

**Challenging Party-Appointed Experts in International Commercial Arbitration based on  
Independence and Impartiality Requirements**

By

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## Abstract

*Nowadays, the use of party-appointed experts has become a growing trend in international commercial arbitration. With the increase in need and purpose of their involvement in arbitration procedures, party-appointed experts are expected to meet various professional requirements and obligations. The need to bring fairness in the arbitral proceedings especially requires experts to be independent and impartial. Moreover, since party-appointed experts are chosen by the parties, involved in various arbitral proceedings repeatedly, and has some sort of professional and personal relationships with parties and members of the tribunal, it is possible to doubt their independence and impartiality. Hence, the main thrust of this paper is to explore the ethical requirements that need to be met by a party-appointed expert in general and the specific standards of independence and impartiality that can be used by arbitrators to determine the independence and impartiality of party-appointed experts. This being the aim, it also investigates whether noncompliance with such ethical requirements will cause their challenge and whether a tribunal has the power to decide upon such a challenge. In doing so, the paper finds out that the duty of independence and impartiality of party-appointed experts has not been expressly stipulated in the binding laws of international arbitration. However, such an obligation can be inferred from the non-binding rules as well as the fundamental principles of international arbitration. It also finds that there are no specific standards of independence and impartiality of party-appointed experts. Based on the analyses of relevant literature and different case law, the researcher argued that tribunals have the power to decide upon a challenge and exclude them based on lack of independence and impartiality. However, such a possibility is being challenged due to the non-existence of specific standards that could help tribunals to use to assess the independence and impartiality of party-appointed experts. For this reason, tribunals are not excluding party-appointed experts despite the existence of some circumstances that create doubt on their impartiality. Therefore, this gap needs a thought from the eyes of the laws. Consequently, the paper acknowledges the need for a specific*

*guideline on the standards of independence and impartiality and recommends for the analogous application of IBA guidelines on conflict of interest in international arbitration for a party-appointed expert. In doing so, the paper emphasizes giving proper consideration of the differences.*

## Introduction

In recent times, commercial arbitration is getting widely accepted and even cases that involve technical matters are being referred to it.<sup>1</sup> For the effective resolution of the issues that occur in international transactions which at the same time involve technical issues, tribunals will usually use expert witnesses. Expert witnesses are individuals or organizations that can be called into the Arbitration Proceeding either to submit a written report or give oral testimony on the specific issue of the dispute that requires special knowledge in a particular field or branch of law.<sup>2</sup> These experts give a professional opinion to clarify technical issues and assist arbitrators in reaching decisions on areas that are not within the competence of arbitrators to ensure the effectiveness of the arbitration proceedings.<sup>3</sup>

These experts may be called either by the parties or the Tribunal Itself<sup>4</sup> and this is also indicated in some relevant rules of arbitration. For instance, the UNCITRAL model law stated that "the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal."<sup>5</sup> Besides, the International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules) indicated the same by stating that arbitrators may appoint one or more independent tribunal-appointed Experts to report to it on specific issues.<sup>6</sup> Not only this, but the IBA rule also indicated that a party may rely on a party-appointed expert as a means of evidence on specific issues.<sup>7</sup> In this way, the possibility to use experts in cases that require special expertise is recognized. As a general professional requirement, these experts are expected to maintain the fairness of

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<sup>1</sup> Margaret L Moses, 'The Principles and Practice of International Commercial Arbitration' CUP (2008), 175.

<sup>2</sup> Alexey Kot and Sergii Korniienko, 'The Role of Experts in International Arbitration' (Antika, august 12/2019) <<http://antikalaw.com.ua/en/the-role-of-experts-in-international-arbitration/>> accessed 16 March 2020.

<sup>3</sup> Howard Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?' in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; ICCA & Kluwer Law International 2015) pp. 379-430, 1.

<sup>4</sup> Moses (n 1) 176

<sup>5</sup> UNCITRAL Model Law (as adopted in 2006), Art 26(1(a)), see also UNCITRAL Arbitration Rules (2010), art 29(1)

<sup>6</sup> IBA Rules on the Taking of Evidence, 2010, Art 6(1)

<sup>7</sup> Ibid, Art 5(1)

arbitration proceedings by being independent and impartial in any time of the proceeding.<sup>8</sup> This obligation is stipulated for Tribunal appointed experts in the international rules of arbitration requiring the tribunal to choose an independent expert.<sup>9</sup> Such an obligation is also supported by institutional rules.<sup>10</sup> Moreover, the international arbitration rules stipulate for the exclusion of tribunal appointed experts when they fail to respect such ethical obligations.<sup>11</sup> However, the problem is such a similar obligation is not clearly indicated for a party-appointed expert. Despite the existence of many cases that base their issues on the ethical requirements of independence and impartiality, the ethical conduct of party-appointed expert witnesses is not well regulated in binding laws and the specific standard to be followed by arbitrators to assess such duty is stated nowhere in international arbitration laws. Particularly, there is no clear approach or law on the possibility of challenging party-appointed experts based on the lack of such professional requirements of independence and impartiality.

There are some works of literature written on the issue of expert witnesses based on different perspectives. For example, Mark Kantor in his Article called ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’<sup>12</sup> discussed the professional code of conduct of party-appointed experts and made possible proposals to explore the ethical duties of a party-appointed expert. He argued that the ethical conduct of party-appointed experts is not regulated in the binding international arbitration rules rather they can be inferred from the specific code of conduct of each profession. He explained his argument by examining the requirement as are found in accounting, Engineering, and Oil and Gas, attorney, and other Profession' code of conduct. He finally concludes on the existence of ethical duties, i.e. duty of disclosure, duty to give full and true information, and a duty

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<sup>8</sup> Mark Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’ (2010) 26 *Arbitration International* 323, see also IBA Rules on the Taking of Evidence, (2010 revision), Art 5(c) and art 6(2))

<sup>9</sup> UNCITRAL Arbitration Rules, Art 29(1)

<sup>10</sup> LCIA Rules of arbitration, Art 21.2

<sup>11</sup> UNCITRAL Arbitration Rules, Art 29(2), see also LCIA Rules, Art 20.3

<sup>12</sup> Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?’ (n 8).

to assess reasonableness. Moreover, he added that there is no uniform standard of ethical duty as there is a variation from profession to profession.

Besides, Doug Jones also discussed the professional requirement of independence and impartiality of party-appointed expert in his Article called "Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last"<sup>13</sup>. His article in general tries to explore the ethical duty of independence and impartiality of party-appointed experts from the currently existing non-binding rules of arbitration. Jones refers to the IBA rule of evidence and also to the emerging protocol of the Chartered Institute of Arbitrators for the Use of party-appointed Expert Witnesses in International Arbitration (CiArb Protocol), to argue on the extension of the duty of independence and impartiality to a party-appointed expert.

