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& PARTNERS

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

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Law firm

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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