method for experts, see Federal Court of Australia, Expert Evidence Practice Note 25 October 2016 available at <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt> (accessed 22.12.2022)

¹¹³⁶ 'BCLP 2021 Survey', 20.

¹¹³⁷ 'BCLP 2021 Survey', 20.

multiple experts.¹¹³⁸ In those circumstances, the conventional approach of examining experts from each side in a linear fashion does not always lead to a clear understanding for both the tribunal and counsels and is not cost-efficient.¹¹³⁹ This is particularly the case if there are multiple and opposing expert statements which are heard in different hearings over a long time span. However, via expert conferencing, the experts are concurrently able to engage with opposing views directly and debate, thus enabling a deeper examination of the contentious issues.¹¹⁴⁰

It is suggested that the arbitral tribunal examines both party-appointed experts to report on the same issues at the same hearing simultaneously and try to infer an understanding regarding their partiality/objectivity and receive a contrast of the experts (and their opinion), which is more convincing by examining them.¹¹⁴¹ This method is supposedly more effective than traditional hearing, where long presentations and examinations take place sequentially and maybe even on different days.¹¹⁴²

A perceived advantage of conferencing experts over the traditional method of examination is that it allows for expert opinions to be fully explored and tested by another expert comprehensively before the tribunal and parties. Conferencing experts may also shorten hearing times and are potentially less adversarial. Conferencing experts may not be suitable when experts have not been instructed to opine on the same issues.¹¹⁴³ However, even when the experts present their opinions on different subject matters if the opinions are strictly interconnected, the method could be useful.¹¹⁴⁴

¹¹³⁸ Bor, 'Expert Evidence', 508.; Hodgson and Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper', 459–60.; Jones, 'Redefining the Role and Value of Expert Evidence', 32.

¹¹³⁹ Brown, 'Oral Evidence and Experts in Arbitration', 85.; Proske, *Expert witness conferencing in Schiedsverfahren*, 31.; Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren*, 73–75.

¹¹⁴⁰ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 280.; Townsend, 'Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration', 165.; Jones, 'Redefining the Role and Value of Expert Evidence', 32.

¹¹⁴¹ Wach and Petsch, 'Der Sachverständigenbeweis Im Schiedsverfahren – Grenzen Der Gestaltungsfreiheit von Parteien Und Schiedsgericht', 96; Peter, 'Witness "Conferencing"', 47.; Senogles, 'Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle', 364.; Blackaby and Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration', 667.; O'Malley, *Rules of Evidence in International Arbitration*, 159; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 194, 196.; Proske, *Expert witness conferencing in Schiedsverfahren*, 26 ff.; Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.

¹¹⁴² Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 95.

¹¹⁴³ Bor, 'Expert Evidence', 509.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 194, 205.; Jones, 'Redefining the Role and Value of Expert Evidence', 33.

¹¹⁴⁴ Proske, *Expert witness conferencing in Schiedsverfahren*, 38.

Expert conferencing can only bear fruit if the tribunal is well prepared and proactive and a joint-report has been established.¹¹⁴⁵

The dynamics of the process can cause the expert to express his own immediate opinions and forget any answer he might have been expected to give to specific questions. It can further start a dynamic conversation, where each expert explains to the arbitral tribunal the reason why he disagrees with the views of the other, hence facilitating the arbitral tribunal's understanding. It may also enable the experts to reach an agreement on some disputed matters.¹¹⁴⁶

The peer pressure and debate which typically results from opposing experts sitting at the same table can also help with rephrasing incorrect or exaggerated previous statements and consequently reducing the number of issues on which experts disagree¹¹⁴⁷

Nevertheless, these described are characteristics derived from various arbitral practices; neither detailed institutional rules nor uniform guidelines as to performing the conference method is present.¹¹⁴⁸

The wording of UNCITRAL Model Law Art. 26 (2) and many jurisdictions like Türkiye or Germany¹¹⁴⁹, which base their statutes on it, seem to support expert conferencing, too.

Whether cross-examination will also be done during the expert conferencing or be accepted as an alternative to conferencing will be up to the tribunal's decision in each case. Whereas one may think that cross-examination is not necessary when experts

¹¹⁴⁵ Jones, 'Redefining the Role and Value of Expert Evidence', 38.; Proske, *Expert witness conferencing in Schiedsverfahren*, 41.

