

PRACTICE NOTE

ON THE USE OF EXPERTS IN ARBITRATION

General remarks

The use of experts, both party-appointed and tribunal-appointed, as an evidentiary means is common in (international) arbitration proceedings. The fields in which expert evidence is adduced are broad and range from technical issues to quantum and the law.

Whilst often crucial to a party's case, expert evidence can add significantly to the time and cost of the arbitration if not handled with circumspection. This applies particularly to cases where expert evidence adduced by the parties is not responsive or relates to issues that are not relevant or material to the outcome of the case.

The 2018 DIS Arbitration Rules (the "**Rules**") encourage the parties and the arbitral tribunal to consider early on in the proceedings how to best deal with expert evidence, if any, in the arbitration, including in Article 27.4, 27.7 and Article 28.1, 28.2 and 28.3, 32 as well as Annex 3 A) and B) of the Rules.

This Practice Note provides further guidance to the parties and the arbitral tribunal on how to efficiently and effectively conduct the expert procedure, if any. It does so by providing a Checklist of tools the parties and the arbitral tribunal may wish to consider for efficiently managing the expert procedure, including issues to be discussed in the first case management conference and potential additional case management conferences. Each Checklist item is accompanied by a short explanatory note and, where applicable, by a proposal for the tools that can be deployed.

The Checklist can also be used by parties' counsel to discuss the issues with the parties in preparation of an arbitration, submissions and case management conferences, with respect to party-appointed experts and tribunal-appointed experts.

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I. Checklist regarding use of experts in general

Pursuant to Article 27.7 of the Rules, in the first case management conference or, if necessary, in additional case management conferences, the arbitral tribunal should discuss with the parties whether to employ experts and, if so, how to conduct the expert procedure efficiently. Specifically, the parties and the arbitral tribunal are encouraged to consider and discuss:

1. Which issues will (not) require expert evidence

Joint determination – where appropriate at an early stage of the proceedings – of issues which will or may (not) require expert evidence can help reduce the risk of non-responsive expert evidence and thus can assist in reducing time and cost. Depending on the type of dispute, the parties will know early on whether they wish to adduce expert evidence and, if so, in which disciplines. An initial discussion at the first case management conference and/or at any later appropriate stage of the proceedings, may prove helpful in structuring the proceedings in an effective and efficient manner (also) regarding expert evidence, if any.

Reasons why issues may not require expert evidence can, for example, be (i) that they are not disputed, (ii) that the arbitral tribunal does not consider expert evidence necessary because an issue is irrelevant to the case or immaterial to its outcome, (iii) that the arbitral tribunal may find that expert evidence is not required because the arbitral tribunal is sufficiently knowledgeable of the (technical, factual or legal) issue in dispute, or (iv) for any other reason.

The joint determination should ensure that each party’s right to be heard and present its case is respected.

Tool: In many cases, a frank discussion of the parties at the first case management conference pursuant to Article 27.2 will be an effective tool to achieve adequate expert management. The parties and the arbitral tribunal may alternatively (or in addition) consider a discussion at a later case management conference when the parties have more fully pleaded their respective cases.

The parties and the arbitral tribunal may also consider holding (i) an early case presentation conference – on the occasion of or after the first case management conference – where the parties present to the arbitral tribunal an "opening statement" setting out the main arguments of their case, without prejudice to their right to later adapt or amend their case to the extent permitted under the Rules, and/or (ii) a preliminary views conference, potentially upon written consent of the parties, in which the arbitral tribunal states (a) its preliminary views as to which legal issues it considers relevant to decide the case and which facts need to be proven by which party and/or (b) its preliminary views on how it would decide on the relevant issues. This may assist the parties and the arbitral tribunal in determining the issues that may (or may not) require expert evidence.

Any case management conference can be conducted as an in-person meeting, by video conference or telephone conference, depending on the parties' and arbitral tribunal's preferences.

2. Definition of issues for early determination by the arbitral tribunal to give the expert(s) the necessary basis on which to base their evidence (or to avoid a need for expert evidence altogether)

The need for expert evidence may be avoided altogether or the scope of such evidence may be significantly reduced if issues are determined at an early stage by the arbitral tribunal. The issues for early determination can be factual, legal, or even technical. They may include issues, for example, such as statutes of limitation or notification requirements and consequences of not meeting such requirements, but also more generally an early determination of which issues the arbitral tribunal considers relevant and material to the outcome of the case. Which issues might be determined early and whether such early determination will result in efficiency gain regarding the expert procedure will depend on each individual case and should be considered carefully by the parties and the arbitral tribunal.

