



Practice Guideline 10: Guidelines on the use of Tribunal-Appointed Experts, Legal Advisers and Assessors

1. Introduction

1.1. In all the major arbitration centres covered in this guidelines, the arbitral tribunal is entitled to appoint experts to report to it on technical matters outside its own expertise and experience.

1.2. As regards arbitrations in England and Wales, Section 37 of the Arbitration Act 1996 (which is based on Article 26 of the Model Law) provides:

“(1) Unless otherwise agreed by the parties -

(a) the tribunal may -

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.”

1.3. In this Guideline, it is proposed to deal separately with tribunal - appointed experts, legal advisers and assessors. Before doing so, however, three general features of Section 37 need to be mentioned.

1.4. First, Section 37 (which is prefaced by the words “unless otherwise agreed by the parties”) is not mandatory. In common with Section 34, it proceeds on the footing that it is for the tribunal to decide all procedural and evidential matters but that this is subject to the right of the parties to reach agreement on these matters. There is only one mandatory aspect of Section 37. Sub-section (2) is made mandatory to avoid the risk of the parties disabling the tribunal from recovering from the parties expenses properly incurred.

1.5 Second, before appointing an expert, legal adviser or assessor under this Section the tribunal must first consider whether this is consistent with its duty under Section 33(1)(b) to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

1.6 Third, if the tribunal does decide to appoint an expert legal adviser or assessor the procedure to be followed must be closely defined in an order made by the tribunal at or about the stage of the appointment. Section 37 leaves the details of that procedure to the discretion of the tribunal save in one respect, that is, that any information, opinion or advice offered by any person appointed by the tribunal must be communicated to the parties and the parties must be given a reasonable opportunity to comment on it. A failure to provide such an opportunity is equivalent to a failure by the tribunal to perform its duty under Section 33(1)(a).

2. Comparative View

2.1 Article 26 of the Model Law itself reads:

“1. Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by 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.

2. 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.”

2.2 Article 1042 of the Dutch Burgerlijke Rechtsvordering contains an equally detailed provision which operates on similar lines to the UNCITRAL Model Law. It says:

“1. The arbitral tribunal may appoint one or more experts to give advice. The arbitral tribunal shall communicate as soon as possible to the parties a copy of the appointment and the terms of reference of the experts.

2. The arbitral tribunal may require a party to provide the experts with the information required by them and to give them the necessary cooperation.

3. Upon receipt of the expert’s report, the arbitral tribunal shall provide a copy of the report to the parties without delay.

4. At the request of either party, the experts shall be examined at a hearing. A party wishing to make such a request shall inform the arbitral tribunal and the opposing party thereof without delay.

5. The arbitral tribunal shall give the parties an opportunity to examine the experts and to produce their own experts.”

2.3. In other countries, notably Switzerland, France, Belgium, the USA, the parties and, in default, the tribunal’s power to determine the arbitral procedure has always been interpreted as permitting the appointment of experts.

2.4. Overall, there is very little if any difference between the position under the 1996 Act and the law prevailing in the other countries considered in these guidelines. Hopefully, then, these guidelines can be used by arbitrators broadly regardless of where they are sitting.

3. Tribunal Appointed Experts

3.1 Introduction

3.1.1 In cases where the parties have not excluded the power of the Tribunal to appoint an expert, the Tribunal should exercise care in deciding:

(1) whether or not the case is suited to the use of a tribunal appointed expert;

(2) if so, the expert’s terms of reference;

(3) who is to be appointed and on what terms;

(4) what material is to be provided initially to the expert;

(5) whether the expert is to be able to seek further material or information from the parties;

- (6) the time-table for the production of the expert's report;
- (7) whether and the circumstances in which the parties are to be entitled to call their own expert evidence or to serve their own experts reports;
- (8) the procedure for enabling the parties to comment on the expert's report; and
- (9) the procedure to be adopted at the hearing.