¹¹⁴⁶ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 205–6.

¹¹⁴⁷ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 8.; '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process', 28; Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 94.; Proske, *Expert witness conferencing in Schiedsverfahren*, 38.

¹¹⁴⁸ Proske, *Expert witness conferencing in Schiedsverfahren*, 37.

¹¹⁴⁹ For the German perspective see Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren*, 154–55; Sachs and Lörcher, 'Experts Appointed by Arbitral Tribunal', 295; Lotz, 'Der Sachverständige Im Schiedsverfahren', 209; Schütze, *Zivilprozessordnung Und Nebengesetze: Großkommentar*, § 1049, para. 46.

already conference, *Proske* demonstrates in her study that in practice, mostly expert conferencing and cross-examination both take place in arbitration, with differences in each regarding their order.¹¹⁵⁰

If the party-appointed expert's credibility is already shaken during the examination by the tribunal or the parties, holding a conference may not be helpful in testing another's lack of independence or lack of qualifications, experience or expertise.¹¹⁵¹

5.2.8. Generative Artificial Intelligence as Experts

The use of generative artificial intelligence (GAI) has also caused the arbitration community to find areas to make use of it for further developing the proceedings.

The question arises whether GAI can be used as an expert to opine on the expertise required matters. Party autonomy and procedural flexibility, as applicable principles in many jurisdictions, enable parties to agree freely on the procedure. For instance, the LCIA Rules Art. art. 14.6(iii)), allow the tribunal to employ technology to enhance the efficiency and expeditious conduct of the proceedings. Hypothetically, if the parties agree and allow the tribunal to use GAI rather than appoint an expert, the tribunal could make use of it.

However, in the current state of the art, due to the relative underdevelopment and other concerns regarding GAI tools, it seems a little ahead that GAI will make its way in international arbitration proceedings effectively.

Firstly, GAIs come with the risk of bias, which is already a big concern of party-appointed experts. GAI is primarily controlled and created by humans, and the way they feed the system with specific datasets may lead, although not intentionally, to a biased system.

¹¹⁵⁰ *Proske* stipulates that sometimes expert conferencing is first applied and sometimes later after cross-examination, see *Proske, Expert witness conferencing in Schiedsverfahren*, 47.

¹¹⁵¹ CIArb Guidelines for Witness Conferencing in International Arbitration, 29, para. 3 a- b.

Secondly, ChatGPT, as one of the most prominent of the GAI tools, has limitations in comprehending and contextualising information. This is called hallucination. Hallucination is the problem where the model generates information not grounded in reality.

Last but not least, anyone, especially software developers, can build a GAI tool without having a proper infrastructure or a duly established company that complies with legal obligations. When information is provided to GAI tools, it is fair to argue that it is highly likely that privacy could be violated. As arbitration is inherently confidential when using a GAI tool as an expert, sensitive and confidential information will be provided. As it is not safe for most tools now, if not for bias or hallucination, this concern would deem the use of GAI as experts, at least for now, not possible. As it is regulated in most arbitration rules, every person included must keep the information confidential.¹¹⁵²

While it is true that web browsers and other web pages also collect information that could lead to leaks, due to the conversation style with the GAI model, users tend to share more sensitive information, such as identification of confidential information.

When asked ChatGPT whether and how it could be used in international arbitration as experts and whether it could replace the use of experts, it gave the following answers¹¹⁵³:

Data Analysis: Generative AI can process and analyse large volumes of data, including expert reports, legal documents, case law, and other relevant information. It can help identify patterns, correlations, and inconsistencies in the information presented by party-appointed experts.

Comparative Analysis: Generative AI can generate comparative summaries of the methodologies, assumptions, and conclusions presented by different experts. This can help arbitrators and legal teams better understand the differences and similarities between the expert reports.

Issue Identification: Generative AI can identify key issues and arguments raised by party-appointed experts and provide structured summaries for easier comprehension.

¹¹⁵² See for instance ISTAC Arbitration Rules Art. 21 or Swiss Rules Art. 44.

¹¹⁵³ Text generated by ChatGPT, December 27, 2023, OpenAI, <https://chat.openai.com>.