However, the above pieces of literature focus on the general professional requirements of experts. Apart from discussing independence and impartiality of party-appointed experts as a general professional requirement, they do not explain what specific standards should be applied and be used by arbitrators in determining the independence and impartiality of party-appointed expert. Moreover, none of the pieces of literature discuss the possibility of challenging party-appointed experts for lack of the ethical duty of independence and impartiality which is the focus of this study.

Hence, the study mainly explores the ethical conduct that needs to be met by a party-appointed expert in general and the specific standards of independence and impartiality that arbitrators can apply to determine the independence and impartiality of party-appointed experts and assess whether noncompliance with such standard will cause their challenge. By doing so, it endeavors to fill the

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<sup>13</sup> Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (2008) 24 Arbitration International 137-156.



theoretical knowledge gap in the existing literature. Moreover, it will serve as inputs for prospective researchers.

This study employs a doctrinal legal research methodology. Using this method, it identifies the existing legal frameworks on party-appointed experts. In so doing, it pinpoints ambiguities and gaps within the law related to the party-appointed experts. It also looks to some cases to show the implication of the gap in the practice. In addition, as primary sources, it uses UNCITRAL Arbitration rules, UNCITRAL Model law, IBA Rule, IBA Guidelines, CiArb Protocol, and other laws as a baseline. Apart from these primary sources, secondary sources, such as books, articles, and online materials, are used throughout the study. As the working title depicts, the scope of the research is particularly tailored to party-appointed experts from the context of standards of independence and impartiality. However, for a better understanding of some of the points, reference has been made to Tribunal appointed expert where the researcher believes there are some relevant laws in that regard.

This study is divided into two main chapters. Chapter one generally explores the professional requirements for experts with a particular focus on the independence and impartiality requirements of party-appointed experts. In doing so, it critically examines the legal frameworks and ethical duties of independence and impartiality that should be met by a party-appointed expert. It also analyses the specific standards of independence and impartiality that can be used by arbitrators to assess the independence and impartiality of independence once appointed. Chapter two discusses on challenges of party-appointed experts based on lack of independence. It also investigates issues that need to be considered when challenging a party-appointed expert and, examines the power of an arbitral tribunal to decide on the challenge of party-appointed experts. For a better understanding of the issues, it also analyses case law and discusses based on the findings from the practical cases on the possibility of challenging party-appointed experts for the reason of lack of independence and impartiality. Finally, a

conclusion is made on the major findings of the study and forward suggestions on things that need a second thought from the law.

## **Chapter One: Independence and Impartiality of a Party-Appointed Expert in International Commercial Arbitration**

This chapter discusses the Independence and Impartiality requirement of a party-appointed expert. The chapter starts with giving a general overview of the purpose and types of expert witnesses and then presents the general professional requirements of experts. In particular, it discusses the requirement of independence and impartiality of a party-appointed expert and the debates related to it. The remaining part of the chapter is devoted to deal with the standards of independence and impartiality of party-appointed experts.

### **1.1. General Conceptual Overview of Experts in International Commercial Arbitration**

Nowadays, experts become well accepted and recognized in International arbitration and will continue to be.<sup>14</sup> Their special relevance in easing points of confusion through providing data and explanation of complicated cases is vital.<sup>15</sup> They also play many related roles. For instance, by testifying based on their professional knowledge, they play an important role in the evidentiary process of arbitral proceedings. Moreover, they can assist in ensuring the effectiveness and completeness of the arbitral proceedings.<sup>16</sup> The fairness of the procedure in respect of properly presenting a case can also be attained through them. Depending on many factors, there are different types of Experts.<sup>17</sup> For example, based on their specialization or the specific issues of concern; they can be legal, technical, commercial, financial, or

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<sup>14</sup> Martin Hunter, 'Expert Conferencing and New Method in International Arbitration 2006: Back to Basics' in Varady, Barcélo, Kröll, Von Mehren, *International Commercial Arbitration – A Transnational Perspective* (2019), p. 762

<sup>15</sup> Kot and Korniienko, 'The Role of Experts in International Arbitration' (n 2)

<sup>16</sup> Ibid

<sup>17</sup> Chartered Institute of Arbitrators International Practice Guideline, Party Appointed and Tribunal Appointed Experts, Commentary on Art 2, <<https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf>> accessed December 29/2019

quantum experts.<sup>18</sup> This paper focuses on the types of experts based on their appointment. Accordingly, they can be classified as party-appointed and tribunal-appointed experts.

Party-appointed expert is “a person or organization appointed by a Party to report on specific issues determined by the Party; while a tribunal-appointed expert is appointed by an arbitral tribunal to report to it on specific issues determined by the Arbitral Tribunal.”<sup>19</sup> There may be a preference for one or the other type of expert since each type has its advantages and disadvantage. Party-appointed expert is usually common in common law jurisdictions. It gives parties a chance to present their cases by relying on experts that are chosen by them. More importantly, when parties appoint their expert it makes them feel they are controlling the manner their case will be decided and give them confidence.<sup>20</sup> However, it is also criticized for encouraging bias. This is usually due to parties' attempts to appoint experts who have a similar view with them. Besides, being paid by the parties may increase the possible bias of the experts. Moreover, it is also considered costly as it allows each party to choose different experts.<sup>21</sup>

On the contrary, Tribunal-appointed experts are usually known in civil law countries.<sup>22</sup> They are generally assumed to be independent and less costly compared to party-appointed experts. However, this may not be always true since on some occasions parties tend to appoint their expert to refute the evidence presented by a tribunal-appointed expert in which case the cost may increase.<sup>23</sup> Besides, in some situations parties have no trust in Tribunal appointed experts and criticize them for snatching parties' ability to control their case.

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<sup>18</sup> Ibid, see also Bernhard Berger, 'The Use of Experts in International Arbitration-Specific Issues Relating to Legal Experts', <<https://www.arbitration-ch.org/asset/017768b26656df897194b7a57ee5dce8/Bernhard%20Berger%20%20Legal%20Experts.pdf>> accessed October 23/2019

<sup>19</sup> IBA Rules on the Taking of Evidence, see the part indicated for definitions of different terms

<sup>20</sup> Hunter, 'Expert Conferencing and New Method in International Arbitration 2006: Back to Basics' (n 14), p. 760

<sup>21</sup> Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?' (n 3).

<sup>22</sup> Ibid

<sup>23</sup> Ibid.

In general, the preference for experts may also depend on the interest in the mind of the one appointing the expert. Indeed, the interest of parties and an arbitral tribunal in appointing experts vary. Parties usually aim to win the case and for that reason, they tend to appoint experts that have the same point of view and control the manner the expert is used. This may lead to the misuse of the expert to the extent it favors the appointing party. On the other hand, arbitral tribunal appoints experts to get honest advice and assistance on the specific issue which is unknown to it.<sup>24</sup> These differences in interest lead to the question of how the expert should be used in international arbitration. Therefore, the need to balance these interests call to different professional obligations and requirements that need to be met by experts. So, what are the professional obligations or requirements?

