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BCDR-AAA 2017 ARBITRATION RULES, PART II

English Section

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Rules

Hearings, Witnesses and Tribunal-Appointed Experts

Melanie Willems*

Article 22: Hearings and witnesses

22.1 The arbitral tribunal shall give the parties reasonable notice of the date, time and place of any oral hearing.

22.2 At least 15 days before the hearing, each party shall give the arbitral tribunal and the other parties the name and address of any witness it intends to present, the subject of the witness's testimony and the language in which such witness will give his or her testimony.

22.3 The arbitral tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.

22.4 Unless otherwise agreed by the parties or directed by the arbitral tribunal, evidence of witnesses may be presented in the form of written statements signed by them.

22.5 In accordance with a schedule set by the arbitral tribunal, each party shall notify the arbitral tribunal and the other parties of the names of any witnesses who have presented a written witness statement whom it wishes to examine.

22.6 The arbitral tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the arbitral tribunal, the arbitral tribunal may disregard any written statement of that witness.

22.7 The arbitral tribunal may direct that witnesses be examined in person or by telephone or video conference.

22.8 The arbitral tribunal may direct the order of proof, exclude irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.

22.9 Hearings shall not be held in public unless the parties agree otherwise or the governing law provides to the contrary.

22.10 If a party, duly notified in accordance with Article 22.1, fails to appear at a hearing without showing sufficient cause for such failure to the satisfaction of the arbitral tribunal, the arbitral tribunal may proceed with the hearing in the absence of such party.

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Willems, Melanie. 'Hearings, Witnesses and Tribunal-Appointed Experts'. *BCDR International Arbitration Review* 5, no. 1 (2018): 3–34.

Article 25: Tribunal-appointed experts

25.1 The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to the arbitral tribunal, in writing, on issues designated by the arbitral tribunal and to be communicated to the parties.

25.2 The parties shall provide such expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the arbitral tribunal for determination.

25.3 Upon receipt of an expert's report, the arbitral tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such report.

25.4 At the request of any party, the arbitral tribunal shall give the parties an opportunity to question the expert at a hearing, at which the parties may present expert witnesses to testify on the points at issue, subject to the provisions of Article 22.

1 ARTICLE 22.1

1.1 Background

Article 22.1 of the 2017 BCDR-AAA Arbitration Rules (the '2017 BCDR Rules') is derived from Article 23.1 of the 2014 ICDR International Arbitration Rules (the 'ICDR Rules'), the only difference of wording being that the ICDR Rules use the term 'tribunal' instead of 'arbitral tribunal'. A similar provision can be found in several other systems of rules.[1]

The previous, 2010 BCDR-AAA Arbitration Rules (the '2010 BCDR Rules') provided, at Article 20.1, that: 'The tribunal shall give the parties at least 30 days advance notice of the date, time and place of the initial oral hearing. The tribunal shall give reasonable notice of subsequent hearings.' In the 2017 BCDR Rules, the requirement that the tribunal give 30 days' notice of the initial oral hearing and reasonable notice of subsequent hearings has been replaced with a

[1] For example, Article 26(1) of the ICC Arbitration Rules ('When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.'); Article 19.3 of the LCIA Arbitration Rules ('The Arbitral Tribunal shall give to the parties reasonable notice in writing of any hearing.'); Article 24(2) of the UNCITRAL Model Law on International Commercial Arbitration ('The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.'); Article 28(1) of the UNCITRAL Arbitration Rules ('In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.'). The English Arbitration Act 1996, by contrast, does not contain a comparable provision. Section 34(2)(a) provides that it shall be for the tribunal to decide, subject to the right of the parties to agree any matter, 'when and where any part of the proceedings is to be held'. This is further subject to the tribunal's general duty under section 33 to give 'each party a reasonable opportunity of putting his case and dealing with that of his opponent' and to avoid 'unnecessary delays'. The end result is thus probably similar, with a tribunal being required to give the parties reasonable notice of any hearing.

single requirement that the parties be given reasonable notice of any oral hearing. A fixed 30-day notice period would seem to have been unnecessarily prescriptive. Depending upon the facts of the case, it may be that a shorter notice period is reasonable, particularly if there are matters which need to be dealt with urgently at the initial hearing. Even where there is no urgency, it will rarely be necessary to give such long notice for an initial procedural hearing in a case where the parties are professionally represented.

1.2 Commentary

Article 22.1 is a common sense provision. What constitutes reasonable notice in any particular case will depend upon the facts and will be a matter for the tribunal's judgment. In practice, the timing of substantial evidential hearings will typically be fixed well in advance, in consultation with the parties, and so the issue of whether a party was given sufficient notice of such a hearing will rarely (if ever) arise.[2]

2 ARTICLE 22.2

2.1 Background

Article 22.2 of the 2017 BCDR Rules is derived from Article 23.2 of the ICDR Rules and from Article 20.2 of the 2010 BCDR Rules, the only difference being, again, that the 2010 rules referred to the 'tribunal' rather than the 'arbitral tribunal'. A provision bearing some similarity to Article 22.2 of the 2017 BCDR Rules is found in the LCIA Rules,[3] but no comparable provision is found in the ICC Arbitration Rules, the UNCITRAL Model Law on International Commercial Arbitration or the UNICTRAL Arbitration Rules.

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[2] By way of illustration, English case law provides few, if any, examples of cases where a tribunal's decision as to the timing/notice of a hearing has resulted in litigation. In *Interprods Ltd v. De La Rue International Ltd* [2014] EWHC 68 (Comm), an arbitrator held a hearing to fix the dates for a further substantive hearing. One party failed to attend without explanation and the arbitrator fixed the dates for the further hearing in that party's absence. This was described by the court as 'a robust but fair decision' and was held not to constitute a breach of the tribunal's duty under section 33 of the Arbitration Act 1996.

[3] *See* Articles 20.1, 20.2 and 20.3 of the LCIA Arbitration Rules: '20.1 Before any hearing, the Arbitral Tribunal may order any party to give written notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject-matter of that witness's testimony, its content and its relevance to the issues in the arbitration. 20.2 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document. 20.3 The Arbitral Tribunal may decide the time, manner and form in which these written materials shall be exchanged between the parties and presented to the Arbitral Tribunal; and it may allow, refuse or limit the written and oral testimony of witnesses (whether witnesses of fact or expert witnesses).'

2.2 COMMENTARY

2.2[a] Modern Practice Rarely Involves Extensive Oral Evidence-in-Chief

The prevailing practice in international arbitration is for each party's witnesses to give detailed evidence in the form of successive signed written statements, which are exchanged well in advance of the substantive evidential hearings. These statements will invariably state the witness's name and address (although the practice in commercial arbitrations is for witnesses to give a professional rather than a residential address). At a hearing, witnesses will attest to the accuracy of their statements, and may give some minor supplemental or clarifying testimony orally, and will then be cross-examined on their evidence by the lawyers representing the other parties.

With regard to interim or procedural hearings, it is common practice for parties' lawyers to produce written statements to stand as their evidence-in-chief, but such evidence will tend to be provided less far in advance. By analogy with English litigation, a statement in support of an application might be provided as little as three clear working days before a hearing.[4]

2.2[b] Does Article 22.2 Mean That a Tribunal Cannot Make It Obligatory for the Parties to Present Their Witness Evidence in the Form of Written Statements?

Article 22.2 of the 2017 BCDR Rules (and Article 23.2 of the ICDR Rules, from which it is derived) are relatively unusual. Similar directives as to the form and timing of what a party is to provide regarding witnesses who are to testify at a hearing are absent from several other institutional rules and arbitration statutes,[5] such matters being left to the parties to agree or, absent agreement, to the tribunal to determine.

Article 22.2 is expressed in mandatory language, requiring that, in advance of a hearing, a party who wishes to 'present' a witness at the hearing 'shall' provide only a minimal amount of information about the witness and the witness's evidence (specifically, the witness's name and address, the language in which the witness will testify and the subject of the witness's testimony). Such information is only required to be provided '[a]t least 15 days before the hearing'. Article 22.2 does not impose any obligation to provide a detailed written witness statement in advance of the hearing.

Article 22.2 requires to be read alongside Article 22.4 (which is also discussed separately below). Unlike Article 22.2, Article 22.4 is expressed in permissive, not

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4 *See* Civil Procedure Rules, 23.7(1)(b).

