BEVISFØRELSE OG BEVISBEDØMMELSE
I
INTERNATIONAL VOLDGIFT

独 立 仲 裁 员
ARBITRATION CHAMBERS
HONG KONG · LONDON

Niels Schiersing, International Arbitrator
Advocate (Denmark) & Solicitor (England & Wales)

Dubai - London - Hong Kong

Advokat (Danmark) - Solicitor (England & Wales)

Full-time arbitrator since 2015
Member, Arbitration Chambers Hong Kong, London & New York since 2017

Approx. 100 appointments (including emergency arbitrator (EA) appointments) by e.g.:

ICC	**(International Chamber of Commerce) *EA***
LCIA	**(London Court of International Arbitration) - incl. LCIA India Arbitration Rules**
SIAC	**(Singapore International Arbitration Centre) *EA***
SCC	**(Stockholm Chamber of Commerce) *EA***
HKIAC	**(Hong Kong International Arbitration Centre)**
KCAB	**(Korea Commercial Arbitration Board)**
DIAC	**(Dubai International Arbitration Centre)**
DIFC-LCIA	**(DIFC-LCIA Arbitration Centre) *EA***
AFSA	**(Arbitration Foundation of Southern Africa)**
FAI	**(Finland Arbitration Institute)**
DIA	**(Danish Institute of Arbitration)**
Ad hoc	**UNCITRAL 1976, UNCITRAL 2010**
	Lex Arbitri

Primære arbejdsområder

- Construction and engineering (onshore and offshore)
- Energy and resources (e.g., oil, gas, coal, nuclear power, hydropower and wind power)
- Commercial chancery (e.g., post-M&A, shareholders, partnerships, JVs and PPPs)
- Banking and finance
- Reinsurance and insurance
- Sale of real estate, commodities, complex technical equipment and other goods
- Licensing, distribution and agency
- Shipbuilding
- Competition law and state aid

Bevis - Indledning

Bevisbyrde

Beviskrav/Bevisstyrke

Bevisformer

Bevisbyrde

Retsfaktum/Faktum

Falsk bevisbyrde /subjektiv bevisbyrde

Beviskrav/Bevisstyrke

Beviskravene ikke statiske

Hvis klart bevis for ansvarsgrundlag og en antagelse om tab kan kravet til kausalitet svækkes

Rpl § 292, stk. 2 (afskaffet):
"Særlig har retten når der mellem parterne er strid om en *skade er forårsaget* eller *hvilken erstatning*, der skal gives, og den ifølge de oplysninger, som foreligger … , anser sig for at være i stand hertil, afgøre disse spørgsmål efter et skøn over alle i betragtning kommende omstændigheder."

RB 35:5 - Tabets størrelse

"Om det är fråga om *uppskattning* av en inträffad skada och *full bevisning om skadan* inte alls eller endast med svårighet kan föras, får rätten uppskatta skadan till skäligt belopp. Så får också ske om bevisningen kan antas medföra kostnader eller olägenheter som inte står i rimligt förhållande till skadans storlek och det yrkade skadeståndet avser ett mindre belopp."

Hvilken bevisførelse og hvilket bevis kan konkret kræves

Bevisformer

1. Dokumentbevis
2. Vidnebevis
3. Ekspertbevis (sagkyndigt bevis)

DOKUMENTBEVIS

Forberedelse af voldgiftssager (1)

Memorial Style

Statement of Claim + documentary evidence + witness statements+ expert evidence (+ legal authorities)

Statement of Defence + documentary evidence + witness statements + expert evidence (+ legal authorities)

Statement of Reply + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Statement of Rejoinder + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Joint EE

Foreberedelse af voldgiftssager (2)

