Arbitration, Mediation & Alternative Dispute Resolution Article

The Use of Experts in International Arbitration: Selection of an Expert Witness

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In international arbitrations, litigators from the U.S. often find a bit of the familiar mixed in with equal or greater bits of the unfamiliar. (Whether they acknowledge or treat the latter as such, alas, varies by practitioner.) For example, expert witnesses may be appointed (a) by the respective parties (“Party-appointed” experts), (b) by the arbitral panel (“Tribunal-appointed” experts), or (c) with input from each. Here, we discuss the seemingly familiar selection of Party-appointed experts. (This is part of a series of articles concerning the use of experts in international arbitration.)

Generally, counsel may engage an expert in an international arbitration (as in domestic litigation) to serve (1) as a consultant, who will not give evidence, (2) as a testifying witness, or (3) both. Selection of an advisory consultant (a “consulting expert”) is principally a matter of identifying a candidate who has the necessary expertise and is compatible with counsel. On the other hand, having the necessary expertise is fundamental, but not sufficient, for a testifying witness.

The selection of a testifying expert also requires due consideration of the candidate’s communication skills, demeanor, and adaptability, among other things. This is due largely to an unfamiliar aspect of international arbitration – that is, codified procedural rules concerning the use of experts in international arbitration are scarce. Hence, the procedural “rules of the road” regarding the presentation of expert evidence will frequently be created ad hoc by the parties during the arbitral proceeding. (This is discussed in another article in this series.)

1. Essential Characteristics of an Expert Witness

As a practical matter, it is advisable to seek at least the following characteristics in expert witness candidates: (1) the required expertise, (2) sterling pertinent credentials or experience, (3) communication skills, (4) a demeanor evoking trust, and (5) fluency in the language of the proceeding.

Communication skills are essential. It is not enough simply to be an expert. The most brilliant expert may not even be a functional expert witness. The ability to communicate expertise to a lay audience is key. Indeed, a candidate expert witness must appreciate that his or her task is to communicate his or her opinions effectively to a specific audience – i.e., the particular arbitrators in the case.

Moreover, credibility is vital. An expert witness must aim to be perceived by the tribunal as authoritative and reliable. The independence of an expert witness is in effect considered a requirement in the useful guidance afforded by the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the “IBA Rules”). (See Arts. 5(2)(c); 6(2).) A Tribunal-appointed expert is, of course, presumed to be independent of the parties, but a Party-appointed expert should in effect aim to be viewed similarly by the arbitrator(s).

Toward that end, it is important for counsel to preserve the appearance of the expert witness’s objectivity. This is a foundation of the witness’s credibility. Hence, an expert witness should not be encouraged to be, or placed in a position in which he or she appears to be, an advocate. The expert is typically not well-suited for the role in any case, and the appearance of advocacy will very likely impair the witness’s credibility and thus effectiveness.

2. Expert Selection: When?

Potential witnesses with even the foundational required expertise and credentials may be scarce. Therefore, it is wise to try to identify the pool of potential experts, especially the elite candidates, at the earliest opportunity.

2.1 Consulting Expert

A consulting expert, who will not be giving evidence, can be useful for identifying (1) the scope of issues that will require expert evidence, (2) the desired evidence, (3) lines of investigation, (4) desirable data and information, (5) likely factual issues, and (6) related legal issues. Hence, if one considers the benefits to be sufficient, the earlier one can bring on board such an advisor, the better.

The need for early engagement of a consulting expert is perhaps most acute for purposes of early assessments of injuries and potential compensation. All parties will likely want to make early evaluations of the risk/reward picture from their respective perspectives. For example, a claimant with a strong case on liability but a weak case on damages will want to be aware of the situation before commencing arbitration. Moreover, this need for early evaluation is no different if the arbitral proceeding is bifurcated between liability and damages.

In addition, relying on a non-testifying expert while one’s case is developing avoids the worry of disclosing sensitive information in communications that are not privileged. Whereas a testifying expert might be questioned about such communications, a consulting expert might not even be disclosed, much less be the subject of questioning.