5 There are exceptions, however; *see e.g.* the LCIA Arbitration Rules, *supra* note 3.

obligatory, language. Article 22.4 provides that the evidence of witnesses 'may' (not 'shall') be presented in the form of written statements signed by the witnesses. The parties' Article 22.4 right to present their evidence in the form of written statements is expressly qualified, however, by the words 'unless otherwise . . . directed by the arbitral tribunal' in that Article. Evidently the tribunal has the power to prevent a party from presenting evidence in the form of written statements.[6] Article 22.2, by contrast, does not contain any such qualification ('unless otherwise . . . directed by the arbitral tribunal').

One interpretation of Articles 22.2 and 22.4 is, therefore, that: (i) a tribunal can prevent the parties from presenting witness evidence in the form of written statements; but (ii) a tribunal cannot make it obligatory for the parties to present witness evidence in the form of written statements. Each party always retains a residual right to have any witness give oral evidence-in-chief, provided that the minimal preconditions in Article 22.2 have been satisfied.

There are various arguments which can be made in favour of the contrary view, that the tribunal does have the power to require that parties present all witness evidence in the form of written statements, and that Article 22.2 does not create an absolute right to have witnesses give oral evidence-in-chief provided the preconditions in that Article have been satisfied:

- It should be said that Article 16.1 of the 2017 BCDR Rules does not seem to offer any assistance in this regard. Article 16.1 provides that '[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate . . .'. The tribunal's Article 16.1 discretion to conduct the arbitration in whatever manner it considers appropriate is thus 'subject to' the rule in Article 22.2. If Article 22.2 does confer an absolute right to have witnesses give oral evidence-in-chief, then the tribunal cannot modify that right by the exercise of its powers under Article 16.1.
- A different argument seeks to rely on Article 22.3. Article 22.3 provides that '[t]he arbitral tribunal shall determine the manner in which witnesses are examined'. It could be argued that 'the manner in which witnesses are examined' includes whether the evidence on which they are to be examined is to be given orally or in writing. The author is given to understand that this is the reading favoured by the committee in charge of drafting the 2017 BCDR Rules.

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[6] The exercise by the tribunal of this power to restrict the use of written statements by the parties is, of course, subject to the tribunal's duty under Article 16.1 to treat the parties 'with equality'. Insofar as a tribunal wishes to restrict one party's right to use written witness statements, it would have to impose an equivalent restriction on all the parties.

– A further possible argument can be made based on Article 22.4. Article 22.4 provides (emphasis added) that '. . . evidence of witnesses *may* be presented in the form of written statements . . .' with the tribunal having the power to 'direct otherwise'. It could be argued that the tribunal therefore has a power to direct that the parties *must* (rather than *may*) present their evidence in this way.

In practical terms the tribunal and the parties could avoid the issue altogether by putting in place *agreed* procedural directions at an early stage, to the effect that each party is to present any witness evidence *exclusively* in the form of written statements to be exchanged on the directed dates. This avoids a situation where, 15 days before a hearing, a party purports to give notice that, in addition to any witness statements it has previously served, it will also be presenting further witnesses at the hearing pursuant to its right under Article 22.2.

2.2[c] Consequences of Non-Compliance with Article 22.2 Are Not Specified

The 2017 BCDR Rules do not specify what the consequence is to be if, contrary to Article 22.2, a party seeks to present a witness at a hearing without having provided the requisite information at least 15 days before that hearing.

In considering how to address a party's breach of Article 22.2, a tribunal must have regard to Article 16.1, which requires that parties be treated with equality and that each be given a fair opportunity to present its case, and to Article 16.2, which requires that the tribunal conduct the proceedings 'with a view to expediting the resolution of the dispute, avoiding unnecessary delay and expense'. What course of action a tribunal takes will depend on the facts.

Article 23.10 (discussed further below) provides that: 'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any evidence.' One option open to a tribunal would therefore be to determine that witness evidence presented in breach of Article 22.2 be deemed inadmissible or that it be given less weight.

Alternatively, a tribunal might consider that evidence presented in breach of Article 22.2 should be admitted, but that the hearing should be rescheduled in order to give the other party a reasonable chance to consider the new evidence and have a fair opportunity to present evidence in response. The tribunal has the power to reschedule hearings pursuant to Article 16.1 ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate . . .'). Pursuant to Article 16.5 ('The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as may be necessary

to protect the efficiency . . . of the arbitration.'), the tribunal also has the power to order a party that causes a hearing to be deferred to pay the associated costs.

A further alternative is that a tribunal might instead conclude that a breach of Article 22.2 by one party did not cause any, or sufficient, harm to justify refusing the evidence or deferring the hearing, in which case it would be open to the tribunal to impose no sanction.

3 ARTICLE 22.3

3.1 BACKGROUND

Article 22.3 of the 2017 BCDR Rules is derived from Article 23.3 of the ICDR Rules. Similar provisions are found in other systems of rules.[7]

Article 20.4 of the 2010 BCDR Rules provided, in relevant part, that: 'The tribunal may require any witness or witnesses to retire during the testimony of

[7] The ICC Arbitration Rules provide that: 'The arbitral tribunal may decide to hear witnesses . . . in the presence of the parties, or in their absence provided they have been duly summoned' (Article 25(3)), and that: 'The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted' (Article 26(3)). The LCIA Arbitration Rules provide that: 'The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its . . . form, content, procedure . . .' (Article 19.2)), thereby giving the tribunal at least equivalent powers to determine who shall be present during witness examination. The LCIA Arbitration Rules also provide that: 'Any witness who gives oral testimony at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony' (Article 20.8), thereby giving the parties a right to cross-examine witnesses, which is not present in the 2017 BCDR Rules. The UNCITRAL Model Law on International Commercial Arbitration does not contain any provision analogous to Article 22.2 of the 2017 BCDR Rules. Article 19(2) of the UNCITRAL Model Law provides that, failing an agreement by the parties, 'the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate'. The UNCITRAL Model Law therefore gives the tribunal at least equivalent powers to determine the manner in which witnesses are examined and who shall be present during witness examination. The UNCITRAL Arbitration Rules provide that: 'Subject to these Rules the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case' (Article 17.1, first sentence), thereby giving the tribunal authority at least equivalent to that of Article 22.3 of the 2017 BCDR Rules to determine the manner in which witnesses are examined. Article 28.3 of the UNCITRAL Arbitration Rules provides, in relevant part, that: 'The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.' Although the English Arbitration Act 1996 does not contain any direct equivalent to Article 22.3 of the 2017 BCDR Rules, section 34 provides that '[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter' and that '[p]rocedural and evidential matters include . . . whether and to what extent there should be oral . . . evidence'. The Arbitration Act 1996 therefore gives the tribunal at least equivalent powers to determine the manner in which witnesses are examined and who shall be present during witness examination.

other witnesses. The tribunal may determine the manner in which witnesses are examined.'

Article 22.3 of the 2017 rules thus confers somewhat wider discretion on the tribunal than Article 20.4 of the 2010 rules. Under the 2010 rules, the tribunal could 'require any witness or witnesses to retire during the testimony of other witnesses', whereas under the 2017 rules the tribunal can 'determine . . . who shall be present during witness examination' – that is, the tribunal's power to exclude people from the hearing is not limited only to witnesses.

3.2 Commentary

Article 22.3 appears to give the tribunal unqualified authority to determine the manner in which witnesses are examined. Unlike (say) the LCIA Arbitration Rules, the 2017 BCDR Rules do not give the parties an automatic right to question witnesses who give oral testimony. Provided that the parties are treated equally, pursuant to the duty imposed by Article 16.1, and subject to any contrary requirement imposed by the law of the seat, it would therefore be open to a tribunal operating under the 2017 BCDR Rules to determine that neither party should be allowed to cross-examine the other's witnesses. Witnesses could be examined only by the tribunal, or the case could be determined solely on the basis of written witness statements.

Note, in this regard, that Article 22.5 (discussed further below) provides that 'each party shall notify the arbitral tribunal and the other parties of the names of any witnesses who have presented a written witness statement *whom it wishes to examine*' (emphasis added), but there is no requirement that the tribunal comply with such wishes. Article 22.6 (also discussed further below) provides that '[t]he arbitral tribunal *may* require any witness to appear at a hearing' (emphasis added). The tribunal is under no obligation to require a witness to attend, even if a party has stated that it wishes to examine the witness in question.