Pleading Style

Statement of Claim + documentary evidence

Statement of Defence + documentary evidence

Statement of Reply + additional DE

(Statement of Rejoinder) + additional DE

Witness Statements

Responsive Witness Statements

Expert Evidence

Responsive EE

Joint EE

Edition – best practice

Memorial Style

Statement of Claim

Statement of Defence

Edition

Statement of Reply

Statement of Rejoinder

Pleading Style

Statement of Claim

Statement of Defence

Edition (alt. 1)

Statement of Reply

(Statement of Rejoinder)

Edition (alt. 2)

Redfern Schedule

Row	Content
1.	Identification of the document(s) or categories of documents comprised by each particular Request: "TEXT"
2.	A short presentation by the Requesting Party of the reasons for each particular Request: "TEXT"
3.	The Receiving Party's summary of any objections by the other Party to the production of the document(s) requested **or** a statement of the Receiving Party's willingness to produce the requested document(s): "TEXT"
4.	Any additional comments by the Requesting Party based on the objections lodged by the Receiving Party: "TEXT"
5.	*Any additional comments by the Receiving Party based on the additional comments by the Requsting Party:* *”TEXT”*
6.	Decision by the Tribunal: ”TEXT”

Edition – IBA Rules

IBA Rules on the Taking of Evidence in International Arbitration (2020)

”Apply”,
”Not apply”
”Not binding, but may seek guidance”:

(v) The Tribunal may, in all matters pertaining to evidence, seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration (adopted by a resolution of the IBA Council in 2020) ("IBA Rules") to the extent considered appropriate by the Tribunal in the exercise of its overall procedural discretion. For the avoidance of doubt, it is noted, the IBA Rules are not deemed to be binding on the Tribunal.

IBA Rules

3. A Request to Produce shall contain:

(a)

(i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c)

(i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party

Edition – Prague Rules

4.1. Each Party shall produce documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings.

4.2. Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery.

4.3. A Party may, however, request the Arbitral Tribunal to order another Party to produce specific document(s) which:

a. Is/are relevant and material to the outcome of the case;

b. b. Is/are not in the public domain; and

c. c. Is/ are in the possession of another Party or within its power or control

Procedural Order (Eksempel)

For its decision, the Tribunal considers that the following standards shall guide its reasoning as regards requests for document production:

(i) There will be no general discovery or disclosure of documents.

(ii) The request must establish, prima facie, the relevance and materiality to the resolution of the dispute of each document or of each specific category of documents sought in such a way that the Receiving Party and the Tribunal can refer to factual allegations in the submissions filed by the Parties to date. This shall not prevent a Party from referring to upcoming factual allegations (subsequent memorials) provided such factual allegations are made or at least summarized in the request for production of documents. However, the Requesting Party must state with reasonable particularity what facts/allegations each document (or category of documents) sought is intended to establish.

”Boilerplate begrundelser”

Insufficiently specific

Overly broad

Overly burdensome

(Prima facie) insufficiently relevant to the outcome

(Prima facie) insufficiently material to the outcome

Generelt om editionsbegæringer

- Relatere sig til submissions
- Snævert tidsrum
- Sammenhæng med bevisbyrde

Requests

Begrænse mest muligt (eller forklare hvorfor ikke muligt at begrænse yderligere):

Dokumenttype

Tidsrum

Forfatter

Modtager

E-disclosure - søgekriterier

Privilege

Legal Privilege

(i) Lex arbitri,

(ii) Lex causae,

(iii) Most Favoured Nation,

(iv) Least Favoured Nation,

(v) Law of the place where the document is located or was created,

(vi) Law of the jurisdiction where the lawyer is registered (regarding legal privilege),

(vii) Law most closely connected to the allegedly privileged document.

Litigation Privilege

Commercial Sensitity

Privilege Log

SCCA Arbitration Rules (2016)

Article (22): Privilege

The Tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the Tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection

Betydningen af lex causae for bevisførelsen

Parol Evidence

Arnold v Brittan [2015] UKSC 36

Lord Neuberger:

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court does so essentially as one unitary exercise by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

Betydningen af lex causae for bevisførelsen

Entire Agreement

North Eastern Properties Ltd v Coleman [2010] 1 WLR 2715

Longmore LJ:

"if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said."

