

Choosing counsel: how close is too close?

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Kristopher Kerstetter, a director of Mark Humphries Legal disputes boutique in London, argues that instructing the firm that negotiated a contract in the ensuing contractual dispute can have its downsides.



Should you instruct the firm that negotiated the contract to handle your dispute, or opt for a beauty parade?

We are often told as practitioners that the most critical decision to be made in an arbitration is the party's choice of arbitrator. From the perspective of the client, however, there is an even more fundamental decision that must be made before the choice of arbitrator, which can also have a profound impact on the course of the case: which law firm should handle it?

Many factors contribute to this decision including relevant expertise, trust and of course cost. An additional factor can sometimes trump these and result in a default choice: the firm in question advised on the formation of the contract in dispute.

This article explores whether this default choice is always the wisest one and whether lawyers from the firm that negotiated the contract are always seen as credible by the tribunal.

The arbitration context

Although the question of whether to instruct the same firm that negotiated and prepared the contract also arises in litigation, it is especially acute where disputes are subject to

arbitration owing to the peculiarities of the arbitral process.

Because arbitral jurisdiction is a creature of agreement between the parties, arbitrations will by definition almost always involve contractual issues or at least centre around a contractual relationship. The question of whether to use the same firm that prepared the contract therefore arises to some extent in virtually every arbitration where the firm is able to field arbitration counsel.

Another unique aspect of arbitration is the lack of mechanisms in place – at least currently – to ensure the credibility of advocates. In most national court systems, advocates who are licensed to appear before the courts will have ethical duties to the court as well as to clients. These will typically address conflicts of interest and prevent them from misleading the court, failing to call attention to adverse precedent or pleading damaging allegations of fraud without evidence to support a prima facie case.

The rules have the effect of establishing a degree of trust between judges and advocates.

Although there have recently been efforts to establish a workable code of ethics for international arbitration counsel – for example, by King & Spalding's **Doak Bishop** and **Margrete Stevens** – there is not yet any enforceable set of rules or formal system for ensuring the credibility of advocates upon which tribunals can rely. This makes it all the more important that the arbitrators have faith in the lawyers appearing before them.

Finally, unlike in court litigation in jurisdictions such as England where there remains a split profession, the lawyers who prepare the case in international arbitration are often the same as those who appear as advocates before the tribunal. There is no “buffer” between the tribunal and the law firm in the form of a barrister or specialist advocate who is professionally independent of the client and the circumstances that led to the dispute.

Choosing counsel

To secure the most effective representation before the tribunal – and determine whether counsel from the firm that negotiated the contract are the right choice – parties facing arbitration should consider the following factors:

Institutional knowledge

A reason often cited for instructing the firm that advised during the creation of a contractual relationship is that it is likely to possess institutional knowledge and other factual information that can easily be accessed by arbitration lawyers in the same firm.

The transactional lawyers will know for example the source of certain contractual language, the history of the parties' commercial relationship and other details of the factual matrix that might inform the interpretation of the contract.

Lawyers from within the same firm will undoubtedly be able to communicate and transfer information and files easily. However, is it really so much more difficult or costly for the

same information to be provided to independent disputes counsel, especially since most communication by lawyers is nowadays done by email even within the same firm?

The transactional lawyers will of course have professional obligations to cooperate fully with disputes counsel regardless of whether they are in the same firm – so logistical concerns about the ease of transfer of information arguably do not justify instructing the same firm that advised on the contract in every case.

Perspective

Lawyers from the firm that advised on the original contract may, in some cases, also lack crucial perspective on the dispute, which can prevent them from arguing their case successfully.

Tribunals come to disputes cold and with an obligation to state reasons for their decision. They are therefore generally looking for grounds to decide for one party or another that are justifiable to a neutral observer. The most effective arbitration advocates are accordingly those with the ability to place themselves in the shoes of the tribunal and identify the arguments that are likely to find sympathy with an impartial audience; advocates who can master the details of the party's case but at the same time look past them to the compelling themes.

In short, they are the advocates who can see the wood for the trees.

