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ETHICAL CONUNDRUMS SURROUNDING PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATIONS

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Introduction

In recent times, the use of expert witnesses in international arbitrations has garnered significant traction.[1] Experts are generally appointed by parties to give their professional opinions on issues beyond the arbitral tribunal's expertise, such as damages, delays, and foreign law, thereby assisting the arbitral tribunal in its decision-making process.

The fundamental role of these experts is to provide independent and impartial evidence that is of assistance to the arbitral tribunal. However, most experts involved in international arbitrations are party-appointed witnesses, giving rise to an inevitable discrepancy between 'what should happen' and 'what actually happens.' While the natural assumption is that the expert's foremost duty lies in assisting the tribunal, there is an underlying potential for conflict since the witness may be seen as a mere extension of the party's legal team, i.e., a 'hired gun'.[2] Consequently, it has increasingly been argued that the participation of a party-appointed expert in arbitration can compromise the composition of the tribunal in the same way as the participation of a legal representative.[3]

A vocal section of the prevailing discourse assumes that since experts always provide an expert opinion in favour of the party that appointed them, it is impossible to expect independence and impartiality from an expert appointed by one of the parties. However, on the other hand, some argue that the appointment of experts is an integral part of a party's right to present its case and

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[1] London Court of International Arbitration, 'Experts in International Arbitration' (*LCIA*, 17 January 2018) <https://www.acerislaw.com/wp-content/uploads/2022/03/2018-LCIAs-Note-on-Experts-in-International-Arbitration.pdf> accessed 5 February 2023; Ian Meredith, Louise Bond, 'Arbitration: Common Criticism and Innovative Solutions' (*K&L Gates,* 24 August 2021) <https://www.klgates.com/Expert-Evidence-in-International-Arbitration-Common-Criticisms-and-Innovative-Solutions-8-24-2021> accessed 5 February 2023.

[2] Tessa Hayes, "To Hot-Tub or Not To Hot-Tub?" in Meriam N. Alrashid, Kabir Duggal, Miriam Harwood and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Volume 12, 2019).

[3] *World Duty Free v Republic of Kenya* [2007] ICSID Case No. Arb/00/7.

excluding party-appointed witnesses would infringe their right in terms of Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**UNCITRAL Model Law**"].

Against this backdrop, the discussion surrounding the independence and impartiality of party-appointed expert witnesses has come to the centre stage in the field of international arbitration.

Standards for determining the impartiality and independence of an expert

The standards of 'impartiality' and 'independence' involve an obvious element of subjectivity. Currently, there is a vacuum of globally recognised rules and standards against which the impartiality and independence of party-appointed expert witnesses must be measured. However, organisations such as the International Bar Association ["**IBA**"] and arbitral institutions such as the London Court of International Arbitration, the Singapore International Arbitration Centre, the International Court of Arbitration, and the International Centre for Settlement of Investment Disputes have created guidelines for examination of witnesses. Though these guidelines do not explicitly lay down standards of 'impartiality' and 'independence', they have formed the basis of the discussion surrounding the impartiality and independence of party-appointed experts. Notably, these guidelines can best be termed as 'soft law instruments' that are neither uniform nor binding.[4]

The IBA Rules on the Taking of Evidence in International Arbitration, 2020 ["**IBA Rules**"] lays down the international best practices that are frequently relied upon, has recognised the test of 'apparent bias'[5] as a valid standard for determining the impartiality and independence of party-appointed expert witnesses.[6] According to the test of apparent bias, impartiality and independence of the expert must be judged from the point of view of a fair-minded and informed observer: if to the observer it appears that there exists a probability that the expert witness is biased towards the party appointing it, the witness may be declared partial. Notably, the IBA subcommittee has preferred a test of "*outward manifestation of partiality*" over the state of mind of the expert.[7] In other words, the state of mind of the expert is irrelevant while determining whether the witness is

[4] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2009).
[5] IBA Rules on the Taking of Evidence in International Arbitration 2020, arts 5.2 and 9.2.
[6] *Liverpool Roman Catholic Archdiocesan Trust v Goldberg The High Court Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2001] WLR 2337.
[7] Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013) 112.

impartial, what must be looked at is whether the party-appointed expert *appears to be* impartial.[8] Now let us understand the rationale behind this test in detail.

