

Law relating to Expert Witnesses in Arbitrations

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Arbitration is the private dispute resolution mechanism which is proved to be an effective alternate to the regular National Court dispute resolution through litigations. To become an arbitrator, there is no requirement of a legal or technical qualification. To prove certain technical issues including legal questions either the party or arbitrator may resort to examination of expert witnesses. Expert witness may be an expert in a specific technical matter or an expert in a specific law or an expert in a business practice. Sometimes even Senior lawyers are invited to be an expert witness when the arbitrator panel consists of persons from other jurisdictions or not with legal knowledge. Even though Arbitration & Conciliation Act, 1996 expressly excludes the applicability of Evidence Act, 1872 the concept of expert witness is not far from the description made in S.45 to S.51 of the Act.

It is important to understand that witness examination is one of the legally permissible tools available to the arbitrating parties to prove their case, which includes examination of fact witnesses, expert witnesses and neutral witnesses. But the said tool must be used effectively to avoid excessive time to complete the arbitration and the corresponding costs. Whether to appoint experts can be a complex question requiring consideration of several factors, including the nature of the issues, the legal or professional background of the tribunal can be either be party appointed or tribunal appointed witnesses.

Party appointed expert can be either from outside or from the in-house team of one party. Both the above said options are in practice. The in-house technical experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. The only issue is the impression of the tribunal about the in-house people relating to impartiality of the witness. But appointing an outside expert as witness may expose the party to more cost and time.

Tribunal appointed arbitrators can in normal circumstances command a better stature relating to impartiality of the witness. Tribunal can make such an appointment of an expert either on the application of parties or on its own, if required to decide the issues in the case. In such situations, an important question arises, if the arbitrator is bound by the opinion of the expert witness appointed by him. The Hon'ble Supreme Court of India in **Malay Kumar Ganguly v/s Dr. Sukumar Mukherjee (2006) 6 SCC 269**, held that the arbitral tribunal is not bound by the opinion of the expert witnesses since the opinion of experts are advisory in nature.

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To get the benefit of examining an expert witness, the witness should demonstrate his expertise over the subject matter and to the issues where technical expert opinion is necessary for the arbitration tribunal to decide the disputes properly. Such an expertise of an expert witness can be understood from his educational qualifications, work experience etc., In *State of HP Vs Jailal* (1999) 7 SCC 280 Supreme Court of India held “ *in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired special experience there in, in other words that he is skilled and has adequate knowledge in the subject*”. More over the expert witness also should give his reasoning along with the basis for his opinion, a mere assertion is not sufficient. In **State of Maharashtra v/s Damus/o Gopinath Shinde and others, (2009)9 SCC 221** it was held that mere assertion by the expert is not sufficient to make the report reasonable and reliable. It is worth bearing in mind the words of Kierans J. cited with approval by Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at 780:

Experts, in our society are called that precisely because they can arrive at well-formed and rational conclusions. If that is so, they should be able to explain, to a fair minded but less well informed observer the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses the right to deference when it is not defensible. That said, it seems obvious that [Appellate Courts] manifestly must give great weight to cogent views thus articulated [emphasis added].

In India, in addition to the right of the opposite party to cross examine an expert witness appointed by the party, the arbitrator also has the powers to ask questions and get clarified. The most important use of an expert witness is the opportunity for the arbitrator to ask questions and understand the business process, business practices and the technical details. Even though everyone knows that the party appointed expert witnesses are paid by parties and hence most of them try to support the case of the party paying their fees. But as held by Supreme Court, change of stand by an expert in his oral evidence from that taken in his written opinion, if deliberate can amount to perjury by such expert witness (*Prem Sagar Vs State* 2012 (8) SCC 21). Hence the biggest challenge faced by arbitrators is to find out the truth from the expert report of the expert, the cross examination of the parties and formulate their own view to ensure justice.