It is normally wise to provide for such matters in a procedural order at an early stage in the arbitration although some aspects may be reserved and dealt with later.

3.2 Cases Suited to the Use of a Tribunal-Appointed Expert

3.2.1 Where an arbitration raises technical issues, these may be resolved in a number of ways such as by ensuring that at least one member of the tribunal has expertise in the relevant discipline, by adopting the familiar procedure that each party commissions an expert to produce a report and that each expert subsequently gives evidence at the hearing, by using a tribunal-appointed expert or by appointing one or more assessors to consider the evidence and to assist the tribunal on technical matters. Two or more of these methods may be used in combination.

3.2.2 At a relatively early stage in most arbitrations it should become clear whether or not there are technical issues upon which expert evidence will be required. Either the tribunal may be called upon to give procedural directions, including directions for the service of experts' reports or, on consideration of the papers, the tribunal may see the need to give directions as regards expert evidence. It is always the duty of the tribunal to ensure that technical issues are fairly resolved and that this is done without unnecessary delay or expense. At this stage the tribunal may wish to consider appointing a single tribunal-appointed expert. Before doing so, however, it is always advisable to enquire from the parties how they propose to deal with any technical issues which may arise and to canvass with them the possible use of a single tribunal-appointed expert. This should enable the possible advantages and disadvantages of the proposal to be brought out into the open and to be properly discussed.

3.2.3 A situation in which the use of a tribunal-appointed expert is obviously called for can arise where the dispute raises technical issues outside the expertise of the tribunal and where neither party has it in mind to call its own expert evidence. But the situation is rarely so clear-cut. In many cases the parties may wish to commission their own expert reports or

to adduce evidence from their own experts. If so, a wise arbitrator will hesitate long before excluding such evidence, if it is otherwise admissible, since this might constitute a ground for challenging the eventual award under Section 33(1)(a). It can then be a serious question whether it will serve any useful purpose to use, in addition, a tribunal-appointed expert. In some cases such an appointment may be justified, eg because the tribunal considers that the party-appointed experts are not sufficiently qualified or not sufficiently independent to deal objectively with the issues. In other cases the tribunal may perhaps take the view that the party-appointed experts are likely to investigate all the technical issues in their reports and that the tribunal will be able to decide between them; alternatively that, should any difficulty arise in resolving any technical issues that remain in dispute after the two experts have met in an attempt to agree or narrow the issues, then, in case of need, it will always be possible for the tribunal to appoint an assessor at a later stage. Questions of cost and convenience are likely to arise and no hard and fast rules can be formulated.

3.2.4. Should it be contemplated that both a tribunal appointed expert is to be used and that the parties are to be free to commission their own expert reports, then care should be taken to lay down the respective functions of each type of expert and the time-table for dealing with them. Duplication of cost can sometimes be avoided or minimised if it is ordered or agreed that in the first instance only a single expert report (commissioned by the tribunal) will be produced and that if, on receipt of that report, either party should wish to challenge or supplement it, that party may apply to the tribunal to be allowed to adduce evidence from its own expert on particular defined issues. The need for such evidence can then be assessed on its merits.

3.3 Terms of Reference

3.3.1 It is one of the advantages of employing a tribunal-appointed expert that he or she can be involved at an early stage in the arbitration and can be invited by the tribunal to assist in the preparation of terms of reference which will serve to define the question or questions to be addressed and the type of investigation to be performed. The tribunal should try to ensure that the expert's terms of reference will result in the key issues being fully considered by the expert.

3.3.2 Terms of reference should be established by the tribunal in consultation with the parties. In some cases, the parties may create their own terms of reference and offer them

for the tribunal's comments or approval. In the more complex type of case it can be useful to ask the expert to look at the draft and to make suggestions before it is finalised.

