

UNCITRAL Working Group II (Dispute Settlement) Seventy-fifth session

Draft Provisions for Technology-related Dispute Resolution

2 - Number of arbitrators

5 - Appointment of experts and neutrals

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Introduction

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5 - Appointment of experts and neutrals

- When and why would an arbitral tribunal or party (with the permission of the arbitral tribunal) appoint an expert/neutral or and expert determiner?
- Who would be able to instruct an expert and what considerations should be given?
- Confirmation of an experts independence
- What information will the expert be able to use in the provision of their opinion?
- How can the expert's report be used?
- Are and expert's findings binding?
- How will the expert or neutral present their evidence?
- Who pays for the expert?
- When would you use and expert determination rather than an expert or neutral?

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2 - Number of arbitrators (1 of 1)

Unless otherwise agreed by the parties, there shall be one arbitrator.

If the ~~parties have not agreed on the number of arbitrators,~~ the default should be a sole arbitrator as proceedings involving an arbitral tribunal composed of more than one arbitrator may be less expeditious. This would be in line with article 7 of the UNCITRAL Expedited Arbitration Rules (the “Expedited Rules”). For the appointment of the sole arbitrator, the mechanism provided in article 8 of the Expedited Rules could apply

In the interest of expediency and efficiency, the default position should be to appoint only a single arbitrator.

However, consideration should be given to availability, as well as technical and financial expertise.

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5 - Appointment of experts and neutrals (1 of 9)

1. Considering the needs and complexities of the dispute, it ~~may be appropriate and necessary to appoint~~ experts and neutrals to ~~expeditiously assist the arbitral tribunal with~~ matters such as the ~~details and scope of the technology in~~ dispute or the intricacies of damage calculations, and to provide ~~an expert determination on specific issues~~. A party may request permission to ~~appoint such an expert or~~ neutral or the arbitral tribunal may determine that such assistance is required.

When and why would an arbitral tribunal or party (with the permission of the arbitral tribunal) appoint an expert/neutral or and expert determiner?

- a) Our drafting highlights that it may be appropriate to appoint an expert on issues regarding the substance or merits of the case, for example when there are complex technological, legal or financial issues. However, the use of may is intended to indicate that it will not always be the right solution due to the experience of the arbitral tribunal and/or counsel or possible in the time available.
- b) The Draft Provisions are designed for a swift resolution to those issues that require specific expertise. NB that this may result in procedural issues for the arbitral tribunal, such as how the procedure should be divided and to what extent discovery should be conducted etc.
- c) In addition to expert or neutral evidence on specific issues, the Draft Provisions, also allow for expert determination on specific issues (also see paragraph 9 below).

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5 - Appointment of experts and neutrals (2 of 9)

2. When so required, the arbitral tribunal will provide additional or alternative directions, including but not limited to directions for the service of written evidence from the appointed expert or neutral. When providing such directions, consideration shall be given to the following:

(a) Accessibility of the parties to counsel with the appropriate technological and related fields expertise;

(b) The type of a suitable independent expert or neutral, the need for technical and/or damage-based expertise and other qualifications, and geographic locations;

(c) The experience and qualification of the arbitrator(s);

(d) Any time frame including those agreed between the parties;

(e) The structure of the expert ~~determination~~ process and timetable of matters subject thereof (including discovery and the scope of discovery); and

(f) Any enhanced confidentiality or data-security requirements.

Who would be able to instruct an expert and what considerations should be given?

a) Only the arbitral tribunal can confirm the appointment of an expert or neutral.

b) When giving that order the arbitral tribunal should consider:

- Whether the expert is needed based on the expertise of the parties, counsel, tribunal etc;
- The information to be provided and any issues of confidentiality (e.g. EU data protection rules or intellectual property or commercially sensitive documents); and
- The timeframe for the provision of expert evidence in order to maintain momentum in the hearing.

NB there is a small typographic error in the draft.

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5 - Appointment of experts and neutrals (3 of 9)

3. An expert or neutral appointed by the arbitral tribunal shall be independent of the parties and shall submit a signed declaration to that effect in its report.

It should go without saying that any expert, whether appointed by a party or the arbitral tribunal should be demonstrably independent of all parties to the arbitration such that there are no conflicts of interest (actual or perceived and both personally or with their wider business) that would prevent them giving an unbiased opinion to the arbitral tribunal.

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5 - Appointment of experts and neutrals (4 of 9)

4. The parties will provide the expert or neutral with all relevant information, documentation, coding, and products, including the organization of site visits if necessary. If a party fails to do so, the arbitral tribunal may order such access as appropriate to the circumstances.

What information will the expert be able to use in the provision of their opinion?

- a) Experts will want as much information as possible, however, in order for the arbitration to proceed expeditiously, the arbitral tribunal should restrict that information to that which is needed.

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5 - Appointment of experts and neutrals (5 of 9)

5. Unless otherwise agreed by the parties and subject to any applicable law, the expert or neutral's report shall be admissible in any judicial or arbitral proceedings between the same parties.

How can the expert's report be used?

- a) In order to mitigate costs, the expert should expect their report to be used in other relevant proceedings between the same parties.

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5 - Appointment of experts and neutrals (6 of 9)

6. The expert or neutral's findings are not binding on either party. However, the findings can be used by the parties as a basis for negotiations with a view to reaching a settlement of their dispute or narrowing their differences.

Are an expert's findings binding?

- a) The expert or neutral is providing assistance to the tribunal and, therefore, any findings cannot be binding. If a binding option is sought then the parties should consider the use of expert determination (see the discussion of paragraph 9 below).

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5 - Appointment of experts and neutrals (7 of 9)

7. If asked by any party, or ordered by the arbitral tribunal, the expert or neutral shall attend any hearing/pre-hearing at which reasonable and relevant question may be put to them about their report.

How will the expert or neutral present their evidence?

- a) An expert will prepare a written report addressed to the Tribunal.
- b) An expert should expect to be called to attend any relevant hearing and talk to their evidence and have that evidence tested by the arbitral tribunal and counsel.

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5 - Appointment of experts and neutrals (8 of 9)

8. The fees and expenses of any expert or neutral appointed by the arbitral tribunal shall form part of the cost of arbitration.

Who pays for the expert?

- a) An expert or neutral appointed by the tribunal will be paid as part of the costs of the arbitral hearing.
- b) Any party appointed experts would be paid for by the appointing party.

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5 - Appointment of experts and neutrals (9 of 9)

9. Subject to any applicable law, the parties may agree on, or the arbitral tribunal may direct the use of an early determination or neutral evaluation on one or more aspects of the dispute. In that case, the expert or neutral's findings shall constitute a contractually binding expert determination for the relevant aspects of the dispute. For the avoidance of doubt, such an expert or neutral is not an arbitrator, and their findings are not enforceable as an arbitral award.

When would you use an expert determination rather than an expert or neutral?

Some issues are binary (an accounting treatment is right or wrong) or specific (does an aspect of technology work or not) and it can be helpful to have a contractually binding expert determination rather than taking the point further at a tribunal hearing, thus saving time and costs.

However, a determination differs from an arbitration as it is not enforceable under the New York Convention or local arbitration rules but is, instead, contractually binding on the parties.

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Summary

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The framework provides guidance where, when, who, how and why experts, neutrals and expert determiners can be effectively, expeditiously and appropriately used to assist an arbitral tribunal.



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