These requirements include but not limited to qualification, duty to assist tribunal, and to be independent and impartial. Since the main purpose of an expert is to give an opinion to clarify complex cases in a particular area, the first requirement is qualification.<sup>25</sup> This means experts need to have the specific experience or specialized expertise that is needed concerning the particular field or area they are expected to give opinions. For instance, if the opinion needed concerns an issue of energy, then the expert should have expertise in energy.<sup>26</sup> The same is true for financial, legal, and other issues. This requirement is also recognized in UNCITRAL arbitration rules. This law requires an expert to submit "(...) to a description of his or her qualification..."<sup>27</sup> before accepting an appointment.

Experts are also required to give reliable information based on their expertise irrespective of the party who appoints them. Since their main purpose is to assist the tribunal to reach a decision, they should

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<sup>24</sup> Hunter, 'Expert Conferencing and New Method in International Arbitration 2006: Back to Basics' (n 14), p. 762

<sup>25</sup> Expert Testimony and Qualification of experts, (Forensic Psychology)–iResearch Net <<http://criminal-justice.iresearchnet.com/forensic-psychology/expert-testimony-and-qualifications-of-experts/>> accessed May 30, 2020

<sup>26</sup> Ibid

<sup>27</sup> UNCITRAL Arbitration Rules, art 29(2)

provide honest evidence and act responsibly to assist the tribunal.<sup>28</sup> In this regard, there are conflicting views on the duty of experts to assist the tribunal. One of the views is that it relates the duty to assist the tribunal only to tribunal appointed arbitrator and oppose the extension of this duty to party-appointed expert. According to this view, extending this duty on a party-appointed expert will reduce the duty a party-appointed expert owe to the appointing party and eliminates the distinctions between party and tribunal appointed experts.<sup>29</sup> On the other hand, some arbitrators and practitioners support the idea of extending the imposition of an affirmative duty to assist the tribunal to a party-appointed expert. Accordingly, proponents of this idea believe that such duty will encourage the party-appointed expert to be independent<sup>30</sup> (A duty which is the focus of this paper). Moreover, they argued that the role of an expert is to testify or give evidence to the tribunal not to act as a counsel for the party who appointed the expert.<sup>31</sup> Despite varying views, there are also emerging protocols which support the idea of an expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced.<sup>32</sup>

The other professional requirement of an expert is to be independent and impartial. When we say experts should be independent and impartial, what does it mean? What does it include? What are the legal bases that impose such an obligation? How is it applicable in practice? As the focus of the paper, these questions are dealt with in the discussions below.

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<sup>28</sup> Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?' (n 3) 2.

<sup>29</sup> ICC International Court of Arbitration, 'Issues for Arbitrators to Consider Regarding Experts' (*ICC Digital Library*, 2010) <[https://library.iccwbo.org/content/dr/COMMISSION\\_REPORTS/CR\\_0041.htm?l1=Commission+Reports#T\\_OC\\_BKL1\\_2\\_1](https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0041.htm?l1=Commission+Reports#T_OC_BKL1_2_1)> accessed 21 March 2020.

<sup>30</sup> *ibid.*

<sup>31</sup> 'International Arbitration: The Independence of party-appointed Experts: Fact or Fiction?' (*Financier Worldwide*, December 2019) <<https://www.financierworldwide.com/international-arbitration-the-independence-of-party-appointed-experts-fact-or-fiction>> accessed 21 March 2020

<sup>32</sup> CiArb Protocol, Art 4(3)

## 1.2. Independence and Impartiality Requirement

### 1.2.1. General Meaning of Independence and Impartiality

Generally, Independence and impartiality are interrelated concepts. Independence refers to “the absence of certain personal or financial relationships with the parties, tribunal or the merit of the case [Emphasis added]” while Impartiality refers to the state of mind of an expert which indicates the non-existence of possible bias or inclination towards them or the capacity to resist the possibility of being influenced by the existing factors which are not related to his expertise.<sup>33</sup> In short, independence indicates an objective perspective that focuses on the existence of the facts and impartiality, on the other hand, indicates a subjective perspective to assess whether the existence of the fact has a possible impact on impairing the capacity of the expert to the advice fairly and neutrally.<sup>34</sup>

Therefore, when we say expert should be independent, it means in general that s/he shouldn't have relation either to the tribunal or the parties nor has interest on the merit of the case that may influence the ability to give honest advice on a particular area of expertise.

### 1.2.2. Legal Basis for Independence and Impartiality of Party-Appointed Expert

Now, it is important to assess whether this obligation of an expert which requires him/her to be free from relationships with either the party or the tribunal has a legal backup. In this regard, it is relevant to make some sort of reference to a tribunal appointed experts. The obligation of independence and impartiality of a tribunal appointed expert is laid in many international instruments.

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<sup>33</sup> International Arbitration: The Independence of Party-Appointed Experts: Fact or Fiction?' (n 31)

<sup>34</sup> The Double Requirement that the Arbitrator be Independent and Impartial' (*Global Arbitration News*, 27 February 2015) <<https://globalarbitrationnews.com/the-double-requirement-that-the-arbitrator-be-independent-and-impartial-20150227/>> accessed 21 March 2020

While giving an option to choose an expert, the UNCITRAL Arbitration Rule noted for the selection of independent experts by an arbitral tribunal.<sup>35</sup> Moreover, it also states that "expert shall submit a (...) statement of his/her impartiality and independence" before accepting an appointment.<sup>36</sup> A similar stipulation is also included in IBA Rules requiring the tribunal to select an independent expert and the expert to submit a statement notifying on its independence.<sup>37</sup> This is also supported in institutional arbitration rules. For instance, the LCIA(London Court of International Arbitration) Rules stipulates that an expert that is appointed by an arbitral tribunal "shall be and remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect."<sup>38</sup> These indicate that experts' independence and impartiality is one of the vital professional requirements that should be considered from the time of their selection to the actual proceedings where their opinion is needed.

However, the above rules show the requirement of independence and impartiality on Tribunal appointed experts. What about the party-appointed expert? Are they also required to be independent? Is there any law that stipulates such obligation on a party-appointed expert?

