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EXPERT WITNESSES IN ARBITRATION

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
OCT-DEC 2012 ISSUE



www.corporatedisputesmagazine.com

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HOT TOPIC

EXPERT WITNESSES IN ARBITRATION

PANEL EXPERTS



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Dr Michael Hammes is a director at PricewaterhouseCoopers AG's Frankfurt office. He has extensive experience in dispute resolution and acted as an advisor to clients and their law firms, as a party-appointed or tribunal-appointed expert in arbitration and court proceedings, and as an expert in resolution mechanisms such as expert determination or mediation/conciliation.

Alexander Yanos is a New York-based partner in Freshfields Bruckhaus Deringer US LLP's international arbitration practice group. For almost 20 years, Mr Yanos has been litigating and arbitrating commercial, financial and treaty-based disputes. He also acts for clients in disputes involving sovereigns, and he speaks six languages.

Julie Bédard concentrates her practice on international litigation and arbitration. She regularly advises clients on the drafting of dispute resolution clauses and has served as counsel in international arbitration proceedings held under the auspices of the ICC, ICDR and ICSID. She also acts as arbitrator in commercial cases.



CD: In what types of disputes are parties bringing expert witnesses into the process? Are their services proving beneficial in particular areas and industries?

Bell: Experts are frequently used in arbitrations. In most cases, they are found in disputes in which damages quantum is a consideration or where issues of industry conduct are in question. Industry expertise may be required to properly characterise a damages issue, but industry experts also are being used more and more in disputes regarding the breakdown of commercial agreements – for example, whether reasonable efforts were used to develop

or commercialise a new product or technology and what guidelines are used by the industry for commercial practices. In addition, more arbitrators are requesting that the parties in the dispute prepare a list of experts from which they could choose in order to assist the arbitrators, particularly in the calculation of damages.

Hammes: Experts are usually engaged in disputes whenever an independent third party assessment of a particular issue is required which is considered critical for making the parties' case. The assessment of liability may involve law professors providing their opinion on a legal argument or engineers to render an opinion on whether a technical failure

caused the damaging event. The quantum phase may require technical assessments, market evaluations and financial analysis, all of which is ultimately consolidated in the assessment of damages.

Technical experts are typically engaged in insurance claims and construction disputes to assess the malfunction of a device or the reason for the delay and disruption of a project. Purchase price disputes will regularly involve an accountant. Lost profit claims will usually require a financial expert.

Yanos: There is no question that experts can, when used properly, play a vital role in the arbitral process. For example, we recommend the inclusion of a damages expert in any dispute involving monetary damages. Similarly, technical experts can be invaluable in disputes involving a subject matter in which counsel or the arbitrators lack sufficient expertise. Such experts often provide opinions on such topics as industry best practices or the structure of a particular business sector. There are also engineering experts, who, especially in the context of construction disputes, can assist with identifying the source of a particular problem or assessing the likelihood that a proposed solution will address a particular problem. On the other hand, we are seeing fewer legal experts used in commercial arbitrations, as many clients are preferring that their international counsel simply associate with a firm with the requisite local legal expertise and plead the relevant issues directly to the tribunal.

Bédard: Parties engage the services of expert witnesses in the arbitration process for the same reasons they might do so in litigation. Indeed, the services of experts are often essential in disputes involving accounting, engineering and other technical issues – or other disputes involving specialist professional expertise that lawyers are not in a position to fully grasp and present to the Tribunal without the assistance of an expert.

CD: To what extent can experts help to analyse the strengths and weaknesses of a pending arbitration matter?

Hammes: In large and complex disputes where the factual context is often not fully known, experts can assist in finding the crucial facts which may support the strengths of a case and also identify its weaknesses. It is important to know the weaknesses of a case because these weaknesses will most likely be the strengths of the opposing party and will point to the arguments the opposing party will make. Therefore, not only the strengths of a case but also its weaknesses should be thoroughly analysed. Experts providing independent and objective assessment can thus have an important consulting role in identifying and addressing the weaknesses of a case and thereby assisting in managing the disputing parties' expectations.

