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Volume II

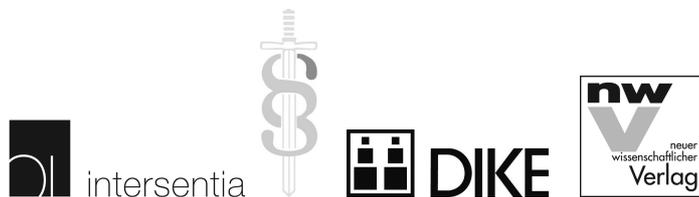
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Practical aspects of using expert evidence in international arbitration

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Abstract

The complexity of disputes in international arbitration often calls for experts to assist arbitral tribunals in making their decisions. It is crucial that parties and their counsel know what characteristics they have to look for in an expert, how to find an expert, and how to employ an expert to best serve their case. Experts are involved in numerous stages of the arbitral process, and can assist by means of written reports, oral testimony, consulting, or any combination thereof. This paper explains the practical role of experts in international arbitration today, and offers advice on how counsel should use them to their clients' advantage.¹

Keywords

Experts, witnesses, testimony, technical cases, evidence, report, valuation, expert conferencing

1 This article is a revised version of a paper presented at the 6th Biennial Symposium on Arbitration, Mediation and ADR of the Center for International Legal Studies (CILS), held in Salzburg on 10-13 June 2010.

I Introduction

The role and impact of expert testimony is pivotal to modern-day international commercial arbitration. Given that arbitral proceedings today regularly concern complex issues of a specialized or technical nature, arbitrators – even those who already have certain expertise in the matter of the dispute – need the assistance of experts to understand the specific issues relevant to the case.² The frequency with which experts are used in arbitration is remarkable, and some have even gone as far as saying that not retaining an expert in certain cases could be negligent.³ Expert testimony thus becomes crucial to the arbitral tribunal's decision-making process. But parties and their counsel often also depend on experts in order to present their case fully and comprehensively.

The expertise that is called for can be very diverse, even within the same arbitration. It can range from financial and accounting opinions (especially in post-M&A disputes), damage calculations,⁴ delay analyses (frequently used in construction disputes), technical expertise (e.g. quality of commodities), legal opinions (for example on questions of foreign law) to market expertise (e.g. on a certain telecommunications or oil and gas market).

The proceedings oftentimes boil down to a "battle of experts". In such cases, the effective use of expert evidence can have a direct influence on the outcome of a case. Training institutions, such as the Foundation for International Arbitration Advocacy,⁵ which offer advocacy training designed for expert examination in the context of international arbitration, have recognized the prevalence of expert evidence and the need for arbitration counsel to deal with it skilfully.

This paper focuses on the practical aspects of the use of expert evidence in international arbitration proceedings, in particular from a counsel's perspective. This paper is not concerned with the academic theories surrounding or the different arbitration rules pertaining to expert evidence.

Also, this paper only looks at the use of party-appointed experts and does not address the debate surrounding "party-appointed expert vs. tribunal-appointed expert" (or a combination of both). Experience shows that expert evidence is commonly adduced by the parties; tribunal-appointed experts remain the exception.⁶

2 Ruth Fenton, *A Civil Matter for a Common Expert: How Should Parties and Tribunals Use Experts in International Commercial Arbitration?*, *Pepperdine Dispute Resolution Law Journal*, 6 (2006) 2, 280; Werner Stieger, *Zum Umgang mit technischem Sachverhalt: Beweisführung und Beweiswürdigung in Schiedsverfahren*, 7/8 *sic!* *Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht*, 7/8 (2010), 493 et seq.

3 Stephen Jagusch, cited by Sebastian Perry, *Quantum Mechanics*, *Global Arbitration Review*, 6 (2011) 2, 1.

4 See e.g. Michael McIlwrath/John Savage, *International Arbitration and Mediation: A Practical Guide*, Alphen aan den Rijn 2010, 302.

5 FIAA, <http://www.fiaa.com> (23 August 2011).

6 See Stephan Wilske/Christine Gack, *Expert Evidence in International Commercial Arbitration*, in: Dennis Campbell (ed.), *The Comparative Law Yearbook of International Business*, Volume 29, Alphen aan den Rijn 2007, 83.

II How to select the right expert

In the case of party-appointed experts, the parties are free to choose whom to appoint. Lawyers must exercise due care in selecting the appropriate experts to provide evidence for their case, and this choice is regarded by some as being “the most important decision of the arbitration.”⁷

A Defining the expert’s profile

The first task consists of establishing the issues on which expert testimony is required. This is a function of the particular arbitration and largely depends on the relevance of the issues to the outcome of the case as well as the existence of other evidence.

