How to Find and Appoint Experts in International Commercial Arbitrations

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Introduction

Expert involvement is often necessary in international commercial arbitrations and, depending on the circumstances, it can be crucial, namely in disputes that involve accounting, engineering or other technical issues with regard to which counsel and/or the arbitrators do not have sufficient expertise.[1]

It is also to be kept in mind that experts can make counsel's life much easier. Experts can, for example, be a great help in processing large amounts of data, or they can make the drafting of written submissions easier for counsel. Experts can, for example, assist by providing to counsel relevant technical input in a structured and, for laymen, understandable form.[2]

Given the important or even vital role that experts can play in international

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1 See, for example, Elena Samaras and Christof Strasser, 'Managing Party-Appointed Experts in International Arbitration – Analysis of the Current Framework and Best Practice Proposals' (2013) 6 SchiedsVZ 319; Bernd Ehle, 'Practical aspects of using expert evidence in international arbitration' in Marianne Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration, Volume II,* (Vienna, Graz 2012) 76, found at www.lalive.ch/data/publications/Ehle.pdf accessed 20 December 2013; Alexander Yanos and Julie Bédard, in *Expert Witnesses in Arbitration*, Reprint of the Corporate Dispute Magazine, October–December 2012 Issue 4, found at: www.crai.com/uploadedFiles/Publications/CRA_Reprint3_Oct12.pdf accessed 20 December 2013.

2 Regarding the benefits that party-appointed experts can provide in international commercial arbitrations, *ibid* Elena Samaras and Christof Strasser at 318 *et seq.*

commercial arbitrations, counsel has to take the issue of expert selection seriously and has to tackle this issue diligently in order not to compromise his or her client's chances of success.[3]

Unlike in commercial litigations in civil law jurisdictions,[4] in international commercial arbitrations expert selection is generally done by the parties, so the experts are generally party appointed (not appointed by the arbitral tribunal).[5] In this context, counsel often has central responsibility in vetting and selecting the expert.

As far as the timing of expert retention is concerned, as a general principle it is recommended to engage experts as early as possible, for different reasons.[6] Experts can, for example, assist in identifying and assessing the strengths of a case and its weaknesses, which may have an impact on the case tactics, and it is therefore preferable and important to receive such input early on.[7] Or experts can assist in identifying and formulating requests for production of documents, so they can help in the context of document production, which normally takes place in an early or earlier stage of arbitral proceedings. Or experts can – as already mentioned – help with the processing of large amounts of data, for example in connection with the drafting of the first substantial written submission.

One final thought regarding the timing issue: it is not uncommon that the

3 See, also, Bernd Ehle, n 1 above at 77.

4 Regarding the difference between the common law and civil law approach, see, for example, Giovanni De Berti, 'Chapter II: The Arbitrator and the Arbitration Procedure – Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?' in Christian Klausegger, Peter Klein, et al (eds), *Austrian Yearbook on International Arbitration* (2011) 53. Concerning, in particular, US lawsuits, although experts may not only be called by a party but may also be appointed by the court (see Rule 706 of the Federal Rules of Evidence, as amended, to be found, for example, at www.law.cornell.edu/rules/fre/rule_706), at least in the past, the calling of experts by a party has been clearly preponderant; see, in this regard, for example Pamela Louise Johnston, 'Court-Appointed Scientific Expert Witnesses: Unfettering Expertise' [1998] High Technology Law Journal 260 ('Nearly all experts testify in a trial at the request of one of the parties as authorized by Rule 702') and 261 ('Today, courts rarely exercise their power to appoint expert witnesses'), found at www.law.berkeley.edu/journals/btlj/articles/vol2/johnston.pdf accessed 20 December 2013.

5 See, for example, the 'White & Case 2012 International Arbitration Survey' 24 ('In the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%)'), found at www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf accessed 20 December 2013.