The tribunal's power to determine 'the manner in which witnesses are examined' would include a whole range of matters such as: (i) where a witness is to give oral evidence-in-chief, whether that evidence is to be adduced by way of a formal examination-in-chief or, rather, whether the witness is simply to give a speech or oral statement; (ii) the degree to which leading questions are permitted in any examination-in-chief; (iii) the order in which witnesses are to be examined and the time permitted to the parties for doing so; (iv) whether and to what extent witnesses may be cross-examined; (v) whether any witnesses (particularly experts) are to give their evidence together (a practice known as 'hot tubbing'); (vi) whether and to what extent witnesses are to be examined by the tribunal; and

(vii) whether and to what extent witnesses may be re-examined by the presenting party.

The author understands it to be the position of the committee in charge of drafting the 2017 BCDR Rules that 'the manner in which witnesses are examined' includes whether the evidence on which they are to be examined is to be given orally or in writing (see discussion of Article 22.2 above).

Article 22.3 appears to give the tribunal unqualified power to determine who may be present at any such witness examination as does occur. However, the exercise of this power would be subject to the tribunal's duties under Article 16.1 to treat parties with equality and give each a fair opportunity to present its case. If a tribunal were to exclude a party and/or its legal representatives, or some of them, from the witness examination, this might well constitute a breach of the duty imposed by Article 16.1, depending upon the facts of the case.

4 ARTICLE 22.4

4.1 Background

Article 22.4 of the 2017 BCDR Rules is derived from the first sentence of Article 23.4 of the ICDR Rules and from Article 20.5 of the 2010 BCDR Rules. Other systems of rules, likewise, generally allow the production of written evidence.[8]

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[8] Although the ICC Arbitration Rules do not contain any provision directly analogous to Article 22.2 of the 2017 BCDR Rules, Article 25(1) of the ICC Rules provides that '[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means'. It can be inferred from other provisions of the ICC Rules that such means include the use of written witness statements: Article 25(6) anticipates that the tribunal may decide the case solely on the documents submitted by the parties; Appendix IV gives 'examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost', which include '[l]imiting the length and scope of written submissions and written and oral witness evidence'; and the ICC Expedited Procedure Rules in Appendix VI state that: 'The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide . . . to limit the number, length and scope of . . . written witness evidence . . .'. The LCIA Arbitration Rules provide, at Article 20.2, that: 'Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document.' The UNCITRAL Model Law on International Commercial Arbitration does not contain any provision analogous to Article 22.4 of the 2017 BCDR Rules. Article 19(2) of the UNCITRAL Model Law provides that, failing an agreement by the parties, 'the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate'. The UNCITRAL Model Law therefore allows a tribunal to adopt a procedure equivalent to that in Article 22.4 of the 2017 BCDR Rules, whereby the evidence of witnesses may be presented in the form of written statements signed by them. The UNCITRAL Arbitration Rules provide, at Article 27.2, that: 'Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.' The English Arbitration Act 1996 does not contain a provision equivalent to Article 22.2 of the 2017 BCDR Rules, section 34(2) providing simply that it shall be for the tribunal to decide, 'subject to the right of the parties to agree any matter . . . whether and to what extent there should be oral or written evidence . . .'.

4.2 Commentary

Article 22.4 is a straightforward provision, giving parties the right to present witness evidence in the form of signed written statements, unless the tribunal directs otherwise.

As to when a tribunal might 'direct otherwise', the tribunal's decision in that regard would be subject to any contrary agreement of the parties and to the tribunal's Article 16 duties (to treat the parties with equality, give each a fair opportunity to present its case, and conduct the proceedings with a view to expediting the resolution of the dispute and avoiding unnecessary delay and expense).

It will rarely be the case that a tribunal will wish to prohibit the use of written statements entirely, in favour of oral evidence-in-chief as contemplated by Article 22.2. The use of oral evidence in place of written witness statements will tend to lead to longer (and so more expensive) hearings, particularly where the subject matter of the arbitration is complex and does not reflect normal practice in international arbitration.

A tribunal might, however, direct that the number, length and/or scope of any written witness statements be limited. Particular care should be taken, when considering making any such direction, to ensure that both parties are still being given a fair opportunity to present their case. It should not be assumed that, just because the same restrictions are imposed on each party, each is therefore being given a fair opportunity. The nature of many disputes is such that one side will require much more detailed and lengthy evidence than the other in order to prove its case (e.g. a contractor seeking an extension of time might have to give detailed evidence about events on a construction project over a long period, an employer alleging that a mechanism or structure was defective might have to provide detailed evidence of how the defects manifested and the tests to which it had been subjected).

5 ARTICLE 22.5

5.1 Background

Article 22.5 of the 2017 BCDR Rules is derived from the second sentence of Article 23.4 of the ICDR Rules. In common with a number of other systems of rules,[9] the 2010 BCDR Rules did not contain a provision equivalent to Article 22.5 of the 2017 BCDR Rules.

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[9] *See e.g.* the ICC Arbitration Rules, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules and the English Arbitration Act 1996. The LCIA

5.2 Commentary

Arbitrators should note that Article 22.5 imposes an obligation on the tribunal to set a schedule for the notification by the parties of witnesses who have presented written statements and whom the parties wish to examine. It will usually be most efficient to schedule this at the same time as the tribunal 'establish[es] procedures for the case' pursuant to Article 16.3 of the 2017 BCDR Rules.

The fact that, pursuant to such a schedule, a party gives notice of its wish to examine a witness does not mean that party then automatically has the right to examine that witness. Rather, once a party has given notice that it wishes to examine a witness, it is for the tribunal to determine (pursuant to Article 22.6, discussed below) whether to require that witness to attend and (pursuant to Article 22.3, discussed above) the manner in which they are to be examined.

6 ARTICLE 22.6

6.1 Background

Article 22.6 of the 2017 BCDR Rules is derived from Article 23.4 of the ICDR Rules. Similar powers are accorded by or may be read into other systems of rules.[10]

Arbitration Rules, on the other hand, provide, at Article 20.4, that: 'The Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances.'

[10] Although the ICC Arbitration Rules do not contain a provision directly analogous to Article 22.6 of the BCDR-AAA Rules, they empower the tribunal, in Article 25(1), to 'proceed within as short a time as possible to establish the facts of the case by all appropriate means'. An ICC tribunal might conclude that it was 'appropriate' to direct that a witness attend for cross-examination and to disregard that witness's statement if the witness fails to attend. The LCIA Arbitration Rules, at Article 20.4, contain a provision similar to Article 22.6 of the 2017 BCDR Rules (see *supra* note 9). The UNCITRAL Model Law on International Commercial Arbitration does not contain a provision directly equivalent to Article 22.6 of the 2017 BCDR Rules, but it provides, at Article 19, that: '(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.' Under Article 19(2) of the UNCITRAL Model Law, a tribunal might conclude that it was 'appropriate' to direct that a witness attend for cross-examination and, in the event that the witness fails to attend, to determine that the witness's statement is inadmissible. The UNCITRAL Arbitration Rules, at Article 27.3, provide that: 'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered'. Likewise, it can be inferred that a tribunal operating under the UNCITRAL Arbitration Rules can direct that a witness attend for cross-examination and, in the event that the witness does not attend, determine that the witness's statement is inadmissible. The English Arbitration Act 1996 provides, in section 34(1), that '[i]t shall be for the tribunal to decide all procedural and

The 2010 BCDR Rules did not include any provision stating that the arbitral tribunal may require a witness to appear at a hearing, nor that the tribunal may disregard any witness statement of a witness who fails to appear without a valid excuse. Instead, they opted for a more general approach to the tribunal's assessment of witness evidence in Article 20.6, which provided that: 'The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.'

6.2 Commentary

Article 22.6 makes clear that if, at a hearing, a party fails to produce a witness whose appearance has been requested by the tribunal, the party runs the risk of having that witness's written evidence disregarded by the tribunal if there is no valid reason for the non-appearance.

If a witness's evidence cannot be challenged through questioning by the opposing party's counsel or the tribunal, it will be difficult for the tribunal to assess the credibility of the witness or properly test the witness's evidence. In such circumstances, it is often reasonable to give little weight to, or even disregard, the entirety of that witness's evidence.

Since arbitration is a consensual, contractual process, a tribunal cannot generally 'require' a witness to appear at a hearing in the same way that a court can.[11] Article 22.6 clarifies that an arbitral tribunal can direct that a party produce a witness at a hearing. The witness is not subject to any personal liability or penalty if they fail to attend, but failure to do so may result in the tribunal disregarding that witness's evidence.