Alternative Perspectives: By analysing various sources of information, generative AI can help generate alternative viewpoints and arguments that may assist arbitrators in evaluating the expert opinions more comprehensively.

Legal Precedent: Generative AI can assist in searching for and summarizing relevant legal precedent and past arbitral awards that address similar technical or factual issues, helping arbitrators to make informed decisions.

Sensitivity Analysis: Generative AI can perform sensitivity analysis based on varying assumptions, allowing arbitrators to understand how changes in assumptions might affect the experts' conclusions.

However, it's important to note that generative AI is a tool and not a replacement for the expertise and judgement of human arbitrators. It can assist in information processing, analysis, and generating insights, but the final decision-making still rests with the arbitrators. Moreover, the reliability and accuracy of generative AI's output depend on the quality of the input data and the algorithms used.

Additionally, the use of generative AI in arbitration proceedings may raise concerns about transparency, explainability, and due process. Parties should carefully consider how AI-generated insights will be introduced and utilized within the arbitration process and ensure that all parties have an opportunity to address and challenge the AI-generated content.

In summary, while generative AI has the potential to provide valuable assistance in addressing issues related to party-appointed experts, its role should be carefully considered, and its outputs should be evaluated in conjunction with expert opinions and other relevant information.

One of the main problems with party-appointed experts is that they can be biased towards the party that appointed them. This can lead to the expert giving an opinion that is favourable to that party, even if it is not supported by the evidence. A generative AI, on the other hand, is not biased towards any party. It would be able to provide an objective opinion, based on the evidence, regardless of who appointed it.

Another problem with party-appointed experts is that they can be expensive. A generative AI would be much cheaper to use, as it would not require the same level of expertise as a human expert. This would make it more accessible to parties in arbitration proceedings, who may not have the financial resources to hire a human expert.

Finally, a generative AI could help to speed up the arbitration process. Party-appointed experts can often take a long time to prepare their reports. A generative AI could be programmed to

prepare a report much more quickly, which would help to shorten the overall arbitration process.

Of course, there are also some potential drawbacks to using a generative AI in arbitration. One concern is that the AI may not be able to understand the complex legal issues involved in arbitration proceedings. Another concern is that the AI may not be able to provide an opinion that is as persuasive as a human expert.

However, I believe that the potential benefits of using a generative AI in arbitration outweigh the risks. A generative AI could help to solve some of the major problems with party-appointed experts, such as bias, expense, and time delays. As the technology continues to develop, I believe that generative AI will become an increasingly important tool in international commercial and investment arbitration.

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CHAPTER VI

EVALUATION AND CONCLUSION

Experts clarify disputed issues that impact the outcome of the case and support the tribunal in the decision-making process. Arbitrators in international commercial and investment arbitration stem mostly from a legal background. Due to the limited capability of lawyer arbitrators, technical, legal and quantum experts are heavily involved in international commercial and investment arbitration cases.

Although both are used, data and practice preferences show that party-appointed experts are generally preferred over tribunal-appointed experts. This is understandable, as the parties and their counsel want to have full control over their case. For the tribunal, it is also convenient not to find the exact expert and not to deal with the costs. The experts' role should always be considered in combination with the overriding competence and function of the tribunal.

In comparison to a party-appointed expert, the main role of a tribunal-appointed expert is to assist the tribunal solely. The party-appointed expert is also expected to support or explain the position of the party that appointed him. The expert's terms of appointment are defined by the arbitral tribunal; neither party is exclusively responsible for the expert's remuneration, and the tribunal-appointed expert does not receive information exclusively from any particular party. In theory, the absence of a financial incentive and connection with a party will increase the likelihood that the expert will be unbiased.¹¹⁵⁴

Expert opinions in international commercial arbitration are crucial in the decision-making process, and it seems only logical to classify them as a means of evidence.¹¹⁵⁵

¹¹⁵⁴ Lim, 'Tribunal-Appointed Experts in International Arbitration', 212.

¹¹⁵⁵ Proske, *Expert witness conferencing in Schiedsverfahren*, 26.

