An arbitration dilemma: party-appointed experts *vs.* tribunal-appointed experts. A comparative study

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Abstract

Arbitration, as an alternate method of solving disputes, is greatly reliant on its capacity to offer an efficient procedure, in terms of costs involved and time consumed to reach a decision on parties' disputes. Taking of evidence in a cost and time effective manner is, therefore, a vital issue, one that the parties and the arbitral tribunal consider with the utmost care; it is the screen that reflects the image that the parties are trying to credit as being the truth. Expert witnesses are often called upon to present a professional view on technical or economic aspects that cannot be decided by the arbitral tribunal without proper expert information. The object of this study is to offer a comparative analysis of the choices that the parties and the arbitral tribunal have to make in taking expert evidence as well as the implications of these choices.

Keywords: *arbitration, expert witnesses, independents experts, party-appointed experts.*

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1. An introductory survey

A personal survey conducted by the author revealed that out of almost 470 files registered, in the last three years, in the caseload of the Court of International Commercial Arbitration (CICA) attached to the Chamber of Commerce and Industry of Romania, the arbitral tribunals have ordered the production and submission of more than 400 expert reports, on various technical, economical or scientific issues. Out of these expert reports, the vast majority was submitted by independent, neutral experts, appointed by the arbitral tribunal and only 4 expert reports were submitted by party-appointed experts[2]. In statistical terms, less than 1%

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[2] Sârbu, Eugen, Castravete, Ana-Maria, *Arbitrajul in constructii. Cum e mai bine: experti parte sau experti numiti de tribunalul arbitral?*, available at: https://www.arenaconstruct.ro/arbitrajul-in-constructii-cum-e-mai-bine-experti-parte-sau-experti-numiti-de-tribunalul-arbitral/, last accessed on 18 April, 2022.

of the expert reports submitted to CICA's arbitral tribunals were assigned to party-appointed experts.

There is, therefore, a huge discrepancy between the large number of independent expert reports and the insignificant number of party-appointed expert reports noticeable in the caseload of the main Romanian arbitration institution. This difference may be grounded on various reasons, one of them being a lack of confidence in a process based on evidence provided by an expert that is paid by a party; it may, as well, be the result of different calculations and assumptions made by the parties. The possible causes of such discrepancy are hereafter reviewed and explained.

2. The international approach

A number of important sources address the issue of expert reports; first, there are national laws, such as the English Arbitration Act 1996, the US Federal Arbitration Act, the Swedish Arbitration Act and, mainly, arbitration laws in other prominent jurisdictions. Under all of the aforementioned national laws, the arbitral tribunal may appoint independent, neutral experts or may allow the parties to appoint their own experts; there are no specific directions regarding when and why the arbitral tribunal may opt for one or another of these solutions.

The issue is also addressed (although scarcely) in the UNCITRAL Model Law on International Commercial Arbitration, as well as in various rules and regulations issued by reputed institutional arbitration bodies.[3] Besides these, the IBA Rules on Taking of Evidence in International Arbitration (the IBA Rules - edition 2020)[4], the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules – 2018)[5] and the CIArb International Arbitration Practice Guideline on Party-appointed and Tribunal-appointed Experts (the "CIArb Guideline")[6] are the most prominent rules, enjoying a remarkable global authority although they are not issued by a state or an institutional arbitration body.

[3] See, for instance, ICC Arbitration Rules, entered into force on 1 January 2021; LCIA Arbitration Rules, effective 1 October 2020 or the SCC Rules, entered into force on 1 January 2017.

[4] The International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules), revised by IBA Council on 17 December 2020. Available at> https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b; Waincymer, Jeffrey Maurice, *Procedure and Evidence in International Arbitration*, Kluwer Law International 2012, Netherlands, p. 72; Jones, Doug, *Methods for Presenting Expert Evidence*, available at https://globalarbitrationreview.com/guide/the-guide-evidence-in-interna tional-arbitration/1st-edition/article/methods-presenting-expert-evidence, last accessed on 18 April 2022.

[5] Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) made available for signing on 14 December 2018 in Prague by a Working Group that was formed with representatives from around 30, mainly civil law, countries. Available at> https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf.

[6] The Chartered Institute of Arbitrators, founded in 1915, is a UK based society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Besides the CIArb International Arbitration Practice Guideline on Party-appointed and Tribunal-appointed Experts CIArb has also issued the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the CIArb Protocol), which will be also addressed in this paper.

The appointing of the experts is an issue that is, also, addressed in the Central and East European countries, where arbitration laws and rules originate and are influenced by occidental standards, but where the statist model still prevails.

