

# Expertvittnen i skiljeförfaranden/ ICC, IBA och FCC

Patrik Lindfors

Advokatbyrå Lindfors & Co Ab

Helsingfors

# Allmänna kommentarer

- Olika slag av expertvittnen
  - Utnämnd av en part
  - Utnämnd av båda parterna
  - Utnämnd av tribunalen
- Olika sätt att använda experten
  - Skriftlig rapport
  - Muntligt förhör av experten
- ”Battle of experts”

# Expertens roll

- Viktigt att experten som utnämns av skiljedomstolen är opartisk
- Krävs ofta att experten ger en skriftlig förklaring om sin opartiskhet
- Bra för skiljedomstolen att förse parterna med en kopia på den skriftliga expertrapporten och ge möjlighet för dem att kommentera
- Parternas har rätt att höra experten
- Expert confrontation

# ICC

- ICC Rules of Arbitration
  - Nya, i kraft 1.1.2012
  - Reglerna gällande expertvittnen har (till väsentliga delar) hållits lika
- Skiljedomstolen har handlingsfrihet gällande hörandet av expertvittnen.
- Domstolen måste dock säkerställa att parterna har möjlighet att presentera sitt case
  - Art. 23 (4). *In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.*
- Partsutnämnda expertvittnen
  - Art. 25 Establishing the Facts of the Case
  - Art. 25 (3). *“The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.”*

- Expertvittnen utnämnda av skiljedomstolen
  - Art. 25 (4). *“The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.”*
- Experter som skiljedomstolen utnämner uppfattas generellt sätt mer opartiska än de som utnämns av parterna
- Används oftast inom teknisk, finansiell och juridisk – expertis
- Kan ofta vara mer kostnadseffektivt att skiljedomstolen utnämner (än att parterna utnämner)
- Skiljedomstolen kan även utnämna en egen expert i tillägg till de som utnämns av parterna
- Artikel 25 (4) kräver att parterna konsulteras
  - Ovanligt att parterna överenskommer om vem som skall fungera som expert  
→ skiljedomstolen väljer

# IBA

- IBA Rules on the Taking of Evidence in International Arbitration
- Senaste, i kraft fr.o.m. 29 maj 2010
- Partsutnämnda expertvittnen
- Art. 5 Party-Appointed Experts

*Art 5 (1). “A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.”*

# IBA – partsutnämnt expertvittne

## Expert Report

- Expert-rapporten skall innehålla:
  - Art. 5 (2)
    - (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;*
    - (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;*
    - (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;*
    - (d) an affirmation of the truth of the Expert Report; and*
    - (e) the signature of the Party-Appointed Expert and its date and place.*

# IBA – partsutnämmt expertvittne Expert Report

*(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;*

*(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;*

*(h) the signature of the Party-Appointed Expert and its date and place;  
and*

*(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.*



## IBA – partsutnämnt expertvittne Additional expert reports

*Art. 5 (3). If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.*

→Var dra gränsen?

## IBA – partsutnämnt expertvittne

- Art. 5 (4). *The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues **meet and confer on such issues**. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.*

→ Rationalisering

IBA – Expertvittnen utnämnda av  
skiljedomstolen

- Art. 6 (1). **The Arbitral Tribunal**, after having consulted with the Parties, may appoint one or more independent **Tribunal-Appointed Experts** to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the **terms of reference** for any Tribunal-Appointed Expert report after having consulted with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

# IBA – Expertvittnen utnämnda av skiljedomstolen

- Expertvittnen skall vara opartiska
- Statement of independence
  - Art. 6 (2). *The Tribunal-Appointed Expert shall, 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 independence** from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications 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.*

# IBA – Expertvittnen utnämnda av skiljedomstolen

- Rätt att få material till utförandet av expertvittnesmålet
  - Art. 6 (3). Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any relevant and material information or to provide access to any relevant documents, goods, samples, property or site for inspection. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.7. The Tribunal-Appointed Expert shall record in the report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

# IBA – Expertvittnen utnämnda av skiljedomstolen

- Art. 6 (4). The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal. The Tribunal-Appointed Expert shall describe in the report the method, evidence and information used in arriving at the conclusions.
- Art. 6 (5). The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any document that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the report in a submission by the Party or through an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission or Expert Report to the Tribunal-Appointed Expert and to the other Parties.

# IBA – tribunalsutnämnda expertvittnen

- Art. 6 (6). At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an **Evidentiary Hearing**. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.
- Art. 6 (7). Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
- Art. 6 (8). The **fees and expenses** of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

# IBA - dokumentinsyn

- Mycket användbar!
- Art. 3 - Documents
- *“In exceptional circumstances, if the propriety of an objection can only be determined by review of the document, the Arbitral Tribunal may determine that it should not review the document. In that event, the Arbitral Tribunal may, after consultation with the Parties, **appoint an independent and impartial expert, bound to confidentiality, to review any such document and to report on the objection.** To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the document reviewed.”*



## FCC – Expertvittnen utnämnda av parterna

- Inga specifika stadganden om expertvittnen utnämnda av parterna
- § 27 Bevisning (första stycket)
- *En part skall på uppmaning av skiljenämnden uppge alla de bevis som han vill lägga fram och vad han vill styrka med vart och ett bevis.*
- Möjliggör användningen av expertvittnen

# FCC

- § 28 Anlitande av sakkunnig
- *Har parterna inte avtalat något annat kan skiljenämnden efter att ha hört parterna ge en sakkunnig i uppdrag att göra utredningar och ge utlåtande i en fråga som har betydelse för avgörandet av saken och för vars bedömning särskilda fackkunskaper behövs.*
- *Skiljemännen kan också uppmana en part att ge den sakkunnige de uppgifter som han behöver för att fullgöra uppdraget samt att bereda honom tillfälle att undersöka handlingar, varor eller annan egendom.*

# Statistik

- Undersökning gjord år 2012 av White & Case - International Arbitration Survey: Current and Preferred Practices in the Arbitral Process
- I två tredjedelar av skiljeförfaranden används expertvittnen
- Majoriteten av expertvittnen är utnämnda av parterna (9 av 10)
- 43 % ansåg att expertbevisning är mest effektiv då experterna är utnämnda av parterna
- 31 % ansåg att expertbevisning är mest effektiv då experterna är utnämnda av skiljedomstolen
- 26 % ansåg att expertbevisning är lika effektiv, oberoende om experterna är utnämnda av parterna eller skiljedomstolen

# Statistik

- 92 % ansåg att expertvittnen inte skall avskaffas från internationella skiljeförfaranden
  - 70 % ansåg att det är en effektiv form av bevisning
  - 22 % ansåg att det är ett oundvikligt ont i internationella skiljeförfaranden
  - Bara 1 % skulle helt och hållet avstå från expertvittnen i internationella skiljeförfaranden
- 66 % tyckte att korsförhör av expertvittnen oftast är ett effektivt sätt att testa expertvittnet, 20 % ansåg att det alltid är ett effektivt sätt medan 13 % ansåg att det sällan är det.

# Kontaktuppgifter

**Patrik Lindfors Advokatbyrå Lindfors & Co Ab**

Partner

Glogatan 3

FI-00100 Helsingfors, Finland

tfn. +358 20 762 2511

mobil +358 40 554 5996

fax +358 20 762 2519

[patrik.lindfors@lindforsco.com](mailto:patrik.lindfors@lindforsco.com)