Article 5.1 of the IBA Rules allows a party to rely upon a party-appointed expert, who is required to submit an 'expert report'. However, Articles 5.2(a) and (c) of the IBA Rules explicitly require the party-appointed expert to provide a statement regarding his or her present and past relationship with any of the parties and a statement of his or her independence from the parties, their legal advisors and the arbitral tribunal. The implication of the requirements laid down in Articles 5.2(a) and (c) of the IBA Rules is under contention. While it may be argued that these requirements are not intended 'to exclude experts with some connection' to the parties,[9] an argument to the contrary does seem plausible. A procedural requirement such as this, which mandates a party-appointed expert witness to declare its present and past associations with any of the parties, is a testament to the fact that such information is of relevance and material importance to the proceeding. Further, when Article 9.2(g) of the IBA Rules, which allows the arbitral tribunal to exclude evidence, based on procedural economy, proportionality, fairness, or equality, is read along with the requirements enlisted in Articles 5.2(a) and (c), the obvious conclusion is that the arbitral tribunal can exclude the evidence of an impartial party-appointed expert witness.

The Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration ["**CIArb Protocol**"] is also a noted authority that is frequently cited in the present discussion. Recital 4 of the Preamble of the CIArb Protocol states that *"experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them."* Notably, Article 4 of the CIArb Protocol is titled 'Independence, Duty and Opinion'. It states that an "*expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party."* Article 4.3 of the CIArb Protocol reiterates that an expert's duty in giving evidence is to the arbitral tribunal and Article 4.4 of the CIArb Protocol mandates the expert to state in its written opinion any past or present relationship with any of the parties, the arbitral tribunal, counsel, or any other entity involved in the arbitration. Further, in terms of Article 8 of the CIArb Protocol, a party-appointed expert witness is mandated to declare and confirm that the opinion given is *"impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration."* Circling back to the observations noted with respect to the intention captured by the IBA Rules and the CIArb Protocol, it is clear that while the concept of party-appointed expert witnesses is well recognised in the international arbitration

[8] International Chamber of Commerce International Court of Arbitration, *Issues for Arbitrators to Consider Regarding Experts* (Vol. 21 No. 1, 2010) <https://iccwbo.org/content/uploads/sites/3/2021/10/icc-arbitration-adr-commission-report-on-issues-for-arbitrators-regarding-experts-english-version.pdf> accessed 5 February 2023.
[9] Peter Ashford, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (Cambridge University Press, 2013) 19.

arena, there exists a positive duty on the expert, though appointed by a party, to be impartial and independent.

While the expert is expected to be impartial and independent, there exist no standards for determining his impartiality and independence. Although the IBA Rules and the CIArb Protocol require the expert witness to provide an account enlisting any present and past relationship with the parties, the said guidelines are silent as to the accepted degree of relationship between an expert and a party..

Repercussions of not having comprehensive standards to determine impartiality and independence of party-appointed experts – A domino effect

The absence of globally accepted rules laying down the standards for measuring the impartiality and independence of party-appointed expert witnesses has certain practical repercussions, which can potentially defeat the purpose of arbitrations.

Though the IBA Rules and the CIArb Protocol require the party-appointed expert witness to provide an account enlisting any present and past relationship with the parties, these guidelines are ridden with red flags. *Firstly*, the aforesaid guidelines are merely guiding principles, which are ***not*** binding upon the parties. *Secondly*, as the said guidelines are merely soft laws, both parties, for and against, can make out a compelling case in their favour. In the absence of binding guidelines, the award will be based on the arbitrator's opinions, leading to inconsistent practices across jurisdictions.

