Tribunal-appointed damages experts: Procedural improvements can serve as a better alternative in arbitration

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This article analyses the use of tribunal-appointed experts in investment treaty arbitration and explores alternatives to this procedure for improving the quantum stage of arbitration proceedings.

In the vast majority of disputes being resolved through international arbitration, claimants and respondents will appoint their own experts to quantify damages. In some cases, tribunals will appoint their own expert, either in place of or, more commonly, in addition to the party-appointed experts.

This article explores the use of tribunal-appointed damages experts and considers whether other solutions exist to improve the quantum process in international arbitration.

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Rules surrounding appointment

The rules of all of the recognised arbitral institutions (such as the ICC, LCIA, HKIAC, SIAC, SCC, UNCITRAL and the AAA, among others) all set out provisions regarding the use of tribunal-appointed experts. The rules are similar across institutions and principally stipulate:

- The approach to selecting the expert and setting the terms of reference.
- The stages at which parties should be consulted.
- The respective duties in relation to providing the expert with information.
- The procedure to be followed after the expert's report is received.

In addition, the Chartered Institute of Arbitrators (CIArb) has issued practice guidance, which expands on such rules and aims to ensure that tribunal experts are used effectively. Practice Guideline 10 of the Guidelines on the use of Tribunal-Appointed Experts, Legal Advisers and Assessors states:

- In selecting the expert, relevant specialist institutions may be consulted, along with the parties, with one option being for parties to submit names of potential nominees.
- Once an expert is appointed by the tribunal, the arbitrators may ask the parties to comment on the expert's assignment and **set out any questions which the parties consider necessary to be addressed.**
- The parties are required to provide the expert with information and, if the expert has direct communication with the parties for this, **the tribunal is required to establish a clear method for ensuring all material shared is seen by all parties.**
- The parties have the opportunity to comment in writing on the tribunal-appointed expert's report and may also request the **opportunity to cross-examine the expert at the hearing.**

Why do tribunals appoint their own experts?

As explained above, it is within the discretion of the tribunal to appoint an expert (quantum or otherwise) in addition to the party-appointed experts. But why do they do it?

One reason is that experts' quantifications of loss can be like "ships that pass in the night"; they can produce considerably different valuations for a number of legitimate reasons, such as:

- Adopting different valuation dates.
- Using different valuation approaches.
- Being instructed to assume different facts or legal interpretations.
- Using different assumptions in their valuation models.

When the experts produce such different valuations, and especially where the dispute procedure does not allow for expert meetings or a joint statement, the tribunal is left with the difficult task of unpicking the principal differences in opinion between the experts.

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Furthermore, it is almost impossible for the tribunal to see the impact on loss of taking different assumptions to the party-appointed experts in their valuation models. This makes a comparison between the evidence of the two party-appointed experts more difficult, as seen in *Hochtief AG v Argentine Republic (ICSID Case No. ARB/07/31)*, in which the tribunal commented:

> "...where there were great differences between the scenarios contemplated by the experts, comparison of their reports was an exercise of regrettably limited utility."

(See *Legal update, ICSID tribunal considers damages calculation in Hochtief claim against Argentina*.)

Party-appointed experts are sometimes accused of adopting unrealistic assumptions which have the effect of producing overly optimistic or pessimistic valuations. Such valuations can be of limited assistance to a tribunal, as was evident in the *Yukos* award (*Hulley Enterprises Limited (Cyprus) v Russian Federation (PCA Case No AA 226)*, *Yukos Universal Limited (Isle of Man) v Russian Federation (PCA Case No AA 227)* and *Veteran Petroleum Limited (Cyprus) v Russian Federation (PCA Case No AA 228)),* in which the following statement was made in the tribunal's award on costs:

> "Another factor which the Tribunal considers relevant in fixing the costs of Claimants which should be borne by Respondent is the fact that, at the end of the day, Claimants' experts were of limited assistance to the Tribunal in its determination of Claimants' damages."

(See *Legal update, Majority shareholders in Yukos awarded US$50 billion*.)

Ultimately, without their own expert, this could result in the tribunal "splitting the baby" in determining damages.

The tribunal may also be more confident in having complicated valuations or specific technical issues deciphered by its own expert, rather than opine on issues beyond its expertise. In cases where quantum has not been bifurcated, it could be argued that the appointment of a tribunal expert also saves time in rendering the award, given that the tribunal has jurisdiction and/or liability issues to determine as well.

The "common law/civil law" divide may also explain the differing approaches to the use of experts in international arbitration. Traditionally, practitioners from a civil law background prefer the use of tribunal-appointed experts, whereas those from a common law background prefer the use of party-appointed experts. However, it is increasingly recognised that there has been a gradual shift towards the use of party-appointed experts in international arbitration, regardless of whether arbitrators (or counsel) are from common or civil law backgrounds.

Interesting findings from investment treaty awards

A review of publicly available investment treaty awards reveals that tribunal-appointed damages experts were engaged in eight of the 100 cases (8%) since 2005 where damages were awarded. In all of these cases, the tribunal expert appointment was in addition to the party expert appointments.