2.1 The IBA Rules

The IBA Rules lay out the most clear and concise frame for taking of evidence through expert reports, which has become a standard approach in international arbitration and, consequently, it is followed by several international arbitration rules.

First of all, when considering the appointment of an expert, the IBA Rules grant adequate attention to the issue of their independence. According to Article 5 of the IBA Rules, a party may decide to rely on a party-appointed expert who has to: (a) declare any past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal (b) provide a description of the instructions pursuant to which they are providing their opinions and conclusions and (c) file a statement of independence from the Parties, their legal advisors and the Arbitral Tribunal. According to Article 6 of the IBA Rules, when the arbitral tribunal decides to independently appoint an expert, after consulting the parties, this expert should submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal.

While the IBA Rules provide for a specific procedure that one party may use to contest the qualifications and independence of a tribunal-appointed party, there is no such instrument in regard of the party-appointed expert [except the opportunity granted to the other party to question the party-appointed expert during an evidentiary hearing – Article 8 (3) letter b) of the IBA Rules].

Regarding the performance of their duties, the IBA Rules make a subtle distinction between the expert reports submitted by these two categories of experts: the tribunal-appointed experts report on specific issues determined by the arbitral tribunal, while the party-appointed experts report on specific issues determined by the appointing party.

The IBA Rules include specific provisions regarding the work performed by the party-appointed experts; the arbitral tribunal, in its discretion, may order that the experts submitting reports on the same or related issues meet and confer, within the scope of their expert reports, in order to reconcile their views on the issues addressed in their expert reports.

2.2 The Prague Rules

The Prague Rules, based on an inquisitorial approach, influenced by the continental civil law procedure,[7] favour the use of tribunal-appointed experts, a

[7] Argerich, Sol, (2019) A Comparison of the IBA and Prague Rules: Comparing Two of the Same, http://arbitrationblog. kluwerarbitration.com/2019/03/02/.../.

hypothesis that is consistently addressed by Article 6, while the party-appointed experts are only marginally mentioned.

According to Article 6 of the Prague Rules, the arbitral tribunal, on its own initiative or at the request of any party, may appoint one or more independent experts to report on disputed matters. For this purpose, the arbitral tribunal will consult the parties regarding the person of the expert, will approve the terms of reference for the chosen tribunal-appointed expert and will monitor the expert's work and keep the parties informed regarding its progress. After submission of the expert report, the arbitral tribunal may call the expert for examination at an evidentiary hearing.

The fact that the arbitral tribunal has already appointed an independent expert does not prevent the parties from appointing an own expert to submit to the arbitral tribunal an expert report. This party-appointed expert may also be called for examination during the evidentiary hearing. The arbitral tribunal may instruct both experts to have a conference and to submit a joint report listing the issues on which they agree, the issues on which they disagree and the reasons for such disagreement.

2.3 The CIArb Guideline

The CIArb Guideline is not a direct procedural instrument for adducing and assessing evidence, as the IBA Rules and Prague Rules tend to be, but a set of guidelines for international arbitration focusing on the use of party-appointed and tribunal-appointed experts, which may be adopted by the parties or followed by the arbitrators.

According to the CIArb Guideline, the first preoccupation of the arbitral tribunal, after hearing the parties on this subject, is to decide whether expert evidence is needed to resolve any specific issues in dispute. If so decided, the parties may agree to jointly appoint an expert (a rare occurrence) or to use the right to appoint their own experts[8] while the arbitral tribunal has a choice between appointing a single/a panel of neutral experts instead of the party-appointed experts, or appointing an independent expert in addition to the party-appointed experts.

To decide between using party-appointed experts and a tribunal-appointed independent expert, the arbitral tribunal has to ponder which of these options will better meet the need to conduct the arbitral proceedings in an efficient and cost-effective manner.[9]

If it is decided that the parties will appoint their own expert, then the selection of the expert, the issues to be addressed as well as the remuneration of the expert will be the sole responsibility of each appointing party. If it is decided that a tribunal-appointed expert will be used, then the parties and the arbitral tribunal will arrange for selection of the expert (using the qualification, experience, availability and independence criteria) and will establish the issues to be determined, the arbitral tribunal having the decisive role.

[8] In most national legislations or arbitration rules, the parties' right to appoint independent experts is regarded as an expression of their right to present their case and to produce evidence that support their claims and/or defense.

[9] Article 3 of the CIArb Guideline.