Betydningen af lex causae for bevisførelsen

No-Oral Modification

Rock Advertising v MWB Ltd [2018] UKSC 24

Lord Sumption:

If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

Betydningen af lex causae for bevisførelsen

Rock Advertising ikke fulgt i Singapore:

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

The Supreme Court focused on the parties' autonomy as the 'master of their own contract', and held that if the parties decide to do away with or depart from a 'no oral modification' clause, then the Court should uphold their autonomy to do so.

Rock Advertising ikke fulgt i Australien:

VIDNEBEVIS

Forberedelse - sammenligning

Memorial Style

Memorial Style

Statement of Claim + documentary evidence + witness statements + expert evidence (+ legal authorities)

Statement of Defence + documentary evidence + witness statements + expert evidence (+ legal authorities)

Statement of Reply + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Statement of Rejoinder + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Joint EE

Pleading Style

Statement of Claim + documentary evidence

Statement of Defence + documentary evidence

Statement of Reply + additional DE

(Statement of Rejoinder) + additional DE

Witness Statements

Responsive Witness Statements

Expert Evidence

Responsive EE

Joint EE

Vidnebevis

Witness Statements

Koncentrere bevisførelsen om det væsentlige

Sparer en hovedafhøring (”examination in chief”)

Ofte formuleret af advokater

Ikke sjældent karakter af yderligere partsindlæg

Practice Direction 57 AC - Appendix

1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

Practice Direction 57 AC

2. The purpose of a trial witness statement

2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.

2.2 Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial.

Practice Direction 57 AC

3.1 A trial witness statement must contain only –

(1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and

(2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

Practice Direction 57AC Appendix

2.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:

1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action),

(2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.

PD 57 AC: Erklæring - vidne

“ I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.

This witness statement sets out only my personal knowledge and recollection, in my own words.

On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.

I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge. ”

Erklæring – ”legal representative”

4.3 A trial witness statement must be endorsed with a certificate of compliance in the following form, signed by the relevant legal representative …

“I hereby certify that:

1.I am the relevant legal representative within the meaning of Practice Direction 57AC.

2.I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].

3.I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.

Ledende spørgsmål?

PO1:

“Questions to a witness during examination in chief and re-direct examination should, as a rule, not be leading.

However, in cross-examination, a Party may ask leading questions to test the credibility and reliability of the witness’s testimony; but a Party shall refrain from asking inappropriate questions or intimidating the witness”

The Litigation Manual
American Bar Association

The Ten Commandments

1. Be Brief.
2. Short questions, plain words.
3. **Always ask leading questions.**
4. Don't ask a question, the answer to which you do not know in advance.
5. Listen to the witness.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.
8. Don't permit the witness to explain his answers.
9. Don't ask the 'one question too many.
10. Save the ultimate point for summation.

Take the Witness: Cross-Examination in International Arbitration (2010)

1. Be Prepared
2. **Ask Leading Questions**
3. Ask Only Questions to Which You Already Know (and Can Prove that you Know) the Answer
4. Ask Clear, Simple Questions
5. Do Not Let the Witness Merely Repeat Direct Testimony
6. Do Not Quarrel With the Witness
7. Save the Argument for Closing
8. Use Cross-Examination to Highlight Favorable Documents

Cross-Examination in International Arbitration (2014)

Basic Principle No. 1: Be Fully Prepared
Basic Principle No. 2: Be Brief
Basic Principle No. 3: Use Only Leading Questions
Basic Principle No. 4: Use Only Short, Simple, Unambiguous Questions
Basic Principle No. 5: Listen to the Answer
Basic Principle No. 6: Do Not Ask for Conclusions
Basic Principle No. 7: Do Not Let the Witness Repeat the Direct Testimony
Basic Principle No. 8: Do Not Let the Witness Explain
Basic Principle No. 9: Exercise Self-control, Do Not Argue, Or Get Angry, with the Witness