The tribunal is not strictly bound by expert opinions and will freely appraise them. It may also come to different conclusions.¹¹⁵⁶

The main difference from a party-appointed expert is that parties have far less control over a tribunal-appointed expert unless the expert has the intention to build some.¹¹⁵⁷

Neither the IBA Rules nor the CIArb Protocol themselves explain how an expert can, in fact, be independent and not merely show independence.¹¹⁵⁸ While the CIArb protocol provides useful guidance for the use of party-appointed experts¹¹⁵⁹, it is criticised by some practitioners in an international arbitration context for its ‘Englishness’.¹¹⁶⁰ A clear body of rules addressing the ethical duties and obligations of party-appointed experts would result in more remedies for the parties and, as a consequence, strengthen their role and value in international arbitration.

The prevailing practice, where the parties present conflicting expert opinions on complex issues, leads to inefficiency in the proceedings and the arbitration stakeholders being unsatisfied. One of the main reasons for this is the lack of express binding provisions in major international arbitration regulations such as the UNCITRAL Model Law or arbitration rules. As a result, efforts have been made to overcome these problems through soft law instruments such as IBA Rules or the CIArb Protocol and recommendations from experienced practitioners.

There is strong empirical proof that bias and the unregulated use of party-appointed experts are seen as crucial problems in international commercial and investment arbitration. This is why the focus is to prevent potential bias while the expert opinion is formed, having a well-structured and transparent process for party-appointed experts, which in cooperation simply guides the tribunal without the pressure of pleasing the parties.

¹¹⁵⁶ Zuberbühler et al., *IBA Rules of Evidence*, 170.; ICC Case No. 14079, Procedural Order May 2007, in ICC International Court of Arbitration Bulletin Vol. 25/Supplement (2014): 11; Oetiker, ‘Commentary on Art. 26-30 Swiss Rules of Arbitration’, 313.

¹¹⁵⁷ Bennouna, ‘Experts before the International Court of Justice: What For?’, 346.

¹¹⁵⁸ Jones, ‘Ineffective Use of Expert Evidence in Construction Arbitration’, 7.

¹¹⁵⁹ Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.

¹¹⁶⁰ Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’, 333.; Jones counter criticises this view arguing that it “ignore[s] the need for detailed focus on procedure.” (emphasis added) Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.

In order to achieve these goals, the arbitral tribunal should first and foremost set out the rules for party-appointed experts in the first procedural order. The tribunal should set the issues and disciplines for which expert opinion is required and may expressly stipulate that for other matters, no expert opinion is required and that they would not be called for testimony or their costs would not be considered under arbitration costs. The tribunal should address the qualifications of the experts sought and may also inform the parties that it will appoint experts if required.

The tribunal should set out that, especially if it is an investment arbitration case, the expert should not have acted as arbitrator in another international investment dispute involving (a) the same measures, (b) the same or related parties or (c) the same provisions of the same treaty.

Then, the tribunal shall forward each expert a common set of questions and also the same set of data and evidence to rely on and, if possible, ask the experts within each discipline to meet before the main hearing and produce a joint expert report explicitly mentioning areas of agreement and disagreement, accompanied by an individual report on the disagreed matters only.¹¹⁶¹

It is generally considered useful to enter into a discussion with the expert of the counterparty to identify respective objectives and methods. In that respect, the preparation of a joint report would be very useful and pre-hearing meetings would be helpful.¹¹⁶² These rules should be determined in the procedural order, accompanied by a procedural timetable, and always be reinforced actively by the tribunal.

The tribunal is authorised to appoint an expert itself. However, a single tribunal-appointed expert, without any party-appointed expert involvement, comes with the risk that arbitrators accept the conclusions of that expert without further analysis.¹¹⁶³

To try to find a middle ground, the *Sachs Protocol* envisions a solution to the challenges the expert evidence is facing through merging benefits of both tribunal and

¹¹⁶¹ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 11.

¹¹⁶² de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 496.