Two scenarios which sometimes arise in practice are:

- A party that does not accept a given witness's evidence decides not to require that witness to attend for cross-examination, perhaps because the party considers the witness's evidence irrelevant to the issues.
- Less commonly, a party decides not to require a witness to attend for cross-examination, because it accepts that witness's written evidence as accurate.

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evidential matters, subject to the right of the parties to agree any matter'. In section 34(2) it defines 'procedural and evidential matters' as including 'whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion . . . [and] whether and to what extent there should be oral . . . evidence . . .'. Under the Arbitration Act 1996, a tribunal may thus direct that a witness attend for cross-examination and disregard that witness's statement if the witness fails to attend.

[11] For an exception, *see* section 7 of the US Federal Arbitration Act, which gives tribunals the power to summon witnesses to attend hearings and provides that failure to obey such summons shall be punishable as contempt of court.

In each of these scenarios, the tribunal retains a theoretical right under Article 22.6 to nonetheless require that the witness attend and to disregard the witness's evidence if the witness fails to do so. To require that a witness attend in circumstances where the parties are content for them not to do so will, however, rarely, if ever, be compatible with the tribunal's Article 16 duties (to expedite the resolution of the dispute and avoid unnecessary delay and expense).

In the event that the tribunal requires a witness to appear and the witness fails to do so, the only consequence foreseen in Article 22.6 is that the tribunal 'may' disregard the witness's evidence. A tribunal is under no obligation to do so, however, and has the discretion to take such evidence into account. Rather than disregard entirely the evidence of a witness who fails to attend, the tribunal might, for example, have regard to that evidence but give it less weight than if the witness had attended, as it is empowered to do under Article 23.10 ('The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any evidence.').

7 ARTICLE 22.7

7.1 Background

Article 22.7 of the 2017 BCDR Rules is derived from Article 23.5 of the ICDR Rules, which provides that: 'The tribunal may direct that witnesses be examined through means that do not require their physical presence.' Provisions to similar effect can be found in other systems of rules.[12]

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[12] The ICC Arbitration Rules, at Article 22(2), provide that: 'In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties', and in Appendix IV lists examples of case management techniques that can be used by the tribunal, including 'Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court'. The LCIA Arbitration Rules, at Article 19.2, provide that: 'The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).' The UNCITRAL Model Law on International Commercial Arbitration, at Article 19 (see *supra* note 10), takes a broad, non-prescriptive approach to the tribunal's power relating to evidence. The UNCITRAL Arbitration Rules, at Article 28.4, provide that: 'The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).' The English Arbitration Act 1996 does not expressly refer to the means by which a witness may be examined, section 34(1) simply providing that '[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter' and section 34(2) listing among 'procedural and evidential matters' 'the manner and form in which [oral material] should be . . . presented'.

The 2010 BCDR Rules contained no express mention of the three alternate means by which a tribunal may direct that a witness may be examined. Instead, Article 20.4 included a catch-all provision – 'The tribunal may determine the manner in which witnesses are examined' – which would have been sufficient to cover all three possibilities.

7.2 Commentary

Article 22.7 is uncontroversial and self-explanatory. In the event that the tribunal directs that a witness be examined by telephone or video conference, the party concerned should ensure that the practical arrangements are made in good time to ensure that the witness's evidence can be given without any avoidable technical problems or delays.

Where a witness does give evidence by video link or telephone, and technical problems do occur, any party which considers that it has been disadvantaged as a result should raise the matter right away. In the Australian case *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd*,[13] C requested permission to have witnesses give evidence via video link from China. The tribunal acceded to the request, but directed that C was to be responsible for arranging the video link and a qualified interpreter. At the hearing, there were faults in the video link and possible errors in the translation. The hearing ultimately took place via a low-resolution Skype link, and with a paralegal translating. C did not object to its witnesses giving their evidence in this way and, in its final submissions, even described the evidence of its witnesses as 'clear and consistent'. It subsequently challenged the ensuing award, alleging a breach of Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, which requires that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. The Federal Court of Australia dismissed the challenge: C had chosen to give evidence in this way, was at least partly responsible for the difficulties experienced and had failed to object at the time.

8 ARTICLE 22.8

8.1 Background

Article 22.8 of the 2017 BCDR Rules is derived from Article 20.3 of the ICDR Rules and from the 2010 BCDR Rules, Article 16.3 of which stated that: 'The tribunal may in its discretion direct the order of proof, bifurcate proceedings,

[13] [2016] FCA 1131.

exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.' The principal difference between the 2010 and the 2017 rules is that the latter omit here the reference to the bifurcation of proceedings, which now appears in Article 16.1. Other systems of rules confer similar powers on the arbitral tribunal.[14]

8.2 Commentary

Article 22.8 specifies certain procedural and evidential powers that the tribunal may exercise in its conduct of the arbitral proceedings.

Such powers are arguably already included in the general power to conduct the arbitration given to the tribunal in Article 16.1:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, including making decisions on preliminary issues and bifurcation of the proceedings, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

Article 22.8 is self-explanatory and uncontroversial, and no difficulties should arise from it in practice.

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[14] The ICC Arbitration Rules, after stating in Article 22(2) that, '[i]n order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties', list in Appendix IV as an example of a case management technique that can be used by the tribunal, '[l]imiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues'. The LCIA Arbitration Rules, after according the tribunal full authority to conduct the hearing in Article 19.2 (see *supra* note 12), at Article 22.1 add that: 'The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide . . . (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal'. As already noted, the UNCITRAL Model Law on International Commercial Arbitration takes a broad, non-prescriptive approach to the tribunal's power relating to evidence and procedure (see Article 19, *supra* note 10). The UNCITRAL Arbitration Rules, after authorising the tribunal in Article 17 to conduct the hearing as it considers appropriate, subject to treating the parties with equality and giving each party a reasonable opportunity to present its case, at Article 27.3 provide that: 'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.' Under the English Arbitration Act 1996, section 34(2), the evidential and procedural powers of an arbitral tribunal include deciding 'whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material' (which would cover the exclusion of irrelevant testimony), 'the time, manner and form in which [any material (oral written or other) sought to be tendered on any matters of fact or opinion] should be . . . presented' and 'whether and to what extent there should be oral or written evidence or submissions' (these would cover directing the parties to focus on particular issues).

9 ARTICLE 22.9

9.1 BACKGROUND

Article 22.9 of the 2017 BCDR Rules is derived from Article 23.6 of the ICDR Rules and from Article 20.4 of the 2010 BCDR Rules, which provided, in relevant part, that: 'Hearings are private unless the parties agree otherwise or the law provides to the contrary.' Several other systems of rules, by contrast, remain silent on this question.[15]

9.2 COMMENTARY

In practice, most international arbitration hearings are de facto private by default, rather than public, even if the parties have never turned their minds to this question. This is because the parties will have taken no steps to publicise the date, time and place of the hearings, will hold hearings in private premises to which the public are not routinely admitted and will provide no facilities to accommodate the public, and it will rarely be the case that the subject matter of an international arbitration attracts much public interest. As such, the question of whether a given international arbitration is technically 'public' or 'private' rarely arises.

Article 22.9 establishes a default rule that arbitrations are to be held in private. Only two things can change the default: first, if the parties agree that the hearing be public; second, if the law governing the arbitration provides that the hearing be public. It is rare for parties to agree that a hearing will be in public (though this is sometimes a feature of treaty arbitrations). It is similarly rare that the governing law will require an international arbitration hearing to be in public. As previously mentioned, neither the English Arbitration Act 1996 nor the UNCITRAL Model Law on International Commercial Arbitration contain any such requirement. Some US state laws require that information about domestic consumer and

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[15] The ICC Arbitration Rules have no default rule providing for the privacy of arbitration hearings. Instead, parties must apply to the arbitral tribunal for an order relating to the confidentiality of the proceedings pursuant to Article 22(3): 'Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.' The UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules are silent as to whether arbitration hearings are to be held in private. The English Arbitration Act 1996 was deliberately silent on the privacy of arbitration hearings, but the English Court of Appeal has confirmed that parties to an arbitration have an implied duty to observe the confidentiality of information relating to the case under any arbitration agreement governed by English law. The LCIA Arbitration Rules, by contrast, expressly state in Article 19.4 that: 'All hearings shall be held in private, unless the parties agree otherwise in writing.'

employment arbitrations be made public, but this is of no relevance to international commercial arbitration.[16]

10 ARTICLE 22.10

10.1 Background

Article 22.10 of the 2017 BCDR Rules is derived from Article 26.2 of the ICDR Rules and from Article 23.2 of the 2010 BCDR Rules, which provided that: 'If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.' Similar provisions can be found in other systems of rules.[17]

10.2 Commentary

Article 22.10 makes clear that the tribunal does not need all of the parties to appear at a hearing in order to proceed with that hearing. This follows from the fact that the parties will have given the tribunal jurisdiction to decide the dispute in their arbitration agreement. Once that agreement becomes binding, one party cannot prevent the arbitration from continuing by refusing to participate in hearings.