A specific issue that is addressed by the CIArb Guideline concerns the supervision by the arbitral tribunal of the procedure for the collection, giving and testing of expert evidences. If the evidence is assessed by a party-appointed expert, it is for such party to instruct the expert according to the general directions approved by the arbitral tribunal. If the tribunal has appointed an independent expert, the arbitral tribunal will issue a procedural order rendering precise directions to the expert and to the parties regarding the expert's assignment.

Testing and reviewing the reports submitted by the appointed experts is the ultimate method enabling the arbitral tribunal to establish the truth, based on the scientific knowledge of the experts, as displayed in their reports. For this purpose, in case of reports submitted by party appointed-experts, the arbitral tribunal may direct the parties to arrange a conference of the experts, or may ask the experts to submit a joint report showing the agreed issues, the dissented issues and the reason for dissenting. Likewise, the arbitral tribunal may order the party-appointed experts to comment, in writing, on each other's report. Finally, during the evidentiary hearing, the parties may use the cross-examination procedure to address questions and the arbitral tribunal may organize an expert witness conference, where the experts are simultaneously examined in relation to the same issue in dispute.

In case of a tribunal-appointed expert, the arbitral tribunal will share with the parties the submitted report and will invite them, within a time limit, to make any comments or objections or to ask for clarifications from the expert. The arbitral tribunal may order the expert to answer those comments or objections and to submit an additional report to offer the required clarifications. The expert may also be heard in an evidentiary hearing, provided that all the parties had enough time to prepare their position.

After using any or all of these methods, the arbitral tribunal should carefully examine and assess the experts' opinions keeping in mind that the expert report is only a guide that assists the arbitrators in making their decision and that they should not, in any circumstance, delegate their decision-making powers to the expert.

2.4 The CIArb Protocol

The CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the CIArb Protocol) is intended to govern in an efficient and economical manner the preparation and giving of party-appointed expert evidence in international arbitrations. As such, it is a veritable procedural instrument that may be adopted by the parties and the arbitral tribunal to administrate the adducing of the evidence through a party-appointed expert.

As a paramount concern, Article 4 of the CIArb Protocol states that an expert's opinion shall be impartial (unbiased) and objective (not influenced by any of the parties). In this respect, the party-appointed expert shall state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration.

In order to save time and costs, unless the arbitral tribunal provide otherwise, Article 6 of the CIArb Protocol orders the party-appointed experts to meet and discuss their assignment. The objective of such a meeting is to identify the issues, tests and analyses on which the experts have a common view, as well as to identify the issues they do not agree on. Based on such discussion, the experts will have to draft a statement setting out the above-mentioned features, to be submitted to the parties and to the arbitral tribunal; consequently, each party-appointed expert will carry out her or his assignment as provided for in the said statement and will produce a written report addressing only the issues in disagreement. Each expert, upon receiving the other expert report, will be entitled, within a time limit set out by the arbitral tribunal, to produce a further written opinion dealing only with such matters as are raised in the report of the other expert.

The arbitral tribunal will hear the oral testimony of each expert during an evidentiary hearing and will be entitled to organize an expert conferencing or to direct the experts to produce further written opinions on issues in dispute. Under certain circumstances, the arbitral tribunal can disregard the expert's written opinion and testimony, either in whole or in part.[10] This can happen if: the arbitral tribunal is not satisfied that the expert's opinion is impartial and objective; the arbitral tribunal is not convinced the matters upon which the expert has expressed an opinion are in her or his area of expertise; or if the expert report fails to address all the directed issues.

2.5 Legislation and Rules of the Central and East European Countries

A swift survey of the arbitration laws and regulations in countries that are part of Central and East Europe and which share a common legal tradition, as members of the former socialist countries block, reveals that the appointment of experts is approached in distinctive ways:

- in Hungary, Poland, Serbia and Slovenia, unless the parties have agreed otherwise, the arbitral tribunal can appoint an expert or experts in order to obtain their opinions; that means that, according to these rules, the parties have the first choice, i.e., to appoint the experts themselves;
- in the Czech Republic, the arbitral tribunal does not have the power to appoint experts but the parties may agree on such an appointment and on the related costs; i.e., the parties are still the ones in charge of appointing and paying the required experts;
- in Bulgaria and Slovakia, the arbitral tribunal may appoint experts in the arbitral proceedings to provide an opinion on issues in dispute; in Bulgaria, the arbitral tribunal may do so at its own discretion. There is no mention about the party-appointed experts.

These examples show that the most appealing method of appointing experts is to leave this burden on the shoulders of the parties, which are best equiped to

[10] Article 7 of the CIArb Protocol.

provide the factual information and the required direction to the appointed experts. If the parties fail to appoint the experts, the arbitral tribunal will appoint one or more experts.