Bédard: If a dispute hinges upon an area of professional expertise, then the assistance of an expert is necessary to assess the strengths and weaknesses of the case. To take a simple example, in a post-acquisition dispute in which the buyer alleges that the seller breached certain representations and warranties, including representations on the compliance of the financial statements of the company with generally accepted accounting principles (GAAP), the views of the expert as to the compliance with the relevant accounting standards, or lack thereof are, of course, highly significant.

Yanos: We do not recommend using experts to opine on the ultimate questions at issue in the case. The arbitrator is likely to view such an expert as attempting to usurp the arbitrator's role. In our view, the role of the expert is not to give an opinion on how the case should be decided, but rather to analyse the questions within his or her speciality, such as: 'Assuming liability, what damages are owed?' or 'What is the source of the corrosion?' or 'Is the proposed solution likely to work?'

Bell: Experts can be very useful in identifying and assessing potential issues of relevance for an arbitration matter. Of immediate interest, experts can provide an objective perspective on the type of information that is likely to be relevant to the inquiry, including areas where it will be important to consider the participation of commercial personnel

from the involved parties. Experts are also equipped to identify issues of potential relevance, including those that might not be directly at issue between the parties but important considerations for assessing liability or guiding quantum considerations. Qualified experts will not only be able to identify these areas prospectively, but they will also be able to provide guidance on where useful information is likely to be found and what constitutes high-quality, reliable information.

CD: Should experts be engaged early in the process to assist with case tactics and the information gathering process?

Yanos: It is important to draw a distinction between testifying experts and consultative experts. The information provided to a testifying expert is not privileged. In addition, discussions with a testifying expert are also not privileged, meaning that both are susceptible to discovery (either in the form of document requests or questions during cross-examination). Accordingly, one should be judicious as to what is provided to or discussed with a testifying expert. In contrast, a consultative expert will provide advice that should be treated as protected by the attorney-client privilege and work product doctrine. As a result, we think that it is critical that such consultative experts be provided with as much information as possible as early as possible, so that counsel can take advantage of the consultative

expert's views and prepare the most effective case presentation.

Bell: Engaging experts early in the process can be very useful, particularly with respect to highlighting lines of inquiry likely to be productive, identifying arguments that may appear to be appealing but are unlikely to be supported by an expert, indicating data and information to be requested from the other side, and preparing for the likely arguments that may be offered by the other side. Costs are always an issue, but often one could garner the benefits of early involvement by an expert without paying the full cost. Consider using non-testifying experts such as the expert's colleagues or research assistants to review material and provide early-stage assistance before engaging the expert to offer an opinion.

Bédard: If possible, experts should be retained early in the process, particularly when experts with the relevant expertise may be scarce. Experts require data upon which they are expected to provide an expert opinion – for example, for the purpose of preparing a damages analysis, the quantification of expropriation claim or loss of business claim.

Hammes: Experts – other than legal or technical experts – are often brought into a case rather late, particularly if the case is bifurcated in a liability and damages phase. It may be useful to engage the expert early because the expert will have a different

angle to look at critical issues and may contribute to fact finding and the assessment of facts which also may have legal implications and not only direct implications on the particular field of the expert opinion. As mentioned, this may help to better understand the strengths and weaknesses of a case and may therefore have an impact on the case tactics.

CD: For a company considering arbitration, is it important to thoroughly assess the potential damages involved? How can an expert aid this process?

Bédard: The assessment of damages is a key issue in many arbitration proceedings. Any claimant wants to get a solid grasp on the likelihood of recovering damages and in what amount. Conversely, the respondent usually needs to ascertain its exposure to a potential award of damages. Experts are a critical part of this process in commercial or investment arbitrations. Taking this time the quantum analysis in a typical investment arbitration as an example, similar to what a banker does in connection with a prospective acquisition, the expert will calculate the value of the company that was expropriated using well-recognised valuation methodologies – for example, discounted projected cash flows of the company, multiples of earnings and other relevant, as well as comparable transactions.