While this represents only a small sample of cases, we have identified a number of interesting features:

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- The majority of the experts appointed by the tribunals were academics or professors, rather than accountants in practice. This observation could support the notion that tribunals prefer a purely "independent" view in using an individual from an academic background who does not work regularly in the field.
- Seven of the eight cases were against Argentina, in cases mostly brought about after the privatisation drive of the 1990's and subsequent Argentine recession in 2001 and 2002. Of the seven cases involving Argentina, three cases (*Enron Corporation Ponderosa Assets, LP v Argentine Republic (ICSID Case Number ARB/01/3)*, *Sempra Energy International v The Argentine Republic (ICSID Case No ARB/02/16)* and *CMS Gas Transmission Company v Argentina (ICSID Case No ARB/01/8)*) had the same chair of the tribunal, who gave the same reason behind appointing an expert to the tribunal: "*to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts*". It appears that the complexity of the damages calculations were the reason behind the other appointments of experts by the tribunals.
- In most of the cases, the tribunal-appointed expert determined (on behalf of the tribunal) the damages amount awarded. However, we identified a couple of awards where this was not the case. In *National Grid plc v Argentine Republic (Final Award) (3 November 2008)*, the tribunal-appointed expert's findings were used for advisory purposes, with the tribunal determining quantum using submissions from all appointed experts. In *Enron Corporation Ponderosa Assets, LP v Argentine Republic (ICSID Case Number ARB/01/3)*, the tribunal-appointed expert agreed with the claimant-appointed expert's approach to interest. However, the tribunal decided on a different method of calculation and applied its own methodology in the award.

The case for tribunal-appointed experts

Our investment treaty research indicates that it is rare for tribunals to appoint their own damages experts. This is borne out by our own experience: in roughly 500 cases that our partners have been involved in, only four have involved tribunal-appointed experts.

In one of those cases, the tribunal appointed an expert because the respondent refused to share with the claimant (by whom our firm was instructed) highly confidential and commercially sensitive information. Tribunals may appoint experts for a similar reason in intellectual property disputes. In another case, we have been engaged by the tribunal where there is a non-participating respondent and so our appointment helps provide the tribunal with a sense-check as to the claimant’s quantification of loss.

One of our experts was appointed as an assessor to an arbitrator in a domestic matter. Section 37(1)(a) of the English Arbitration Act 1996 permits a tribunal to appoint an assessor to assist it on technical matters and may allow any such assessor to attend the proceedings. In this case, our expert attended the hearing and listened to the damages expert testimony before also being allowed to examine the evidence of the experts himself. Our expert also provided support to the arbitrator when it came to writing the award.

More comparable and reasonable valuations

The early appointment of a tribunal expert can help set certain parameters and questions for the party-appointed experts to answer, such as the valuation date or the basis of valuation. This would inevitably reduce the number of differences in approach by the party-appointed experts, especially when counsel instructs these experts to adopt certain assumptions in their valuations. Knowing that the tribunal has appointed its own expert may also reduce the likelihood of party-appointed experts producing overly optimistic or pessimistic valuations.

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When used in place of party-appointed experts

This article has focused primarily on tribunal-appointed experts that are used in addition to party-appointed experts. However, particularly for smaller disputes, there is certainly a case for using a tribunal-appointed expert **instead of** party-appointed experts. This approach removes the issue of party-appointed experts producing overly optimistic or pessimistic valuations and can result in a quicker and more cost-effective process. In English litigation, the use of single joint experts has been in place for a number of years but, despite its widespread use and benefits, there are also occasions when a range of legitimate expert opinion is necessary.

Where valuation hangs on particular technical detail

There may be value in the tribunal appointing an expert in cases where quantum hangs on a technical detail, particularly one on which the party-appointed experts have widely differing views. A third opinion from a tribunal-appointed expert could clarify the differences between the experts and help the tribunal with its decision-making.

There may be a better way...

Encourage greater collaboration between experts

In our experience, rather than appointing an additional expert, the most efficient and effective process of determining quantum involves an open and collaborative approach by the party-appointed experts from the outset. Tribunals generally greatly appreciate this approach and it removes a number of the issues tribunals have with party-appointed experts. The comments made by the tribunal in *The Rompetrol Group NV v Romania (ICSID Case No ARB/06/3)* award, support our experience in this regard:

> "The Tribunal would like to note at this stage the high quality of the expert evidence put forward on both sides on this aspect of the case. Not only were the experts on each side...deeply knowledgeable in their field, but they were each ready to engage with the arguments of the opposing experts in an exemplary fashion. The Tribunal found its joint session with both sets of experts on the penultimate day of the hearing to be genuinely informative, as well as helpful to it in forming a view of the case, and would like to record its particular appreciation for that." *(Award, page 151).*

To encourage such collaboration between experts, the arbitration procedure should allow for:

- Joint statements.
- Sharing of Excel spreadsheet models.
- The production of joint models under various different assumptions before, during or after the hearing.

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Have the appropriate expertise on the panel

As mentioned, one of the reasons for tribunal expert appointments is the need for additional expertise in complex valuation matters. Rather than appoint another expert to address this need, this could perhaps be addressed with greater diversity in expertise on the tribunal, for example by including accountants, economists or academics on the tribunal. Alternatively, although this may be controversial among the arbitration community, where quantum is bifurcated from jurisdiction and liability, the arbitration procedure could include a change to the arbitral panel for the quantum phase.

Conclusion

Publicly available investment treaty awards and our own experience show that the appointment of experts by the tribunal is rare. The occasions when tribunals have appointed their own expert highlight the difficulties faced by tribunals in understanding complex damages matters and also the presence of inefficiencies in the quantum procedural process. In our view, the most effective quantum procedural process encourages open communication between the experts and legal teams, particularly with regard to joint statements and the sharing of valuation models. With an effective quantum procedural process, the need for tribunal-appointed experts may diminish.

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