Moreover, the arbitral tribunal may consider encouraging the parties to agree on certain issues or resolve certain issues amicably with a view of rendering the expert process more efficient and effective. The overall amount in dispute of

the claims that require expert evidence may – but need not be – a factor to consider when seeking to find agreement on points of contention.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address issues for early determination by the arbitral tribunal or potential agreement among the parties. The arbitral tribunal may consider requesting the parties or their experts to draw up a list of agreed and contentious issues, the early determination of which (or agreement on which) may have the potential to avoid or reduce the scope of expert evidence.

3. Whether expert evidence shall be adduced by the parties or whether the arbitral tribunal should appoint an expert pursuant to Article 28.2 and Article 28.3 (or both)

The Rules allow for both party-appointed and/or tribunal-appointed experts. The parties and the arbitral tribunal should consider early in the proceedings whether expert evidence shall be adduced by the parties or whether the arbitral tribunal shall appoint an expert pursuant to Article 28.2 and Article 28.3, or even both. Depending on the case, it may be advisable to revisit that decision as the case develops.

The parties and the arbitral tribunal should also consider whether hybrid models, whereby each party nominates an expert, which then together are appointed by the arbitral tribunal as tribunal-appointed experts, or similar models, may be appropriate for their case.

The ultimate determination should ensure that each party's right to be heard and present its case is respected. Further considerations in case of a tribunal-appointed expert are summarized in part III. of this Checklist.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address this issue, whereby an earlier decision will likely result in more efficiency.

4. How to structure the expert procedure in order to ensure the efficient and effective conduct of the same

Having clarity at an early stage on how expert evidence will be brought into the arbitral proceedings can help efficiently plan the preparation of witness evidence and reduce time and costs. The structure of the evidence procedure should encourage a continued fine-tuning of the issues requiring expert evidence and the elimination of unnecessary contentiousness. The issues to be

considered and discussed between the parties and the arbitral tribunal according to Art. 27.7 of the Rules include:

- at which stage(s) of the arbitration expert evidence shall be adduced;
- potential limitations to the length and or number of expert reports;
- (if party-appointed experts are used) in which sequence expert reports shall be adduced;
- whether further case management conferences pursuant to Article 27.6 shall be added to the procedural timetable for the specific purpose of discussing expert evidence;
- possible joint expert reports of party-appointed experts (if any);
- meetings among party-appointed experts (if any) and at which stage(s) of the proceedings such meetings might take place;
- (joint) communication(s) of party-appointed experts (if any) to the arbitral tribunal and the parties regarding points of agreement and/or disagreement and at which stage(s) of the proceedings such report(s) might be given;
- oral testimony of experts including the possibility of witness conferencing by the arbitral tribunal and/or counsel.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address these issues, whereby an earlier decision will likely result in more efficiency.

5. How to coordinate – where appropriate – the evidence of experts in different disciplines

Sometimes, experts in one discipline need to rely on expert evidence in other disciplines to opine on a specific issue. The parties may wish to consider whether this applies and structure the expert procedure accordingly.

Tool: The parties can have an initial discussion at the first case management conference as to what type of expert evidence will be required as a starting point. Moreover, they may want to discuss with each expert as early as feasible whether there are points regarding which that expert will need to rely on evidence from another expert. The parties and their experts may consider drawing

up a joint list of such issues. If such points come up later in the proceedings, they should be raised with the other party/ies as early as possible.

6. In which form expert evidence shall be adduced

In order to allow the expert reports to be responsive to the relevant issues and easy to navigate for the arbitral tribunal (and comply with applicable rules of professional conduct, see item 10 below), the parties may wish to consider discussing the format and structure of expert reports. Typically, but not necessarily in each case, experts will provide written reports summarizing their findings and their analysis. Expert reports will normally include an executive summary and a declaration by which the experts confirm their duties as experts in preparing the report. Experts will also normally set out their instructions and the assumptions their report is based upon, as well as identifying all documents and information they have received and appending or referencing the evidence they have relied upon. Experts may also be asked to include their CV.

Tool: The parties and experts can agree on specific rules for the case at hand, or they might consider referring to a set of rules that sets out in more detail the format and content of expert reports.

7. Whether (a) an expert determination according to the DIS Rules on Expert Determination or (b) an expertise according to the DIS Rules on Expertise may be conducive to efficiency in the proceedings

The DIS offers a confidential, flexible and cost-efficient dispute resolution method for parties wishing to obtain a provisionally binding decision on a factual issue within a short period of time under the DIS Rules on Expert Determination, as well as the possibility to obtain a non-binding expert opinion under the DIS Rules on Expertise. The parties may wish to consider whether these options may assist them in resolving (parts of) their dispute more efficiently, including by limiting or avoiding expert evidence in an ongoing arbitration.

