
Dr. Klaus Sachs* with the assistance of Dr. Nils Schmidt-Ahrendt**

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1. INTRODUCTION

The subject our panel has been asked to address centres on the independence and impartiality of experts. The way the subject is formulated – “Experts: Neutrals or Advocates” suggests that we are talking exclusively about party-appointed experts. It would be odd to ask this question if we were talking about tribunal-appointed experts; they are rarely perceived as being advocates. The situation is different when it comes to party-appointed experts where one increasingly often hears complaints that their evidence is of little value because it advocates too much in the interest of the party presenting it. The result is that tribunals then find themselves faced with deciding between the opinions of opposing experts who have arrived at diametrically opposite and hardly reconcilable conclusions: no damages vs. US$ 100 million damages; insurmountable regulatory hurdles to proceed with a project vs. no impediments whatsoever; state-of-the-art construction of a product vs. serious engineering mistakes.

That is a rather unsatisfactory situation for a tribunal, in particular in complex cases where the stakes are often high and much depends on technical, regulatory or financial issues. After all, is it not the role of experts, be they tribunal- or party-appointed, to assist, educate and advise the tribunal, in a fair and impartial manner, in specific fields in which the arbitrators do not themselves have the relevant expertise?1

Hence, a preliminary question to our topic is whether it has become a given in international arbitration practice that expert evidence should be provided only by

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* Partner CMS Hasche Sigle, Munich, Germany; head of the Practice Group Arbitration.
** Associate, CMS Hasche Sigle, Munich, Germany; member of the Practice Group Arbitration.
party-appointed experts? Or, is there still a case to be made for using a tribunal-appointed expert?

In analyzing this question, we will start by looking into the regulatory framework, i.e., first, the various arbitration laws, from both common law and civil law countries and, second, the rules of the leading institutions and those reflecting best practices, such as the IBA Rules: Do they provide further guidance as to the circumstances under which the one or the other method is more suitable?

In a second step, we will briefly point out the main advantages and disadvantages of both types of expert testimony.

In a third step, we will briefly address some of the techniques which have been introduced in international arbitration proceedings to cope with the disadvantages commonly connected with party-appointed experts, such as “pre-hearing meetings”, “witness conferencing” and “codes of conduct”. We submit that these remedies can indeed be helpful but that they are not always sufficient to do away with the disadvantages of using party-appointed experts.

For all these reasons, in a final step, we will describe an alternative approach to expert evidence which may be referred to as “expert teaming” and to present an outline for a protocol setting forth such an approach. Instead of remedying potential disadvantages connected with the use of party-appointed experts, the concept of “expert teaming” rather seeks to address the concerns commonly expressed with regard to tribunal-appointed experts.

II. REGULATIONS

1. National Laws

It is true that arbitration practice still reflects a certain divide between the common law and the civil law approach to expert evidence. It is a common law tradition for parties to present “their” expert witness, a tradition built on the notion of a fully adversarial system. Civil lawyers, by contrast, have historically been more sceptical about the benefits and costs of party-appointed expert witnesses. This is a result of the civil law tradition of attributing only limited evidentiary value to expert opinions put forward by the parties. Thus, civil law arbitrators still tend to favour the appointment of experts who follow the tribunal’s and not the parties’ instructions. However, there is a clear trend in international arbitration to rely primarily on the testimony of party-appointed experts, with tribunal-appointed experts being used only in exceptional circumstances.

Interestingly, national arbitration laws do not exactly mirror this divide in the approach to expert evidence. Most national arbitration laws, from both common law and civil law countries, if at all, primarily deal with tribunal-appointed experts, and only secondarily with party-appointed experts. This is certainly due to the fact that until the 1990s tribunal-appointed experts were more commonly used in arbitration than today.

2. The IBA Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules).
Thus, the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law) – the mother of most modern arbitration laws – deals in Art. 26 only with experts appointed by the tribunal. Party-appointed experts are only mentioned in the context of the parties’ right to put questions to the tribunal-appointed expert at the hearing. However, there is no doubt that evidence by means of party-appointed experts is admissible under the Model Law. This principle follows from the parties’ general right to submit evidence pursuant to Sect. 23(1) of the Model Law. It includes the right to present expert evidence from their own party-appointed experts.