Holly Corp v Frontier Oil Corp

- Delaware Court of Chancery (Opinion 2005)
- Fusionsaftale mellem to olieselskaber
- Holly betænkelig ved aftalen og overvejer at gøre brug en ”fiduciary out” klausul (træde tilbage fra aftalen ved betaling af 16 MUSD)
- Frontier ønsker at Holly skal vægre sig ved at gennemføre aftalen så Frontier kan rejse erstatningskrav på mere end 100 MUSD (den yderligere værdi som Holly menes at have udover værdien i fusionsaftalen)
- Under et telefonmøde forsøger Frontiers direktør (Gibbs) at få Hollys direktør (Norsworthy) til at nægte at gennemføre aftalen (”repudiation”)

Holly Corp v Frontier Oil Corp

"Frontier and Its Lawyers Develop a Strategy

On August 18, Gibbs met with Richard Caldwell of Andrews Kurth to begin planning to sue Holly. At this meeting Gibbs heard the word "repudiation" applied to this matter for the first time. Caldwell provided Gibbs with a script of questions to ask Norsworthy when they next talked. This script would be used the following day.

Gibbs took notes of this conversation as it transpired, then recopied these notes into a final form (the "Transcript"), and discarded the original. The full text of his recopied version of the Transcript is as follows: …"

Holly Corp v Frontier Oil Corp

“1. After a few cordial addresses got right to business

…

8. I then asked [Norsworthy] and asked him to listen carefully “Is your Board no longer willing to do or support our signed deal on its existing terms?”

He clearly, unambiguously, distinctly and unequivocally responded

“No [they are not]

9. I repeated this for the second time.

…”

Holly Corp v Frontier Oil Corp

Sagen anlagt ved Delaware Court of Chancery

Frontier krævede erstatning på 100 MUSD af Holly baseret på den hævdede ”repudiation” af fusionsaftalen

Frontier fik ikke medhold.

Cross-examination af Frontiers CEO (Gibbs) spillede en betydelig rolle. En lille del heraf (2 ikke ledende spørgsmål vedrørende telefonnotatet og svarene herpå blev citeret i afgørelsen):

Non-leading questions
Cross-Examination of Gibbs

Spørgsmål 1:

“As a straight-talking, boot-wearing Texan who does not speak legalese, is this how you talk? Clearly, unambiguously, distinctly, and unequivocally, is that an example of the manner in which you speak?”

Svar:

“No”

Non-leading questions
Cross-Examination of Gibbs

Spørgsmål 2:

“Well, pray tell, why is it written in that fashion?”

Svar:

“That was information that I got from my attorneys.”

Decision of
Delaware Court of Chancery

“Gibbs, in contrast, arrived at the call with an entirely different agenda. His purpose was to induce Norsworthy to repudiate the Merger Agreement. With the prior guidance of counsel, he sought to induce Norsworthy to tell him “unambiguously, distinctly and unequivocally” that Holly would not go forward.

Ultimately, Frontier has failed to prove that Holly, through Norsworthy or its other representatives, made “an unequivocal statement” that would “it would not perform [its] promise.”

A phone call is a somewhat strange (perhaps calculated) way to close off a contract involving several hundreds of millions of dollars and which had been negotiated and monitored by a number of talented and informed lawyers.”

Post-M&A (baseret på svig) – afhøring af sælger

Q. Because contrary to what you say about being an open and honest businessman, you're actually a brazen liar, aren't you, Mr XX?