The parties and the arbitral tribunal may also wish to discuss how such proceedings can be best integrated into the ongoing arbitral proceedings so as to allow for the most efficient and effective resolution of the parties' dispute.

Tool: The parties may wish to consider and discuss this issue even before an arbitration has commenced. If an arbitration is ongoing, the issue can be discussed at the first or any later case management conference (Article 27.2 and 27.6 of the Rules).

II. Checklist regarding party-appointed experts

Where the parties and the arbitral tribunal have agreed upon a procedure involving party-appointed experts, there is a risk that, for a number of reasons, the arbitral tribunal ends up being faced with expert evidence that is not responsive and thus not helpful to the arbitral tribunal. To mitigate such a situation, parties and the arbitral tribunal are encouraged to consider and discuss:

8. Which instructions and assumptions are provided to the expert

One of the main factors in preventing wasted time and cost are differing or imprecise expert instructions, including assumptions, being provided to the expert. The parties and the arbitral tribunal may consider agreeing on a set of instructions for party-appointed experts.

If the parties' views differ on principles or methodology, or if the parties disagree on the assumptions the experts shall base their reports on, they may wish to instruct the experts to opine on different alternatives so as to provide the arbitral tribunal with responsive expert reports. This may include instructing the experts to opine on the facts as they are presented by the opposing party if those differ from the facts as presented by the instructing party.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address this issue. If possible, the parties and the arbitral tribunal should consider including the experts in the discussions about defining instructions and assumptions. If any expert finds at a later stage that any agreed instructions or assumptions prove to be inappropriate or inadequate and need to be adapted or amended, the issue should be raised and discussed as early as possible, not only with the instructing party but also with the opposing party/ies and the arbitral tribunal.

9. Which methodology/ies the experts shall apply when conducting their investigation and preparing their expert reports

If disciplines are at stake where the experts may apply different methodologies to the same question – e.g. calculating quantum or delay, sampling and testing delivered products – parties and the arbitral tribunal, ideally upon consultation of the experts, may wish to seek to agree on the applicable methodology/ies the experts shall apply in preparing their expert reports.

Where the parties and/or experts cannot agree, the experts might be instructed to opine on alternatives so as to provide the arbitral tribunal with responsive expert reports and/or to explain why they favour one approach over others, i.e. why they approach they chose is in their view more suitable in the case at hand.

Tool: This issue can be discussed at the initial or any later case management conference (Article 27.2 and 27.6 of the Rules), provided the experts have a sufficient grasp of the matters at hand. It may be worth revisiting the issue periodically as the experts' views may change depending on how the case and the evidence presented in the case develops. If so, the issue should be raised and discussed as early as possible, not only with the instructing party but also with the opposing party/ies and the arbitral tribunal.

10. The rules applicable to the expert(s) in the given case, including any applicable rules of professional conduct and the effect(s) of such rules in the given case

Experts in (international) arbitration often hail from different jurisdictions where different rules of professional conduct may apply. It may be prudent to discuss which rules shall apply and what effects such rules may have on the expert procedure.

Tool: A case management conference can be held as soon as the experts are appointed. Each expert can present the rules that apply to their work as the basis for a discussion on the rules that should apply to the case at hand.

11. Which documents and/or other information the experts require to prepare their expert reports and how and when such documents and/or information will be made available to the expert(s)

Parties are often not in possession of the same relevant information and documentation when instructing experts. The parties and the arbitral tribunal may wish to consider coordinating the expert procedure and document production (if any) when setting up the procedural timetable in order to ensure responsive expert reports based on the same set of facts and documents.

Tool: The parties may wish to draw up a list of documents and/or other information required by their experts as early as possible. Those lists can be discussed at the first or any later case management conference (Article 27.2 and 27.6 of the Rules). It may be worth revisiting the issue periodically as the experts' views may change depending on how the case and the evidence presented in the case develops. If so, the issue should be raised and discussed as

early as possible, not only with the instructing party but also with the opposing party/ies and the arbitral tribunal.

12. Whether the parties can agree on the documents and/or other information to be made available to the expert(s) (Expert Document Agreement)

To ensure responsive expert reports on the same factual basis, parties may wish to agree on a joint set of documents and/or information to be provided to all experts.

Tool: The parties may wish to consider setting up a joint database of shared documents accessible to all experts. The parties may also wish to consider allowing the experts to jointly request documents from the parties – through the arbitral tribunal – to be shared among all experts.