3.3.3 It should be borne in mind when drafting terms of reference that the expert is being employed to give evidence of opinion or fact related to the specialised discipline in which his experience lies. This may involve him in carrying out investigations or tests. Both the questions to be addressed by him or her and the type of investigations or tests should be clearly defined. It is important that the expert should not be invited to draw inferences or to express opinions on matters outside his or her expertise. It is equally important that the terms of reference should seek to draw a distinction between matters on which the expert can properly give evidence and those matters which are for the tribunal to decide.

3.4 Selection of Expert

3.4.1. In many cases the search for a suitably qualified and independent expert can be difficult. Relevant specialist institutions (such as the Chartered Institute of Arbitrators, the Expert Witness Institute, the Society of Expert Witnesses and the Academy of Experts) can be consulted. The tribunal should involve the parties in the selection process and may consider asking each party to offer suggestions or to indicate approval or disapproval of possible appointees.

3.4.2. The tribunal-appointed expert should be asked, before accepting appointment, to submit to the tribunal and to the parties a statement of his or her independence from the parties and or disclose any material connections that he or she may have with the parties. The tribunal should invite the parties to state whether they have any objections to the proposed expert's independence.

3.4.3. The tribunal-appointed expert can also be asked, before accepting appointment, to provide a copy of his or her C.V. (and of his or her hourly charging rate) to the parties and the tribunal. The tribunal can then invite the parties to state whether they have any objections to the proposed expert's qualifications to perform the tasks in question, or to the proposed charging rate.

3.5 Material to be furnished to the Expert

3.5.1 The tribunal should specify either in its order for directions or in the expert's terms of reference precisely what documentation or other material is to be provided to the expert initially as the basis upon which his report is to be made.

3.5.2 The tribunal should also consider including a provision in its order requiring each party to give the expert any further information or to produce any further documentation or material that the expert may require. Similarly the tribunal may require the parties to provide the expert with access to any relevant documents, goods, or other property for his or her inspection.

3.5.3 Where the expert is authorised to communicate with the parties so as to obtain documentation or material relevant to his or her task the tribunal should lay down a clear procedure designed to ensure that any material provided by one party is seen by the other and that both sides and the tribunal know precisely what material has been provided to the expert for the purposes of drawing up his or her report.

3.6 Procedure after the report is received

3.6.1 After the expert's report has been delivered it must be sent to the parties and at this stage the tribunal should set a precise time-table for the service of written comments if this has not previously been done. If there is to be an oral hearing any written comments or submissions will have to be served in sufficient time to be considered beforehand.

3.6.2 At this stage the tribunal may have to deal with any request from the parties that the expert should expand or clarify a particular aspect or aspects of his report or even conduct further investigations with a view to making a supplementary report. The tribunal may of its own motion seek further clarification of the report.

3.6.3 Directions may also have to be given with regard any application from the parties to be allowed to adduce supplementary expert evidence from a party-appointed expert.

3.7 Procedure at the Hearing

3.7.1 The procedure to be followed at the hearing should be prescribed in advance. In s doing this, the tribunal should be mindful of its duty under Section 33(1)(b) to adopt procedures which are fair and which avoid unnecessary delay and expense.

3.7.2 Section 37 does not go so far as Article 26 of the Model Law in giving the parties the right to put questions to the expert at a hearing or to present their own expert witnesses to testify on the points at issue. Section 37 leaves these matters to be decided by the tribunal subject to any agreement between the parties.

3.7.3 Some caution needs to be exercised before allowing a situation to develop where extensive oral evidence has to be received both from the tribunal appointed expert and also from experts presented by the parties. There may be situations where this cannot be avoided; such situations, though, should be exceptional.

3.7.4 No such objection attaches to a provision that the tribunal-appointed expert is to attend the hearing and that the parties may question him on his report either directly or through the tribunal. Such a procedure has certain advantages, not least in ensuring that each party has an opportunity to put its case and to deal with any opinion or evidence tendered by the expert.