6 See, also, Bernd Ehle, n 1 above at 79–80; and also Robert M Craig III and Tim Tyler, 'What Not To Do When Choosing An Expert For Your International Arbitration' (2010) ABA Section of Litigation, Expert Witnesses, 2010 Annual Review 5, found at www.velaw.com/uploadedFiles/VEsite/Resources/TylerABAarticleInternationalArbitration.pdf accessed 20 December 2013. See also Alexander Yanos, Gregory K Bell, Julie Bédard and Michael Hammes, Expert Witnesses in Arbitration, 5–6.

7 *Ibid*, Michael Hammes and Julie Bédard.

client will be unwilling to retain an expert from an early stage, particularly because of the costs involved with such a step. However, in general, it will make sense if counsel explains to the client the benefits of early expert involvement and tries to convince the client to select and retain the expert early on.

First step: defining the relevant issues and the expert's profile

The first step in the expert selection and retention process is the definition of the expert's profile.[8] In this regard, counsel should determine the issues on which the expert input is required. The goal of such an exercise is to define what is needed in terms of expert input in the particular case at hand and, on that basis, to determine the expert's required skillset.

Therefore, the factual and/or legal issues which are *in dispute* in the arbitration and which are *relevant for the outcome* of the case are to be determined. Obviously, in connection with expert retention, the additional criterion is that the relevant, material issues in dispute involve a subject matter in which counsel and/or the arbitrators lack sufficient expertise, such as typically in relation to accounting, engineering or other technical issues.

From such relevant, material issues requiring expert input flows the 'ideal' expert's profile, in terms of his or her knowledge, experience and education, language skills, etc. For example, if the dispute involves two pharmaceutical companies fighting over the development of a new drug, depending on the type of drug and other factors, the profile of the 'ideal' expert can be established, maybe pointing to a certain category of scientists or researchers in a certain field, with certain language proficiencies, etc.

A practical tool that can be useful in the present context is the establishment of a shortlist of candidates or potential experts, where one establishes a table with columns for each candidate's name, position, qualifications, contact information, language proficiencies, availability, etc.[9] Such a shortlist or overview may be a useful tool when deciding, together with the client, the order of priority in which to approach and interview the experts and whom to retain.[10]

8 See in relation to this aspect Bernd Ehle, n 1 above, 77.

9 *Ibid.*

10 *Ibid.*

How to find the expert

In international commercial arbitrations, there is no single source of information regarding experts, since the range of topics is simply too wide.[11] Such topics can range from accounting issues to construction issues, to technical or scientific issues in all kinds of industries.[12] This can make the search for experts difficult,[13] for example, if the relevant technical issues are highly exotic, with a limited amount of qualified experts in the particular field. The search for an expert can also be particularly difficult due to other factors, such as the need for particular language skills or because of the domicile of a party which is subject to international sanctions, which can make the retention of qualified experts difficult for such a party.

As to possible sources of information regarding experts, often it is the client itself that can be helpful.[14] To use again the above-mentioned example of the opposed pharmaceutical companies, it is likely that in such a case the client's relevant research department has in-depth knowledge regarding which scientists are active or leading in the relevant field. So, depending on the circumstances, it is possible that the client is a very good source of information regarding the required expert.

Another source of information is internal or external colleagues. Counsel may know colleagues within his or her own organization, in other firms or bar associations involved in international commercial arbitrations to which he or she can turn to in connection with the search for a particular expert.

Another source may be the ICC International Centre for Expertise, which may be called upon for any of the following services: (i) the proposal of experts; (ii) the appointment of experts; or (iii) the administration of expertise proceedings.[15] Hence, in the context of a search for an expert, one may file a request with the International Centre for Expertise in Paris to propose an expert.

A request should contain: (i) the names, description and addresses of the parties involved; (ii) any relevant information concerning the choice of an expert (such as nationality, qualifications, language abilities, availability,

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11 *Ibid*

12 See also Michael E Schneider, 'Technical experts in international arbitration, introductory comments to the materials from arbitration practice', ASA Bulletin 3 (1993) at para 1, 446.