3. Party-appointed experts *vs.* tribunal-appointed experts

3.1 Preliminaries

The main continental institutional arbitration entities have adopted arbitration rules that deal with the adducing of evidence through expert reports, however without making a significative distinction between the appointment and the assignment of party's or tribunal's appointed experts.

Nevertheless, most of the prominent arbitration bodies favour the taking of evidence through expert reports, although their arbitration rules do not encompass specific rules for dealing with the option between party-appointed experts or tribunal-appointed experts, nor with the reconciliation of expert opinions or questioning by the parties of the reports and opinions submitted by party-appointed experts.

On the other hand, the soft-law sources examined above – i.e., the IBA Rules, the Prague Rules and the CIArb Guideline - expressly provide for taking of evidence through both approaches and set out procedures for testing, examining and assessing evidence through the use of scientific and technical knowledge adduced by the party or tribunal appointed experts.

As a matter of fact, most arbitration institutions that share a common legal tradition use the same method of taking evidence through expert reports; those which are based on common law systems tend to favour the work of party-appointed experts while those which are of continental civil law descent are more inclined to trust an independent tribunal-appointed experts.

3.2 Party-appointed experts. Upsides and downsides

3.2.1 The positive aspects

The use of party-appointed experts seems to be a good choice for the parties to an arbitration, since it offers them the opportunity to select the expert according to their qualification, experience, reputation as well as their previous stances in addressing similar issues. Naturally, the parties will be attracted to those experts which, on certain specific issues, expressed opinions that are compatible with the views of the selecting party. Sometimes, the parties are even inclined to appoint a known expert that provided her or his expertise in previous arbitrations in which the party was involved. This can often happen when parties use the expert services of legal entities that are national or global consultancy firms specialized in a particular area and whose expertise is well known at international level.

Moreover, when they have decided to appoint an expert, the parties are able to negotiate the fees of the expert as well as the method of payment, and will be entitled to define the assignment of the expert, usually in agreement with the expert. This presents a great advantage for the parties, who are thus able to present to the arbitral tribunal an expert report that answers the issues they consider fundamental in support of their processual position. For instance, they will enjoy the autonomy offered by the position of appointing party, allowing them to establish the issues or circumstances to be addressed, and the ability to issue directions that serve their best interests and not the interests of the other parties.

Another advantage, for the procedure this time, is that the parties, which have the best knowledge of the relevant facts, will be able to appoint an expert in the preliminary phases of the arbitration, even before the arbitrators becoming aware of them, thus avoiding the time-consuming process of expert selection by the arbitral tribunal, including any likely opposition and challenges from the parties. Moreover, through reports of party-appointed experts, the arbitral tribunal will be familiarised with the complex technical or specialist intricacies of the case much sooner, and will be able to compare the same issues from various perspectives.

On the other hand, experts that are appointed by the parties are in a better position than the tribunal appointed experts; it could be argued they will have easier access to the flow of facts and information from the appointing party, who will be willing to offer the expert any required data. In other words, the parties have more trust in the experts that they select than in the tribunal-appointed experts and will have better communication with "their" experts.[11]

3.2.2 The shortcomings

The main deficiency, often criticised, of using party-appointed experts is a limitation or lack of independence of such experts. It has been questioned whether experts who are being paid by one party and are provided with facts, information and opinions by said party, do not tend to identify with the position expressed by the party that appointed them. It can be argued there is a risk of reacting only to the issues indicated by the appointing party, sand of seeing or articulating only one side of the whole truth; in other words, "their statements often resemble arguments made by the party which appointed them"[12]. Moreover, the parties may be inclined to direct the expert to answer only those questions that are of immediate interest of the

[11] Clark, Victoria, Matlak, Elena, *Walking the line: independence and the party-appointed expert*, available at http://arbitrationblog. practicallaw.com/walking-the-line-independence-and-the-party-appointed-expert/, 11 June 2020, last accessed on 16.04.2022; Rosher, Peter, *International arbitration: the independence of party-appointed experts: fact or fiction?* available at https://www.financier worldwide.com/international-arbitration-the-independence-of-party-appointed-experts-fact-or-fiction#.Yl0q0OhByUl, last accessed on 18 April 2022.

[12] Sachs, Klaus, with the assistance of Schmidt-Ahrendts, Nils, *Experts: Neutrals or Advocates*, https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_ Doutrina_ScolarsTexts/evidence/experts__icca_2010_sachs.pdf, p. 6, last accessed on 18 April, 2022.

appointing parties, an approach which may obstruct the whole picture of the addressed issue.