To understand these issues from a practical standpoint, let's take an example. In an arbitration between two parties, one party relies upon the evidence of a party-appointed expert to establish its claims. In this situation, an obvious objection regarding the credibility of the evidence produced by the party-appointed expert will crop up. The party which appoints the expert will argue with respect to the qualifications of the expert and their past experiences. It will endeavour to demonstrate that neither there is nor there was any relationship between the expert and the party based on which the expert testimony should be excluded. On the other hand, the opposite party will make compelling submissions on the point that the mere act of appointing an expert signifies an inherent bias. The opposite party may also put forth the argument that there are other experts equally qualified as the party-appointed expert to adduce evidence on the same point. This tug-of-war between the parties is a conundrum for the arbitrators. At this point, in the absence of binding guidelines and definite principles to determine the standards against which impartiality and independence must be measured, different factors will influence the decision of the arbitral tribunal - the circumstances of the case, background and culture of the arbitrators, and the

jurisdictions they hail from amongst various others. In other words, an element of subjectivity and personal bias will operate while deciding upon the said issue. To back this statement statistically, it is significant to discuss a study that interviewed 42 (forty-two) judges on a similar issue.[10] When the judges were questioned on whether they felt party-appointed experts brought any significant or useful knowledge essential for the case, 62% answered negatively. This difference of perception is what we call 'the element of subjectivity'. However, every arbitral tribunal confronted with this issue will be decided upon by the tribunal in either of the two ways: -

A. the arbitral tribunal may disregard the evidence adduced by the party-appointed expert witness; or
B. the arbitral tribunal will accept the evidence of the party-appointed expert on account of the stellar qualifications and the justified reasoning provided by them.

Due to the absence of binding guidelines and definitive principles to determine the standards against which impartiality and independence must be measured, the unsatisfied party in *both* the aforementioned situations will find reasonable ground to challenge the arbitral award. On a micro level, parties will become prone to wastage of time and resources; and from the macro viewpoint, challenges to arbitral awards on this point will lead to contradicting jurisprudence on the issue.

Transposing the safeguard of party-appointed arbitrators to party-appointed experts - A possible solution?

The issues of independence and impartiality in international arbitrations are not *sui generis* to party-appointed experts, with a similar conundrum also present in the debate regarding party-appointed *arbitrators*. Whether the same is couched in standards of 'real danger of bias'[11] or 'evident partiality',[12] the so-called '*neutrality*' of party-appointed arbitrators assumes paramount significance in most arbitral proceedings.

This is more so since the presence of justifiable doubts as to the independence or imparity of an arbitrator may constitute a ground for challenging the mandate of the arbitrator or the award of the tribunal. To illustrate, Articles 11-13 of the UNCITRAL Arbitration Rules, 2010, mandate the disclosure of any potential circumstances that could create justifiable doubts as to an arbitrator's independence or impartiality and permit challenging the appointment of arbitrators in such

[10] Ulf Stridbeck, Pal Grondahl & Cato Gronnerod, 'Expert for Whom: Court-Appointed versus Party-Appointed Experts' (2016) 23 Psychiatry Psychol & L 246.
[11] *R v Gough* [1993] AC 646.
[12] The U.S. Federal Arbitration Act 1947, s 10(a).

scenarios.[13] This is further echoed in Article 18 of the SCC Rules, 2017,[14] Articles 13-14 of the SIAC Rules, 2016[15] and Articles 13-14 of the ICC Arbitration Rules, 2021.[16]

In this vein, the IBA Guidelines on Conflict of Interest in International Arbitrations, 2014, provide practical standards for ascertaining the above standards of independence and impartiality.[17] Part II of the Guidelines contain color-coded lists describing varying degrees of potential conflict of an arbitrator, and the ideal consequences thereof- i.e. the Red List, Orange List and Green List.[18] The Red List, which is further divided into waivable and non-waivable scenarios, describes serious and incurable situations relating to the ability of an arbitrator to function neutrally. The Orange List, on the other hand, delineates situations that may give rise to doubts as to the arbitrator's impartiality or independence, resulting in a requirement for disclosures. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which there are no prescribed disclosures. While the IBA Guidelines are not legally binding, they envisage widely recognised best practices to avoid conflict of interest, especially in party-appointed arbitrators. The same has been adopted in several national jurisdictions as well, such as in Schedule V and VII of the Indian Arbitration and Conciliation Act, 1996.[19]

A question which naturally arises in light of the aforesaid discussion is whether it is possible to transpose the standards of party-appointed *arbitrators* to party-appointed *experts*? For example, would it be possible to provide similar colour-coded lists to assess the neutrality and independence of expert witnesses?