¹¹⁶³ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 10–11.

party-appointed experts. Nevertheless, there are concerns with regard to experts' access to relevant documents and information, which would be readily available to party-appointed experts working closely with parties and their counsel. Despite its potential merits, the *Sachs Protocol* has not achieved widespread adoption in international arbitration.¹¹⁶⁴ Although the *Sachs Protocol* addresses the credibility of experts, it is also criticised for being “heavily tilted to justifying tribunal-appointed experts”.¹¹⁶⁵

Conferencing of experts is often effective as the experts discuss only their professional views before the tribunal and counsel. Over time, with its successful applications, expert conferencing has gained some acceptance in the practice of international arbitration.¹¹⁶⁶ This method tries to combat the shortcomings of traditional hearing, where long presentations and examinations take place sequentially and maybe even on different days, resulting in inefficiency.¹¹⁶⁷

This method of taking evidence is especially effective in complex arbitrations which have difficult factual and technical issues and where the parties rely on evidence from multiple experts.¹¹⁶⁸ In those circumstances, the conventional approach of examining experts from each side in a linear fashion does not always lead to a clear understanding for both the tribunal and counsels.¹¹⁶⁹ This is particularly the case if there are multiple and opposing expert statements which are heard in different hearings over a long time span.

¹¹⁶⁴ Jones, ‘Redefining the Role and Value of Expert Evidence’, 22.; de Chazournes et al., ‘Uses of Experts before International Courts and Tribunals’, 493.

¹¹⁶⁵ Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 461.

¹¹⁶⁶ Raeschke-Kessler, ‘Witness Conferencing’, 689.; Townsend, ‘Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration’, 165.; Webster and Bühler, *Handbook of UNCITRAL Arbitration*, 446.; Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.; Some state courts also adopted this method for experts, see 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.>; Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usûlüne Uygulanacak Hukuk ve Deliller*, 285.; Akıncı, ‘Milletlerarası Tahkimde Bilirkişi’, 79.

¹¹⁶⁷ Wilske and Gack, ‘Expert Evidence in International Commercial Arbitration’, 95.

¹¹⁶⁸ Bor, ‘Expert Evidence’, 508.; Hodgson and Stewart, ‘Experts in Investor-State Arbitration: The Tribunal as Gatekeeper’, 459–60.; Jones, ‘Redefining the Role and Value of Expert Evidence’, 32.

¹¹⁶⁹ Brown, ‘Oral Evidence and Experts in Arbitration’, 85.; Proske, *Expert witness conferencing in Schiedsverfahren*, 31.; Christoph Grenz, *Der Faktor Zeit Im Schiedsverfahren*, 73–75.

However, via expert conferencing, the experts are concurrently able to engage with opposing views directly, debate, and enable a deeper examination of the contentious issues.¹¹⁷⁰ The conferencing technique is potentially helpful on the condition that it is controlled and managed firmly by the tribunal.¹¹⁷¹ Another advantage of conferencing experts over the traditional method of examination is that it allows for an expert's opinion to be fully explored and tested by another expert. Moreover, conferencing experts potentially shorten hearing times. Conferencing experts may not be suitable when experts have not been instructed to opine on the same issues.¹¹⁷² However, even when the experts present their opinions on different subject matters if the opinions are strictly interconnected, this method could be viable.¹¹⁷³ The spontaneousness of the process can lead the expert to express his own sincere opinions and forget any answer he might have been expected to give to specific questions. It further engages the experts in a vigorous conversation, where each expert explains to the arbitral tribunal the reason he disagrees with the views of the other, hence facilitating the arbitral tribunal's understanding.¹¹⁷⁴ Sitting at the same table with a fellow can also help with rephrasing incorrect or exaggerated previous statements and consequently reducing the number of issues on which experts disagree.¹¹⁷⁵ If the tribunal is also well prepared and controls the process firmly, then the conferencing would be a dynamic and useful process where expertise issues can be heard and tested in quick time.¹¹⁷⁶

Cross-examination is another vital method for the effective use of party-appointed experts. Through cross-examination, party counsel will uncover inconsistencies, biases, and pertinent information that the counter-expert has provided that may impact the resolution of the dispute. Cross-examination enables the testing of an expert's

¹¹⁷⁰ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 7.; Knoblach, *Sachverhaltsermittlung in Der Internationalen Wirtschaftsschiedsgerichtsbarkeit*, 280.; Townsend, 'Crossing the Hot-Tub – Examining Adverse Expert Witnesses in International Arbitration', 165.; Jones, 'Redefining the Role and Value of Expert Evidence', 32.

¹¹⁷¹ de Chazournes et al., 'Uses of Experts before International Courts and Tribunals', 496.