Article 22.10 states that the tribunal will only proceed in a party's absence if the party cannot show sufficient cause for its failure to appear at a hearing. As to what constitutes 'sufficient' cause, a tribunal will probably be prepared to consider

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16 For an example, *see* California Civil Procedure Code, paragraph 1281.96.

17 The ICC Arbitration Rules, at Article 26(2), provide that: 'If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.' The LCIA Arbitration Rules, at Article 15.8, provide that: 'If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or otherwise by order of the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.' The UNCITRAL Model Law on International Commercial Arbitration, at Article 25, provides that: 'Unless otherwise agreed by the parties, if, without showing sufficient cause, . . . any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.' The UNCITRAL Arbitration Rules, at Article 30(2), provide that: 'If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.' The English Arbitration Act 1996 provides in section 41(4) that: 'If without showing sufficient cause a party – (a) fails to attend or be represented at an oral hearing of which due notice was given, or (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.'

only reasons outside of a party's control which could not have been anticipated in advance. Anything less than this is unlikely to be sufficient to convince a tribunal not to proceed with a hearing.

If a party does show sufficient cause within the meaning of Article 22.10, it is most likely that the arbitral tribunal will order a stay of the proceedings and reschedule the hearing to a new date that suits all the parties, and one that minimises any detrimental effect the change of date may have on the parties. It will be possible for the tribunal to issue an order allocating any costs which have been wasted as a result of the rescheduling of a hearing (for example, venue hire or hearing preparation that will need to be repeated prior to a rescheduled hearing) pursuant to Article 16.5, which provides that '[t]he arbitral tribunal may allocate costs . . . as may be necessary to protect the efficiency and integrity of the arbitration'.

11 ARTICLE 25.1

11.1 Background

Article 25.1 of the 2017 BCDR Rules is derived from Article 25.1 of the ICDR Rules, which is worded identically save for the use of the pronoun in 'report to it' where the BCDR provision reads 'report to the arbitral tribunal'. The tribunal's power to appoint an independent expert also appeared in the 2010 BCDR Rules, Article 22.1 of which provided that: 'The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.' The only material difference between the 2010 and the 2017 rules is therefore that the 2017 rules require an expert to be appointed 'after consultation with the parties'. Although similar provisions can be found in other systems of rules, a number of differences can be noted.[18]

[18] The ICC Arbitration Rules provide in Article 25(4) that the tribunal, 'after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports'. Unlike the 2017 BCDR Rules, the ICC Rules do not specify that such reports are to be in writing, nor that the terms of reference are to be communicated to the parties. The LCIA Arbitration Rules, at Article 21.1, contain a provision whose terms are similar to those of Article 25.1 of the 2017 BCDR Rules, save that: (i) whereas the BCDR Rules provide that the tribunal 'may appoint one or more independent experts', the LCIA Rules provide that the tribunal 'may appoint one or more experts'; and (ii) whereas the BCDR Rules provide for the experts to report 'to the arbitral tribunal, in writing, on issues designated by the arbitral tribunal and to be communicated to the parties', the LCIA rules provide for the experts to report 'in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal'. The UNCITRAL Model Law on International Commercial Arbitration (which is given force of law in Bahrain by Bahrain Arbitration Law No. 9/2015) states in Article 26(1) that the right of the tribunal to appoint experts applies 'unless otherwise agreed by the parties'. Unlike the 2017 BCDR Rules, the UNCITRAL Model Law does not specify that experts are to report to the arbitral tribunal 'in writing' and does not require that the tribunal consult the parties. The UNCITRAL Arbitration Rules, at Article 29.1, contain a provision

11.2 Commentary

11.2[a] General

Arbitrations frequently involve complex technical issues or are subject to a system of law with which the tribunal is unfamiliar. In such cases, it is desirable that a tribunal have the benefit of expert evidence.

Under the 2017 BCDR Rules, expert evidence can come before a tribunal in two ways:

- Under Article 22, a party may present an expert witness's evidence.
- Under Article 25, the tribunal may appoint an independent expert to report to it.

11.2[b] 'Experts', 'Legal Advisers' and 'Assessors'

Article 25.1 permits the tribunal to appoint an expert to report to it. By contrast, section 37(1) of the English Arbitration Act 1996 provides that, '[u]nless otherwise agreed by the parties', a tribunal may appoint not just 'experts' but also 'legal advisers to report to it' and 'assessors to assist it on technical matters'.

In an arbitration subject to the 2017 BCDR Rules which is seated in England, it might therefore be argued that, as a result of Article 25.1, the parties have agreed that a tribunal should be allowed to appoint 'experts' only and excluded the tribunal's right under section 37(1) of the Arbitration Act 1996 also to appoint 'legal advisers' and 'assessors'.

Unsurprisingly, the issue has not been addressed in case law. The reports of the Departmental Advisory Committee on Arbitration Law offer no enlightenment as to the difference (if any) between 'experts', 'legal advisers' and

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similar to Article 25.1 of the 2017 BCDR Rules, except that (as in the ICC Arbitration Rules) the 'issues designated by the arbitral tribunal' are instead called the expert's 'terms of reference'. Article 29.2 of the UNCITRAL Arbitration Rules sets out a procedure which does not appear in the 2017 BCDR Rules, whereby a prospective expert 'shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.' The English Arbitration Act 1996, in section 37(1), provides that 'unless otherwise agreed by the parties' the tribunal may appoint 'experts or legal advisers to report to it and the parties' or 'assessors to assist it on technical matters'. Unlike Article 25.1 of the 2017 BCDR Rules, the Arbitration Act 1996 does not require prior consultation with the parties, nor does it specify that experts' reports to the tribunal are to be in writing.

'assessors', saying of section 37(1) only that: 'This to our minds would be a useful power in certain cases. We trust that the provisions we suggest are self-evident.'[19]

It is suggested that the term 'experts' in the 2017 BCDR Rules would in fact also encompass what are termed 'legal advisers' and 'assessors' in the Arbitration Act 1996. A legal adviser is an expert on law who reports to ('advises') the tribunal; an assessor is an expert in some field who forms an assessment of some issue and reports that assessment to the tribunal.

11.2[c] The Use of Tribunal-Appointed Experts

Different tribunals will take different approaches to expert evidence, often depending on their composition and legal backgrounds. Some may take a more inquisitorial approach, appointing their own experts. Others may prefer a more adversarial approach, being content to hear whatever expert evidence the parties submit without also appointing their own experts. Whether an expert should be appointed will be a matter for the tribunal's judgment in each case, and there are no hard and fast rules.

When deciding whether to appoint an expert, the key consideration should be the tribunal's duty under Article 16.2 of the 2017 BCDR Rules to expedite the resolution of the dispute, avoiding unnecessary delay and expense.

Whenever a tribunal is considering appointing an expert, it is necessary to recognise the potential for increased delay and expense. The fact that the tribunal proposes to appoint an expert will not prevent each party from also appointing its own expert to give evidence on the same issue, given that Article 25.4 (discussed further below) expressly gives parties a right to present expert witness evidence on points at issue in a tribunal-appointed expert's report, and Article 16.1 requires that 'that each party has the right to be heard and is given a fair opportunity to present its case'. It is reportedly rare for an international tribunal to appoint its own expert where party-appointed experts are to give evidence on the same issue.[20]

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[19] Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill. The committee's supplementary report on the Arbitration Act 1996 makes no reference to section 37.

