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& PARTNERS

# The Role of Party-Appointed Experts in Construction Arbitration: Hired Guns or Truth Seekers?

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**1.**

Introduction

What happens with a biased expert during  
...? Attack.



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2.

Role of the Expert  
Evidence in  
Construction  
Disputes

## Is there a need for expert evidence in construction disputes?

- ✓ variety of complex technical, architectural, engineering and construction issues involved
- ✓ standard of care
- ✓ quality of the work in place, and its compliance with the applicable plans and specifications
- ✓ evaluation of a partially completed project and determination what work remains
- ✓ how poor work and delayed work impact the rest of the project, as well as attribute cause for delays
- ✓ determination of the cause of a defect
- ✓ delay analysis
- ✓ construction safety
- ✓ cost estimates
- ✓ design evaluation
- ✓ damages etc.

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# 3.

The Core Principles  
of Giving Expert  
Evidence:  
Impartiality,  
Independence and  
Objectiveness

## Key guidance

- ✓ IBA Rules on the Taking of Evidence in International Arbitration
- ✓ The Chartered Institute of Arbitrators Protocol for the Use of the Party-Appointed Expert Witnesses in International Arbitration
- ✓ Codes of conduct of professional organizations

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## IBA Rules

Expert report shall contain (*amongst other*):

- ✓ statement regarding expert's present or past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal
- ✓ a description of the instructions
- ✓ a statement of his or her independence
- ✓ an affirmation of his or her genuine belief in the opinions expressed

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## CIArb Protocol

- ✓ tends to expand upon the IBA Rules
  - ✓ “*experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them*”
  - ✓ “*expert’s opinion should be impartial and objective*”
- ✓ are instructions to, and any terms of appointment, of an expert privileged against disclosure in the arbitration?

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## Codes of conduct of professional organizations

- ✓ ECEC – Code of Conduct for European Chartered Engineers; and
- ✓ Code of Conduct for the Members of the Slovenian Chamber of Engineers
  - no specific rules on serving as expert witnesses in dispute resolution
- ✓ some good examples from the UK:
  - ✓ Code of Conduct Regulations of the Institution of Mechanical Engineers
  - ✓ practice statement and guidance note “Surveyors acting as expert witnesses” of the Royal Institution of Chartered Surveyors

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4.

The Reality?

*“Adverse expert witnesses fall into two main categories. One is the honest but mistaken professional. The other is the paid liar.”*

John M. Townsend

*“[C]ognitive biases work without awareness, so biased experts may think and be incorrectly convinced that they are objective, and be unjustifiably confident in their conclusion.”*

**Itiel E. Dror, Justice Bridget M. McCormack, and Jules Epstein, *The Judges's Journal*, 2015**

*“Truth, like gold, is to be obtained not by its growth, but by washing away from it all that is not gold.”*

**Leo Tolstoy**

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Thank you.

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