¹¹⁷² Bor, 'Expert Evidence', 509.; Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 205–6.; Jones, 'Redefining the Role and Value of Expert Evidence', 33.

¹¹⁷³ Proske, *Expert witness conferencing in Schiedsverfahren*, 38.

¹¹⁷⁴ Abdel Wahab, 'Party Appointed Experts in International Commercial Arbitration', 205–6.

¹¹⁷⁵ Jones, 'Ineffective Use of Expert Evidence in Construction Arbitration', 8.; '2012 International Arbitration Survey: Present and Preferred Practices in the Arbitral Process', 28.; Wilske and Gack, 'Expert Evidence in International Commercial Arbitration', 94.; Proske, *Expert witness conferencing in Schiedsverfahren*, 38.

¹¹⁷⁶ Senogles, 'Some Views from the Crucible: The Perspective of an Expert Witness on the Adversarial Principle', 364.

credibility, the clarification of ambiguities, and the introduction of counter-narratives. Depending on the flow of the hearing, additional to the expert conferencing, cross-examination is advisable¹¹⁷⁷ or even necessary to have regard to the right to be heard.¹¹⁷⁸

Currently, the use of GAI for the purpose of replacing experts seems far ahead. Bias, hallucination, and privacy concerns come with the use of GAI. As of today, these concerns cannot be satisfactorily addressed. Nevertheless, in the near future, GAI and other AI tools will highly likely streamline quantum work by automating tasks and performing data analysis.

In conclusion, to tackle the problems arising from the use of party-appointed experts in international commercial and investment arbitration, these aforementioned methods could be helpful depending on the circumstances. However, the tribunal's active involvement and early determination of protocolling the use of party-appointed experts in every detail are indispensable. In particular, designing the examination phase in a conferencing style will enable not only the prevention or disclosure of bias but also accelerate the process for the tribunal to understand the expertise required for technical, legal or quantum issues.

¹¹⁷⁷ Waincymer, 'Advocacy Training in International Commercial and Investment Arbitration', 72.

¹¹⁷⁸ Waincymer, *Procedure and Evidence in International Arbitration*, 968.; For critics to this view see Proske, *Expert witness conferencing in Schiedsverfahren*, 46.

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APPENDIXES

APPENDIX A

RULES FOR THE USE OF PARTY-APPOINTED EXPERTS IN INTERNATIONAL ARBITRATION

Rule – 1 – Determining the Requirement

- 1.1. As soon as the arbitral tribunal receives the case file, it needs to analyse and decide whether it needs the assistance of experts to resolve disputed issues.
- 1.2. If the tribunal decides that it needs assistance, it should identify the disciplines in need of expert evidence.

Rule – 2 – Ordering Parties to Submit Expert Opinion

- 2.1. If the parties have not yet adduced expert reports, but the arbitral tribunal determined that expertise is necessary, it shall order the parties to submit an expert opinion in due time set by the tribunal.
- 2.2. The tribunal needs to make sure that all factual evidence from all parties has been provided to all experts in due time.
- 2.3. Depending on the experience of the arbitral tribunal, it may offer suitable experts whose credibility has been proven in previous arbitration.

Rule – 3 – Preliminary Analysis of Expert Opinion

- 3.1. If the parties at that stage have already adduced expert reports in the disputed matters the tribunal had considered requiring expert opinion, the tribunal may analyse the expert opinion to determine whether the opinion addressed the corresponding issues.

Rule – 4 – Meetings of Experts and Joint-Report

- 4.1. If both or one of the expert reports did not address some or all of the issues which the tribunal determined to be addressed, the tribunal shall establish within each discipline a common list of questions and direct the experts to hold meetings and cooperate.
- 4.2. In this meeting, the experts need to produce a joint expert report identifying areas of agreement and disagreement regarding facts, methodology, and conclusion.