[20] *See e.g.* Born, *International Arbitration* (2009) at 1861: 'International arbitral tribunals only rarely appoint experts to address technical issues which the parties have already addressed through party-appointed experts'. That said, the use of tribunal-appointed experts appears somewhat more common in treaty-type arbitrations. For examples of cases where an international tribunal has appointed an expert, or at least consulted parties as to whether such an expert should be appointed, *see Wintershall AG et al. v. Government of Qatar*, Partial Award on Liability, paragraph B.VIII (5 February, 1988) (ad hoc arbitration under 1976 UNCITRAL Arbitration Rules arising out of a concession agreement), (1989) 28 ILM 798, 803 (the tribunal appointed a 'technical expert'); *Shahin Shaine Ebrahimi v. Government of the Islamic Republic of Iran*, Iran-US Claims Tribunal, Chamber Three, Cases 44, 46 and 47, Order of 20 July 1992, at 1–3 (the tribunal decided to appoint an expert to report on

One clear example of a circumstance where a tribunal should not appoint an expert is provided by the English case *Hussmann (Europe) Ltd v. Al Ameen Development & Trade Co. and Ors*.[21] The contract which gave rise to the dispute provided for arbitration in England and was stated to be subject to the laws of Saudi Arabia. Presuming the laws of Saudi Arabia to be the same as those of England, the parties did not propose to submit any expert evidence on the laws of Saudi Arabia. The tribunal insisted on appointing an independent expert on Saudi Arabian law. The court cited with approval the following passage from Mustill and Boyd, *Commercial Arbitration*, 2nd ed., p. 72:

> the arbitrator should recall that it is for the parties to allege that the foreign law differs from English law. If they are content to have their disputes decided according to English law, it is no part of his function to multiply trouble and expense by suggesting that the two laws differ. . . .
>
> The obvious good sense of this needs no elaboration. Experience has shown that in many cases, recourse to foreign law adds very considerably to the expense of an arbitration and in very many cases makes little difference; where there are genuine points of difference (as in this case in relation to the admissibility of evidence of post contractual conduct as an aid to construction), the point can generally be isolated and often be agreed. A general request to a foreign lawyer to review the entire case and opine on the principles of foreign law where the parties have not raised specific issues is a course that a prudent tribunal should not embark on without considerable hesitation.

An example of a circumstance where a court considered it was justified for a tribunal to have appointed an 'assessor' is provided by the English case of *Price and Anor v. Carter (t/a Ian Carter Building Contractors)*.[22] An arbitrator appointed a

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the valuation of a company and set out a procedure whereby the parties would seek to agree upon an expert or, failing agreement, the tribunal would appoint one); *Hussmann (Europe) Ltd v. Al Ameen Development & Trade Co. and Ors* [2000] 2 Lloyd's Rep. 83 (the tribunal appointed an expert on Saudi law); *SD Myers, Inc. v. Government of Canada*, Second Partial Award (21 October 2002) (ad hoc arbitration under 1976 UNCITRAL Arbitration Rules based on NAFTA Chapter Eleven), (2001) 40 ILM 1408, 1411, 1443 (the tribunal directed that a case management meeting take place to consider whether the tribunal should appoint its own forensic accountancy expert); *National Grid PLC v. Argentine Republic*, Award (3 November 2008) (ad hoc arbitration under the 1976 UNCITRAL Arbitration Rules based on UK-Argentina BIT) at 11–13 (the tribunal informed the parties that the appointment of experts to review expert reports submitted by the parties might be of assistance to the tribunal, and invited the parties to agree on the selection of such an expert; the parties were unable to agree but proposed selection criteria; following further consultation with the parties on selection criteria, terms of reference and procedure, the tribunal appointed an expert); *Chevron Corp. et. al. v. Republic of Ecuador*, Procedural Order No. 8 (31 March 2010) (arbitration administered by Permanent Court of Arbitration under 1976 UNCITRAL Arbitration Rules based on US-Ecuador BIT) at 2–3 (failing agreement on the taxes owed by the claimant, the parties were to appoint experts on Ecuadorian tax law; the tribunal was to consider appointing its own expert on Ecuadorian tax law; the experts were to attempt to present a joint proposal to the tribunal as to the relevant amount, failing which the tribunal could ask for individual submissions from each expert).

[21] [2000] 2 Lloyd's Rep. 83.

[22] [2010] EWHC 1451 (TCC).

quantity surveyor to assess the value of each item in the claim and counterclaim. The court observed as follows:

> It is said on behalf of [the defendants] that the arbitrator was quite capable of making the valuations and carrying out the relevant computations himself but chose not to do so. This may be correct, but I do not see that it precludes an arbitrator from appointing an assessor to assist him if he so wishes. . . . [T]he arbitrator's comments suggest that he considered that it would be more cost effective for individual items of valuation to be dealt with in this way: an approach that would be justified by the duty to avoid unnecessary expense imposed on arbitrators by section 33 of the [Arbitration] Act [1996].

11.2[d] Consultation with the Parties Prior to Appointment

Article 25.1 requires that the tribunal appoint any expert only 'after consultation with the parties'. This is a new requirement in the 2017 BCDR Rules, which do not specify what form such 'consultation' should take. Points which a tribunal may wish to address include:

- whether it is really necessary/desirable for the tribunal to appoint its own expert;
- what the expert's terms of reference are to be; and
- how a suitable candidate is to be identified (a tribunal may invite the parties to identify and, if possible, to agree upon suitable candidates or criteria for their selection).

11.2[e] Treatment of Tribunal-Appointed Experts' Fees

A tribunal which appoints an expert will be liable to pay that expert's fees in accordance with the terms of any contract under which the tribunal has appointed the expert.

Article 36.2 of the 2017 BCDR Rules lists 'the costs of assistance required by the arbitral tribunal, including its experts' as an example of 'costs of the arbitration'. Article 30.1 requires that 'from time to time . . . during the arbitration the Chamber shall direct the parties to pay appropriate amounts as an advance for the costs of the arbitration . . .'. In practice, therefore, the Chamber will direct the parties to make advance payments on account of any fees which the tribunal would otherwise be liable to pay a tribunal-appointed expert. Article 36.1 provides that '[t]he arbitral tribunal may allocate [costs of the arbitration] among the parties if it determines that allocation is reasonable'.

A situation might occasionally arise where a tribunal insists upon appointing an expert against the protestations of one party (or even both parties) that such expert is unnecessary. Alternatively, one, or both, of the parties might not object to the appointment of the expert, but might consider that the expert's fees are unreasonable. If all the parties agree that an expert is unnecessary, or that the expert's estimated fees or rates are unreasonable, the parties can avoid the appointment of the expert and the imposition of the fees by having the tribunal's appointment revoked, and a new tribunal appointed, under Article 12.1(c). Where only one party considers that an expert is unnecessary, or that the expert's estimated fees or rates are unreasonable, that party's only remedy would be to seek to persuade the Chamber to revoke the tribunal's appointment, and appoint a new tribunal, under Article 12.1(e), which operates if 'the Chamber on its own initiative determines that an arbitrator is . . . not participating in the arbitration in accordance with the arbitral tribunal's duty under Article . . . 16.2'. The party would argue that, in appointing the expert, the tribunal was in breach of its Article 16.2 duty to avoid unnecessary expense. Short of obtaining a pre-emptive revocation of the tribunal's appointment, there would appear to be little scope for the parties to avoid paying the entirety of any tribunal-appointed expert's fees.

This can be contrasted with the position of party-appointed experts. The unsuccessful party will typically be ordered to pay fees charged by experts (and lawyers) whom the successful party appointed. But it will be open to the unsuccessful party to argue that some proportion of those fees was unreasonable, and so should be borne by the successful party.

Article 31.1 provides that 'the . . . expenses of the arbitrators shall be reasonable in amount'. Article 31.3 provides for any dispute regarding the tribunal's expenses to be determined by the Chamber. The definition of 'costs of the arbitration' in Article 36.2, however, lists 'the . . . expenses of the arbitrators' and 'the costs of assistance required by the arbitral tribunal, including its experts' as separate items. This suggests that fees charged by tribunal-appointed experts are not considered to be 'expenses of the arbitrators' for the purposes of the 2017 BCDR Rules. The 2017 BCDR Rules do not contain any express requirement that 'the costs of assistance required by the arbitral tribunal, including its experts' be 'reasonable in amount', or make such costs subject to any review by the Chamber.

It would appear that the tribunal simply has an absolute right, therefore, under Article 36.1 to order that the parties pay all the fees charged by any expert that the tribunal chooses to appoint.

11.2[f] Issues Designated by the Tribunal to Be Communicated to the Parties

Article 25.1 allows the tribunal to appoint an expert to report on 'issues designated by the arbitral tribunal and to be communicated to the parties'. It is not specified that either the 'designation' or the 'communication to the parties' be in writing.