13 *Ibid* at para 22, 456.

14 See also *Bernd Ehle*, n1 above.

15 See www.iccwbo.org/products-and-services/arbitration-and-adr/expertise accessed 20 December 2013.

ect); and (iii) a brief description of the underlying dispute or situation.[16]

The disadvantage of retaining the services of the ICC Centre for Expertise is the quite substantial costs involved, since the request must be accompanied by a payment of US$2,500 for *each* name requested.[17]

Finally, one may, of course, also search the web for a particular expert. In particular, one may consult online directories of experts.[18]

Relevant factors in expert selection

The leitmotiv or guiding principle in the expert selection process is the aspect of credibility.[19] In other words, the client's goal is to convince the arbitrators of his or her position, specifically in relation to the disputed and material issue on which the expert is to render his or her opinion.[20] The arbitrators will, however, only be convinced by an expert which they consider to be credible. When vetting and selecting the expert, close attention is therefore to be paid to the question whether this or that factor relating to the expert increases or diminishes the expert's credibility.

Keeping this in mind, the first factor that obviously has a crucial impact on the expert's credibility is the expert's knowledge, in other words, his or her subject-matter expertise and experience. In relation to the relevant and disputed topic, the expert should convey to the arbitrators that he or she is as qualified and experienced as possible, otherwise he or she will lack – in the arbitrators' eyes – the necessary credibility and power of persuasion to convince the arbitrators of their expert opinion. Therefore, counsel will have to duly research and assess the expert's credentials, possibly together with the client and/or other sources. In this regard, counsel will also have to examine the publications of a potential expert and, if accessible, the views he or she expressed as an expert in previous cases (if any). From the potential expert's publications and/or testimony will derive, inter alia, to what extent the expert dealt with the relevant or related topic(s), which position he or she took in relation to such topic(s), and how the expert conveys information in writing. Regarding the latter point, the potential

16 See www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/request-for-expertise accessed 20 December 2013.

17 *Ibid.*

18 For example, www.expertdirectory.ch accessed 20 December 2013, or www.experts.com accessed 20 December 2013.

19 See also Bernd Ehle, n 1 above at 77 *et seq*; and also n1 above, Michael Hammes, 11.

20 See also Elena Samaras and Christof Strasser, n1 above at 319 ('Starting at the outset of the arbitration, the nominating party and its expert will attempt to convince the tribunal that the expert's testimony is relevant and should be considered by the arbitrators').

expert's written work will be a basis for counsel to determine whether the expert is capable of writing clearly and expressing even complex issues in a comprehensible and convincing fashion. The examination of the potential expert's past publications and/or expert testimony is also relevant to avoid any exposure by contradicting or inconsistent statements which could be exploited by the opposing party. If the expert candidate has advocated in the past in his or her publications a certain scientific standpoint that contradicts the position to be presented to the arbitral tribunal such publications could obviously be used by the opposing party to challenge the credibility and persuasiveness of such expert.

As far as the factor of experience is concerned, if an expert has experience or even sophistication with the arbitration process, this can be a great asset because it should, in particular, make the collaboration with the expert easier as they will have a better understanding of what is expected.[21] Experience with international commercial arbitrations is also an important factor because experience is important to know how to deal with difficult situations in the proceedings, particularly the cross-examination and possibly the so-called 'hot tubbing', that is, the joint examination of experts by the tribunal. There is a significant risk that experts who have never experienced a cross-examination or 'hot tubbing' will underperform in such situations. These situations have specific challenges, such as dealing with the significant stress resulting from being directly and persistently challenged by the opposing party's counsel or the risk of an expert underestimating the significant amount of work necessary to be sufficiently well prepared.