Rule – 5 – Individual Expert Reports and Form of Report

- 5.1. In case of disagreement, the tribunal needs to require the experts within each discipline to produce individual expert reports on areas of disagreement only. After these reports have been submitted to the tribunal, if it deems it necessary, it should require the experts to produce ‘reply’ expert reports containing views in the alternative showing what their conclusions would be if the other expert’s factual basis and methodologies were accepted.
- 5.2 The Expert Report shall contain:
 - (a) the full name and address of the Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal representatives, advisors, witnesses and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience, including areas outside his or her expertise;
 - (b) a description of the instructions and questions pursuant to which he or she is providing his or her opinions and conclusions;
 - (c) a declaration of his impartiality and objectivity;
 - (d) a declaration that his opinions are an independent product of his own views and conclusions;
 - (e) a statement that he has received his remuneration before the final production of this report;

- (f) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
- (g) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents and sources that he or she relies on shall be referenced in a way that is easily accessible.
- (h) if the Expert Report has been translated, a statement as to the language in which it was originally prepared and the language in which the expert anticipates giving testimony at the hearing;
- (i) the signature of the expert(s) and its date and place; and
- (j) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Report will be given to each author.

Rule – 6 – Testimony and Examination

- 6.1. Experts within each discipline will testify in a conference and will be examined by the tribunal and, if the tribunal deems it necessary, by the party counsel.
- 6.2. The tribunal shall not allow for the hearing of experts if the tribunal has not deemed it necessary to have expertise-required issues to be addressed. Nevertheless, if the tribunal considers basing its award on the conclusion of only one of the experts, it shall order the hearing of experts to allow parties to examine the expert.

Rule – 7 – Evaluation of the Report

- 7.1. The tribunal shall have the authority to freely assess the experts' reports together with all other evidence, including the tribunal-appointed expert's report.
- 7.2. The tribunal may come to a different conclusion than presented in the experts' opinion, provided it gives explicit reasons and allows parties to comment on its views.

APPENDIX B
CODE OF CONDUCT

Rule – 1

An expert is a professional who has undergone education/training and has experience, special knowledge or skills that would enable him to help the arbitral tribunal decide on disputed issues that require special understanding it does not possess.

Rule – 2

The expert shall only accept the proposal to act as an expert if he is impartial and will remain objective during his service. If the expert senses any reasons that will lead him to prepare a biased opinion, the expert shall not accept his office. An expert shall not accept his duty if he is acting as a mediator or arbitrator in another dispute where the parties or any related parties are the disputants.

Rule - 3

The expert's opinion shall be an independent product of his own, not influenced by the appointing party.

Rule – 4

The expert's primary duty and responsibility is against the arbitral tribunal.

Rule – 5

The expert's fees for his services shall be paid before the final report has been prepared. The expert's fees shall not be dependent on the outcome of the case.

Rule – 6

The expert shall maintain confidentiality of any and all information related to the dispute or the parties that he has gained before, during or after the proceedings.

Rule – 7

An expert shall comply with his Codes of Practice and Guidelines that are foreseen in his profession.



APPENDIX C
LIST OF COURT DECISIONS

1. Australia

Oil Basins Ltd v. BHP Billiton LTD & Ors, [2007] VSCA 255.

2. Germany

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OLG Frankfurt am Main, 1 U 104/96, 28th April 2005.

OLG Saarland, 5 W 42/08-16, 11th March 2008.

OLG Frankfurt am Main, 26 Sch 13/10, 17 February 2011.

3. Hong Kong

Hong Kong. Brunswick Bowling & Billiards Corporation v. Shanghai Zhonglu Industrial Co. Ltd. and Chen Rong, No. HCCT 66/2007 (Hong Kong, Court of First Instance, In the High Court of the Hong Kong Special Administrative Region 10 February 2009).

———. Paklito Investment Limited v. Klockner East Asia Limited, No. HCMP002219/1991 (Hong Kong, Court of First Instance 15 January 1993).

4. New Zealand

New Zealand Court of Appeal. Methanex Motunui Ltd. v. Spellman, [2004] 3 NZLR 454 (New Zealand Court of Appeal 2004).

5. Switzerland

Swiss Federal Supreme Court. 4A_2/2007, Bundesgericht (Swiss Federal Supreme Court 2007).

———. 4A_178/2015, Bundesgericht (Swiss Federal Supreme Court 2015).

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———. Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A., Swiss Federal Supreme Court June 1996).

