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ASA Annual Conference 2018

Expert Evidence: Conflicting Assumptions and How to Handle them in Arbitration

Panel 2 - Instructing Experts

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Part 2

Instructions to Tribunal-appointed
experts



Tribunal-appointed expert - appointed at start of the case (1)

- There cannot be one single “correct” answer to an assessment of damages
- Example 1: modelling counterfactuals into the far future
 - Modelling of the present value of cash flows relating to a Port Concession in East Africa for up to 50 years
 - Wide range of credible values to:
 - The cash flows themselves
 - The appropriate discount rate to apply to those cash flows
- The respective valuation of the experts fell into a very wide range - implies one or both was biased?



Tribunal-appointed expert - appointed at start of the case (2)

- Example 2: a well-known case on company valuation in the English Courts
 - Shareholder dispute over a company running a health food business
 - Using the same data, the same methodology and at the same date two valuation experts valued the company:
 - £2.2 million - the expert for the Party for whom a low valuation was helpful
 - £6.3 million - the expert for the Party for whom a high valuation was helpful

Tribunal-appointed expert - appointed at start of the case (3)

- Judgment “*Both witnesses [experts] were, I thought, fair and made genuine attempts to be reasonable*”
- Judge did not see either expert as partisan and therefore the valuations by both experts were in a credible range
- Judge gave more weight to evidence pointing to a valuation at the lower end of the range set by the two experts
- Tribunal-appointed expert’s approach?
 - Range of valuations or mid-point valuation?
 - High level of subjectivity of subject matter
 - Outsourcing Tribunal’s task to the expert?



Tribunal-appointed expert - appointed at start of the case (4)


- El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15
 - *“The Tribunal has heard various experts, all knowledgeable, having opposite perceptions of the same reality”*
 - *“Economics is a complicated science or, better, a complicated art; the mere reading of the analyses of the experts of both Parties show that there is little certainty”*
 - *“The DCF method embodies a wide range of inherently speculative elements, as stated by the International Law Commission (“ILC”) and by arbitral awards”*
- National Grid plc v. The Argentine Republic UNCITRAL 2008
 - *“..the DCF methodology necessarily involves projecting future cash flows—calling for considerable latitude for creativity and speculation as evidenced by the conflicting views of the experts engaged by the Parties and the Tribunal.”*



Tribunal-appointed expert - appointed at start of the case (5)

- Tribunal taking its own view, notwithstanding the opinion of the Tribunal appointed expert
 - *Starrett Housing Corp. v Iran* (Chamber One (Lagergren, Ameli, Holtzmann) 16, Iran-US CTR (1987) 112
- Tribunal not diverting from the Tribunal appointed expert's opinion, unless it has grounds to do so
 - ICC case No 12131 (2006) (Partial Award), unreported
 - “there are no reasons for the Arbitral Tribunal to divert from the Expert's findings, unless there is an objectively justified material and different solution [...]”
- How would the Tribunal establish those grounds without expert assistance?





Tribunal-appointed expert - appointed after the exchange of Party-appointed experts' reports and the hearing (1)

- Tribunal hears opposing views of party-appointed experts and outsources to Tribunal-appointed expert to interpret
- El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB.03.15

“In view of the number and complexity of the accounting issues relating to the damages assessment, as evidenced by the diverging views.. the Tribunal, with the agreement of the Parties, has appointed its own expert ...”






Tribunal-appointed expert - appointed after the exchange of Party-appointed experts' reports and the hearing (2)

- Suez and Vivendi v Argentina ICSID 2015

“because of the complexity involved in ascertaining damages, a matter extensively argued with widely differing conclusions by each party

.../...

it was appropriate after issuing its Decision on Liability to create a separate procedural phase devoted to damages and to seek the services of an independent financial expert to assist the Tribunal”



Conversion of previously Party appointed experts into Tribunal appointed experts (1)

- Party-appointed experts become Tribunal-appointed experts
 - Instructed as a Party appointed expert in a dispute over the supply of gas to a power station
 - Quantum issues are complex, experts' reports made complicated calculations of liquidated damages and loss of profits, partly dependent on evidence from technical experts
 - After the exchange of reports and the hearing, Tribunal has requested that the two Party-appointed quantum experts become Tribunal appointed experts to assist with translating its findings of fact into quantum outcomes



Conversion of previously Party appointed experts into Tribunal appointed experts (2)

- Flemingo v Poland UNCITRAL 2016:
 - Tribunal asked Party-appointed experts to produce a model / calculations that the Tribunal can use itself to translate its findings of fact into a finding on damages
- Burlington Resources Inc. v Republic of Ecuador, ICSID 2017
 - Tribunal asked Party-appointed experts to produce a joint valuation model
 - One of the parties “*urges the Tribunal to exercise the utmost caution in the reliance it may place on said Model for quantum purposes*”
 - Challenge rejected by the Tribunal





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