However, the required technical or scientific knowledge and experience is not enough. It is, so to speak, a necessary but not sufficient condition. Equally important is the expert's independence.[22] Obviously, for reasons of efficiency, it is to be verified right at the beginning of the discussions with the expert that he or she has no conflict of interests. Beyond this obvious point, it is important to select an expert who is independently minded and capable of drawing the line between positions that the expert considers reasonable and positions he or she considers unreasonable.[23] If the expert is not capable of doing this, in other words of being unable to push back against any position that he or she considers unreasonable, the impact of his or her expert report and testimony will be reduced significantly; in particular, it is doubtful that the expert will manage to convincingly defend under cross-examination any position that he or she cannot really stand

21 See also Robert M Craig III and Tim Tyler, n 6 above at 6.

22 See also Bernd Ehle, n 1 above at 78; and also Alexander Yanos, n1 above, 11.

23 *Ibid*, 8.

behind.[24] It is therefore important that the expert's testimony is an objective assessment that acknowledges the facts regardless of whether they are in favour of or disadvantage a party.[25] An experienced arbitral tribunal will recognise a biased expert who is not respecting these guidelines and this is likely to harm the party's case.[26] To sum up, one has to avoid retaining an expert who has the reputation or comes across as being a 'hired gun' that defends any position if asked to by the party that retained him or her.[27] Such expert input will likely not be credible in the arbitral tribunal's eyes, and may also harm the party's credibility and case overall.

The expert's personality is also a crucial factor. The expert should, obviously, be a person of integrity with a convincing appearance. A further aspect of the expert's personality is his or her qualities as a team player. If the person is pleasant to work with, this will make the collaboration with him or her – which, depending on the matter, can be long and intensive – easier. The expert's team player qualities cannot be overestimated, since in international commercial arbitrations putting together often voluminous written submissions or preparing for lengthy hearings regularly is a team effort, in which sometimes two or even more experts have to closely collaborate with the client and the client's counsel. If an expert is not a team player, he or she may stall or disrupt such team effort, with the obvious negative effects on the task at hand, for example the drafting of a convincing submission.

Another important feature of the expert's personality is his or her ability to communicate. In other words, the expert has to be able to convey opinions in a straightforward and understandable fashion.[28] The brightest and most experienced expert in a given field will not be an asset to your party's case if the only other person understanding him or her in the arbitration is the other party's expert. In this regard, if the expert teaches, one should seize this opportunity for one's own direct observations, since the classroom is an opportunity to preview the expert's presentation skills.[29]

It is quite obvious that all the mentioned factors can only be reasonably assessed in direct discussions with potential experts.[30] Therefore, if time and budget allow for such meetings, counsel – preferably together with the client – should personally meet the expert candidates, to get a direct first-hand impression of the potential expert's personality.

Another aspect is the expert's availability which obviously should be checked before retaining him or her to avoid unpleasant surprises. In order

24 See also Gregory K Bell and Alexander Yanos, Expert Witnesses in Arbitration, 8.
25 See Michael Hammes, n1 above, 9.
26 *Ibid.*
27 See Bernd Ehle, n 1 above.
28 See Gregory K Bell, n1 above, 11.
29 See Robert M Craig III and Tim Tyler, n 6 above at 6.
30 See also Bernd Ehle, n 1 above at 78.

to check the expert's availability, counsel should be in possession of the arbitral tribunal's provisional timetable so that not only is the deadline for the submission of the expert report known, but also the hearing dates so that one can check the expert's availability for his or her personal testimony.

Costs are, of course, also an issue. US and UK experts can be expensive, so it is important to address the cost issue transparently and early on, together with the client.

Finally, it is recommended to agree in writing with the expert on the principal points of his or her engagement, such as the scope of his or her tasks, the timing of such tasks, the expert's remuneration, confidentiality, document retention policy, etc.

Conclusion

Experts often play a crucial role in international commercial arbitrations. Their selection is, therefore, critical. In order not to compromise the party's chances of success, counsel has to handle the expert selection process carefully and diligently. In particular, generally it should pay off to involve experts early on, and the characteristics that an expert should possess are not only impeccable subject-matter expertise, but also a high degree of independence, team player qualities, and great communication skills.