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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 1

Instructions to Party-appointed
experts





Hired gun or independent expert (1)?

- Instructing Party's motivations and expectations (at the extreme)?
 - That the expert is instructed as late as possible to save costs?
 - That the expert will and can be pushed to provide an opinion that is as favourable as possible to the instructing party's already pleaded case?
 - That the expert will advocate / argue the Party's case?
 - That the expert will raise no counter arguments to the Party's case?
 - That the expert does not cave in and change their opinions in the face of:
 - New evidence that does not support the Party's case
 - Counter arguments raised by the opposing expert (for example during the conduct of a meeting of experts)
 - Cross examination at the hearing





Van Oord UK Ltd v Allseas UK Ltd EWHC 3074 TCC 2015 (1)

- The Court's 12 criticisms of C's expert:
 - Repeatedly took C's claims at face value - did not check to docs that supported or undermined them
 - Only based report on C's Witness Statements
 - Refused to value C's claims other than on the full basis claimed
 - Based assessment of C's claims on made up rates
 - Throughout cross-examination caught out repeatedly - many issues already pointed out by D's expert months before
 - Said in cross-examination was not happy with his report
 - Accepted that parts of his report were confusing / misleading
 - Appended documents he had not looked at / checked in any detail
 - Made assertions based only on what had been told by C





Van Oord UK Ltd v Allseas UK Ltd EWHC 3074 TCC 2015 (2)

- The Court's 12 criticisms of C's expert:
 - Produced a schedule said to be prepared by him but it was prepared by C's Directors
 - Preferred to recite what others had told him even though obviously wrong
 - Never considered valuing C's claims using fair and reasonable rates, even as a cross check
 - Summary:
 - Expert allowed himself to be used as a mouthpiece for C
 - Expert not independent
 - Evaluations not appropriate nor reliable
 - Court "obliged" to disregard his evidence in full





Hired gun or independent expert (2)?

- Hulley Enterprises Limited (Cyprus) - and - The Russian Federation PCA Case No. AA 226 (Yukos)

“The Tribunal observes that the Claimants’ expert admitted at the Hearing that his DCF analysis had been influenced by his own pre-determined notions as to what would be an appropriate result.”

- Pre hearing did the instructing Party derive confidence from their valuation expert having such a strong view on the valuation?
- When does “strong”, “solid” (confirming / supporting the Instructing Party’s case) become “trenchant”, “stubborn” or “pre-determined”?





Independence (1)

“Independence is a relative, not an absolute concept” - Prof. Thomas Walde

- Independence (or lack of it):
 - A matter of fact - connections between expert and Party?
 - The conduct of the expert as perceived by the Tribunal:
 - Nuances of language in report
 - Presenting alternatives (no single right answer)
 - Not holding out for untenable positions





Independence (2)

- Challenges to independence:
 - Helnan Int's Hotels AS v Arab Repub. Of Egypt, Award in ICSID Case No ArB/05/19 of 3 July 2008
 - Jan de Nul NV v Arab Repub of Egypt Award in ARB/04/13 of 6 November 2008
 - Alpha Projektholding GmbH v Ukraine, Award in ICSID Case No. ARB/07/16 of 8 November 2010
- Tribunals and Courts rarely uphold challenges to the admissibility of expert evidence on the grounds of independence
- Relationship with Party goes to the weight given to expert evidence





Shadow experts (1)

- Role when there are Tribunal appointed expert(s):
 - Submissions to the Tribunal on the appointment and instruction of a Tribunal appointed expert
 - Submission on the content of reports produced by the Tribunal appointed expert
 - Cross-examination of the Tribunal appointed expert





Shadow experts (2)

- If the rules on communication with experts are unclear keep entirely separate roles?:
 - A “**dirty expert**” (i.e. “shadow expert” / “consultant expert”) provides expert assistance to the Party under the cover of privilege
 - A “**clean expert**”, prepares the expert report to the Tribunal having regard only to the specific materials which are provided





Legal, technical and quantum experts

- Practical challenges with technical experts and quantum experts:
 - Interface between technical experts and quantum experts
 - Sequencing
 - Knock-on effects of change in opinion of technical expert





The authorised level of contact with counsel and the Party

- Expert feeling a part of “the team”
- Discussions on strategy?
- Acting as an adviser to the instructing Party before acting as an expert
 - Assisting with the scope of the instructions
 - Providing preliminary view
- Incompatible?





Disclosure of instructions to experts?

- The Civil Procedure Rules (CPR 35.10(4) & PD 35.4)
 - The Court may order that an expert discloses all material instructions if the Court has reason to believe that not all have been disclosed
- CIArb Protocol - Art 5(1)
 - Instructions can be ordered to be disclosed, but only if there is a ‘good cause’
 - Arbitrators from Common Law jurisdictions may lean towards CPR 35.10(4)?
- Could the possibility of disclosure of communications depend on whether the instructions/communications were referred to / relied upon / or reviewed by the expert?
- Assume any communications between the instructing Party and its lawyers may be seen by the Tribunal?



Transmission of knowledge of the disputed facts and strategy to the expert (1)

- Could the nature of instructions to an expert been seen as constraining their opinion?
- Copper Mesa Mining Corporation v Republic of Ecuador
UNCITRAL 2012

“The Claimant contends that the Respondent gave specific instructions to its expert witness on quantum regarding the valuation dates it considered to be applicable, while the Claimant allowed its expert witness to come to his own conclusions. Hence, according to the Claimant, the evidence from the Respondent’s quantum expert can have little or no value.”

Transmission of knowledge of the disputed facts and strategy to the expert (2)

- Chevron Corp. (USA) and Texaco Petroleum Co (USA) v Ecuador UNCITRAL (2010)
 - The Respondent requested the Tribunal to disregard the evidence of Claimant’s experts as:
 - *“they were based on assumptions provided by the counsel or where they opined on issues of law and contract interpretation”*
 - and therefore
 - *“suffered from a lack of independence”*
 - However, the Tribunal ignored this request and instead primarily relied on the evidence of the criticised Claimant’s expert



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