Secondly, the profile of the “ideal” expert should be defined, regarding in particular specialized knowledge, experience, education, and language skills.

Thirdly, it is useful to establish a short-list of experts with a table featuring columns for each candidate’s (i) name, (ii) position and qualifications, (iii) contact information, (iv) educational background and expertise, (v) relevant publications, if any, (vi) language proficiencies, and (vii) availability. This short-list is a useful tool when deciding, together with the client, the order of priority in which to approach the experts and whom to retain.

B Where to find a suitable expert?

Given the variety of fields of expertise that may be required in international arbitration proceedings, there is no single source of information pertaining to experts. In many cases, the clients have names in mind or are best placed to know where to look.⁸ The ICC International Centre for Expertise and many national arbitration institutions or chambers of commerce keep lists of experts and are prepared to assist. Of course one can also resort to online directories such as “Pool of Experts” (www.poolofexperts.ch), a website developed by the Swiss business network OSEC to find international business experts, or “Experts.com” (www.experts.com).

C What characteristics are important?

The party and its counsel should conduct due diligence when selecting an expert. In large cases and when time permits they may consider conducting a so-called “beauty parade” or at least a bidding process requesting information about the particular experience and cost estimates of potential experts.

Besides the specialized knowledge of the identified issues and specific academic background or experience in the subject matter under examination, which are the basis for the expert’s credibility vis-à-vis the arbitral tribunal, it is critical that an expert possesses the right kind of personality and communication skills. More specifically, a competent expert must be able to do the following:

7 Eugenio Hernández-Bretón, Chapter 11: Expert Evidence, in: Grant Hanessian/Lawrence W. Newman (eds.), *International Arbitration Checklists*, 2nd ed., Huntington 2009, 125.

8 *Ibid* at p. 126.

- From his or her overall demeanour, the expert should be perceived as an expert by the arbitrators and the opposing party, on the basis of credentials regarding the specific issues that call for expert evidence.
- The expert should not come across as a “hired gun” who is “prepared to advocate an opinion dictated to him as long as he is remunerated adequately for such exercise”.⁹ Such an attitude undermines the credibility of the expert and is therefore counterproductive.
- The expert must possess the mental agility to withstand the challenging test of cross-examination, i.e. be able to react to surprises and defend his or her opinion effectively.¹⁰
- He or she should be able to articulate his or her opinions clearly and persuasively, demonstrate how such opinions were reached and, most importantly, not lose sight of what the tribunal needs to understand.¹¹ The expert should also be a person who can make the area of testimony “come to life”. Prior experience testifying before a court or arbitral tribunal is of course beneficial.
- In addition, particularly in international cases where the parties, counsel and the arbitrators come from different jurisdictions, the ideal expert must be sensitive to the context of the arbitration and the different cultural or legal background of the arbitrators.¹²
- The expert should be a person with apparent integrity. For instance, pending criminal proceedings against him or her are not helpful.

In order to be in a position to assess these points in a reliable way, a face-to-face meeting with the expert is indispensable.

The due diligence also includes reviewing the expert’s publications and verifying the expert’s availability to prepare written reports or to attend the evidentiary hearing.

Last but not least, the cost of the expert must be considered. Exorbitant fees not only burden the party and may not be reimbursed, but also risk undermining the expert’s independence and credibility.

D Independence and credibility

It is important that the expert is independent of the parties, particularly the party adducing his or her testimony as evidence. Lack of independence of party-appointed experts (unlike their tribunal-appointed colleagues) will not result in a challenge of the expert, but may severely affect his or her credibility or the weight that the arbitrators will attach to the evidentiary value of the testimony.¹³ This

9 Richard Kreindler, Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques, in: Laurent Lévy/V. Veeder (eds.), ICC-Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law: Arbitration and Oral Evidence, 2005, 93.

10 Ibid. at p. 89.

11 Dushyant Dave, Contemporary Practice in the Conduct of Proceedings: Techniques for Eliciting Expert Testimony – How Party-Appointed Experts can be Made Most Useful, in: Albert Jan van den Berg (ed.), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13, Montreal 2006, 815.

12 Rachel D. Kent, Expert Witnesses in Arbitration and Litigation Proceedings, *Transnational Dispute Management (TDM)*, 4 (2007) 3, 3.