A. Not really, no, you're just making an assumption, I don't know from where. It's very clear, you know you're trying to --

Q. I'm putting this to you because I am

-- (overspeaking) –

A. -- trying to shape me like a fraud. I have been in business for 40 years. This is the first time I'm going through such a case, ridiculous accusation and false statements and, you know, related to a transaction which was made in a good faith with openness and with clarification. Just unbelievable, you know, the manner this claim is coming on. …

Post-M&A (baseret på svig) – afhøring af konsulent

Q. You're not even a good liar, are you, because five minutes ago, you said that it was you, in your capacity as an educational consultant, who reviewed the historic enrolment trends and thought there might be a problem with those figures, because they didn't reflect what you would expect to see in term of summer enrolment. Now you're telling the tribunal you didn't actually worry about the figures?

A. First, I don't like to describe me as a liar at all. …

Post-M&A (baseret på svig) – afhøring af konsulent

Q. You should think very carefully about the course of this evidence. You're doing Mr Al Safar the most enormous damage to his case by your persistent lying.

A. I strongly deny what you are saying. I do dislike what you describing me as a liar. I'm just saying facts, only facts. …

Post-M&A (baseret på svig) – afhøring af konsulent

MR "H": I hesitate to interrupt, but Mr "F" is allowed to say that Mr YY is lying about a specific answer, he is not allowed to make a submission that Mr YY is hugely damaging Mr XX's case in the way that he did. That was an improper question.

Pro – Contra - Proposition

Overordnet

Hvis man kan fremkalde det samme svar med et ikke-ledende spørgsmål, vil det være ikke sjældendet være mere overbevisende

Med andre ord

Stil ledende spørgsmål, hvis nødvendigt – ellers ikke

EKSPERTBEVIS

Eksperter – hvem udpeger

Party Appointed

Tribunal Appointed

Hybrid: Expert Team

Forberedelse - sammenligning

Memorial Style

Statement of Claim + documentary evidence + witness statements + expert evidence (+ legal authorities)

Statement of Defence + documentary evidence + witness statements + expert evidence (+ legal authorities)

Statement of Reply + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Statement of Rejoinder + additional DE + reply/responsive WS + reply/responsive EE (+ additional LA)

Joint EE

Pleading Style

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Statement of Defence + documentary evidence

Statement of Reply + additional DE

(Statement of Rejoinder) + additional DE

Witness Statements

Responsive Witness Statements

Expert Evidence

Responsive EE

Joint EE

Introduction

To mest brugte regelsæt vedrørende ekspertbevis

1.

International Bar Association Rules on the Taking of Evidence in International Arbitration (2.udg. 2020) ("**IBA Rules**")

2.

Chartered Institute of Arbitrators Guidelines on the Use of Party Appointed Experts in International Arbitration (2007) ("**CIArb Protocol**")

PO1: Olieraffinaderi (London)

“Subject to express agreements by the Parties to the contrary, and to specific provisions of this Procedural Order No 1, the Arbitral Tribunal will be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 (the "**IBA Rules**") and the Chartered Institute of Arbitrators Guidelines on the Use of Party Appointed Experts in International Arbitration (the "**ClArb Protocol**").“

Often ”may be” or ”may seek guidance from” or similar

CIArb Protocol 2007: Preamble

1.

"…intended to govern in an efficient and economical manner the preparation and giving of expert evidence in international arbitrations, particularly those between Parties from different legal traditions. …"

2. "… may adopt the Protocol in whole or in part or may use it as a guideline in developing their own procedures for the preparation and giving of expert evidence. The Protocol is not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration …"

CIArb Protocol: Preamble cont.

3.

“ Tribunal is encouraged to identify and establish with the Parties, as soon as it is appropriate in the Arbitration, the issues in respect of which it considers expert evidence to be appropriate.

4.

“each Party is entitled to know, reasonably in advance of any Evidentiary Hearing, the expert evidence upon which the other Parties rely;

experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them;

there should be established before any hearing the greatest possible degree of agreement between experts.”

PO 1: Offshore Windfarm Dispute (London)

In accordance with the times set out in the Procedural Timetable:

…

(ii) the Parties shall discuss and seek to agree the disciplines on which expert evidence will be given and the questions on which the experts will opine.