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6. Türkiye

Turkish Court of Appeal 15th Civil Chamber, Docket No. 1995/4114, Decision No. 1995/4916, 22.09.1995

———. 1st Civil Chamber, Docket No. 2014/1052, Decision No. 2014/17226, 10.11.2014

———. 11th Civil Chamber, Docket No. 2013/16990 Decision No. 2014/18560, 28.11.2014

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———. 11th Civil Chamber, Docket No. 2020/577, Decision No. 2021/618, 01.02.2021

———. 11th Civil Chamber, Docket No. 2019/2417, Decision No. 2021/1051, 10.02.2021

7. India

High Court of Delhi. National Thermal Power Corporation Ltd. v. Wig Brothers Builders and Engineers Ltd., No. OMP 16/2003 [2009] INDLHC 1466 (High Court of Delhi 17 April 2009).

8. UK

Queen's Bench Division (Commercial Court). *Egmatra AG v. Marco Trading Corporation*, No. [1999] 1 Lloyd's Representative 862 (Queen's Bench Division (Commercial Court) 28 July 1998).

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———. *Price & Anor v. Carter (T/A Ian Carter Building Contractors)*, No. [2010] EWHC 1451 (TCC) (England and Wales High Court 18 June 2010).

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9. Canada

Supreme Court of Canada. *R. v. Mohan*, [1994] 2 SCR 9, No. 23063 (Supreme Court of Canada 5 May 1994).

———. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, No. 35492 (Supreme Court of Canada 30 April 2015).

10. USA

U.S. District Court, Southern District of California. Trevino Hernandez, S. de R.L. de C.V. v. Smart & Final Inc., No. 09-cv-2266 BEN (NLS) (U.S. District Court, Southern District of California 17 June 2010).

11. Singapore

Luzon Hydro Corp. v. Transfield Philippines Inc., Singapore High Court, [2004] SGHC 204, 13 September 2004.



APPENDIX D
LIST OF ARBITRATION CASES

ICSID

1. Suez, Sociedad General De Aguas De Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19
2. Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No ARB/08/6
3. Abaclat and Others v Argentine Republic, ICSID Case No ARB/07/5
4. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)
5. Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, Award, 12 July 2019, ICSID Case No ARB/12/1
6. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21
7. VM Solar Jerez GmbH, M Solar Verwaltungs GmbH, Solarizz Holding Verwaltungs-GmbH, M Solar GmbH & Co. KG, Solarizz Holding GmbH & Co. KG and Helmut Vorndran v. Kingdom of Spain, ICSID Case No. ARB/19/30,
8. 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
9. Joshua Dean Nelson and Jorge Blanco v. United Mexican States, ICSID Case No. UNCT/17/1
10. Venezuela Holdings, BV and others v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27
11. Occidental Petroleum Corporation and others v Republic of Ecuador, ICSID Case No ARB/06/11
12. Mar Int'l Nominees Establishment v Guinea, ICSID Case No ARB/84/4
13. Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia (ICSID Case No. ARB/22/14)
14. Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13
15. Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine (ICSID Case No. ARB/21/15)

16. Orazul International España Holdings S.L. v. Argentine Republic (ICSID Case No. ARB/19/25)
17. Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34)
18. Eiser Infrastructure Limited Andenergía Solar Luxembourg S. À R.L. v Kingdom of Spain (Eiser v Spain), ICSID Case No. ARB/13/36
19. Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3
20. Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28
21. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18
22. Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33
23. Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/19
24. SolEs Badojoz GmbH v Kingdom of Spain, ICSID Case No ARB/15/38.
25. Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9
26. Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1
27. Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2
28. Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42

ICC

1. ICC Case No. 6497
2. ICC Case No. 5418
3. ICC Case No. 4629
4. ICC Case No. 14079
5. ICC Case No. 12131
6. ICC Case No. 12761
7. ICC Case No. 17818
8. ICC Case No. 20065
9. ICC Case No. 18981

10. ICC Case No. 6497

UNCITRAL

1. CME Czech Republic B.V. v. The Czech Republic, 14 March 2003

LCIA

1. LCIA Ref. No 97/X27

SCC

1. Green Power K/S and Obton A/S v. Spain, SCC Case No. V 2016/135

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Published Works:

Books:

Ömer Faruk Kafalı, Tahkim Yargılamasında Ara ve Nihai Hakem Kararları,
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