Unlike the tribunal appointed experts, there are no binding rules that explicitly put a requirement on choosing an independent party appointed expert. The UNCITRAL Arbitration Rules, The Model law as well as the institutional rules of arbitration are also silent setting the ethical duties of independence and impartiality on party-appointed experts. The only way such professional obligation can be inferred is by looking to the requirement put in the non-binding but widely accepted rules of IBA and emerging protocol of CI Arb, for submitting a written statement by the party-appointed experts. For instance, The IBA Rules require that a party-appointed expert submit a statement indicating his or her independence

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<sup>35</sup>UNCITRAL Arbitration Rule, Art 29(1)

<sup>36</sup>UNCITRAL Arbitration Rules, art 29(2)

<sup>37</sup>IBA Rules on the Taking of Evidence, art 6(1) & (2)

<sup>38</sup> LCIA Rules of Arbitration, Art 21.2



from the parties, their legal advisors, and arbitral tribunal.<sup>39</sup> Similarly, CiArb's protocol put an obligation on a party-appointed expert to disclose any past or present relationships with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration.<sup>40</sup> This is put to assure independence and impartiality of the expert or in other words, the non-existence of bias or conflict of interest. It also refers to a quality of mind: indicating that the opinion of the expert shall be impartial, objective, unbiased, and uninfluenced due to pressure from parties or other factors.<sup>41</sup>

Therefore, what can be concluded from this is that despite the nonexistence of clear and straightforward rules that directly impose such obligation, some of the provisions in the non-binding rules indicate that such an obligation can be inferred indirectly from the articulation of the provisions.

### **1.2.3. Debates on Independence and Impartiality of Party- Appointed Expert**

In addition to the nonexistence of binding rules, there are also debates on whether party-appointed experts can be independent and whether such an obligation of independence and impartiality should be imposed on a party-appointed expert.

There are some scholars like Thomas Walde, who argue on the impossibility of being independent for a party-appointed expert giving the fact they are retained and paid by the party. Plus, a need for further engagement with a party in the future also will make them believe as if they owe a duty to the party.<sup>42</sup> Therefore they usually tend to assist the party in developing evidence and winning the case. If an independent expert is needed, then the tribunal can appoint its expert.<sup>43</sup> Karrer, on the other hand,

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<sup>39</sup>IBA Rules on Taking of Evidence, Art 5(2(a&c))

<sup>40</sup>CiArb protocol, Art 4(4(b))

<sup>41</sup> Ibid, Art 4(1)

<sup>42</sup> Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?' (n 8) 334

<sup>43</sup> Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?' (n 3).

advises leaving for the tribunal to decide on how much it can believe the party-appointed expert than trying to impose an obligation of independence and impartiality as it may be difficult to achieve.<sup>44</sup>

On the contrary, some scholars like Freedman believe the party-appointed expert need to be independent irrespective of the party who appointed since it has a general duty to assist the tribunal in reaching a decision.<sup>45</sup> They believe that the need to come up with a fair decision by itself requires the party-appointed expert to be independent. Otherwise, it can result in an unjust outcome that is based on biased evidence.<sup>46</sup> They also noted that nowadays, it may be hard to get an independent party appointed expert since appointed experts are being used as 'counsel' or 'advocates' of the parties who appointed them. By borrowing the word of Doug Jones, they are "a hired gun" of the parties. However, the fact that they are acting this way should not be taken as a proper way and there should be mechanisms to ensure their independence.<sup>47</sup>

I believe that the professional requirement of being independent and impartial should not be questionable as far as the fair procedure of arbitration is concerned. Similar to Tribunal appointed experts, party-appointed experts also play a huge role in the fairness and effectiveness of an arbitration proceeding. Therefore, this requirement can strengthen the very purpose of an expert in arbitration, which is giving an opinion to help the tribunal come up with a fair and balanced decision. Moreover, laying such obligation can also limit the cost and delay of arbitration proceedings since parties will be limited to call experts only based on the expertise rather than their relationship or based on having a similar point of view. This, in turn, will limit parties from appointing/calling on many irrelevant experts

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<sup>44</sup> Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?' (n 8) 341.

<sup>45</sup> Freedman, 'Trials of an Ethics Expert Witness', Legal Times, 23 May 1994, as cited in Kantor, 'A Code of Conduct for party-appointed Experts in International Arbitration - Can One Be Found?' (n 8) 369.

<sup>46</sup> Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (n 13), 138.

<sup>47</sup> Ibid.

to strengthen their weak case.<sup>48</sup> Therefore owing a similar duty of independence from a party-appointed expert will be reasonable.

#### **1.2.4. Approaches to Preserve the Independence and Impartiality of Party Appointed Expert**

Supporting the need for the independence of party-appointed experts, there are some approaches/ways suggested by scholars and some others recognized in some rules that can be used to ensure the independence of a party-appointed expert. The first method to ensure the independence of the expert is requesting an affidavit to that effect. So, a party-appointed expert can come up with a statement indicating his independence and an intention to remain the same in the overall proceeding. The idea behind such a method is that when an expert witness takes such commitment before testifying, it will potentially impose an ethical obligation on the expert since the expert will fear to breach such an obligation.<sup>49</sup> This is the idea enshrined in the IBA rules as well as CiArb Protocol. Similarly, an expert may also submit a declaration with its report affirming a duty to assist the tribunal and indicating his/her impartiality in providing the expert opinion.<sup>50</sup> The other way can be cross-examination. In this way, the parties can be given the chance to cross-examine any expert that is appointed by the opposing party. This method is used for tribunal appointed experts in international arbitration.<sup>51</sup> However, the analogical application can help to differentiate reliable information from the non-reliable information. This can also help the tribunal to identify some party-appointed experts who are good actors to appear independent while giving biased testimony in reality and can assist the tribunal in deciding on the weight of the evidence to be given to the testimony of the expert.<sup>52</sup>

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<sup>48</sup> Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (n 13), 138

<sup>49</sup> Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?' (n 8), 328.

<sup>50</sup> CiArb Protocol, Art 7.1 and Art 8

<sup>51</sup> IBA rules on Taking of Evidence, Art 8(3), see also UNCITRAL Arbitration rules Art 28(4) and Art 29(5)

<sup>52</sup> Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration - Can One Be Found?' (n 8) 335.

On the other hand, some scholars suggest using a different method that can help in appointing an independent expert from the start and avoid possible bias that comes with a party-appointed expert. Dr. Sachs comes up with a proposal in this regard. Dr. Sach's proposal suggested "for each side to identify a number of possible experts it would prepare to rely on, with the tribunal ultimately selecting one expert from each side's list. The two tribunals appointed experts would have full duties of independence and be paid by the tribunal out of the common arbitration fund. Their terms of reference would be framed by the tribunal and they would be required to work as a team and produce a single report. The report would be provided to the parties as a preliminary draft, on which the parties will have the opportunity to comment. The experts would testify together at the hearing and be questioned by both parties. Crucially, each expert would not be permitted to communicate separately with the parties, but could seek input and assistance from both parties."<sup>53</sup>In this way, the parties will suggest experts that are relevant in giving evidence or testimony with the area of the dispute and the last option to appoint an independent expert will lie on the tribunal. Therefore, all these methods can be used to ensure the independence of the expert and avoid possible bias. However, there should also be some standards that could assist the tribunal to decide on independence or not of the expert. This being the fact, however, none of the above rules indicate what it means by independence? When can we say a party-appointed expert is not independent? What are the standards to take into consideration? All these are not addressed in the laws. The next session discusses the standards of independence and impartiality required of a party-appointed expert.