Sometimes, during the performance of a contract or while preparing their case, parties can use experts (sometimes called shadow or ghost experts) to shape the technical or factual aspects that are beyond the knowledge of the parties or of their counsels; there is then an easy temptation to use, thereafter, the same persons or entities as party-appointed experts.[13] In such hypothesis, the lack of impartiality may conduct the party-appointed experts to grant different or opposite answers to the same questions, which will not assist the arbitral tribunal in taking a decision and will call for further inquiries addressed to the experts before or during the evidentiary hearing. That means further costs and time-consuming procedures and, finally, a lack of efficiency of the arbitration proceedings.

A problematic issue is the apparent conflicting relation between the affirmed and required independence of the expert and the reality that her or his services are directly and openly funded by one of the parties. When the expert is aware that her or his services are paid for by one party, and that the instructions of that party are designed to obtain a favorable conclusion from the expert, the independence of such expert is under pressure. As a matter of fact, the party-appointed experts tend to deliver reports that are in line with the claims of the appointing party. That means that either the party has altered its claims according to the expert's findings and conclusions or the expert's report has been adapted to the party requirements.

3.2.3 Preventing and mending the disadvantages

To ensure that an expert's opinion is impartial and uninfluenced by any of the parties, the IBA Rules and the CIArb Protocol ask that party-appointed experts declare any past relationship with any of the parties, their legal advisors and counsels or other representatives of the parties, other witnesses and any other person or entity involved in the arbitration.

In other words, the experts are called to state their past and present state of independence in relation with any of the parties and their representatives, although their services are paid by one of the parties, such disclosure is, somehow, an insurance that the opinion of the expert is not biased or influenced by an obvious dependence of the expert to the appointing party.

Since experts do not usually offer their expertise free of charge, it is generally accepted that payment, by the appointing party, of the reasonable professional fees of the expert[14] is not a matter to invalidate the presumed impartiality and independence of the expert.[15]

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[13] *LCIA about Experts in International Arbitration*, available at https://www.lcia.org/News/experts-in-international-arbitration.aspx, last accessed on 16 April, 2022.

[14] In absence of a definition of the reasonable professional fees, every arbitral tribunal has to assess, according to circumstances of the case, if the expert's fees are adequate to the mission carried out. If the arbitral tribunal will find out that the fees are unreasonably high it may conclude, in relation to other circumstances, that the expert's independency was affected.

[15] For instance, Article 4.2 of CIArb Protocol.

Therefore, since, in relation with the party-appointed experts, it seems that independence may coexist with a certain degree of financial dependence, it should be the task of the experts to use their ethical and moral standards to maintain their allegiance to the arbitral tribunal and not to the appointing party. In order to protect and encourage the experts to use such standards, "*the arbitrators can establish practical parameters for the conduct of party-appointed experts such as (1) a duty to disclose material relationships; (2) a duty to include in any written and oral evidence all material information, whether supportive or adverse; and (3) a duty to professionally assess the reasonableness of assumptions on which that expert relies in the expert evidence"*.[16]

From this point of view, there is no reason why the ethical and moral standards of a party-appointed expert should differ from the ones applicable to a tribunal-appointed expert, who is presumed to be neutral and independent whose opinions are expected to be thorough and trustworthy. In this regard, the CIArb Protocol has set forth in Article 4 that a (party-appointed) expert's opinion shall be impartial, objective, unbiased and uninfluenced and that an expert's duty is to assist the arbitral tribunal to decide the issues referred for expert evidence.

It is still worth noting that, in a pragmatical approach, the arbitral tribunals may count on a certain degree of partisanship of the party-appointed experts and, therefore, they have to control expert evidence on admissibility and credibility grounds, in relation with the scientific assessment of the evidence (to avoid the expert becoming a fourth arbitrator).

When party-appointed experts' reports vary in significant ways, several means and devices were suggested in order to seek consensus between the experts or narrow the issues in dispute. The IBA Arb40 Subcommittee Compendium on Arbitration Practice[17], released in October 2017, mentions a few measures to be adopted by arbitral tribunals dealing with party-appointed experts:

- ask the parties to identify the experts in an earlier procedural phase and monitor the experts' progress with regular conference calls; further, the experts may be directed to meet each other and discuss their report, without prejudice, before finalizing it;
- schedule a meeting of experts after submission of first rounds of reports and before submitting supplemental reports, in order to narrow the issues in dispute;
- direct the parties and their experts to focus on certain issues and evidence for the final reports;
- ask the experts to produce a joint report setting out their areas of agreements and disagreement, mentioning the reasons for the disagreements;
- organize experts' conferencing at evidentiary hearings (as also set by Article 8.2 of IBA Rules).