Hammes: Tribunals can be rather critical in respect of a claimant's damages calculation, in particular if the claimant did win on the merits. The respondent, on the other hand, will want to reduce the now unavoidable damages as far as possible. Therefore, a thorough assessment is important from both parties' perspectives in order to present a case to the tribunal. In simple cases the assessment of damages may be done by a single party expert. However, complex cases may need the collaboration of an industry expert and an economist to evaluate the gross income stream and the use of an accountant to assess the associated costs. Patent infringement disputes or antitrust disputes may in addition require complex econometric analysis, for example simulations of market prices.

Yanos: We advise any client considering bringing an arbitration as a claimant to learn as much as possible about the strengths and weaknesses of its case in advance of filing the request. This process includes a thorough assessment of potential damages and how they will be presented to the arbitrators. A client with a strong case on the merits but a weak case on damages will avoid an unpleasant surprise at the end of the process if it has

considered this position at the outset with the help of a consultative expert.

Bell: Initial assessment of quantum is an important aspect of dispute resolution because it can help guide both the process and the arguments for a dispute. First, using an expert could help the lawyers identify which aspects of an aggrieved party's claimed damages could be appropriately supported and which aspects of the claim are unlikely to merit

"Complex cases may need the collaboration of an industry expert and an economist to evaluate the gross income stream and the use of an accountant to assess the associated costs."

expert support. Second, the business people need to be informed about the likely quality and quantity of the damages claim so that an informed assessment of risk and opportunity could be made at each stage of the arbitration process. Third, appropriate consideration of the quantum by both sides of the dispute could be a useful impetus to timely settlement as opposed to costly arbitration. Fourth,

assuming that the quantum warrants continued arbitration, the initial estimate can also inform important areas for development of argumentation or information.

CD: There has been some criticism that expert witnesses are simply 'hired guns'. What is your reaction to such claims? In your experience, how difficult is it for expert witnesses to maintain a balanced, impartial view?

Bell: First, one should not hide from the fact that experts are generally hired by one party or the other, notwithstanding the joint experts that may be appointed by a court or tribunal. In my experience, however, it is not difficult for expert witnesses to maintain a relatively balanced, impartial view. In fact, it is essential that they do so. In addition to an expert's knowledge, experience, and ability to convey opinions in an appropriately straightforward and understandable fashion, an expert's only asset is a reputation for objectivity – reputation will follow the expert well beyond the current matter. Expert bias will become apparent through rebuttal reports, interaction in the hearings, or censure in the decision. In this respect, the witness conferencing – so-called 'hot-tubbing' – that may be used in arbitrations can be a very effective tool for highlighting the quality and objectivity of an expert's opinion and thereby highlighting bias. On the other hand, the

confidentiality associated with arbitrations may mean that a censure for bias does not generate the reputational harm that otherwise would result from a similar censure in court. Accordingly, it may be appropriate for the governing bodies of arbitration to begin to track censure of experts for failure to provide the relatively balanced and impartial perspective that an arbitral tribunal should be able to consider in its deliberations.

Yanos: As a practice, we very much prefer to work with experts who are known for their independence. Many lawyers would say the same thing. However, in the heat of the battle, lawyers often push their experts to take more aggressive positions. There is no harm in that process – lawyers are ethically bound to zealously advocate for their client, and testing their experts' positions is part of that advocacy. However, it is vital that one select an expert who is independently minded and capable of drawing the line between positions that the expert considers reasonable and positions the expert considers unreasonable. If the expert fails to hold to his or her own views in this dialogue with counsel, the expert's own testimony is rendered worthless, as it no longer reflects the expert's independent views. In contrast, an expert with a reputation for independence can tell the tribunal unequivocally that the report reflects his or her own opinion. Such testimony is likely to be more effective in the presentation of the case. When

the parties trade independence for acquiescence, they are making a grave error, in our view.

Hammes: A credible expert opinion must foremost acknowledge the facts regardless of whether they are in favour or to the disadvantage of a party and should provide for an objective assessment. An experienced tribunal will recognise a biased opinion which may harm the party's case and the expert's credibility. To ensure that the expert is not acting as an advocate of the party, the UK civil procedure rules, as an example, impose the overriding duty to assist the court. The 2010 revision of the International Bar Association's (IBA) rules on the taking of evidence raised the requirements regarding an expert's independence. An expert underlying the regulation of German Certified Accountants has the foremost duty to be independent and impartial when rendering a professional opinion.