2.2 Testifying Expert

A testifying expert, on the other hand, ideally will not be selected until after the
relevant arbitration procedures, including hearing procedures, are set by agreement of the parties and/or the Tribunal's order. Engaging a testifying expert before knowing what that expert’s entire job will be—e.g., before it is decided whether “hot-tubbing” will be part of the hearing procedure—creates an unnecessary risk. We do not mean to suggest that a consulting expert could not be selected to testify as well, or that a testifying expert could not be selected relatively early in the arbitration process, but rather that it would be best that any such choice await a full elucidation of all that will be required of the expert witness.

3. Factors for Consideration in Assessing Candidate Experts

In assessing each candidate expert’s strengths and weaknesses, consideration should be given to the candidate’s personal qualities, to the agreed or prescribed procedures for giving expert evidence, and to the international arbitration “culture” that affects its practice.

The following factors should be considered in selecting a testifying expert: (1) the necessary expertise; (2) relevant formal credentials and/or experience; (3) reputation for expertise in the relevant field; (4) reputation generally; (5) prior publications (including speeches) and testimony; (6) potential conflict, bias or interest factors; (7) language skills (including fluency in the language of the proceeding); (8) communication skills (oral and written); (9) an ingratiating demeanor; (10) apparent credibility, assertiveness (willingness to challenge others), and tenacity (when challenged); and (11) experience as an expert witness. Counsel may also be tempted at the outset to probe whether a candidate is inclined to support the client’s position. This is at best a most delicate inquiry, and is likely to result in problems no matter what the response is to such a litmus test.

One begins with the basics—assessing the relevance and degree of the candidate’s expertise, the strength of the candidate’s formal credentials, his/her reputation in the pertinent field of expertise, and the candidate’s prior testimony and publications.

Second, one will want to assess the candidate’s oral communications skill, including the candidate’s language skills. Fluency in the agreed language of the arbitration is almost essential. Ideally, an expert should testify in his native tongue. Technical expertise is particularly difficult to convey in a non-native language, and the credibility of testimony will suffer if the expert is not fluent in the language of his testimony. (When an interpreter must be used, that person should be very familiar with the jargon of the expert’s discipline, the expert’s dialect, etc.)

Furthermore, the expert’s demeanor (hopefully pleasant and ingratiating) in a pressurized situation—giving testimony in a formal proceeding, being cross-examined, possible hot-tubbing, etc.—will have a significant effect on how that testimony is perceived. Moreover, given the variety of potential interrogators and procedures that the expert may have to accommodate, one should assess the candidate’s mental agility and ability to respond in a proceeding similar to a debate.

In general, one should assess each candidate’s assertiveness, tenacity and flexibility. At the extreme, for example, one must anticipate whether an expert’s opinions, once formulated, could be substantially changed (without good reason such as changed assumptions) during his/her interactions with friendly counsel, colleagues, or adverse counsel. If so, that witness is vulnerable and a potential liability because unwarranted acquiescence of that kind is undesirable.

There are also extrinsic factors that may affect one’s selection of an expert witness. For example, in considering what will persuade the Tribunal, the backgrounds and styles of the arbitrators—most importantly, the Tribunal chairman—should be considered. Thus, one should consider each arbitrator’s training and experience. Is it, for example, in business or technology or law? If his or her background is in law, does the arbitrator come from a common law jurisdiction, which resolves disputes by an adversarial process, or a civil law jurisdiction, which resolves disputes by an inquisitorial process? Moreover, is the personal style of the arbitrator formal or informal?

One should also consider the expertise, credentials, and reputation of opposing experts and the backgrounds of opposing counsel.

4. Conclusion

Perhaps the simplest lesson to be retained is that the timing, criteria, and vetting in the selection of expert witnesses in international arbitration is a bit different from routine practices in U.S. litigation, particularly in Federal Court. An appreciation of those differences will be invaluable.