13 Pierre Bienvenu/Martin J. Valasek, Chapter 10: Witness Statements and Expert

does not imply that the expert cannot be loyal towards the appointing party who pays his or her fees.¹⁴

A way to ensure the independence and credibility of an expert is to follow, as a guideline, the duty of experts stipulated in Article 4.3 of the “Protocol for the Instruction of Experts to give Evidence in Civil Claims” of the UK Civil Justice Council, dated June 2005 and amended October 2009 (“Protocol for the Instruction of Experts”), which reads as follows:

“Experts should provide opinions which are independent, regardless of the pressures of litigation. In this context, a useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.”¹⁵

Experts, especially inexperienced ones, must understand that their primary mission is to assist the tribunal to enhance its ability to decide the technical issues in a fair manner. Although not directly applicable in arbitration proceedings, Article 4.1 of the above-mentioned Protocol for the Instruction of Experts provides another useful guideline:

“Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court on matters within their expertise (CPR 35.3¹⁶). This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.”

E Timing of expert retention

The moment to contact potential experts should not be needlessly delayed. Unlike in US litigation, for example, the parties to arbitral proceedings are often required to submit expert reports together with their first detailed submission.¹⁷ As soon as it is conceivable that expert evidence will be necessary and the decision to engage an expert has been undertaken, the possible candidates should be approached in view of examining any possible conflicts of interest. Although engaging an expert early-on may be perceived as creating an added expense,

Reports, in: Doak Bishop/Edward G. Kehoe (eds.), *The Art of Advocacy in International Arbitration*, 2nd ed., Huntington 2010, 269.

14 See Peter Schlosser, *Der Privatvertrag mit Zeugen und Forumsexperten*, RIW, 2 (2005), 85.

15 UK Civil Justice Council, *Protocol for the Instruction of Experts to give Evidence in Civil Claims*, http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf (23 August 2011).

16 *The Civil Procedure Rules 1998* (last amendment 6 April 2011), 1998 No. 3132 (L.17), Rule 35.3.

17 Rachel D. Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, *Transnational Dispute Management*, 4 (2007) 3, 3.

the value of doing so lies in managing client expectations, deadlines, and ultimately producing an accurate report.¹⁸ This also carries the obvious advantage of the expert becoming a part of the team at an early stage,¹⁹ possibly providing input to the case strategy and presentations of the factual evidence and development of legal arguments.

III Written expert reports

It has become common for experts in arbitral proceedings to draft their reports in close consultation with the parties and their counsel. The influence of counsel, however, should not result in self-serving expert evidence. It must be limited to the style of the report and may not touch its substance.²⁰ The review of the draft report by counsel is particularly beneficial if the expert has little or no experience in preparing forensic reports.

First, counsel should ensure that the report is issued in an acceptable format and that it contains the basic information that is generally required, as set out for example in Article 5(2) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”). This includes:

- a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
- b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
- c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
- d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
- e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
- 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 opinion 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.

18 Sebastian Perry, *Quantum Mechanics*, *Global Arbitration Review*, 6 (2011) 2, 2.

19 Michael McIlwrath/John Savage, *International Arbitration and Mediation: A Practical Guide*, Alphen aan den Rijn 2010, 304; Robert Wisner/J. William Rowley/Campbell Neil, Chapter 8: *Effective Use of Economic Experts in International Arbitration: Counsel’s Role and Perspective*, in: Gordon Blanke and Phillip Landolt (eds.), *EU and US Antitrust Arbitration*, Alphen aan den Rijn 2011, 247.

20 Rachel D. Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, *Transnational Dispute Management*, 4 (2007) 3, 4.

The 2007 Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (“CI Arb Protocol”), developed by the Practice and Standards Committee of the Chartered Institute of Arbitrators, goes further and lists a few additional indicators to be included in the report, such as

- a) a statement setting out all instructions the expert has received from the appointing party and the basis of remuneration of the expert;
- b) a statement on the matters on which the expert has been unable to reach an opinion on; and
- c) a statement as to which matters (if any) are outside the expert’s area of expertise.

The CI Arb Protocol even prescribes that the expert report should be as brief as is reasonably possible, not contain copious extracts from other documents, adequately reference all documents and sources relied upon, and not annex more than what is reasonably necessary to support the opinion.

To the above one might add that the report should contain an executive summary, and indicate the persons spoken to in the preparation of the report.

Further, as mentioned in the IBA Rules, if several authors have participated in the drafting, their names should be indicated in the report. Arbitrators appreciate this kind of transparency and sometimes like to examine the authors in relation to the specific parts of the report that they have drafted.