Although the BCDR-AAA Rules do not prohibit the tribunal from designating issues and communicating them to the parties orally, best practice would be to do so in writing, and to copy any communications between the tribunal and the expert in this regard to the parties (see further below).

11.2[g] Tribunal-Appointed Expert's Report to Be in Writing and a Copy Sent to the Parties

Article 25.1 requires that a tribunal-appointed expert 'report to the arbitral tribunal in writing'. Article 25.3 requires that the tribunal 'shall send a copy of the report to all parties'.

11.2[h] Communications with Tribunal-Appointed Experts Other Than 'Issues Designated by the Tribunal' and 'Reports'

The 2017 BCDR Rules provide that 'issues designated by the tribunal' are to be 'communicated to the parties' and that tribunal-appointed experts are to 'report to the arbitral tribunal in writing' (Article 25.1), and that the tribunal is to 'send a copy of the report to all parties' (Article 25.3). This raises the question of whether other communications between a tribunal-appointed expert and the tribunal also need to be communicated to the parties.

In an arbitration under the 2017 BCDR Rules seated in England or Wales, section 37(1)(b) of the Arbitration Act 1996 would apply. It provides that, unless otherwise agreed by the parties, 'the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered to it by any [expert, legal adviser or assessor appointed under section 37(1)(a)]'.[23] The issue is whether, under Articles 25.1 and 25.3 of the 2017 BCDR Rules, parties could be said to have 'otherwise agreed' and thereby excluded that right. It is suggested that clearer words are required before the parties could be found to have given up such an important right.

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[23] Prior to the Arbitration Act 1996, it was said that arbitrators did not have to put legal advice before the parties because it was not 'evidence': *Giacomo Costa fu Andrea v. British Italian Trading Co.* [1961] 2 Lloyd's Rep. 392 per McNair J. at 403. Section 37(1)(b) of the Arbitration Act 1996 reverses this because it specifically refers to 'advice'.

The court in *Hussmann (Europe) Ltd v. Al Ameen Development & Trade Co. and Ors*, quoting Merkin *Arbitration Law*, held that 'consultation with the experts should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment'.[24] The conduct of the tribunal in that case, in holding a private meeting with the expert to discuss his draft report without obtaining the consent of the parties, was an 'irregularity' for the purposes of a challenge to the award under section 68 of the Arbitration Act 1996. On the facts of that case, the meeting was prevented from being a 'serious irregularity' such as to justify setting aside the award because 'no prejudice or injustice flowed in fact from [the tribunal's] error as the fact of the meeting became known to the parties during the evidence of [the expert]'. Referring to Cato's advice in *Arbitration Practice and Procedure: Interlocutory and Hearing Problems*, the court noted that 'an arbitrator who finds himself in [the position of having met with the expert absent the parties] should tell the parties about what he has done and give them a full opportunity to test the evidence by way of cross examination or by calling evidence in rebuttal'.

In *Price and Anor v. Carter (t/a Ian Carter Building Contractors)*,[25] a provision in the Construction Industry Model Arbitration Rules gave an arbitrator power to appoint an assessor, but did not allow the parties to comment on any opinion or advice offered by such an assessor. The court said:

> It is to be noted that this rule gives no entitlement to the parties to have a reasonable opportunity to comment on any opinion or advice offered by such an assessor, and so it might be suggested that the parties have 'otherwise agreed' not to confer this right. However, it seems to me that the overriding duty on an arbitrator to act fairly as between the parties imposed by section 33 of the Act probably requires an arbitrator appointed under the CIMA Rules to give the parties some opportunity to comment on the views given by an assessor.

This reasoning is unsatisfactory. The right in section 37(1)(b) is stated to apply 'unless otherwise agreed by the parties' – the intention was that the parties should be allowed to exclude that right if they wished. The question in any particular case is whether the words used in the relevant arbitral agreement/institutional rules evidence an intention to have excluded the right. Section 33 of the Arbitration Act 1996 does not operate to make the right mandatory or inalienable.

In an arbitration under the 2017 BCDR Rules seated in Bahrain or some other jurisdiction that applies the UNCITRAL Model Law on International Commercial Arbitration, the position is potentially different. If anything, the

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[24] [2000] 2 Lloyd's Rep. 83.
[25] [2010] EWHC 1451 (TCC).

UNCITRAL Model Law imposes even fewer restrictions than the 2017 BCDR Rules do on communications between tribunals and experts:

- Article 26(1)) of the UNCITRAL Model Law permits the tribunal to appoint experts 'to report to it on specific issues' but, unlike Article 25.1 of the 2017 BCDR Rules, does not require that the tribunal consult the parties and does not state that the issues are to be communicated to the parties.
- Whereas the 2017 BCDR Rules require that the report be in writing and that a copy be sent to the parties, Article 26(2) of the UNCITRAL Model Law provides that the expert's report may be written or oral and does not state that the report is to be provided to the parties, though this is arguably implied: 'Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him . . .'

Notwithstanding the less prescriptive approach in the UNCITRAL Model Law, it is suggested that best practice, even for a tribunal which is conducting a BCDR arbitration under the UNCITRAL Model Law, is nonetheless as follows:

- Except at a hearing which all parties have been given an opportunity to attend, communicate with an expert only in writing, provide copies of such communications to the parties and give them the opportunity to comment on them.
- Where, outside of a hearing, a tribunal has communications with an expert other than in writing (for example, an unsolicited call from an expert or a chance meeting), inform the parties and give them the opportunity to comment.

Reasons for taking this approach are:

- The terms 'issues designated by the tribunal' and 'report' in the 2017 BCDR Rules might be given a wide reading, whereby almost any communication from an expert to the appointing tribunal might be considered a 'report'. Communications from a tribunal to an expert about the substance of the case which in any way clarified or explained the issues and how they were to be addressed might be characterised as 'designating' the issues. A conservative approach avoids any argument about whether any particular communication satisfies these definitions.
- Where a tribunal has undisclosed communications with a tribunal-appointed expert, this potentially provides ammunition for attempts to

resist enforcement of, or challenge, an award. This will cause cost and delay, even if it is ultimately held that such communications were permissible or (as in the *Hussmann* case discussed above) that such communications did not cause sufficient prejudice to justify setting aside an award. A tribunal should have regard to its duty under Article 16.2 of the 2017 BCDR Rules to conduct proceedings with a view to expediting the resolution of the dispute (i.e. producing an award which is, so far as possible, readily enforceable and not open to challenge) and avoiding unnecessary delay and expense. Providing the parties with copies of any communications with an expert is hardly burdensome.

11.2[i] No Obligation to Appoint a Legal Expert

In *Hussmann (Europe) Ltd v. Al Ameen Development & Trade Co. and Ors*, the court rejected a submission that section 46 of the Arbitration Act 1996[26] (which is worded in similar terms to Article 32.1 of the 2017 BCDR Rules and Article 28 of the UNCITRAL Model Law on International Commercial Arbitration) imposes an obligation on a tribunal to obtain expert evidence on the applicable law of an arbitration, insofar as the tribunal members are unfamiliar with it. The court said of this argument:

> I do not accept that construction of the Act. If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales. To hold otherwise would mean that international arbitrations held in London would be encumbered with the considerable extra expense of obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales.

Section 34 of the Arbitration Act 1996 states that '[i]t shall be for the tribunal to decide all . . . evidential matters, subject to the right of the parties to agree any matter'. The court in *Hussmann* appears to have considered that the tribunal would have been free to adopt a presumption that the law of Saudi Arabia was the same

[26] Section 46, entitled 'Rules applicable to substance of dispute', reads as follows: '(1) The arbitral tribunal shall decide the dispute – (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules. (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'

as the law of England because deciding whether to adopt such a presumption was an 'evidential matter'.

It follows that, in an arbitration subject to the 2017 BCDR Rules which is seated in England, and absent any contrary agreement by the parties, it would be possible for a tribunal to adopt the same presumption. On the other hand, in an arbitration subject to the 2017 BCDR Rules which is seated in Bahrain, or in another state that has adopted the UNCITRAL Model Law on International Commercial Arbitration, a tribunal wishing to adopt that presumption would rely instead on Article 19 of the UNCITRAL Model Law, which provides that, absent a contrary agreement by the parties, 'the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate'.

In any case that is, or might be, subject to a system of laws in which the tribunal lacks expertise, the best practice is to consult with the parties at an early stage as to the approach to be taken to proof of that law. It will often be appropriate to make an order to the effect that, absent contrary evidence submitted by a party and accepted by the tribunal, the applicable law is presumed to be the same as the system of laws specified in the order. Usually, that will be the law of the seat, though it might be some other law with which the parties and the tribunal are familiar.