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[16] Kantor, Mark, A *Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?* LCIA, 2010, Arbitration International, Volume 26, Issue 3, p. 323, available at http://arbitrateatlanta.org/wp-content/uploads/2013/04/Code-of-Conduct-for-Party-Appointed-Experts.pdf, last accessed on 18 April, 2022.

[17] *IBA Compendium of arbitration practice*, October 2017, IBA Arb40 Subcommittee, available at https://files.essexcourt.com/wp-content/uploads/2020/05/13120915/Compendium-of-Arbitration-Practice-October-2017-2-5.pdf, last accessed on 17 April, 2022.

Another remedy of the party-appointed experts' disadvantages is the method of expert teaming.[18] As soon as the parties have submitted their first briefs, the tribunal invites each of them to provide a list of three to five experts. From each of these two lists, the arbitral tribunal will select one expert and will appoint these two experts to act as an "expert team", setting forth, after consulting with the parties and with the experts, their mission. In this respect, the arbitral tribunal will issue a procedural order, including a code of conduct for the experts and providing directions regarding, at least, the matters submitted to the experts' determination, the evidence to be submitted by the parties and the payment of the fees of the expert team. The expert team will prepare a preliminary report and the parties (and/or the arbitral tribunal) will have the opportunity to comment on the preliminary report; the final report will be prepared after taking into consideration such comments and it will be distributed to the parties and the tribunal.[19]

Subsequently, the team experts will attend the evidentiary hearing and will answer the questions raised by the arbitral tribunal and the parties.

This approach may satisfy the parties' option for a specific expert while offering the expert team a neutral, independent position in respect of the parties. Moreover, by appointing a team of experts, the arbitral tribunal will introduce a system of check and balances.[20]

3.2.4 Preliminary conclusions

It is a fact that using party-appointed experts is the most frequently used method for adducing expert evidence in arbitration. While there are concerns related to the independence and impartiality of such experts, there are also, as shown above, various practical methods to check and to preserve their mission to assist the arbitral tribunal to determine the technical or scientific issues in dispute.

3.3 Tribunal appointed experts

The option of the arbitral tribunal to choose and appoint an independent, neutral expert, is present when the parties choose not to appoint their own experts. In such circumstance, the arbitral tribunal will consult with the parties upon the name and the number of the tribunal appointed expert/s and, sometimes, will appoint an expert, by hazard, from a pool of experts specialized in the area of the required determination.

Such appointments are not very popular, since parties are inclined to use their own experts, who have a better knowledge of the factual information and issues in dispute; in addition, parties distrust a person whose professional abilities and expertise are not personally known to them.

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[18] Proposed by Dr Karl Sachs and sometimes quoted as "*Sachs Protocol on Expert Teaming*". See supra no.15, M. Kantor, p. 323 and supra no. 16, IBA Compendium of arbitration practice.

[19] See K. Sachs, supra no. 11, pp.14 - 15.

[20] Id., p. 16

The work and reports of tribunal-appointed experts present a number of disadvantages, identifiable in practice and discussed in arbitration studies. Firstly, parties fear that, instead of the arbitral tribunal, the appointed expert will have the last word in deciding their case, based on a report that might misguide the arbitrators[21].

On the other hand, the relation between a tribunal-appointed expert and the parties has a tendency to be challenging, since such an expert is perceived as an extension of the arbitral tribunal and, sometimes, the parties fear that they are not given the opportunity to explain and argument their case and cannot control the way in which their case will be presented[22]; such problems will not arise with party-appointed experts, which will submit preliminary reports to the appointing parties and will take into consideration their instructions and comments.

Another argument is that the appointing of an expert by the arbitral tribunal is infringing the parties' autonomy; they were entitled to select the arbitrators called to decide on the legal aspects of their dispute but they are not allowed to select the persons that will decide upon the most important technical or scientific issues of their dispute. Thus, the perception that a dispute is – in fact – decided by someone other than the persons chosen by the parties may raise substantial concerns and it is unacceptable in arbitration[23].

There are, also, other downsides regarding the efficiency of the procedure: tribunal-appointed experts appear at a later stage in the procedure, and the comments and objections of the parties will, in most cases, trigger a supplemental report and, therefore, further costs and delays.