Bédard: My experience has been that the best experts care about their credibility and reputation, which leads them to adopt a position that they believe to be correct based on the facts, regardless of the party that hired them.

CD: In what ways have the rules and procedures governing expert evidence in arbitration changed over the years? Consequently, how has the role of the expert witness evolved?

Hammes: Institutional arbitration rules are generally rather broad in governing matters of evidence. Due to the civil law tradition it is far more likely to come across tribunal-appointed expert evidence in a German national arbitration than using party-appointed experts. In international arbitration, reference is often made to the IBA rules on the taking of evidence. Although the tribunal-appointed expert is recognised in the IBA rules the party-appointed expert clearly dominates in international arbitration. The examination of experts in international arbitration may have gained more flexibility in recent years although direct and cross examination still prevail. However, 'witness conferencing' or 'hot-tubbing', in which all party-appointed experts are examined simultaneously, appears to be getting more popular.

Bédard: The rules and procedures governing expert evidence in international arbitration tend to vary in any given case, but it is probably fair to say that certain practices have developed over time. The so-called 'hot-tub' procedure has gained favour among certain tribunals. With experts who have a solid delivery and ability to react, discuss and argue, this procedure may be worthwhile. I would not say that the role of the expert has changed all that much. Tribunals continue to look to experts for answers to tough questions. Lawyers of civil and common law jurisdictions may sometimes have a different approach to the testimony of expert witnesses, but

counsel and tribunals usually work out a suitable procedure.

Yanos: One major change has been an increase in the use of discovery in the arbitral process. This has made it more important to be judicious in choosing the information that one shares with experts. It has also made the cross-examination of experts a more focused process, because we can get closer to the

"A failure to assess broadly the impact of a quantum opinion is likely to become most apparent through witness conferencing where an opposing expert could more easily identify and highlight logical flaws in an otherwise apparently reasonable opinion."

heart of the material they reviewed in preparing their reports. Another significant change has been the advent of 'hot tubbing', in which experts for both sides testify together, with no direct examination by counsel. Instead, the experts ask questions of each other before the tribunal. While lawyers may interject, they do not run the process. This makes the expert an independent actor in the arbitral process, which can be scary from the lawyer's perspective. It also

means that parties must be careful to select experts who can perform well in that setting.

Bell: From an expert's perspective, it is difficult to differentiate what changes have resulted from rules and procedures as opposed to changes resulting from the growing sophistication of the role that an expert can play in dispute resolution. Perhaps the most welcome change has been the use of expert witness conferencing. Witness conferencing raises the bar for an expert's capabilities. As a result, it is much more important that the expert understand the nuances of an industry as it may affect his or her opinion and possess skills beyond the accounting of quantum to include appropriately associated issues in economics and finance. It is not enough to say that the lost profits stemming from a commercial dispute are X without also assessing

the market impacts in the but-for world and the appropriate consideration of present value. A failure to assess broadly the impact of a quantum opinion is likely to become most apparent through witness conferencing where an opposing expert could more easily identify and highlight logical flaws in an otherwise apparently reasonable opinion.

CD: Is it fair to say that a properly qualified witness can have a defining influence on the outcome of an arbitration case?

Bédard: In many cases the testimony of an expert does influence the outcome of the decision. The more significant the area of expertise in resolving the legal dispute, the more important the role of the expert becomes.

Yanos: It is certainly possible for an independent, highly qualified expert to have a substantial impact on an arbitration, especially where the expert's independence and expertise are readily apparent to the arbitrators.

Bell: An expert needs to be able to communicate his or her opinion in an appropriate and accessible fashion. This means being able to take sometimes highly technical issues and effectively present the intuition behind the opinion. Without the ability to communicate effectively, the expert's opinion may lack a voice for the tribunal. As a result, the arbitral tribunal that hears from an expert highly qualified in the technical aspects of the field but unable to communicate effectively beyond those skilled in the field may be denied the opportunity to appropriately consider the expert's opinion.