(iii) in the event that agreement cannot be reached between the Parties, the Parties shall refer the disciplines on which expert evidence will be given and on the questions on which the experts will opine to the Tribunal, together with submissions.

(iv) an oral hearing on these issues may be fixed by the Tribunal.

(v) after considering the Parties' submissions and/or following the said hearing, the Tribunal will decide the disciplines on which expert evidence will be given and the questions on which the experts will opine.

(vi) the Tribunal may subsequently revise the questions to be considered by the experts.

PO1 – Finance dispute (London)

11.1 Subject to the Tribunal's permission, the Parties are at liberty to submit one or more expert reports concerning a matter or issue relating to the Claimant's disputed claim.

11.2 At the PH, the Respondent confirmed that it intends to rely on expert evidence regarding the following issues:

(i) The invalidity of the Agreement under Cyprus law (the "financial assistance" defence);

(ii) The invalidity of the commencement of the arbitration (the "lack of authority" defence);

(iii) The interests claimed are usurious (the "usury" defence)

(iv) XX's *de facto* control of the Claimant

11.3 The Claimant objected to expert evidence being submitted on issue (iv) as the issue is considered without any bearing on the legal issues in dispute, i.e. whether the Claimant's requests for monetary relief should be awarded or not. The Respondent disagreed.

11.4 The Tribunal stated that it was not inclined to rule on this issue until the exchange of written statements has been completed.

CIArb Protocol - Art 3: Permission to adduce evidence

"...Tribunal shall, in consultation with the Parties and in timely fashion, direct:

(a) the issues to be opined upon…

(b) the number of experts …

(c) the tests or analyses required ...

CIArb Protocol - Art. 4: Opinion (*inter alia*)

(c) contain a statement setting out all instructions the expert has received from the appointing Party and the basis of remuneration of the expert;

(d) only address the issue or issues in respect of which the Arbitral Tribunal has given permission for expert evidence to be adduced;

(e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;

(f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;

(g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);

(h) state which matters the expert has been unable to reach an opinion on;

(i) state which matters (if any) are outside the expert's area of expertise;

IBA Rules 2010 – Art 5: Party Appointed Experts

5.2

The Expert Report shall contain:

…

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(i) …

Protokol - dansk

En sagkyndig erklæring skal indeholde en redegørelse for:

(i) den opgaveformulering, som parten har stillet til den sagkyndige, herunder de konkrete spørgsmål, som den sagkyndige er anmodet om at besvare,

(ii) den sagkyndiges kompetencer og erfaring indenfor det relevante område,

(iii) de faktiske oplysninger og den dokumentation, som den sagkyndiges erklæring er baseret på, og, hvis en sådan dokumentation ikke allerede er fremlagt i Voldgiftssagen, skal dokumentationen vedhæftes som bilag til erklæringen,

(iv) det eller de valg af metode, som den sagkyndige har foretaget, baggrunden herfor og relevansen heraf,

(v) den sagkyndiges besvarelse af de spørgsmål, som er stillet til den sagkyndige, baggrunden for de af den sagkyndige dragne konklusioner samt eventuelle usikkerheder heri.

PO1 – Olieraffinaderi (London)

3.

The experts in each discipline shall meet without prejudice as often as is necessary for the purposes of

(a) identifying the issues between them; and

(b) where possible, reaching agreement on those issues

The experts shall prepare and exchange draft outline opinions for the purposes of these meetings on or before **[date]**, which opinions shall be without prejudice to the Parties' respective positions in the arbitration and privileged from production to the Tribunal

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4.

The experts shall on or before **[date]** send to the Tribunal and the parties a statement showing:

(a) those issues on which they agree; and

(b) those issues on which they disagree, with a summary of their reasons for disagreement.

5.