4. Legal Advisers

4.1 Section 37 enables arbitrators who are not themselves lawyers to appoint legal advisers for the purposes of making a report to the tribunal and the parties. It does not seek to deal with other situations where lawyers are commonly employed to assist arbitral tribunals, as in certain trade arbitrations where the trade association's legal adviser may sit with the tribunal at hearings to give procedural rulings or as when the tribunal instructs a lawyer to draft, or assist in drafting, its award. In that situation, the role of the lawyer is governed by the applicable arbitration rules or in some cases the custom of the type of arbitration concerned.

4.2 Section 37 where it does apply enables a tribunal to appoint legal advisers to report to it but requires that the parties must be given a reasonable opportunity to comment on any information opinion or advice that is offered. This necessarily involves that the information opinion or advice must be made known in sufficient time for the parties to comment.

4.3 While it can be appropriate, and even desirable in certain situations, for a tribunal to appoint legal advisers to report on a procedural question that has arisen in the reference, or on the substantive law applicable to the dispute, there are dangers involved which it is important to avoid. The lawyer may not be fully informed of the relevant background, the arguments presented to the tribunal may differ from those communicated to the lawyer and the impression may be conveyed that the tribunal has decided the case on the basis of advice provided privately by the lawyer or even that it has been decided by the lawyer himself.

4.4 Section 37 therefore requires that an open procedure be adopted for obtaining information opinion or advice. It sets a standard which should be followed even in those situations where the Section may not strictly apply.

4.5 The important points have been mentioned previously in connection with experts:

(1) Any proposed appointment of a lawyer should be canvassed with the parties before it is made.

(2) The proposed terms of reference, or letter of instruction, should also be communicated in draft to the parties who should be given the opportunity to comment and to suggest amendments so that, if possible, a draft can be agreed.

(3) The identity of the proposed lawyer should similarly be canvassed with the parties.

(4) A clear procedure should be laid down in advance (after being discussed with the parties) covering the information, documents and other material to be supplied to the lawyer, the time within which the report is to be made, the time-limits within which comments are to be made and the procedure at any hearing that may follow.

4.6 It is perhaps worth adding that once an open procedure has been laid down or agreed it should be strictly followed. Private communications between the tribunal and the legal adviser should not occur.

5. Assessors

5.1 The function of an assessor is in many respects similar to that of an expert, namely to give impartial information or advice to the tribunal on technical matters within his or her expertise. There are some differences. An assessor does not normally make a report. He or she commonly sits with the tribunal throughout the hearing or, at all events, those parts of the hearing concerned with matters falling within his or her discipline. The assessor does not give evidence and customarily is not questioned by the parties. An assessor is not part of the tribunal which must make up its own mind on the advice it receives.

5.2 The danger exists that the tribunal may be perceived as deciding an arbitration as a result of private advice given informally by the assessor throughout the hearing or subsequently during informal conversations. Since the danger cannot be wholly avoided and since the tribunal will be mindful of its duty under Section 33(1)(b) to avoid unnecessary

expense, it is only in cases where the technical issues are exceptionally complex or difficult that the appointment of assessors should be contemplated.

5.3 Section 37 (like Article 26 of the Model Law and Article 1042(2) of the Dutch Burgerlijke Rechtsvordering) requires that the parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by any assessor. This means that an open procedure must be followed. Whenever possible the role of the assessor and the procedure to be followed should be agreed or laid down in advance.

5.4 In particular, whenever possible any information or advice offered by the assessor should be communicated at the same time to the tribunal and to the parties. Private conversations between the tribunal and the assessor concerning the effect or weight of the technical evidence should be avoided if possible and, if they occur, the effect of any information or advice given by the assessor should be communicated to the parties immediately. Where assessors give advice to the tribunal following the conclusion of the oral hearing, a convenient mode of ensuring that the parties have an opportunity to comment on that advice is to reduce it to writing and to send it, together with a draft of the proposed technical sections of the award, to the parties for their comments before the award is issued.