Similarly, the English Arbitration Act 1996 mainly deals with tribunal-appointed experts although it is unusual for a tribunal in England to appoint its own experts. Interestingly, Sect. 37 of the English Arbitration Act mentions not only experts in the usual sense but also legal advisors and so-called assessors, the role of whom is to assist the tribunal on technical matters. The Swedish Arbitration Act, in turn, simply states that the parties shall supply the evidence; however, the arbitrators may appoint experts, unless both parties are opposed thereto. See Sect. 25 of the Swedish Arbitration Act. By contrast, none of the French, the Swiss or the US arbitration laws contain specific provisions for expert evidence. Nevertheless, also in these countries, the admissibility of both types of expert evidence is beyond doubt.

Interestingly, some of the laws enacted more recently in UNCITRAL Model Law countries, such as Austria and Spain, now expressly address the parties’ right to appoint their own experts. Thus, the Austrian Code of Civil Procedure (Zivilprozessordnung – ZPO) provides in Sect. 601(2) that “in the hearing, the parties shall have the opportunity … to present their own expert witnesses in order to testify on the points at issue”; and states in Sect. 601(4) that “unless otherwise agreed by the parties, each party has the right to produce reports from his own expert”. It is noteworthy that the Austrian legislator specifically included these additions to the text of the Model Law in recognition that the use of party-appointed experts is increasingly common in international arbitration, even though it does not follow the tradition in civil law systems.

To summarize: It can safely be said that national arbitration laws permit both types of expert evidence without giving a clear preference. It is further commonly accepted that the decision whether or not the tribunal should appoint its own expert is left to the tribunal’s discretion. However, national arbitration laws offer no guidance as to how to exercise such discretion.


2. **Institutional Rules**

Most institutional rules are not much more specific than the national arbitration laws when dealing with expert evidence. This is true, for example, for Art. 27 of the UNCITRAL Arbitration Rules 1976 which corresponds more or less to Art. 26 of the Model Law and thus primarily deals with tribunal-appointed experts. A similar provision appears in Art. 21 of the Arbitration Rules of the LCIA (London Court of International Arbitration).

The Arbitration Rules of the International Chamber of Commerce (ICC) provide for the two mechanisms in a distinct manner, though in very broad terms, with Art. 20(3) dealing with party-appointed experts and Art. 20(4) dealing with tribunal-appointed experts. It is not expected that the current revision of the ICC Rules will become more specific in this respect, except possibly for providing certain case management techniques. Although Art. 20(4) might arguably be said to give the tribunal the right to appoint an expert even if none of the parties desire it, Derains and Schwarz in their commentary are of the view that there is no way in which the tribunal can, as a practical matter, impose an expert on the parties against their wishes as the expert has to be paid by the parties.

3. **The IBA Rules**

The 1999 version of the IBA Rules provides more detailed procedures both for party-appointed and tribunal-appointed experts.

Art. 5 of the IBA Rules specifically confirms the well-established principle that a party may rely on a party-appointed expert as a means of evidence. It further sets forth in detail the required content of an expert report; the general obligation of an expert to give his testimony at an evidentiary hearing; the consequences of a failure to appear; and the possibility for a tribunal to order the party-appointed experts, if they have submitted reports on related issues, to meet and confer with each other in order to reach agreement on issues upon which they had disagreed in their reports.

Art. 6 of the IBA Rules confirms that the tribunal has the right to appoint its own "independent" expert but requires it to consult with the parties before selecting its expert and in establishing the expert’s terms of reference. The parties, in turn, are required to raise any objections to the independence of the tribunal-appointed expert within the time limit set by the tribunal. Art. 6 further provides that the tribunal-appointed expert is entitled to request any relevant and material information directly from the parties and requires him to report in writing to the tribunal and to describe in his report the method, evidence and information used in arriving at his conclusions. Art. 6 makes clear that the tribunal-appointed expert may be questioned at the hearing by any party-appointed expert on issues raised in his report.

As one can see, the IBA Rules set forth rather comprehensive and well-balanced rules for each of the two procedures, however, without giving any preference. Both procedures are dealt with on an equal footing, which should not come as a surprise.

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since the IBA Rules have an overall tendency to find compromise solutions between civil law and common law practices.

III. ADVANTAGES AND DISADVANTAGES

The question therefore remains as to how arbitrators should exercise their discretion to appoint their own expert. To answer this question, we shall analyze the most common concerns expressed with regard to each type of expert testimony.

1. Party-appointed Experts

The most common concern expressed with regard to party-appointed experts is that their expertise is often tainted by a lack of impartiality. Party-appointed experts are accused of acting like “hired guns” or of producing evidence “bought by the party presenting it.” Their statements often resemble arguments made by the party that appointed them. In particular, party-financed reports on issues of quantum tend to come to extreme conclusions.