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<sup>53</sup>R. K. SACHS, "Protocol on Expert Teaming: A New Approach to Expert Evidence" in *Arbitration Advocacy in Changing Times*, ICCA Congress Series no. 15 (2011) p. 147, as cited in Rosen 'How Useful Are party-appointed Experts in International Arbitration?' (n 3).

### **1.2.5. Standard of Independence and Impartiality Requirement of a Party Appointed Expert**

Now, I come up with the conclusion that a party-appointed expert also needs to be independent. As mentioned in the previous discussion, the IBA rules come up with an obligation of submitting a written statement that discloses the independence of the expert from the tribunal, parties, or their counsel. But the main question here is how can we determine the independence? What kinds of relationships are considered to impede the independence and impartiality of party-appointed experts? However, none of the rules that can be interpreted in a way that imposes such an obligation laid a definition on what does it mean by independence nor they explain what factors should be followed to ensure party-appointed experts are independent of the parties or their legal advisors. Besides, there are no standards stipulated that can be used by an arbitral tribunal to decide whether a party-appointed expert is independent or not. The nonexistence of such standards is also one of the obstacles that arbitrators may confront when any challenge is raised against party-appointed experts, which will be the focus of the next chapter.

In the absence of such stipulation, scholars have been suggesting different solutions to fill this Gap. In this regard, Gaffney and O'Leary suggested the analogical application of the standards that are found in the IBA guidelines on conflict of interest of arbitrators to the party-appointed experts. They believe the analogical application of the IBA guidelines can serve as 'a useful test of independence' and thus, it will be easier to determine the requirements expected from the party-appointed expert.<sup>54</sup> In effect, using such a guideline may help in identifying which information need to be disclosed by the expert and can provide a reasonable basis for the tribunal to decide whether the expert appointed by the party is independent and or not. The IBA guideline is designed to ensure the independence and impartiality of

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<sup>54</sup> John Gaffney and Gillian O'Leary, 'Tilting at Windmills? The Quest for Independence of Party- Appointed Expert Witnesses in International Arbitration' (2011), Asian Dispute Review, Hong Kong International Arbitration Centre (HKIAC) Volume 13 Issue 3, pp. 82 - 85, 2.

arbitrators in international arbitration. for this purpose, the IBA guideline lays general standards that need to be met by Arbitrators. In general, it sets out a general principle that requires them to be independent and impartial at all times of the proceedings,<sup>55</sup> it also requires them to decline to accept their appointment if s/he knows the existence of a conflict of interest that could create Justifiable doubt on her/his independence and impartiality on a reasonable person<sup>56</sup> Moreover, it lays a standard of disclosure of circumstances that have a potential impact in creating doubt<sup>57</sup> that may include but not limited to relationships with parties, counsels, and/or Institutions in concern.

More importantly, it also sets out lists that can guide the practical application of the general standards. These lists are categorized into three: Red, Orange, and Green List, and classified based on the degree of the circumstances in causing justifiable doubt on the independence and impartiality of an arbitrator.<sup>58</sup>

To have a brief understanding of the categories, the red lists include two parts: waivable and non-waivable red list. The lists consist of situations that give rise to justifiable doubts as to the independence and impartiality of the arbitrator. These lists include circumstances where their existence indicates a conflict of interest that can be observed by a reasonable third person knowing the relevant facts. The circumstances that can fall on the red list are the relationship of the arbitrator with the parties in the form of serving as employee or representative, or if regularly advises the parties, relationship with the dispute by giving legal advice or provide expert opinion or prior involvement in the dispute, hold share and so on. Thus, in case, the arbitrators' circumstance falls into one of the lists of this category, and then He

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<sup>55</sup>IBA Guideline, General Standards Regarding Impartiality, Independence and Disclosure, General Standard No 1

<sup>56</sup>. Ibid, General Standard No 2

<sup>57</sup> Ibid, General Standard No 3

<sup>58</sup> Gaffney, O'Leary and O'Leary, 'Tilting at Windmills? The Quest for Independence of Party- Appointed Expert Witnesses in International Arbitration' (n 54).

should not accept the appointment.<sup>59</sup> If S/he does, the tribunal can decide to remove based on lack of independence and impartiality.

The Orange lists, on the other hand, indicate circumstances where there can be conflicts of interest or justifiable doubts if the arbitrator is appointed. However, the difference from the Red list is that the arbitrator has to disclose the material facts that he thinks could create justifiable doubt. The lists include previous services of the arbitrator to the parties as counsel, legal advisor, or party-appointed arbitrator for more than two or more occasions in the last three years.<sup>60</sup> In this regard, disclosure doesn't indicate the existence of a conflict of interest. However, simple disclosure will avoid potential doubt on the independence and impartiality of the arbitrator.<sup>61</sup>

The green list also includes lists of circumstances their existence will not create doubt on independence and impartiality and there will be no conflict of interest from an objective point of view. So, the arbitrator is not obliged to disclose such circumstances or refuse the appointment. Such circumstances include expression of legal opinions, through publication or public lecture.<sup>62</sup>

Therefore, arbitrators depending on the degree and the category where their situation lies will be required to disclose their circumstance to the extent of refusing appointments when the degree of justifiable doubt is higher. In case the arbitrator accepts the appointment despite the existence of justifiable doubt on his independence and impartiality, then the tribunal can easily check up on the standards stipulated under the guideline to identify whether the arbitrator is independent or not and to decide based on that.

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<sup>59</sup> IBA Guideline, Explanation to General Standard No 2, see also Practical Application of General Standard List No 1 and 2

<sup>60</sup> IBA guideline, Practical Application of General Standard List No 3

<sup>61</sup> IBA Guideline, Explanation to General Standard No 3(c)

<sup>62</sup> IBA Guideline, Explanation to General standard no 3, practical application of general standard list no 4

Therefore, it is true that the analogical application of IBA guidelines on an expert can achieve the purpose of setting a guideline for arbitrators to use it to check on the independence and impartiality of party-appointed experts. This means, there will be justifiable doubt on the independence and impartiality of the expert when s/he has a relationship either with the parties or conflict the dispute at hand that can fall into the Red list and orange list. In such cases, it will be easy for tribunals to check on independence and impartiality. Such a standard may also help to curb the continuous appointment of an expert by parties and will help to avoid potential bias that can occur as a result of repetitive appointments and previous relationships.

However, the next question that will come into the picture is, would the analogous application of the standards under the IBA guideline be reasonable or helpful to be used as a standard for a party-appointed expert? What factors should be considered?