In our opinion, such a solution would neither be practically feasible nor theoretically sound. The reason being that for party-appointed arbitrators, there is a legal presumption and mandate of neutrality. For party-appointed experts, while the same is *ideal*, it is not *mandatory*. And therein lies the difference.

Traditionally, an arbitrator is defined as a neutral person who resolves disputes between parties, by means of formal adjudication by their very definition therefore, there is an expectation that arbitrators will act objectively. More importantly, there is an *expectational symmetry* in their role, i.e. regardless of who has appointed them, both parties still expect the arbitrator to perform their duty in a non-partisan manner.

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[13] The UNCITRAL Arbitration Rules 2010, art 11-13.
[14] The SCC (Stockholm Chamber of Commerce) Arbitration Rules 2017, art 18.
[15] The SIAC (Singapore International Arbitration Centre) Rules 2016, art 13-14.
[16] The ICC (International Chamber of Commerce) 2021, art 13-14.
[17] The IBA (International Bar Association) Guidelines on Conflict of Interest in International Arbitrations 2014, pt II.
[18] ibid.
[19] The Indian Arbitration and Conciliation Act 1996, sch. V & VII.

However, the situation is vastly different for a witness - expert or not. Since, by definition, a witness is not expected to be neutral, practically speaking, there are no expectations of independence from the party they are representing. Hence, while on the face of it, party-appointed arbitrators and experts do possess similar ethical conundrums, the solution for the latter lies elsewhere.

Way Forward

The above discussion demonstrates that while the concerns raised in respect of party-appointed expert witnesses are manifold, the prevailing international framework does little to assuage the surrounding concerns. Although various soft law instruments such as the IBA Rules and CIArb Protocol set out guiding principles for ensuring impartiality, these fall short in providing any uniform or binding regulations for international arbitrations. Hence, the first step in addressing the ethical conundrums surrounding party-appointed expert witnesses is to accommodate the issue within national laws.

Certain domestic jurisdictions, such as India[20] and Singapore,[21] do recognise parties' rights to appoint expert witnesses. However, there is a lack of any corresponding set of guidelines. Therefore, it is recommended that, as laid down in the IBA Rules or CIArb Protocol, minimum obligations such as providing a statement of independence - in addition to the description of the method, and the evidence and information utilised in arriving at findings, should be stipulated for such witnesses. These obligations should be supplemented by codifying the standards for determining the impartiality or independence of an expert witness, as laid down in the soft law instruments discussed earlier.

However, it is opined that merely laying down standards for assessing independence and impartiality does little to address the primary concern- that no undertakings or disclosure can gloss over the fact that party-appointed expert witnesses are, in fact, *party*-appointed. As discussed above, there will always remain a perception that such witnesses tend to favour the party which appoints them. Therefore, it is imperative to provide some form of minimum guarantee to all stakeholders.

A possible solution in this regard would be to expressly provide a procedure by which parties can challenge both the appointment and the evidence led by these witnesses, with a requirement that any adjudication made by the arbitral tribunal be reasoned and subject to challenge/ appeal. Furthermore, often parties deliberately appoint experts who may not have any previous relationship with them but may have an association with the arbitral tribunal in order to influence the latter. Such a scenario may be categorised as a specific ground for setting aside an award, as

[20] The Indian Arbitration and Conciliation Act 1996, s 26(2).
[21] The Singapore Arbitration Act 2011, s 27(2).

was done by the ICSID Annulment Committee in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.àr.l. v. Kingdom of Spain*,[22] where the award was annulled since one of the arbitrators failed to disclose a relationship with the ' 'claimant's damages expert.

In our opinion, the above proposals would address a majority of the ethical conundrums surrounding the appointment of party-appointed expert witnesses. Of course, there are some who continue to believe that no amount of intervention can ensure the independence and impartiality of these witnesses, and hence they should be disallowed *in toto*. However, excluding party-appointed witnesses would be in derogation of the basic right to present one's case in terms of Article 18 of the Model Law.[23] Therefore, it is clear that the way forward entails regulating the appointment and testimony of party-appointed expert witnesses in an effective manner; rather than dismissing their relevance altogether.

[22] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.àr.l. v. Kingdom of Spain* [2020] ICSID Case No. ARB/13/36.
[23] UNCITRAL Model Law on International Commercial Arbitration 1985, art 18.