13. Language of expert testimony

Whenever possible, the parties should ensure that the experts testify in the same language, ideally the language of the proceedings. Where this is not possible, the parties and the arbitral tribunal should agree on the modalities of translation and interpretation of any written report and/or oral testimony at a case management conference. They may also wish to consider expressly addressing the need for translation of evidence relied upon by the experts, including particularly extensive documentary evidence (like lengthy reports or excel sheets or other data bases) which the experts rely only in certain limited parts.

Tool: These issues should be discussed at a case management conference.

III. Checklist regarding tribunal appointed experts

The parties may agree that – instead of or in addition to party-appointed experts –, the arbitral tribunal shall appoint experts. Pursuant to Article 28.2, the arbitral tribunal may also appoint experts on its own initiative if it so deems necessary to establish the facts of the case.

Article 28.3 of the Rules provides that the arbitral tribunal shall consult with the parties before appointing an expert. Any expert appointed by the arbitral tribunal shall be impartial and independent of the parties. The arbitral tribunal shall apply the provisions of Article 9 and Article 15 of the Rules, *mutatis mutandis*, to any tribunal-appointed expert, provided, however, that the arbitral tribunal shall assume with respect to the expert the function that the DIS has with respect to the arbitral tribunal.

In this respect, the parties and the arbitral tribunal are encouraged to consider and discuss:

14. Whether a tribunal-appointed expert should be appointed

If the parties, or the arbitral tribunal on its own initiative, consider(s) it necessary to have an expert appointed by the arbitral tribunal, they/the arbitral tribunal should raise the issue as early as possible.

Tool: The parties and the arbitral tribunal should discuss at the first case management conference and/or at any later case management conference whether a tribunal-appointed expert shall be appointed.

15. How to structure the expert procedure with the tribunal-appointed expert in order to ensure the efficient and effective conduct of the same

When consulting the parties pursuant to Article 28.3 of the Rules, the arbitral tribunal should consider the following points:

- the specific questions to be answered by the tribunal-appointed expert;
- the required expertise of the expert;
- instructions to be given to the tribunal-appointed expert;
- any need for early determination of issues by the arbitral tribunal to give the expert(s) the necessary basis on which to base their evidence or to avoid a need for expert evidence altogether;

- the documentation and/or other information to be provided to the expert;
- any necessary factual, legal, methodical or procedural instructions and/or assumptions to be provided to the expert by the arbitral tribunal (or the parties upon the tribunal's instruction, as the case may be);
- the timing of the expert's report(s) and the opportunity for the parties to comment on them;
- the necessity of examining the expert in an oral hearing;
- the conditions of the engagement letter to be concluded between the tribunal and the expert and who is to draft the engagement letter;
- the remuneration of the expert's services and the necessity of an additional advance on costs to be paid by the parties (Article 32, 35.6 of the Rules);
- any other of the items listed in this Practice Note.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address these issues.

16. Which instructions and assumptions are provided to the expert and which methodology the expert should apply

The parties and the arbitral tribunal may consider including the expert(s) in the discussions about defining instructions including assumptions and methodology. If any expert finds at a later stage that any agreed instructions or assumptions prove to be inappropriate or inadequate and need to be adapted or amended, the issue should be raised by the expert and discussed with the arbitral tribunal and the parties as early as possible. The arbitral tribunal may adjust the instructions at a later point in time, if appropriate, having granted the parties the right to be heard.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address these issues.

17. Whether and how the tribunal-appointed expert is allowed to communicate directly with the parties

The parties may also wish to allow the tribunal-appointed expert, upon the expert's request, to communicate directly with the parties in defined instances, for example to interview relevant personnel, in the presence of representatives of the parties and/or of the arbitral tribunal, as the case may be.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address these issues.

18. How to ensure that the expert is independent and impartial

To ensure that the expert is sufficiently independent and impartial (see Article 28.3 of the Rules), the arbitral tribunal should request any potential expert to disclose all circumstances likely to give rise to doubts as to the expert's impartiality or independence, for example any relations the expert may have with any of the parties, their counsel and the members of the arbitral tribunal. The arbitral tribunal should give the parties an opportunity to comment on any disclosure made by any potential expert before appointing the expert. The arbitral tribunal should also oblige any appointed expert to continue to disclose all circumstances likely to give rise to doubts as to the expert's impartiality or independence throughout the proceedings, and give the parties the opportunity to comment on any such disclosure if and when made.

Tool: The first or any later case management conference (Article 27.2 and 27.6 of the Rules) can be used to address these issues with the parties. Any orders to the expert can be included in the engagement letter with the expert or issued by procedural order of the arbitral tribunal.

19. Who ultimately has to bear the costs of the party-appointed expert

Pursuant to Article 32, the costs of any expert appointed by the arbitral tribunal are part of the costs of the arbitration. The arbitral tribunal decides on the ultimate allocation of such costs pursuant to Article 33.