A second concern is that the reports submitted by these experts suffer from a lack of clarity. They tend to be too long and too complex. In addition, since the experts preparing the reports have been instructed by the party and not by the tribunal, the reports tend to have a different focus than the tribunal has.

A third concern is the lack of coordination among the party-appointed experts. In particular, if the reports are submitted simultaneously, they do not correspond to each other. They are often based on different facts, different scientific approaches and different assumptions, and they address different issues. In other words: it is often difficult, if not impossible, for the tribunal to bridge the gap between the reports without the help of yet another expert. As a consequence, actual or potential points of agreement remain unclear.

A fourth concern is that the traditional method of examining party-appointed experts by direct and cross-examination often proves to be inefficient. At the same time, experts guided by counsel may develop points which are not decisive for the tribunal’s decision.


2. Tribunal-Appointed Experts

In light of these criticisms, the obvious response appears to be that tribunals should instead seek to appoint their own “independent” experts. However, such approach also suffers from a number of disadvantages and gives cause for substantial concern.

The main concern, at least from a common law perspective, is that the parties distrust the tribunal-appointed experts because they feel that they are unable to control the manner in which what may be the most critical element in their case will be presented. This concern is understandable but does not speak against tribunal-appointed experts per se if one accepts that their focus should be to advise the tribunal.

A second and closely related concern is that tribunal-appointed experts render a report despite a potential lack of factual information. Undisputedly, the flow of factual information between the party and the corresponding party-appointed expert is usually much smoother than between a party and the tribunal-appointed expert, who, at least in case of non-compliance, has to obtain the assistance of an intermediary, i.e., the arbitral tribunal.

A third concern is that the reports prepared by tribunal-appointed experts are as likely to suffer from a lack of clarity as those prepared by party-appointed experts. At times it appears that when talking about the same set of facts, lawyers and experts use different languages.

Another concern of the parties is that their dispute is in effect decided by the experts instead of the tribunal. It has been said that: “When appointing an independent expert, an arbitral tribunal seeks to obtain technical information that might guide it in the search for truth.” Yet, in practice, one can observe that the experts’ tasks may go well beyond this. In some cases, tribunals have assigned experts the task of “establishing the facts of the case by identifying the evidence provided and assessing its probative value”. In other cases, experts have been asked to express their “opinion on a claim” without identifying any specific aspects to be addressed.

This last concern is a more serious one: Although a tribunal-appointed expert has to be competent and neutral and is subject to the same standards of impartiality and independence as the members of the tribunal, he is not the person chosen by the parties to resolve their dispute. Any suggestion that the expert should be called in and included in the tribunal’s deliberations and the preparation of the final award is therefore highly problematic and is likely to raise further suspicion as to tribunal-appointed experts in general.

12. The corresponding examples from cases are reprinted as abstracts and cited in M. SCHNEIDER, Techniques for Eliciting Expert Testimony: Expert Conferencing and New Methods”, op. cit., fn. 11, p. 450.
The ability to select the person who will resolve the dispute is one of the major reasons why parties choose to submit their disputes to arbitration. Therefore, it is expected that special efforts will be made by the tribunal to resolve the dispute itself. Thus, while the perception that a dispute is – in fact – decided by someone else may raise substantial concerns in state court proceedings, it is unacceptable in arbitration, or to quote the Latin phrase: \textit{delegatus non potest delegare.}

IV. “NEW TECHNIQUES” FOR PARTY-APPOINTED EXPERTS

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

With the aim of responding to the criticisms and complaints related to the use of party-appointed experts, certain techniques have been proposed and introduced in international arbitration proceedings which seek to address some of the concerns and perceived disadvantages of relying exclusively on party-appointed experts. Two techniques should be mentioned in particular: “pre-hearing meetings” and “expert witness conferencing” or “hot-tubbing”; further, “specific codes of conduct” for party-appointed experts have been initiated.

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

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

1. “Pre-hearing Meetings”

The instrument of pre-hearing meetings is expressly foreseen by Art. 5(3) of the IBA Rules which reads as follows:

14. Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER, \textit{Redfern and Hunter on International Arbitration}, 5th edn. (Oxford University Press 2009) p. 246 referring to such option as one of the "unique distinguishing factors of arbitration".
16. The terms attributed to such techniques vary and shall not be regarded as fixed terms.
“The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.”