Individual expert reports dealing only with areas of disagreement shall be sent to the Tribunal and the other party on or before **[date]**.

CIArb Protocol - Art 6.1: Testimony

(h) Each expert who has provided a written opinion in the Arbitration shall give oral testimony at an Evidentiary Hearing unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement.

(i) If an expert who has provided an opinion in the Arbitration does not appear to give testimony at an Evidentiary Hearing without a valid reason, unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement, the Arbitral Tribunal shall disregard the expert's written opinion unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

CIArb Protocol - Art 6.3: Testimony

Any agreement by the Parties pursuant to Article 6.1(h) that an expert need not give oral testimony at an Evidentiary Hearing shall not constitute agreement with, or acceptance by a Party of, the content of the expert's written opinion.

CIArb Protocol – Art 7: Testimony

1 The manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence.

2 The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.

Oral Testimony

Area by Area

1.
Short Examination-in-Chief or Presentation by the Expert

Followed by

2.
Traditional Cross-examination

and/or

Oral Testimony

… And/Or

3.

Expert Conferencing (”Hot-tubbing”)

(i) Conducted by the Tribunal

(ii) Conducted by the experts (”conversation”)

(iii) (Conducted by counsel in conjunction)

(iv) (Combination)

PO1: Offshore Windfarm Dispute

The expert evidence at an oral hearing will proceed as follows:

(i) oral expert evidence will be grouped by area of expertise, with experts within each area giving evidence concurrently;

(ii) the written expert reports shall stand as the evidence-in-chief of an expert;

(iii) prior to cross examination, each expert may deliver an introductory presentation to place their evidence in context and identify key outstanding issues of disagreement;

(iv) following the presentation mentioned at (iii), counsel for each party may cross examine the expert presented by the other party;

(v) following cross examination, each expert may ask questions of the other experts in their area of expertise; and

(vi) the Tribunal shall be permitted to ask questions at any time.

...

PO1: Infrastructure dispute (Johannesburg)

The expert evidence at an oral hearing will proceed as follows:

(i) oral expert evidence will be grouped by area of expertise, with experts within each area giving evidence concurrently;

(ii) the written expert reports shall stand as the evidence-in-chief of an expert;

(iii) each expert may deliver an introductory presentation to place their evidence in context and identify key outstanding issues of disagreement;

(iv) following the presentation mentioned at (iii), counsel for each party may cross examine the expert presented by the other party;

(v) following cross examination, the Tribunal will manage and facilitate a discussion between the experts within each area of expertise; and

(vi) following the discussion, counsel for each party may conduct a short cross examination concerning any issue or finding which transpired during the discussion mentioned at (vi), and

(vii) the Tribunal shall be permitted to ask questions at any time.

Excerpt PO1: Electricity Pricing Dispute (Reykjavik)

The procedure for examining experts at the Hearing shall be the following::

(i) Oral expert evidence will be grouped by area of expertise, with experts within each area giving evidence concurrently;

(ii) the written expert reports shall stand as the evidence-in-chief of an expert;

(iii) prior to cross examination, each expert may deliver an introductory presentation to place their evidence in context and identify key outstanding issues of disagreement;

(iv) following cross examination, each expert may ask questions of the other experts in their area of expertise; and

(v) the Tribunal shall be permitted to interject questions at any time.

(vi) Subject to any further orders that the Tribunal may make in consultation with the Parties, the provisions set out in relation to witnesses shall also apply to the evidence of experts.

Ekspertbevis

1. Værdiansættelsesspørgsmål (quantum)

Tab (garantisvigt)

Tab (forlængelsesomkostninger, forstyrrelsesomkostninger, forceringsomkostninger)

2. Andre spørgsmål

Forsinkelse

Juridiske spørgsmål

Andre emner af relevans for sagens afgørelse

Ekspertbevis

Klassisk erstatningssag:

Ansvarsgrundlag

Kausalitet

(Adækvans)

Tab

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