Second, the lawyers must ensure that the report serves its purpose, which implies explaining to the expert and verifying the following aspects:

- The report must be comprehensive from either a layman’s or lawyer’s point of view. It should appreciate the arbitrators’ level of sophistication.
- The report must appropriately expose the facts and data upon which it is based. If not, there is a risk that the whole testimony may become useless in the arbitral tribunal’s eyes.
- The report must logically and realistically lead to the conclusions drawn by the expert, setting out the assumptions, reasoning, methodology and supporting evidence.
- The report must demonstrate that the expert is credible and independent, i.e. by showing that the expert would use the same methodology and reach the same opinions if he or she were hired by the opposing party.²¹
- The report should highlight the points that support the retaining party’s position, but it should not openly advocate this party’s case.

Counsel may play devil’s advocate to uncover possible weaknesses of the report and generally ask the expert to re-read the report as if he were the opposing party’s expert, keeping in mind that the report will eventually be subject to cross-examination.

Some experts, in particular accounting firms, insist on including standard disclaimers in their reports. From a party’s or counsel’s point of view this is not particularly desirable, but it is not particularly harmful either.

21 See R. Doak Bishop, Chapter 15: Toward a Harmonized Approach to Advocacy in International Arbitration, in: R. Doak Bishop (ed.), *The Art of Advocacy in International Arbitration*, Huntington 2004, 466.

Finally, it is often part of counsel's role to make sure that the experts deliver their written testimony in a timely fashion, so as to leave sufficient time to consider the testimony while drafting the legal brief.

IV Pre-hearing discussions between experts

Through the common law influence on international arbitration, it has become standard practise for arbitral tribunals to request that the parties' experts meet in advance of the evidentiary hearing, at least in larger cases that warrant the additional costs related therewith.²²

The purpose of these meetings is for the experts to identify and discuss the issues at stake in the proceedings and agree where agreement can be reached. They jointly draw up a list of points as to which they are in disagreement and possibly explain the reasons for the disagreement, which narrows down the outstanding issues in the case.²³ Article 5(4) of the IBA Rules reads:

"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, and remaining areas of disagreement and the reasons therefore."

This list of points on which the experts have different views then serves the arbitrators as a basis for questioning in separate or joint examination of the experts.²⁴

In general, counsel should encourage experts to participate in such pre-hearing discussions and, if possible, try to convince them to reach a consensus on certain matters. The lawyers can help put together the agenda for the expert discussions to ensure that no point is forgotten. The expert discussions should normally not be attended by anyone other than the experts themselves.

V Oral expert testimony

As a general remark, live testimony of an expert at the evidentiary hearing is crucial and "can conceivably decide a dispute".²⁵ It is therefore important to help

22 Werner Stieger, Zum Umgang mit technischem Sachverhalt: Beweisführung und Beweiswürdigung in Schiedsverfahren, 7/8 SIC! Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht, 7/8 (2010), 504.

23 Stephan Wilske/Christine Gack, Expert Evidence in International Commercial Arbitration, in: Dennis Campbell (ed.), The Comparative Law Yearbook of International Business, Volume 29, Alphen aan den Rijn 2007, 95.

24 See also Chartered Institute of Arbitrators, Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007), <http://www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf> (23 August 2011).

25 Richard Kreindler, Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques, in: Laurent Lévy/V. Veeder (eds.), ICC-Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law: Arbitration and Oral Evidence, 2005, 87.

the expert prepare for the hearing. One way to prepare and familiarize the expert with what to expect when in the witness stand is of course to conduct a mock cross-examination.²⁶ In addition, it may be useful to acquaint the expert with the opposing party's expert evidence.²⁷

The expert should be made aware that the questions coming from the members of the tribunal must be carefully considered as they can be a valuable clue to the expert (and to counsel) as to how the tribunal is viewing the issues. The tribunal's questions should be answered openly and thoroughly; every opportunity should be used to assist and educate the tribunal. Providing the tribunal with a synthesis of the often voluminous information is also welcome.

An important strategic question to be considered is whether to request that the expert be allowed to be present during the testimony of fact witnesses and other experts, to the extent relevant to his or her own testimony. Many tribunals tend to be in favor of such a solution as it allows for the economization of time.