Such an application of IBA guidelines on an expert can serve as a guideline to help the tribunal while deciding on the challenge procedure based on independence and impartiality. In this way, the tribunal can easily look to the lists and check upon the circumstances of the expert at issue. However, this does not mean that it is always practical to use the IBA guidelines. Indeed, the direct application of the IBA may not be feasible. This is because some of the rules of the IBA may not apply to experts while others may need some logical amendment. For instance, publication and expression of opinion on the same case at hand can be taken as an example. This is categorized as an orange list in the IBA guideline however; it may pose a question if we still use this standard for an expert. This is because most of the role of expert relates to giving an opinion to the specific issues of a particular field. Therefore, giving opinion or publication on the specific issue could not be used as a factor that could cause possible bias since the expert is only bound to give an opinion and have no role in decision making as arbitrators. Similarly, the expression of opinion previously should not be used to doubt his/her independence. It will



also lose the very purpose and advantage of having party-appointed experts since parties prefer to rely on an expert who has the same point of view on issues. Moreover, the relationship between Experts and Arbitrators should also be emphasized as one factor since that can shed a justifiable doubt. Since different roles are assumed by experts and arbitrators, all the practical standards under the IBA may not apply to the experts. In such an instance, the best alternative will be to come up with a guideline that can specifically apply to an expert that is similar to the IBA guideline.

To conclude the basic finding of the chapter, there is no clear, direct, and express obligation of independence and impartiality that is laid on a party-appointed expert from the binding laws of international commercial arbitration. However, this doesn't mean they have no such obligation. Such an obligation can be inferred from the non-binding laws. Moreover, the need for respect of fairness in arbitration proceedings calls for such duty even from a party-appointed expert. On the other hand, even with an implied inference of the obligation, there is no specific standard to be used by arbitrators to assess the independence and impartiality of party-appointed experts. As a result, the study suggested the analogous application of IBA guidelines as a way out with proper consideration of its practical application on party-appointed experts. In case of practical difficulty, the other alternative is to come up with a guideline that can specifically apply to an expert that is similar to IBA guideline

## **Chapter Two: Challenging Party Appointed Experts in International Commercial Arbitration**

The previous chapter has discussed that party-appointed experts have to fulfill professional requirements which also include independence and impartiality requirement. Despite this, experts may not be objective all the time or there might be factors that may question their independence and impartiality. Such factors may be the relationship of the experts to the party, tribunal, or have a potential conflict of interest on the case at hand, etc. In such circumstances, one of the parties may doubt the independence of the expert chosen by the other party for there might be possible bias towards the party that appointed them. As a result, challenge procedures may be initiated based on a lack of independence and impartiality.

This in short means, non-fulfillment of such obligations can be used by the parties as a reason to challenge the expert. Though all the grounds are relevant as far as challenge is concerned, this chapter focuses to discuss on the possibility of challenging a party-appointed expert on the ground of lack of independence and impartiality. In doing so, it examines specific issues that need to be addressed when one thinks of challenging a party-appointed expert. In particular, questions on whether an arbitral tribunal has the power to exclude or decide on the challenge of a party-appointed expert? If yes, what are the legal bases to do so? are discussed. It also addresses the practical difficulty that is faced by the tribunals as a result of a lack of a specific standard to use when dealing with such issues.

### **2.1. Power of arbitral tribunal to decide upon a challenge of Party appointed expert**

One of the issues that can be raised when challenging a party-appointed expert is the power of a tribunal to decide upon the challenge of the party-appointed expert. Some provisions grant power to a tribunal to decide upon the challenge of a tribunal appointed expert. The UNCITRAL arbitration rule and the IBA

rules stipulate the possibility for parties to challenge experts chosen by the tribunal based on the ground of qualification and independence of the expert. The provisions further stipulate the power of the tribunal to decide upon such a challenge.<sup>63</sup> However, such clear legal bases are not available in international arbitration that applies to the challenge of a party-appointed expert.

As can be seen from international practice, it is undeniable that a challenge to an expert is not limited to only a tribunal appointed expert rather parties also bring their claim to challenge party-appointed experts. So, in such cases, what is the legal basis? How can tribunal decide on the challenges of a party-appointed expert? This paper tries to find the possible basis for the power of the tribunal by examining the international, institutional arbitration rules, and some practical cases to find a possible extension of such power on party-appointed experts.

There are different ways suggested for having a base for such power of the tribunal. The first possible way one can argue to infer such power is through the analogical application of the rules to a tribunal appointed expert (or a counsel). As mentioned earlier tribunals are given the power to exclude tribunal appointed experts, therefore some scholars argued that the analogical application of these rules may help to achieve the same purpose. However, such a suggestion is not without criticism. Markus Burianski and Alexander C. Lang do not agree on the analogous application of the rules. They believe the fact that international arbitration rules provide for the challenge of tribunal appointed experts while leaving a gap about the party-appointed expert implies that such a procedure is not needed. As a result, they consider such a gap as one which is made intentionally, and thus, the analogical application of the rules will serve no purpose.<sup>64</sup> However, it is somehow hard to believe that looking at the previous discussions made to establish that party-appointed experts also need to be independent and impartial. Therefore, requiring

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<sup>63</sup> UNCITRAL Arbitration Rules, Art 29.2 of, see also IBA Rules on Taking of Evidence, Art 6.2

<sup>64</sup> Markus Burianski and Alexander C Lang, "'Challenges" to Party-Appointed Experts' (2019), 16 Kluwer Law International 6, p 3–4.

them to be independent but without any consequence for not respecting those requirements does not make sense. Therefore, if party-appointed experts are also needed to be independent, there should be a mechanism to control that and take action to achieve the very purpose of the requirement which is creating fair arbitration procedure between parties. Therefore, I believe the analogical application can be one way to help the tribunal to gain the power to decide upon the challenge of a party-appointed expert.

The other way such power of a tribunal can be inferred is from the implied power of the tribunals' discretion to weigh the admissibility and exclude evidence. Accordingly, it is possible to argue for the extension of this discretion to the extent of excluding a party-appointed expert itself. As a principle, international arbitration rules give arbitral tribunals a power to determine the admissibility, relevance, materiality, and weight of evidence.<sup>65</sup> This right is also recognized in the institutional rules of arbitration. For instance, LCIA Rules allow arbitral tribunals to "refuse or limit the written and oral testimony of witnesses (whether witnesses of fact or expert witnesses)."<sup>66</sup> Besides, it gives discretionary power to the tribunal to "(...) decide as to the admissibility, relevance, or weight of any material tendered by a party on any issue of fact or the expert opinion".<sup>67</sup> From this, the tribunal can indeed decide to exclude or not to admit any oral or written evidence that can be presented by the expert witness. If this is the case, there will not be a reason for the tribunal not to have the power to exclude the expert itself. This is because, if the tribunal can exclude the evidence brought by the expert for reasons that the tribunal think is viable, then extending this power to the first step of excluding the expert itself can serve a lot of purposes. For instance, if the expert is not independent, then what is the purpose of waiting for the whole process of submission of evidence (either oral or written) and decide to exclude it based on the possible bias seen in the evidence. Wouldn't it be more appropriate to exclude the expert from the

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<sup>65</sup>UNCITRAL Arbitration Rules, Art 27.4

<sup>66</sup>LCIA Rules, Art 20.3

<sup>67</sup> Ibid, Art 22.1(vi)

beginning? This way the tribunal can also save the time and cost of the arbitral proceedings than rejecting or decide on the inadmissibility of the evidence after some of the procedure goes. Therefore, I believe extending the discretionary power of the tribunal to the exclude or challenge the expert itself is more feasible.