Hammes: The defining influence of an expert witness will foremost depend on the expert's credibility. Therefore, it is important that the expert provides objective assessments and does not act as an advocate of the appointing party. I would also like to emphasise that 'properly qualified' does not always match with formal qualifications. For example, properly qualified should also include the ability of the expert to get his expertise on the critical issues across to the tribunal. The best expertise is useless if it doesn't register with the arbitrators. However, acting as an expert witness myself, the defining influence of an expert witness can be better evaluated by the users of expert evidence.

CD: What characteristics should a disputing party look for when selecting an expert witness to assist with arbitration?

Yanos: The most important characteristics are independence and an ability to explain complex issues clearly and concisely. An expert with these characteristics will be best placed to make an effective presentation to the tribunal.

Hammes: The parties should look for an expert who can provide objective assessment and ensure credibility. However, I believe that a disputing party should not view the expert witness as someone who only provides a written opinion and testifies in a hearing, but also as someone who can assist

the party and its counsel to better understand the issues of a particular case and help them manage the disputing party's expectations of a realistic outcome.

Bédard: An expert needs to be intelligent, knowledgeable, and, most importantly, crystal-clear in his analysis and exposition to the arbitration tribunal. The best expert should be able to convey to the opposing party and the tribunal that he or she presents the most compelling view based on an in-depth understanding of the issues as well as reasonableness and independence of opinion.

Bell: There are three main characteristics that a party should seek in an expert. A potential expert needs to have qualifying credentials that justify the time invested by the parties and the arbitrators to consider the expert's opinion. A potential expert also needs to demonstrate the integrity to deliver an objective opinion; although hired by one party or the other (or perhaps the arbitrators), an expert must demonstrate the independence to consider relevant information and deliver an effective opinion. Perhaps most importantly, a potential expert needs to be a clear communicator since impressive qualifications and a considered opinion will not assist the parties in resolving their dispute if the testimony is turgid, unclear, or incomprehensible to anyone beyond other experts. In addition, there are characteristics of an expert that are likely to make it easier and more efficient to work with one expert as compared to

another. These characteristics include the capability to address commercial or legal perspectives, an effective support team for the expert to whom the lawyers may have more ready access, and an amiability that eases regular communication as well as testimony.

CD: Going forward, do you expect to see more effective use of expert witnesses to facilitate the resolution of complex commercial disputes?

Bell: In particular, I believe that we will continue to see more effective use of expert witnesses to the extent that witness conferencing is used more frequently and as experts become more capable of articulating appropriately industry-specific aspects of their opinion and go beyond accounting data to consider the market in issues of quantum. Further, with respect to industry-specific issues on liability, it is going to become progressively more and more difficult for arbitrators to deal effectively with an increasingly volatile and integrated business world without the assistance of experts who are appropriately versed in industry conduct and rationale.

Hammes: Experts should not fiercely defend the respective positions of the disputing parties without giving the tribunal the benefit of gaining a better understanding of the factors, issues and

assumptions applied, which may be decisive for the case. Such battles may be a costly and ultimately useless exercise. The 2010 revisions of the IBA rules on the taking of evidence, the Chartered Institute of Arbitrator's protocol for the use of party-appointed expert witnesses in international arbitration, and the use of witness conferencing, provide for an adequate framework, the tools and the necessary flexibility for a more effective use of expert witnesses.

Bédard: I note with interest that your question is whether more 'effective' use will be made of expert witnesses in the future as opposed to whether we will see a mere increase in the use of experts in arbitration. Many tribunals have expressed a certain frustration with the adversarial way expert evidence is presented, which hinders their ability to reach a conclusion on an issue requiring expertise in the drafting of the arbitration award. The more effective experts are on the ones who are able to adequately address the questions and concerns of the arbitration tribunal.

Yanos: There is no question that, as the subject matter of commercial disputes becomes more and more technical, the parties will need the assistance of technical experts more and more often for the foreseeable future. Whether such use will be effective will depend on the judicious use of the right types of experts. CD





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