It is sometimes difficult for advocates to maintain this perspective given the natural tendency to sympathise with the client's case. One can see how this might be harder still when an advocate is presented not only with the views of the client as to its side of the dispute but also the views of his or her partners.

This is the flipside to having the benefit of the institutional knowledge of the lawyers who negotiated the contract: one must accept the potential influence that experience may have on the advocates' perspective.

Even if lawyers do not consciously allow the views of other lawyers in their firm to influence their judgment as to how to present the case, it is human nature to sympathise with colleagues to an extent. On top of that, the advocates themselves may have been peripherally involved in the negotiation of the contract or in the very early positioning of the parties with respect to the dispute.

There are also times when the best path through a contractual dispute is to abandon any preconceived interpretation of or approach to the contract, call into question previous advice given to the client and take a critical look at how it found itself in the difficult situation it is in. In these circumstances, lawyers may be understandably reluctant to interrogate their own partners - especially if their work is being called into question.

Continuity

Continuity is a factor that generally favours instructing the firm that advised the client throughout the contractual process. However, it can also make the client vulnerable. If, for example, there is a factual dispute about what happened between the parties at the time of contracting there is a chance that the lawyers representing the client at the time will have relevant factual information that will need to be disclosed. In some cases, they may even be called to give evidence.

If this happens, ethics rules in most jurisdictions will prevent the firm from continuing to act – for example, rule 3.7 of the New York Rules of Professional Conduct and rule 11.06 of the Solicitors Code of Conduct for England and Wales. While privilege arguments can prevent lawyers being called in most cases, it will not always be in a party's interest to assert the privilege.

Many of us have experienced or heard of parties attempting to disrupt their opponent's litigation strategy by attacking their lawyers in this way. Indeed, I have personally been involved in an arbitration where the opponent sought to attack my client's local lawyers by initiating criminal proceedings against transactional lawyers from the same firm for their conduct around the time of contracting. Unfortunately, such sharp tactics are not as unusual as they should be.

If the transactional lawyers are attacked in this way, it can be highly disruptive to counsel acting in the arbitration, who may be required to withdraw if their firm gets dragged too deeply into the dispute. The disruption to the party's case will also be severe. For this reason, clients should think carefully about whether the continuity they seek could be compromised because of their lawyers' closeness to the dispute and vulnerability to conflict or attack.

Coincidence of interest

One reason cited for instructing the same firm that negotiated the contract to handle any dispute is the perceived coincidence of interest between the firm and the client. It is sometimes assumed that the firm's interest in defending its own work before the arbitral tribunal will provide them with an extra incentive to represent the client's best interests as zealously as possible (even though such an incentive is in most cases not necessary).

It should be borne in mind, however, that a perceived coincidence of interest between the lawyers and the client can lead to the former losing credibility in the eyes of the arbitrators. They may take the view, that the firm is making an argument not because it believes it to be meritorious but because it casts the firm's transactional work in the best light, and look with scepticism on submissions that appear to benefit the firm as much or more than the client.

Credibility

By now it will be clear that all these factors interrelate. Where it appears that an advocate

is too close to the circumstances that have given rise to the dispute, this can impact the credibility of the advocate before the tribunal, even where he or she has acted wholly appropriately.

While parties may see it as an advantage to have counsel who will argue the facts and the law zealously, it should be remembered that arbitrators are trained and experienced in detecting external influences on the information that is put before them and may be frustrated by the perception that the facts are being “spun” to conform with an inflexible position.

The most effective arbitration lawyers are attuned to this; they realise that they best protect their client’s interests by maintaining the highest degree of credibility – making it more likely that their submissions will be accepted a face value.

The closer advocates or their colleagues are to the issues in dispute the more difficult they will find this.

Time for open discussion

In many cases it is wholly appropriate – and in some cases, beneficial – to instruct the “incumbent” firm to advise on an arbitration. However, it should not be the default decision; but one arrived at after careful consideration of the potential downsides.

It is also high time that the arbitration community - practitioners, parties and arbitrators - engage in an open debate about the factors that should be considered in choosing counsel in international arbitration. How close is too close when it comes to arbitration advocates and the contract under dispute?

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