On the other hand, it is also possible to argue that the arbitral tribunal has an inherent power to decide on the challenge or exclude party-appointed experts. Proponents of this view argue that this inherent power of the tribunal can be exercised whenever there is a situation that questions the integrity of the tribunal.<sup>68</sup> The power of the Tribunal to exclude an expert is also supported by the applicable case law. For example, in the *Flughafen Zurich AG v Venezuela case*<sup>69</sup>, the tribunal affirmed that it has an inherent power to preserve the integrity of the arbitral tribunal and maintain the fairness of the proceedings. The tribunal also indicated that a balance should be made between the interest of parties to present their case and the integrity of tribunal. Thus, whenever there is a potential effect on integrity, experts should be excluded.<sup>70</sup>

The case of *Hrvatska Elektroprivreda. the Republic of Slovenia*<sup>71</sup> is also be a good example. In this case, the respondent initiates to add a counsel to its legal team who used to be in the same barristers' chamber with the president of the tribunal. Thus, the tribunal had to decide whether to exclude the president of the tribunal or whether it should exclude the counsel added by the respondent. The tribunal decided that it had an inherent power to take measures to preserve the integrity of the proceedings and maintain its composition and therefore excluded the counsel from taking part in the proceedings.<sup>72</sup> Even

<sup>68</sup> Burianski and Lang, "'Challenges" to Party-Appointed Experts' (n 64) 6.

<sup>69</sup> *Flughafen Zurich AG v. the Republic of Venezuela*, ICSID Case No ARB/10/ 19, 29 August 2012

<sup>70</sup> Ibid, see also Luis Gonza 'lez, 'Case comment on 'Flughafen Zurich AG v Venezuela, A Catch-22 on the Protection of Procedural Fairness', ICSID Review, Vol. 28, No. 1 (2013), pp. 21–26

<sup>71</sup> *Hrvatska Elektroprivreda.d. v. The Republic of Slovenia* (ICSID Case No. ARB105124)

<sup>72</sup> Ibid, see also Cristina Florescu, 'Arbitral Tribunal Power to Disqualify Unethical Counsel'(2015), Journal of Economic Development, Environment, and People, < www.icesba.eu> accessed 13 march 2020.

though this case relates to counsel, it is an indicator of the inherent power of the tribunal to preserve the integrity of the proceedings by avoiding possible bias.

Furthermore, the analogical application of *the Rompetrol v Romania* case supports the Tribunal's power to exclude a party-appointed expert witness. In this case, the respondent requested the exclusion of the claimant's counsel due to his previous professional relationship with one of the members of the tribunal. The tribunal affirmed its power to exclude a counsel when the inclusion of a counsel compromises the integrity of the tribunal.

This is also true when we think of a party-appointed expert. For instance, let's assume that the expert appointed by the expert has a close relationship with one of the members of the tribunal. In such a case, apart from the independence of the expert, the independence and impartiality of the arbitrator may also be in question. Therefore, the tribunal should balance interests at stake and should decide either to keep the arbitrator or the expert. This is because, if it keeps both, the award will be affected by a possible bias that can affect the integrity of the tribunal.

Therefore, the above rulings affirm the competence of a tribunal to exclude or decide upon a challenge a party-appointed expert witness. So, once the legal basis for the power of the tribunal is established, the next concern will be to assess how far the tribunals are using it in practice and what challenges they faced in the process. This leads to the next session.

## 2.2. The Practical Impediment of Lack of Specific Standards of Independence and Impartiality on the Challenge of Party-Appointed Expert

The previous session discussed that tribunals have the power to decide upon the challenge of a party-appointed expert. Despite that, tribunals are not seen when they remove experts based on a lack of independence and impartiality in most cases. This poses a question of why? The next discussion focuses on how a lack of independence and impartiality is used as a ground in practical cases of international commercial arbitration and the difficulty faced by tribunals to challenge potentially partial Experts.

Lack of impartiality and independence has been one of the major reasons used in international cases. For instance, in the *Helnan Int'l Hotels AS v. Arab Repub. of Egypt* case<sup>73</sup> a request for challenging the expert was made based on his previous employment relationship with the company of the claimant. On the other hand, in *Jan de Nul NV v. Arab Repub. of Egypt* case<sup>74</sup>, the respondent contended that the expert of the respondent was not impartial for the reason that he has been a member of the board of the company of the claimant.<sup>75</sup> Besides *Egemetal v. Fuchs* case<sup>76</sup> also involved a situation whereby the claimant challenged an expert based on lack of independence due to his contact with the respondent. In addition, *Sedco v. Iran*<sup>77</sup> the case is also another example, where the respondent contended on the independence of the expert by claimant due to his role as a leading officer in the company of the claimant.<sup>78</sup>

All these cases can indicate how a lack of independence and impartiality is being used as a ground to challenge an expert appointed by parties and how such a relationship creates doubt on the impartiality of

<sup>73</sup>*Helnan Int'l Hotels AS v. Arab Repub. of Egypt*, Award in ICSID Case No. ARB/05/19 of 3 July 2008, ¶¶39–42

<sup>74</sup>*Jan de Nul NV v. Arab Repub. of Egypt*, Award in ARB/04/13 of 6 November 2008, ¶¶28, 42

<sup>75</sup> Ibid, See also Burianski and Lang, “Challenges” to Party-Appointed Experts’ (n 64)

<sup>76</sup>*Egemetal v. Fuchs*, as cited in OlenaTretiak, 'Expert Testimony-Method of presentation of Evidence in International Commercial Arbitration' (LLM thesis, Central European University, 2010) (available in CEU Library)

<sup>77</sup>*Sedco Inc v. Iranian National Oil Co and the Islamic Republic of Iran*, Ira-US Claims Tribunal, Award 2.7.1987- No. 309-129-3, ¶¶ 49,

<sup>78</sup> *Sedco Inc v. Iranian National Oil Co and the Islamic Republic of Iran*, Ira-US Claims Tribunal, Award 2.7.1987- No. 309-129-3, ¶¶ 49(Ibid), see also Burianski and Lang, “Challenges” to Party-Appointed Experts’ (n 64)p.2

the experts. In addition to showing a reliance on this ground, it is also good to assess how far such experts were excluded based on a lack of Independence and Impartiality Requirement?