Surprisingly, although concerns regarding the role and the method of appointing experts are growing, a paradox persists: while most arbitration rules and regulations state, first, the right of the arbitral tribunal to appoint an expert and make only marginal reference to the party-appointed experts[24], in reality, the vast majority of experts assisting the arbitral tribunal are party-appointed experts.

4. The Romanian approach

4.1 Legislation and rules

According to Article 330 of the Romanian Code of Civil Procedure (hereinafter, CCP) whenever the court, to clarify certain factual circumstances, considers that it is appropriate to learn the opinion of specialists, it will appoint, at

[21] Schneider, Michael, E., *Technical experts in international arbitration*, ASA Bulletin 11/1993, p. 449, available at https://www.lalive.law/wp-content/uploads/2019/10/mes_technical_experts.pdf, last accessed on 18 April, 2022.

[22] Blackaby, Nigel, Partasides, Constantine, *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, 2009, p. 406 et seq.

[23] See Sachs, supra no.11, p. 9.

[24] Knoll-Tudor, Ioana, Rus, Ionut, *Regulating Party-Appointed Experts: How to Increase the Efficiency of Arbitral Proceedings*, available at: http://arbitrationblog.kluwerarbitration.com/2021/05/10/regulating-party-appointed-experts-how-to-increase-the-efficien cy-of-arbitral-proceedings/.

the request of the parties or *ex officio*, one or 3 experts. In this respect, the Government Ordinance no. 2/2000 on the organization of the activity of judicial and extrajudicial technical expertise, establishes that such experts are called to assist the court to clarify factual aspects or circumstances of the case.

Under certain circumstances, the court may approve that the taking of evidence will be carried out directly by the counsels of the parties, if the parties have agreed upon such a procedure (Article 368 Paragraph 3 CCP). In such situations, according to Article 379 CCP, if the court approves the taking of evidence through an expert report, the parties are called to agree on one common, independent expert. Additionally, the parties can appoint their own council-experts, to act as their advisers. If the parties do not agree on the choice of expert, the court will appoint such expert. The appointed expert will submit to the court and to the parties her or his report and, upon request, has the legal obligation to answer the questions of the parties' counsels or to submit a supplementary report to clarify the objections of any party.

The above-mentioned dispositions are also applicable in arbitration procedures; while Book IV of the Code of Civil Procedure is dedicated to arbitration, it does not elaborate on any rules regarding the appointment of experts. In fact, Book IV contains only one mention to expert witnesses, which only deals with the examination of the expert witness.

However, Article 31, Paragraph 6, letter e) of the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania (CICA Arbitration Rules) requires the parties, before or during the case management conference, to inform the arbitral tribunal if they opt for a tribunal-appointed expert or for a party-appointed expert. This means that, in an arbitral procedure, the arbitral tribunal may appoint one expert or a panel of experts but that, alternatively, the parties can appoint their own experts.

According to Article 36 of the CICA Arbitration Rules, party-appointed experts have to participate in evidentiary hearings, to be examined by the arbitral tribunal or by the parties, unless the arbitral tribunal, after consulting with the parties, decides otherwise.

Consequently, we can argue that there is no reference to party-appointed experts in the Code of Civil procedure and that only marginal mentions of such experts are encompassed in the CICA Arbitration Rules. Instead, the CICA Rules dedicate a text (Article 37) to the tribunal-appointed experts, detailing the method of their selections, setting forth the determination of their professional fees and mentioning the causes for reduction of such fees. Moreover, Article 34 Paragraph 6 of CICA Arbitration Rules provides that, when requesting the adducing of evidence through expert reports, the parties have to indicate the issues to be addressed and the name of their counsel-experts, i.e. their own experts that are called to assist the independent expert in carrying out her or his work and are allowed, together with the parties, to submit comments or objections to the expert report.

Therefore, the provisions of Article 34 Paragraph 6 and of Article 37 of CICA Arbitration Rules seem to indicate that these rules favour the taking of

evidence through tribunal-appointed experts, which is, also, the only solution accepted by the Code of Civil Procedure.

Nonetheless, is it worth mentioning that, in addition to these provisions, art. 34 Paragraph 7 of CICA Arbitration Rules indicates that the arbitral tribunal, following the parties' agreement, may apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association. That means that, should the parties make such choice, party-appointed experts may, according to IBA Rules, provide and submit expert reports, assisting the arbitral tribunal to decide upon the issues in dispute.

4.2 The whys and wherefores

While the international arbitration practice obviously and consistently favours the taking of evidence through party-appointed experts, the Romanian arbitration approach is, apparently, resisting this method to adduce evidence.

The reasons are varied and understanding them is the best way to open the door to offer parties a real chance to opt between tribunal-appointed experts and party-appointed experts.