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

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

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

2. “Witness Conferencing”

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

It is for that reason that the instrument is not foreseen by Art. 5 of the IBA Rules, which deals with party-appointed experts, but rather by Art. 8(2) of the IBA Rules, which provides rules for the evidentiary hearing and thus applies to all types of witnesses. In its relevant part, the provision reads:

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

20 For a detailed analysis of the protocol and its background, see D. JONES, “Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last”, op. cit., fn. 6, pp. 137 et seq.
21 See Art. 6 of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration at <www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf> (last accessed 10 June 2010).
However, there is agreement that witness conferencing is particularly useful for examining party-appointed expert witnesses.\footnote{Ibid., p. 49; see also R. TRITTMAN and B. KASOLOWSKY, “Taking Evidence in Arbitration Proceedings between Common Law and Civil”, op. cit., fn. 7, p. 339.}

In sum, this approach may elicit much clearer evidence than having a single expert more or less lecture the tribunal. Being placed next to their peers may well compel experts to present their opinions more independently and objectively.\footnote{Robert MACPHERSON, Richard SMITH and Roy MITCHELL, "Innovations in Arbitration: Improving the Presentation of Evidence in Construction Arbitration", Dispute Resolution Journal (2003) pp. 1 et seq. at p. 3.} The approach has also been successfully introduced in the national court systems in England and Australia where it has colloquially become known as “hot tubbing”.

3. "Code of Conduct"

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

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

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

4. Preliminary Assessment

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

In particular, “pre-hearing meetings” and “witness conferencing” with the opposing experts are useful in order to
(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, as a consequence,
(vi) render the taking of expert evidence more time- and cost-efficient.

Further, the introduction of specific codes of conduct for party-appointed experts, such as the one proposed by the CIArb Expert Protocol, should have a positive impact on the impartiality of the experts and thus on the objectivity and quality of their work.26

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

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

Metaphorically speaking: “pre-hearing meetings” and “witness conferencing” might downsize the ring in which the experts confront each other, coached by the counsel who appointed them, and thus make it less burdensome for the arbitrators as referees to oversee the fight and to detect fouls and lack of sportsmanship. However, they will not stop them from fighting altogether.

V. EXPERT TEAMING

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

At least from my knowledge and review, few efforts have been made in practice or literature to address and remove the concerns expressed in relation to tribunal-appointed experts.

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

1. **Characteristics**

In the following, we will briefly describe the characteristics and general functioning of the instrument:

Instead of relying exclusively on party-appointed experts or appointing its own expert of choice, the tribunal could consult with the parties at an early stage in the proceedings and invite them to each provide the tribunal and the opposing party with a short list of candidates who they consider could serve as an expert to give evidence on the issues at stake. The tribunal should then invite the parties to briefly comment on the experts proposed by the other party, in particular as to whether there are any conflicts of interest. Then the tribunal chooses two experts, one from each list, and appoints these experts jointly as an “expert team”. Following such appointment, the tribunal will meet with the expert team and the parties in order to establish a protocol on the expert team’s mission.

Based on the terms of the protocol, the expert team prepares a preliminary joint report which is circulated to the tribunal and the parties. The parties and the tribunal are given the opportunity to comment on this preliminary report. The experts then review these comments and take them into consideration in preparing their final joint report which will be submitted to the parties and the tribunal.

Finally, upon request by one of the parties or the tribunal, the members of the expert team shall be present at the evidentiary hearing and they may be questioned by the tribunal, the parties or any party-appointed expert on issues raised in the experts’ report.

2. **The Outline of a Protocol**

As regards the duties and obligations of the expert team, it is advisable that the protocol provides, inter alia, that

(i) both experts retained must be impartial and independent;
(ii) the task of the expert team is to assist the tribunal in deciding the issues in respect of which expert evidence is adduced;
(iii) the expert team shall only address issues identified in the terms of reference;
(iv) the expert team is expected to submit a joint report providing only the joint and mutual findings;
(v) each member of the expert team shall refrain from communicating separately with the parties, the tribunal or any third party;
(vi) the expert team shall prepare its report “from scratch” and shall rely only on its own expertise;
(vii) the expert team shall seek any input and assistance required from the parties;
(viii) in the preparation of the report, the expert team shall carefully examine all briefs and documents submitted by the parties and shall address the parties’ views and concerns; and
(ix) the expert team shall be prepared to testify during an oral hearing and to respond to questions asked by the tribunal and the parties, their counsel and consultants.

Areas of disagreement on which the experts cannot reach a joint conclusion should be identified and, if necessary, the parties will be permitted to comment or submit additional (expert) evidence on these.
3. **Advantages**

My experience has shown that the appointment of a team of experts selected equally from proposals made by both sides is likely to remove most of the concerns commonly connected with tribunal-appointed experts.