In all the cases mentioned above, none of the tribunals decided to challenge or exclude the experts. We can take the case of *Helnan Int'l Hotels AS v. Arab Repub. of Egypt* as an example, the tribunal did not disqualify the expert because he was not in employment relationship anymore and that excluded his possible bias.<sup>79</sup> Accordingly, it means a previous relationship doesn't count to create bias. I left the comment on their decision to the reader, but I would like to note how the tribunal comes up with such a conclusion.

On the other hand, in the case of *JandeNul NV v. Arab Repub. of Egypt*, the tribunal rejected the claim believing that there will be possibilities to cross-examine the expert at the hearing and whether he is biased or not can be seen afterward.<sup>80</sup> In addition, in the case of *Egemetal v. Fuchs*, the tribunal noted the contact between the expert and claimant was made in between the submission of the first draft and the final report and since there was a minor difference between the two reports, the contact was irrelevant.<sup>81</sup> Similarly, *Sedco v. Iran* case does not make any difference since the tribunals also refused to challenge the expert despite the existence of an employment relationship. Here my question is, on what standard did the tribunals base to decide whether some sort of relationships or contacts are relevant or not, to create bias and shed doubt in the mind of the contending party?

The whole point from the previous discussions was that if there are instances that create doubt as to independence and impartiality of party-appointed experts, then it means tribunals can use its power to exclude based on lack of one of the professional requirements.

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<sup>79</sup> *Helnan Int'l Hotels AS v. Arab Repub. of Egypt* (n 73), see also Gary Born, 'International Commercial Arbitration' 2nd ed', (2014) Kluwer Law International, p 2281.

<sup>80</sup> *Jan de Nul NV v. Arab Repub. of Egypt* (n 74)

<sup>81</sup> *Egemetal v. Fuchs* (n 76)



However, the case law discussed above indicates how the lack of such a requirement did not lead to the exclusion or challenge of the party-appointed expert. In relation to this, the other question will be what makes it hard for the tribunals to exclude the experts even with the existence of some instances that shed doubt on their independence and impartiality?

I believe a lack of a specific standard that can help to assess the independence and impartiality of party-appointed experts is the major reason that brought difficulty to tribunals to decide on the challenge and exclude them. It is very difficult and illogical to assess any relationship or conflict of interest the expert can possibly have with the parties, the case and member of the tribunal itself, and to decide on whether that relationship or contact can impede the impartiality of the expert in the absence of such a standard. As was discussed in the first chapter, unlike that of the standards that are put for an arbitrator in the IBA guidelines, there is no standard of independence and impartiality for party-appointed experts. Therefore, tribunals will not have the courage to exclude the experts even if there are some sorts of relationships or conflicts of interest.

Looking to the cases at hand, it was not clear on what basis they come up with a conclusion not to exclude the experts stating that the specific ground used by the parties was either irrelevant or is not enough to show the partiality of the expert. This seems clear to demonstrate that the nonexistence of such a standard has put its shadow over the decisions.

In conclusion, Tribunals have the power to decide upon a challenge and exclude party-appointed experts when the expert does not full fill the requirement of independence and impartiality. However, as can be seen from the case law, the practical difficulty that appears due to lack of specific standards of independence and impartiality of party-appointed experts had hindered them from using their power to exclude party-appointed expert. In this regard, the suggestion forwarded under the first chapter, the

analogues application of the IBA guidelines to a party-appointed expert would be of importance to curb the practical difficulty to be faced by tribunals.

## Conclusion and Recommendation

The use of party-appointed experts has increased with a growing trend of referring cases that involve technical matters to international Arbitration. The main purpose of their involvement is to assist the tribunal in deciding by giving a professional opinion on areas of specific expertise. They also have a role to play in bringing fairness in the arbitral proceedings. As a result of that, they are required to meet some professional requirements. In general, this study attempted to explore the ethical duties that need to be met by a party-appointed expert. Particularly, it investigates the specific standards of independence and impartiality that arbitrators can apply to determine the independence and impartiality of party-appointed experts and assess whether noncompliance with such standards will cause their challenge. It also analyzes whether the tribunals have the power to decide upon or exclude party-appointed experts.

Based on the investigations made, the study comes up with the following conclusions. First, even though the obligation of independence and impartiality of party-appointed expert is not stipulated expressly and clearly in the binding laws of arbitration, such an obligation can be inferred by looking to the requirement put in the non-binding but widely accepted rules of IBA and emerging protocol of the Chartered Institute of Arbitrator's (CI Arb's). These rules require submission of a written statement indicating his or her independence from the parties, their legal advisors, and arbitral tribunal. Moreover, it can also be induced by the fundamental principles of arbitration proceedings and the purpose of an expert in arbitration. The fairness and effectiveness of an arbitration proceeding can be achieved by laying this obligation on a party-appointed expert. Therefore, it concludes that party-appointed experts also need to be independent and impartial.

Second, despite such obligation of independence and impartiality, there is no specific standard of independence and impartiality for a party-appointed expert. In other words, it is difficult to assess

whether the expert has crossed the line of independence and impartiality without a guideline that puts some specific standards. In this regard, the paper suggested that the analogical application of IBA guidelines on an expert would achieve the purpose of setting a guideline to be used to check on the independence and impartiality of party-appointed experts.

Third, unlike for tribunal appointed experts, there are no clear and specific legal bases that empower a tribunal to decide upon a challenge or exclude a party-appointed expert based on lack of independence and impartiality. However, the paper argued on a different basis that can be used by a tribunal as a base to enjoy the power. The analogical application of the rules that apply to exclude tribunal appointed experts can be used as a base. The other way such power of a tribunal can be inferred is from the implied power of the tribunals' discretion to weigh the admissibility and exclude evidence (written or oral evidence). Accordingly, the tribunal can extend this discretion to the extent of excluding a party-appointed expert itself. This way, it can also save the time and cost of the arbitral proceedings. Last but not least, the investigation of the different case law reveals that an arbitral tribunal has also an inherent power to decide on the challenge or exclude party-appointed experts. This can be seen from cases of *Flughafen Zurich AG v Venezuela*, *Hrvatska Elektroprivreda v. the Republic of Slovenia* and *Rompetrol v Romania*. Therefore, the paper concludes that the tribunal has the power to exclude a party-appointed expert.

Finally, the paper also finds the practical difficulty tribunals are facing due to a lack of a specific standard of independence and impartiality. Accordingly looking to different case law reveals that tribunals are not excluding party-appointed experts despite the existence of facts that doubt the independence and impartiality of party-appointed experts. The paper concludes that the main reason for such difficulty is the lack of a specific standard of independence and impartiality.

Therefore, in light of the findings of the study and the conclusion drawn above, the paper recommends:

- To come up with a guideline that can serve as a standard to assess the independence and impartiality of party-appointed expert
- Alternatively, and until such guidelines come into reality, it recommends the analogues application of the IBA guideline with proper consideration to the particular cases of party-appointed experts.

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