4.2.1 Legal tradition

The CICA Arbitration Rules are the first body of rules mentioning the parties' right to choose between tribunal and party appointed experts. Traditionally, the taking of evidence through expert reports is assigned to independent experts appointed by the courts, experts that are specialized in different areas and which are authorized and listed by the Ministry of Justice. Although there are many issues regarding the real independence and impartiality of these experts, it is hard to abandon this traditional approach, which is used by courts and most of the arbitral tribunals.

On the other hand, the appointing of experts by courts and arbitral tribunal is, somehow, subject to a check and balance policy, since the parties are allowed to appoint their own experts, acting as counsels to them and as "watch dogs" in relation with the tribunal-appointed experts. By that, the fear that the arbitral tribunal will be entirely influenced by the independent expert is diminished, since the arbitral tribunal will, also, hear the voice of the experts representing the parties. In some way, the parties are inclined to favour this system, where a presumed independent tribunal-appointed expert is flanked by their own trusted experts.

4.2.2 Insufficient knowledge and absence of trust

Many of the counsels providing legal services in arbitration are educated to practice in the traditional procedural style that is used by the courts of justice. There are few counsels dedicated exclusively to arbitration practice while most of the rest are more familiar with the courts of justice practice. Consequently, the large mass of

counsels is not aware of the possibility of adducing evidence through party-appointed experts or do are not familiar and do not trust such a method of proving their case, being convinced that a party-appointed expert is less credible than an independent tribunal-appointed expert.

Usually, the party-appointed experts are regarded as being "hired guns", since their professional fees are paid by the appointing party; in order to remove the mistrust, the parties have to select their expert as they select the arbitrators, i.e., based on reputation, professional abilities and moral standing.

4.2.3 The costs

The parties are, often, convinced that it is better to share the professional fees of a Tribunal-appointed expert than to support the whole costs of using party-appointed experts. The fees of a tribunal-appointed experts are controlled and approved by the arbitral tribunal, which may limit them to reasonable figures, while the fees of a party-appointed expert are exclusively subject to the negotiations of the involved parties, although the appointing party may not be able to recover entirely the fees paid to such expert.

4.2.4 Absence of guidelines

Even if the parties or their counsel will be open to use party-appointed experts, there are no guidelines, procedures or codes of ethical and moral conduct, addressed to the parties and to the experts, to convince them that taking of evidence through party-appointed experts may be more efficient (in terms of costs and time) and equally impartial, objective or credible as the adducing of evidence through tribunal-appointed experts. A system of checks and balance, providing means to obtain objective, unbiased reports, is required. The provisions of Article 34 Paragraph 7 of CICA Arbitration Rules, indicating the possibility of use of IBA Rules is a good start in this direction.

4.2.5 Fear of failure

Sometimes, parties that are not familiar with the party-appointed experts' system are afraid of the competition and the challenge to select the best expert (which, usually, is the best paid one) and fear that the party that is able to acquire the professional services of the most notorious expert will have an advantage in the eyes of the arbitrators. They may reach the conclusion that a tribunal-appointed expert is the right solution, offering equal chances to the parties. Therefore, in order to gain confidence in the party-appointed expert system, parties need to familiarise themselves with the various instruments that may be used to check and keep the balance between the experts: directing the experts to cooperate and identify the issues in dispute, interrogating the experts during the evidentiary hearing or the experts conferencing.

5. Conclusions

In international arbitration, due to the complexity and, often, technical intricacies of the disputes, there is a growing demand for involvement of expert-witnesses. It is a fact that most expert reports are submitted by party-appointed experts, while tribunal-appointed experts are rarely preferred by the parties.

Although there are concerns and disadvantages in using party-appointed experts, the arbitral tribunal may overcome them by using a system of check and balance instruments, offering the parties and the experts the opportunity not only to raise objections but, also, to identify a common ground and to assist the arbitral tribunal in reaching a decision on the issues in dispute.

There is a common perception that the opinions of the party-appointed experts should be objective, impartial and based on factual, technical or scientific information available to them; nonetheless, these ethical and moral standards are only mentioned in soft law norms, as IBA Rules or CIArb Guideline and CIArb Protocol. There is a large consensus that the arbitration regulations should provide ethical standards and duties for experts, similar to those of the arbitrators.

In Romania, the party-appointed expert option is still at the inception phase; for a balanced procedure, where the parties enjoy options, a better promotion of the party-appointed expert system may assist the parties in eliminating the distrust and the apparent inconvenience of selecting and trusting their own experts.

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