11.2[j] Limitation of Expert's Liability

Article 41.1 of the 2017 BCDR Rules states:

> None of . . . any expert to the arbitral tribunal . . . shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, except where such act or omission is shown by that party to be the consequences of conscious and deliberate wrongdoing, or to the extent that any part of this limitation of liability is shown to be prohibited by any applicable law.

Where the 2017 BCDR Rules govern an arbitration, it is by virtue of a contract between the parties to the arbitration and Article 41.1 is (in effect) a term of that contract. There is no contract between the parties and a tribunal-appointed expert. A question might therefore conceivably arise as to whether Article 41.1 (a term of a contract to which the tribunal-appointed expert is not a party) can operate to limit a tribunal-appointed expert's liability. That question would need to be determined under whatever law governed the party's claim against the tribunal-appointed expert. If English law were applicable, the tribunal-appointed expert would probably be entitled to the protection of Article 41.1 by operation of section 1(1)(b) of the Contracts (Rights of Third Parties) Act 1999. Alternatively,

such an expert might argue that the fact a party agreed to arbitration under a set of rules that contained a limitation of liability as in Article 41.1 negates any 'assumption of responsibility' by the expert, such as would be required to establish a duty of care. Another alternative would be for the expert to seek to argue that they were 'an employee or agent of an arbitrator' and so entitled to protection under section 29 of the Arbitration Act 1996.[27] If an expert was neither entitled to the protection of Article 41.1 nor 'an employee or agent of an arbitrator', the expert would not enjoy any immunity under English law merely by reason of having been a witness.[28]

12 ARTICLE 25.2

12.1 Background

Article 25.2 of the 2017 BCDR Rules is derived from Article 25.2 of the ICDR Rules and from Article 22.2 of the 2010 BCDR Rules. While other systems of rules contain similar provisions, they are sometimes formulated in terms of a power rather than an obligation.[29]

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[27] Section 29, entitled 'Immunity of arbitrator', reads as follows: '(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. (2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself. . . .'

[28] *Jones v. Kaney* [2011] UKSC 13.

[29] The ICC Arbitration Rules do not impose any express obligation on the parties to provide a tribunal-appointed expert with information. If no such obligation is imposed by the law of the seat (e.g. English Arbitration Act 1996, section 40(1), or UNCITRAL Model Law on International Commercial Arbitration, Article 26(1)(b)), it would have to be imposed by the tribunal pursuant to Article 22(2) ('In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties.'). The LCIA Arbitration Rules do not impose a duty on the parties to provide the tribunal-appointed expert with information, but in Article 21.3 give the tribunal the power to impose such a duty: 'The Arbitral Tribunal may require any party at any time to give to such expert any relevant information or to provide access to any relevant documents, goods, samples, property, site or thing for inspection under that party's control on such terms as the Arbitral Tribunal thinks appropriate in the circumstances' (note that, whereas the 2017 BCDR Rules refer only to 'information' and 'goods', the LCIA Arbitration Rules also include 'samples, property, site or thing'). Likewise, the UNCITRAL Model Law on International Commercial Arbitration does not impose a duty on the parties to provide the tribunal-appointed expert with information, but in Article 26(1) gives the tribunal the power to impose such a duty, provided there is no contrary agreement between the parties: 'Unless otherwise agreed by the parties, the arbitral tribunal . . . (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.' The UNCITRAL Arbitration Rules, at Article 29.3, contain a provision that is materially identical to Article 25.2 of the 2017 BCDR Rules, providing that: 'The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.' The English Arbitration Act 1996 does not impose any express obligation on the parties to provide a tribunal-appointed expert with information; instead, section

12.2 Commentary

In order to prepare their reports, tribunal-appointed experts might require access to information beyond that which has already been disclosed by the parties. Article 25.2 imposes upon the parties a duty to provide experts with 'any relevant information or produce for inspection any relevant documents or goods that the expert may require'. It provides for any dispute as to the relevance of 'the requested information or goods' (though, oddly, not 'documents') to be determined by the tribunal.

Article 25.2 has limited practical significance, as demonstrated by the fact that the authors of the English Arbitration Act 1996 and of the ICC Arbitration Rules did not think it necessary to impose any equivalent obligation. Realistically, and quite apart from the duty imposed by Article 25.2, a party is likely to cooperate with an expert appointed by a tribunal because doing otherwise would not sit well with the tribunal and might lead a tribunal to draw adverse inferences.

13 ARTICLE 25.3

13.1 Background

Article 25.3 of the 2017 BCDR Rules is derived from Article 25.3 of the ICDR Rules and from Article 22.3 of the 2010 BCDR Rules, from which it differs only in the use of 'arbitral tribunal' as opposed to just 'tribunal'. A similar provision can be found or be implied in some other systems of rules, but is lacking in others.[30]

34(1) provides that '[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter' (which, according to section 34(2)(d), includes 'whether any and if so which documents . . . should be . . . produced by the parties . . .'), while section 40(1) requires that '[t]he parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings'.

30 Neither the UNCITRAL Model Law on International Commercial Arbitration nor the ICC Arbitration Rules contain a provision equivalent to Article 25.3 of the 2017 BCDR Rules. The UNICTRAL Arbitration Rules, at Article 29.4, contain a provision that is materially identical to Article 25.3 of the 2017 BCDR Rules. The LCIA Arbitration Rules, at Article 21.1, provide for a tribunal-appointed expert to 'report in writing to the Arbitral Tribunal and the parties'. Unlike the 2017 BCDR Rules, the LCIA Rules do not expressly say that the parties may examine any document which the tribunal-appointed expert has relied on. Such a right is, however, arguably implicit in the tribunal's duty under Article 14.4 of the LCIA Rules to 'giv[e] each [party] a reasonable opportunity of putting its case' and 'provide a fair . . . means for the final resolution of the parties' dispute'. Section 37(1)(b) of the English Arbitration Act 1996 provides that 'the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any [expert, legal adviser or assessor appointed under section 37(1)(a)]'. Unlike the 2017 BCDR Rules, the Arbitration Act 1996 does not expressly say that the parties may examine any document which the tribunal-appointed expert has relied on. Such a right is, however, arguably implicit in the tribunal's duty under section 33 of the Arbitration Act 1996 to 'giv[e] each party a reasonable opportunity of putting his case . . .' and 'provide a fair means for the resolution of the matters falling to be determined'.

13.2 Commentary

Article 25.3 is uncontroversial, self-explanatory and unlikely to lead to any difficulties in practice.

Note that although Article 25.3 refers to the parties being entitled 'to express, in writing, their opinion of the report', the use of the word 'opinion' does not signify that any response must be in the form of an expert opinion. 'Opinion' in this context is better understood as equivalent to 'comment' or 'submissions'.

14 ARTICLE 25.4

14.1 Background

Article 25.4 of the 2017 BCDR Rules is derived from Article 25.4 of the ICDR Rules and from Article 22.4 of the 2010 BCDR Rules, which provided that: 'At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.' A similar provision is found in several other systems of rules.[31]

14.2 Commentary

Article 25.3 is uncontroversial, self-explanatory and unlikely to lead to any difficulties in practice.

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[31] The ICC Arbitration Rules, at Article 25(4), provide that: 'At the request of a party, the parties shall be given the opportunity to question at a hearing any such [tribunal-appointed] expert.' The LCIA Arbitration Rules, at Article 21.4, provide that: 'If any party so requests or the Arbitral Tribunal considers it necessary, the Arbitral Tribunal may order the expert, after delivery of the expert's written report, to participate in a hearing at which the parties shall have a reasonable opportunity to question the expert on the report and to present witnesses in order to testify on relevant issues arising from the report.' The UNCITRAL Model Law on International Commercial Arbitration, at Article 26(2), provides that: 'Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.' The UNCITRAL Arbitration Rules, at Article 29.5, provide that: 'At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 ['Hearings'] shall be applicable to such proceedings'. By contrast, the English Arbitration Act 1996, in section 34(2)(b), provides that, subject to the right of the parties to agree any matter, it shall be for the tribunal to decide all procedural and evidential matters, including 'whether and to what extent there should be oral or written evidence or submissions'. Thus, under the Arbitration Act 1996, there is no absolute right equivalent to Article 25.4 of the 2017 BCDR Rules to question a tribunal-appointed expert at an oral hearing.