Furthermore, instead of a "traditional" examination-in-chief, it can be useful to ask for the possibility to let the expert make a presentation to the tribunal, summarizing and outlining the report with the aid of demonstrative exhibits.²⁸ Many tribunals are grateful for such presentations and visual aids because they help provide a better understanding of the issues. Finally, it has been proposed that the transcript of expert testimony be accompanied by a video, whenever appropriate.²⁹

VI Expert conferencing

"Expert conferencing" – the joint hearing and examination of "duelling" experts – has become a method frequently employed in international arbitral proceedings.³⁰ It is indeed an efficient means, not only of gaining time, but of helping the arbitral tribunal immediately clarify relevant matters during the hearing, which might not have been possible otherwise.³¹ Expert conferencing is said to "compel experts to present their opinions more independently and objectively."³²

26 Rachel D. Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, *Transnational Dispute Management*, 4 (2007) 3, 5.

27 Eugenio Hernández-Bretón, Chapter 11: *Expert Evidence*, in: Grant Hanessian/Lawrence W. Newman (eds.), *International Arbitration Checklists*, 2nd ed., Huntington 2009, 131.

28 *Ibid.* at p. 132; Robert Wisner/J. William Rowley/Campbell Neil, Chapter 8: *Effective Use of Economic Experts in International Arbitration: Counsel's Role and Perspective*, in: Gordon Blanke and Phillip Landolt (eds.), *EU and US Antitrust Arbitration*, Alphen aan den Rijn 2011, 248.

29 Martin Hunter, *Expert Conferencing and New Methods*, in: Albert Jan van den Berg (ed.), *ICCA Congress Series 2006, Volume 13*, Alphen aan den Rijn 2007, 824.

30 Burkard Lotz, *Der Sachverständige im Schiedsverfahren*, *SchiedsVZ* 2011, 205; Werner Stieger, *Zum Umgang mit technischem Sachverhalt: Beweisführung und Beweiswürdigung in Schiedsverfahren*, 7/8 *SIC! Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht*, 7/8 (2010), 504.

31 See Stephan Wilske/Christine Gack, *Expert Evidence in International Commercial Arbitration*, in: Dennis Campbell (ed.), *The Comparative Law Yearbook of International Business*, Volume 29, Alphen aan den Rijn 2007, 94-95.

32 Klaus Sachs, *Experts: Neutrals or Advocates*, Paper presented at the 2010 ICCA

Expert conferencing has also found its way into the IBA Rules. According to Article 8.3(f), witnesses or party-appointed experts can be questioned simultaneously and in direct response to each other.³³ In practice, expert conferencing is usually done on an agenda-basis or on the basis of the list of points of disagreement (see above section IV).³⁴

The expert should be made aware of this possibility and be given some explanation as to how it functions in order to be well-equipped for this scheme. Testifying in the presence of learned colleagues is quite a different experience from testifying alone in front of laymen. Such a format may not, however, be suited to all types of personalities.

VII Post-hearing involvement of experts

The use of the expert does not always end with the hearing. It is often necessary to resort to the expert's knowledge to review parts of the transcript and comment on the testimony of the opponent's expert. Without this assistance, it may be difficult for the lawyers to identify all weaknesses in this testimony for the preparation of the post-hearing submission, if any.

In addition, it usually turns out to be instrumental to ask the expert to review his own testimony as it was recorded at the hearing and make corrections, if necessary, particularly where he or she has given scientific explanations with acronyms that the court reporters may not have accurately transcribed.

VIII Conclusion

In complex commercial disputes, expert evidence is often important to the final outcome of a case. The arbitrators have the difficult task of assessing and weighing expert evidence and must decide between conflicting positions on complicated issues about which they themselves may not be sufficiently knowledgeable.³⁵ The experts should be aware that their primary task is to assist the tribunal as much as possible in making its decision.

Counsel in arbitrations play an active role and should think creatively about how best to use or present expert evidence to their advantage. The purpose of this paper is to identify and highlight some of the aspects that should be taken into consideration. It is important, however, never to lose sight of the fact that in the end it is largely a question of the expert's credibility.

Congress in Rio, http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/evidence/experts__icca_2010_sachs.pdf (23 August 2011).

33 Rachel D. Kent, Expert Witnesses in Arbitration and Litigation Proceedings, *Transnational Dispute Management*, 4 (2007) 3, 5.

34 Martin Hunter, Expert Conferencing and New Methods, in: Albert Jan van den Berg (ed.), *ICCA Congress Series 2006, Volume 13, Alphen aan den Rijn 2007*, 822.

35 Stephan Wilske/Christine Gack, Expert Evidence in International Commercial Arbitration, in: Dennis Campbell (ed.), *The Comparative Law Yearbook of International Business*, Volume 29, Alphen aan den Rijn 2007, 93.