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

First, it removes the concern that the tribunal will select an expert of its own choice although the parties, due to their better knowledge of the factual and technical details of the case, would be in a much better position to make such choice.

Second, it removes the concern that the tribunal will select a person whose personal skills and business-related expertise could not be carefully examined and tested by the parties prior to the appointment.

Third, it removes the concern that the report will be prepared by a single individual who is not under the supervision of anyone possessing sufficient knowledge and technical expertise to challenge the technical findings and to correct potential errors by the expert. By appointing an expert team, the tribunal introduces a system of checks and balances.

Fourth, as regards the concern that, in the case of tribunal-appointed experts, the dispute will be decided by the experts rather than by the tribunal, I submit that this is more an issue of properly drafting the experts’ terms of reference. It is the task of the tribunal and the parties alike to ensure that the expert team is provided with a clear mandate which precisely defines the issues which the expert team shall determine and those which are left to the tribunal to decide.

*b. Advantages compared to party-appointed experts*

The principal advantage compared to party-appointed experts lies in the general status of the experts. Although the experts have been proposed by the parties, they are appointed by the tribunal and, thus, under the applicable laws and regulations, qualify as tribunal-appointed. Consequently, they are subject to special duties of independence and impartiality.\(^27\) Probably, even more important, the experts themselves regard themselves as facilitators to the tribunal and not as assistants to the party appointing them. In addition, the experts are not paid by the party who proposed the expert. Instead, the fees of each expert are shared by the parties and are subject to the final determination of costs by the tribunal in its final award.

A second advantage is that when making proposals for their member of the expert team, the parties will be guided by different thoughts and concerns than when selecting their own experts. The parties themselves will ensure that the proposed expert’s competence, independence and impartiality are beyond doubt since otherwise this person will have little chance of being selected by the tribunal.

Third, the fact that both the parties and the tribunal meet with and instruct the experts also addresses the concern that reports from party-appointed experts always run the risk of missing the points which the parties and the tribunal regard as relevant.

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\(^{27}\) For example, according to Sect. 1049(3) German Code of Civil Procedure and Art. 27(5) Swiss Rules, tribunal-appointed experts are subject to the same rules regarding independence and impartiality as the members of the tribunal.
and material for the outcome of the case. In other words, this method appears much more likely to be successful as regards effectiveness, time and ultimately costs. Of course, this method also eliminates the risk of multiple expert reports which come to completely contradictory results or, worse, are not even responsive to each other.

Finally, for the avoidance of doubt, it should be reiterated that the parties, of course, remain free to comment on the expert team’s report in writing and to question the experts during an oral hearing. In this regard, the parties naturally also remain entitled to seek the assistance of one or several experts of their choice, a so-called “expert consultant”.28 The consultant shall be entitled to assist the parties in the same manner as they are assisted by their counsel in legal matters. Such consultant shall be entitled to be present at oral hearings and to question the expert team. He may also argue before the tribunal, but since the consultant does not testify, his submissions may only qualify as arguments, not as evidence.

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

VI. CONCLUSIONS

It is a fact that experts are essential and indispensable for the process of dispute resolution in complex international proceedings. Thus, determining the most efficient and successful forms and methods for the taking of evidence by expert witness testimony is essential for the process.

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

The taking of evidence by means of party-appointed experts does raise substantial concerns and has often led to frustration among arbitrators and counsel alike. Nevertheless, it has become standard practice in international proceedings to rely mainly on party-appointed experts. In recent years, substantial efforts have been made to address the concerns resulting from this technique and to minimize potential disadvantages. In particular, procedures such as “pre-hearing meetings” and “witness conferencing” have proven quite successful. The CIArb Expert Protocol issued by the Chartered Institute of Arbitrators probably reflects most closely today’s standards of best practice for party-appointed experts in international arbitration.

Much fewer efforts have been made to remedy the potential disadvantages of tribunal-appointed experts and to address the respective concerns, in particular those of practitioners and parties with a common law background. The concept of “expert teaming” seeks to combine the advantages of party-appointed and tribunal-appointed

28 For a distinction between the different types of experts in international arbitration proceedings and their respective functions and duties, see “Issues for Experts Acting under the ICC Rules for Expertise or the ICC Rules of Arbitration”, 20 ICC Bulletin (2009, no. 1) pp. 23 et seq.
experts and thus may serve as an alternative approach to assist the tribunal, in an impartial and objective manner, to decide the issues in respect of which expert evidence is adduced.